

**IN THE HIGH COURT OF TANZANIA
(MOROGORO SUB-REGISTRY)
AT MOROGORO**

LABOUR REVISION NO. 01 OF 2023

JOFREY DAMIAN MWANI & 18 OTHER.....APPLICANTS

VERSUS

KILOMBERO PLANTATION LTD (UNDER RECEIVERSHIP)RESPONDENT

RULING

23rd Febr, 2024

M.J. CHABA, J.

Through the legal aid services of Mr. Boniface Basesa, herein featured as the applicants' personal representative from DOSHTWU based in Morogoro Region, Jofrey Damian Mwami & 18 Others (hereinafter to be referred to as the Applicants) preferred the instant application by way of chamber summons made under section 94 (1), (a) & (b) and 2 (b), section 94 (1) (b) (i) of Employment and Labour Relations Act [CAP. 366 R.E. 2019], Rule 24 (1), Rule 24 (2) (a), (b), (c), (d), (e) & (f) and Rule 24 (3) (a), (b), (c) & (d) read together with Rule 24 (1), 24 (2) (a), (b), (c), (d), (e) & (f) and Rule 24 (3) (a), (b), (c) and (d), Rule (11) (c), Rule 28 (1) (c), (d) and (e), Rule 44 (1) of the Labour Court Rules, GN. 106 of 2007 and any other enabling provisions of the law.

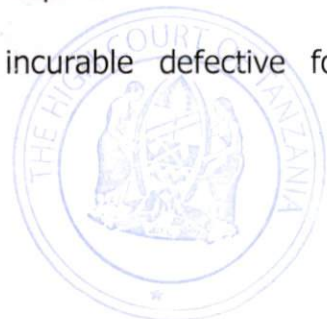
Essentially, the applicants are seeking for the following orders: -



1. That, this Honourable Court may be pleased to call for record, examine and revise the decision and the award of the Commission for Mediation and Arbitration in Labour Dispute No. RF/CMA/MORO/73/2021, by Hon. Kiobya, Z., the Arbitrator with a view to satisfy itself to the legality, propriety, rationality and correctness thereof;
2. That, this Honourable Court be pleased to issue an order quashing the said decision and the award in Labour Dispute No. RF/CMA/MORO/73/2021, dated 11/12/2022 issued by Hon. Kiobya, Z., for being illegal, improper, irrational and incorrect;
3. Cost of this Application; and
4. Any other relief(s) which this Honourable Court may deem fit and just to grant.

Upon being served with the chamber summons, notice of application and the affidavit in support of the application, the respondent resisted the application by lodging the notice of representation, and notice of opposition coupled with the counter affidavit. However, before the matter could proceed with the hearing of the application on merits, the respondent's notice of representation, notice of opposition and the counter affidavit were spanked by the notice of preliminary objection on points of law filed by the Applicants' Personal Representative, to wit; I quote: -

1. The notice of opposition and counter affidavit of the respondent is bad in law for being filed out of time, time barred, and incurable defective for



contravening Rule 24 (4) (a) the Labour Courts Rules GN. No. 106 of 2007 (Sic); and

2. Representative of the respondent started to represent before written notice, advice the registrar dated 28/02/2023 incurable defective for contravening Rule 43 (1) (a) (b) the Labour Courts Rules GN. No. 106 of 2007 (Sic).

With the parties' consent, the hearing of the points of preliminary objections (PO) were canvassed by way of written submissions. All applicants were represented by Mr. Boniphace Basesa, personal representative whereas the respondent enjoyed the legal services of Mr. Tazan Keneth Mwaiteleke, learned advocate.

Submitting in support of the first point of PO, Mr. Basesa averred that, the applicants duly effected the services of the application and summons to the respondents through a person identified as the manager of the respondent, JOSEPHAT NGW'WAHAYA (As per Annexure A1) and the same were received on 02/02/2023. He said, the service of documents was witnessed by LEVO KISOMA, the Suburb Chairperson at Itongoa "A" within Mngeta Village. To prove that service of summons, notice of application and the affidavits deponed by the applicants were duly served / effected to the respondent, on the 2/02/2023 the Suburb Chairperson prepared and wrote a letter but without indicating to whom it was concerned explaining how he and other two persons namely, MARCO MWAGALA and MICHAEL MGETA went to

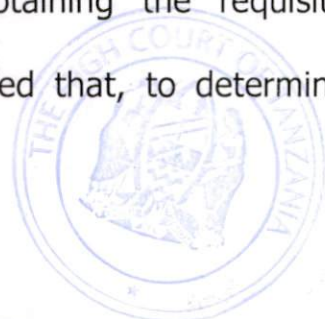


the respondent's factory and served the said manager, JOSEPHAT NGW'WAHAYA as per Annexure A1.

