

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

MISC. LABOUR APPLICATION NO. 25 OF 2022

(From Misc. Labour Application No. 05 of 2022 in original Labour Execution No. 12 of 2021 of the High Court of Tanzania at Mbeya)

**MAURICE SELEMANI MWAMWENDA (personal legal
representative of the estates of the late
PROF. TUNTUFYE SELEMAN MWAMWENDA, deceased)APPLICANT
VERSUS**

ACCESS BANK TANZANIA LTD PLC1ST RESPONDENT

RASHIDI NDITI2ND RESPONDENT

MLIMA MBEYA VIEW ACADEMY t/a HIGH SCHOOL3RD RESPONDENT

RULING

Date of last order: 13/2/2024

Judgment: 22/2/2024

NONGWA, J.

The applicant has filed the present application seeking extension of time to apply to set aside *ex-parte* ruling in Misc. Labour Application No. 5 of 2022. The chamber summons and notice of application is made under rule 24(i)(2) (a-f), 54, 55(1)(2) and 56(1) of the Labour Court Rules G. N. No. 107 of 2007 and section 26 of the Law of Limitation Act [cap 89 R: E 2019]. It is supported by the affidavit of Maurice Selemani Mwamwenda. The respondents resist the application each filed counter affidavit. In

addition, the 3rd respondent raised two points of preliminary objection challenging competence of the applicant to file this application.

In a nutshell, the background of the matter as per records is that the 2nd respondent had labour dispute with the 3rd respondent before the Commission for Mediation and Arbitration of Mbeya which ended in his favour. The 2nd respondent initiated execution proceedings in this court vide Labour Execution No. 12 of 2021 in which the property with Title No. 4222-MBYLR Block "M" Forest area owned by 3rd respondent was ordered to be attached and sold in execution. Learning of the attachment order, the 1st respondent filed objection proceedings vide Misc. Labour Application No. 5 of 2022 on reason that the property was pledged to her as security, thus it was not liable for execution. The objection proceedings were heard *ex-parte* as against the 3rd respondent who had refused service of summons. In that objection proceedings, the court ordered execution to proceed, the interest of the 1st respondent ranking first over that of the 2nd respondent. It is against that background, the applicant filed this application for the following orders;

1. An enlargement of time to set aside *ex-parte* ruling and order made by this honourable court in Misc. Labour Application No. 5 of 2022 out of time prescribed under the law.
2. And any other reliefs(s) this honourable court may deem fit and proper to grant in the interest of just (sic).

During hearing, the applicant was represented by Mr. Felix Kapinga, learned advocate, Mr. Evance Rwekaza, also learned advocate appeared for the 1st respondent and Mr. Hassan Gyunda learned advocate for the 3rd respondent. The 2nd respondent did not enter appearance.

Both preliminary objections raised by the 3rd respondent and main application has been heard at once on assumption that the determination on merits of the application would be only upon failure of the preliminary objection to dispose of the application. That is, if the preliminary objection succeeds, it will be the end of the matter.

Starting with preliminary objection, when Mr. Gyunda took the floor, he prayed to abandon the second objection, there was no objection from Mr. Kapinga, so it was marked withdrawn. Counsel proceeded with the first objection which goes;

The applicant in this application has no locus standi to make this application since he was not party to the original proceedings.

Submitting on the above objection, Mr. Gyunda stated that the applicant had no *locus standi* to apply for extension of time to set aside *ex-parte* order. That, it is the law that a person who was not a party to the case cannot appeal or apply to set aside *ex-parte* order. He contended that in Misc. Labour Application No. 5 of 2022 Maurice Selemani Mwamwenda has never been a party to that application. He referred the

court to the case of **Matrida Aloyce Mgeni vs Ezekia Amos**, Misc. Land Application No. 11 of 2019, HCT at Mbeya and **Transport Ltd vs Jestina George Mwakyoma** [2003] TLR 251 to support the point.

Mr. Gyundu also stated that the enabling provision of the law cited by the applicant do not give him locus to bring this application and order IX rule 13 of CPC was non exiting. The counsel prayed to dismiss the application with costs on reason that the application was vexatious citing rule 51(2) of the Labour Court Rules and the case of **Stanbic Bank (T) Ltd vs Idd Halfan**, Civil Appeal No. 139 of 2021 to support the argument.

In reply, Mr. Kapinga submitted that he was not going to reply on wrong citation of the law for it was brought in improper way of raising preliminary objection.

On whether the applicant had *locus standi*, the court was referred to the case of **Lujuna Shibi Balonzi vs Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 2003. He argued that the applicant has locus by virtual of being the legal representative of Prof. Tuntufye Mwamwenda who was a shareholder in the 3rd respondent. That owning shares means applicant has interest and capacity to file and defend the case, with this submission prayed the preliminary objection to be dismissed.

Rejoining, Mr. Gyunda submitted that the applicant's counsel had failed to comprehend the objection which was that the applicant has never

been a party to Misc. Labour Application No. 5 of 2022 for him to have right to apply to set aside the ex-parte ruling.

On argument that the applicant has interest by his holding of shares in 3rd respondent, it was submitted that the same is protected and dealt by other laws. Counsel added that the applicant had no locus to challenge decision in Misc. Labour Application No. 5 of 2022.

Having considered rival submissions, the only issue for my determination is whether objection has merit. In advance, I will settle first the point raised in submission of Mr. Gyunda that the cited provision did not confer the applicant powers to bring this application and order IX rule 13 of the CPC was inexistence in our laws. Mr. Kapinga abstained from making any comment on ground that it is not the way of raising objection.