It was Mr. Basesa's argument that, the delay to file the notice of opposition and counter affidavit was deliberately made by the Counsel for the respondent considering the fact that, service of summons and notice of application was done on time, and in accordance with the requirement of law under Rule 9 (1) and (2) of the Labour Court Rules, GN. No. 106 of 2007. He argues further that, when the respondent was duly served, she replied by filling a notice of opposition and counter affidavit on 07th March, 2023, about thirty-three (33) days later and against Rule 24 (4) (a) the Labour Courts Rules GN. No. 106 of 2007 which requires that, the notice of opposition shall be filed within fifteen (15) days from the day on which the application was served on the party concerned.

He maintained that, according to the record, the respondent delayed to file notice of opposition and counter affidavit for eighteen (18) clear days which is beyond fifteen (15) days and without obtaining leave of the Court to file such documents out of time. He stressed that, the respondent contravened the law and she ought to have sought first leave of the Court before filing her notice of opposition and counter affidavit.

On the second limb of PO, Mr. Basesa contended that, the respondent's representative started his representation before obtaining the requisite authority for so doing from the respondent. He added that, to determine

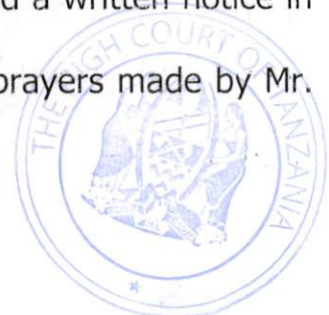


whether the respondent did authorise Mr. Mwaiteleke to act on his behalf or not, it is pertinent to revisit the notice of representation signed by the respondent as the same ought to have been filed in Court before the representative could assume his post and began to perform his duty.

He highlighted further that, the notice of representation filed in this Court was signed by the Receiver and manager of the respondent on 6th March, 2023 and afterwards presented for filing in this Court on 7th March, 2023 whereas it is on record that, Mr. Mwaiteleke filed the notice of opposition and counter affidavit on behalf of the respondent on 28th February, 2023 without obtaining leave of the Court to lodge the same out of time.

He averred further that, it was wrong for the Counsel for the respondent to submit/table his prayers before the Hon. Acting Judge (He meant Ag. Deputy registrar) so that he could be allowed to file the said notice of opposition and counter affidavit while knowing that the Hon. Acting Judge had no jurisdiction to hear and entertain any prayer and grant the same. He was of the view that, the Acting Judge's jurisdiction was only limited to adjourn the case, unlike the trial Judge who had all jurisdiction to hear and determine the respondent's prayers on merits, citing Rule 43 (1) (a) (b) of the Labour Courts Rules GN. No. 106 of 2007 to fortify his argument.

He underlined that, the act of the respondent's representative to enter appearance on behalf of his client without having first filed a written notice in this Court, was against the law and all proceedings and prayers made by Mr.

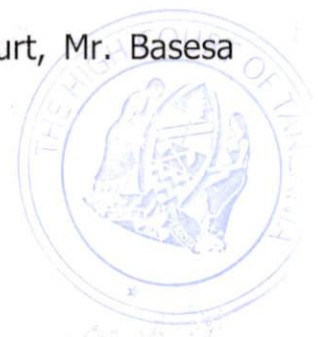


Mwaiteleke, Counsel for the respondent were null and void ab-initio. He therefore, urged the Court to declare both the notice of opposition and counter affidavit as void and proceed to expunge them from the records and hear the application *ex-parte*.

In view of the above submission, Mr. Basesa prayed the Court to sustain the raised points of Preliminary Objection.

In reply, Mr. Mwaiteleke, Counsel for the respondent commenced his submission by accentuating that, upon considering the applicants' submission, he found that the points of objections raised by the applicants' personal representative were grossly misconceived and prayed the Court to dismiss them with costs.