This point will not detain me much, as rightly submitted by Mr. Kapinga, it was improper to bring the objection of improper citation of the enabling provision of the law at the stage of submission. Mr. Gyunda had ample time which enabled him to raise objection found in the notice of preliminary objection. Otherwise, if he discovered the new issue was required to inform the court, he ought to have seek leave of the court to argue the same and give opportunity for the opposite party to prepare on the new discovered issue.

As to whether the cited provision gives locus to the applicant, it is vague and uncomprehendable as to what the counsel meant. Assuming he meant that there was wrong citation of enabling law, the same could to not have succeeded because, non-citation or wrong citation of the enabling provision is not fatal so long as the court has powers to grant the relief or order sought.

Looking at the chamber summons and notice of application, rule 56(1) of the Labour Court Rule which gives the court power to enlarge time has been cited by the applicant. On the other hand, order IX rule 13 of the CPC has not been cited by the applicant anywhere. Therefore, the complaint is dismissed.

Back on the objection, from the application documents, it is undeniable fact that in Misc. Labour Application No. 05 of 2022, the parties to the case were Access Bank Tanzania Limited against Rashid Ndit and Mlima Mbeya View Academy t/a High School. That the said application was heard *ex-parte* as against Mlima Mbeya View Academy t/a High School, 3rd respondents in this application.

The objection by 3rd respondent is that the applicant has no right or *locus standi* to file this application because was not a party to the original proceeding that is Misc. Labour Application No. 05 of 2022. In reply it was

argued that the applicant has interest in 3rd respondent by virtual of being a shareholder.

It is of important to remind ourselves that the application at hand is for extension of time to have the *ex-parte* order set aside, the application to which Prof. Tuntufye Mwamwenda have never been a party. I join hand with Mr. Gyunda that the applicant has no right or *locus standi* to file the application of this nature. The reason is not far-fetched as he was not a party to original proceedings giving rise of this application he thus cannot be heard in those proceedings. Just like right of appeal which is only available to persons who were parties to original proceedings, the rule extends to application of this nature save, application for revision.

Mr. Kapinga submitted that the applicant has *locus standi* because is the legal representative of the late Prof. Tuntufye Mwamwenda, if I understood him, he meant the applicant being the appointed administrator of the deceased had right to lodge this application. After scanning the objection and submission of the objector, the *locus standi* meant by the objector is that of filing the present application and not suing or defending the suit for and on behalf of the deceased. The fact that Prof. Tuntufye Mwamwenda was not a party in Misc. Labour Application No. 05 of 2022, had have no right to lodge this application, so

any person(s) claiming any interest under his capacity as the applicant herein could not do and have *ex-parte* ruling set aside.

Mr. Kapinga's another line of argument conferring locus on applicant to bring this application is that of shareholding. In my view the fact that the applicant is a shareholder in 3rd respondent as rightly argued by Mr. Gyunda has no right to file this application. Rights of shareholders are available under the Companies Act where they have their ways of protecting their interest in the company. The present application concern parties to the case to which the applicant has never been involved and no interest in the company as argued by the applicant.

It is noteworthy that the company in which the applicant alleges to have interest is the one which filed objection against the applicant, meaning the company is against the applicant. Assuming for sake of argument the applicant is right to say he has interest in the company, still the matter is better dealt after considering rights of the shareholder under the memorandum and article of association of a company on how shares of the deceased have to be dealt which is not the case here.

With the above, the applicant has no right to bring this application to have time extended to apply for setting aside *ex-parte* ruling. Even if time is enlarged, still the applicant will have no right in application to set aside *ex-parte* ruling on ground that the deceased Tuntufye Mwamwenda has

never been party to Misc. Labour Application No. 05 of 2022, so his representative cannot have right in those proceedings.

Counsel for the 3rd respondent surged for costs, strategically or inadvertently Mr. Kapinga did not make any reply. It is the settled law under rule 51(1) of the Labour Court Rules that in labour disputes costs are not awarded. Mr, Gyunda propagated his payer under rule 51(2) of the rules and cited the case of **Stanbic Bank (T) Ltd** (supra) in support.

I have read rule 51(2) and found that the court can only depart from the general rule and exercise its discretion to award costs if it is satisfied that proceedings are frivolous or vexatious. The term frivolous is defined by the Black's Law Dictionary to mean without reasonable or probable cause or excuse; harassing; annoying. Similar definition is found in the Academic's Legal Dictionary and the Concise Oxford Dictionary. See also the case of **Bulyanhulu Gold Mine Ltd & Others vs Petrolube T. Ltd & Another**, Civil Application 364 of 2017 [2020] TZCA 1844 (11 November 2020; TANZLII).

From the above definition it is clear that for the court to consider proceedings as frivolous or vexatious it must be shown that there was no justification or proceedings was *mal fide* instituted.

Applying the above principle to this matter, Mr. Gyunda made a sweeping prayer for costs without offering any explanation as to why he

considers the proceedings is frivolous or vexatious for the court to exercise its discretion powers and grant costs in labour matter. My perusal of the application documents has not found the same to be frivolous or vexatious, in my view failure to meet the thread of the law to be entitled to reliefs or orders sought, it does not make the proceedings frivolous or vexatious.

In the end I uphold the preliminary objection of the 3rd respondent. Following this decision, I find no need to belabour in the merits of application as it will be for academic purpose. I therefore struck out the application without costs.



V.M. NONGWA
JUDGE
22/2/2024

DATED and DELIVERED at MBEYA this 22nd February 2024 in presence of Applicant in person, Hassan Gyunda counsel for 3rd respondent, Mr. Elisha Mahenge – Director of 3rd respondent and in absence of 1st and 2nd respondents.



V.M. NONGWA
JUDGE