Starting with the first limb of PO, Mr. Mwaiteleke protested all allegations made by the applicants' representative and proceeded to highlight that, on 28th February, 2023, both the applicants' personal representative and the Counsel for the respondent appeared before Hon. E. Lukumai, Ag. Deputy registrar. Thereby, he informed the Court that, until the time he entered appearance before the Court, still the service of chamber summons and notice of application were not duly effected to respondent and the Mr. Basesa did not object his argument. As there was no any objection, the Court ordered Mr. Basesa to immediately effect services of chamber summons and notice of application. He said, in compliance with the order of the Court, Mr. Basesa



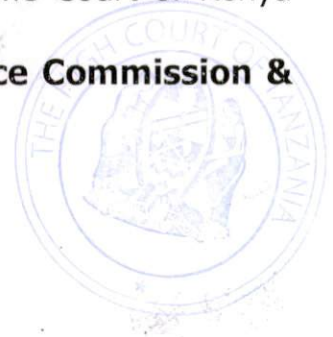
immediately effected the services of chamber summons and notice of application on the same day on 28th February, 2023.

He argues that, if the applicants through their personal representative adhered to the order of the Court on 28th February, 2023, then Mr. Basesa had two options to challenge the respondent: One; To prove his allegation on this facet, he was supposed to file the respective summons as proof of service through Court file or records. Two; He was required to object the prayers made by Counsel for the respondent in respect of service of chamber summons and notice of application. However, Mr. Basesa did not react against these two options. Astonishingly, though Mr. Basesa claimed that, he served the respondent on 2nd February, 2023, up to 28th February, 2023 neither the applicants nor their personal representative, were able to file any proof of services as required by the law. He asserted that, the act done by Mr. Basesa to challenge the respondent's notice of opposition and counter affidavit by way of PO, was an afterthought. He insisted that, the respondent filed her pleadings pursuant to the order issued by the Court on 28th February, 2023.

Mr. Mwaiteleke went on stating that, Rule 24 (4) (a) of the Labour Court Rules, GN. No. 106 of 2007 provides that, a notice of opposition and counter affidavit both shall be filed within fifteen days from the day on which the application is (was) served on the party concerned. He argues that, it is apparent on records that, the respondent was served with the chamber summons and notice of application on 28th February, 2023 and accordingly,

acknowledged service of the application on behalf of the respondent. He stated that, counting from the date in which the Counsel for the respondent entered appearance before the Court and duly served with the chamber summons and notice of application by order of the Court dated 28th February, 2023, it means that the notice of opposition and counter affidavit ought to be filed by the respondent on or before 11th March, 2023. However, the same was filed in this Court on 7th March, 2023 before expiry of statutory time.

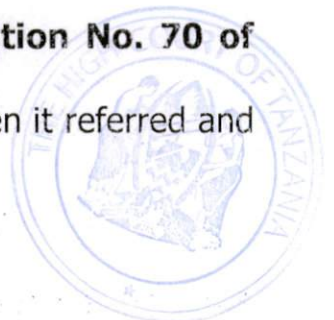
It was Mr. Mwakitekele's argument that, it is a trite law that, proof of service can only be established upon production of a sworn or affirmed affidavit by the Court Process Server, which in this case, such evidence do not exist. He underlined that, the question as to when the respondent was properly served with the relevant documents, is a matter of fact which requires production of evidence. He further contended that, the raised PO, cannot be characterized as such on the ground that, the same does not meet the standard of the principles laid down and established by the famous case of **Mukisa Biscuits Manufacturing Ltd Vs. Eastern Distributors Ltd [1969] E.A. 696**. He said, normally, the point of preliminary objection is the one which must be based on a pure point of law which requires no evidence to prove the same, and not the one which is based on the disputed facts and requires evidence to prove. To buttress his contention, Mr. Mwakiteleka referred this Court to a persuasive decision of the Supreme Court of Kenya between **Justice Kalpana H. Rawal Vs. Judicial Service Commission &**



3 Others [2016] eKLR, wherein the Court endorsed the dictum in **Mukisa Biscuits Manufacturing Ltd (supra)** by quoting the case of **Hassan Ali Joho & Another Vs. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, eKLR [2014]** and observed that:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

The Counsel averred that, the attached Annexure A1 to the applicants' submission, is a piece of evidence which is not required to form party of this submission. He argues that, it is the principle of the law that, submission is not evidence as it was expounded by this Court in the case of **Benjamin Watson Mwaijibe Vs. Ellen & Ethan Consult (Revision Application No. 70 of 2022) [2022] TZHCLD 673 (15 July 2022)** at page 4 when it referred and

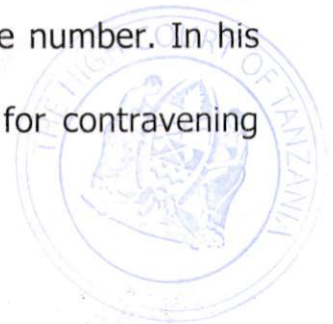


quoted the decision of the Court of Appeal of Tanzania in case of **The Registered Trustees of the Archdiocese of Dar es Salaam Vs. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (unreported), wherein it observed that: -

".....submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

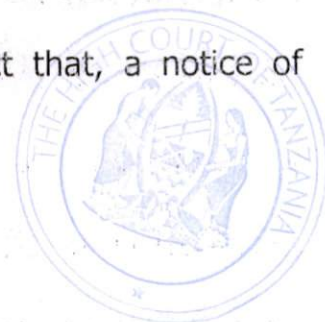
Based on the above cited authority, the Counsel for the respondent submitted that, in as much as the applicants' submission is concerned, it is apparent that, this point of preliminary objection invites evidence to prove as to when the respondent was properly served with the documents, and therefore do not qualify to be termed as a point of objection. He prayed the Court to dismiss the first point of objection for lacking merit.

Regarding the second limb of point of objection, Mr. Basesa's assertion is that, the representative of the respondent started to represent his client on 28th February, 2023, before filling a written notice advising the registrar of the names of the representative, the postal address and place of employment or business and any available fax number, e-mail and telephone number. In his view, such a written notice is therefore incurably defective for contravening



Rule 43 (1) (a) (b) of the Labour Court Rules, GN. No. 106 of 2007. Rebutting this point, Mr. Mwakiteleke accentuated that, the submission and arguments made by Mr. Basesa are misconceived and devoid of merits on the ground that, the order of the Court cannot be impeached by way of raising preliminary objection as done by Mr. Basesa. He averred that, always, order of the Court shall remain intact unless and until it is vacated by a lawful order or set aside by the Court. He said, if at all, the applicants were aggrieved by the order of the Court dated 28th February, 2023, the only recourse which should have been taken by the applicants, was to challenge the same in a competent Court and not by the way of raising preliminary objection, which in his view is devoid, misplaced and legally wrong. He invited the Court to dismiss the second point of objection for lacking merit.

He stressed that, the objective behind Rule 43 (1) (a) (b) of the Labour Court Rules, GN. No. 106 of 2007 is to ensure that, a representative who acts on behalf of any party in any proceedings shall, by a written notice, advise the registrar and all other parties on the names of the representative and the postal address and place of employment or business, and any available fax number, e-mail and telephone number. He insisted that, the notice of opposition and counter affidavit ought to have been filed after the respondent was served with the chamber summons and notice of application. He said, since the aim of this rule is not to condemn or dismiss a case for failure to file a notice of representation, in case the Court will detect that, a notice of



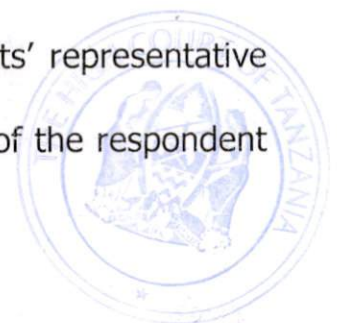
opposition and counter affidavit are flawed, he urged the Court to invoke the overriding objective principle to cure the anomaly under section 3A and 3B of the Civil Procedure Code, [CAP. 33 R.E. 2019] (the CPC).

Based on the foregoing submission, Mr. Mwaiteleke concluded that, as the raised points of PO are unfounded, frivolous and devoid of merits, the remedy is to dismiss them in its entirety with costs.

Having summarized the contending arguments and fully considered the entire application in line with the points of objections raised by the applicants, and further upon considering the provisions of the laws applicable in this application and the authorities cited by both parties' in a bid to convince this Court to believe their versions, the pertinent issue calling for consideration, determination and decision thereon is, whether the notice of opposition and counter affidavit were filed in this Court out of time or otherwise.

To begin with, I will consider and determine the points of PO in pattern as submitted by the parties. I have had ample time to scrutinize the parties' submissions and Court records in line with the points of PO raised by the applicants. At the outset, I find it apt to state that, on a close scrutiny of the records, parties' submissions and the points of objection, I have found that the applicants have not made their case (objections). I will elaborate the reasons for reaching my verdict.

As regards to the first point of objection, the applicants' representative asserted that, the notice of opposition and counter affidavit of the respondent



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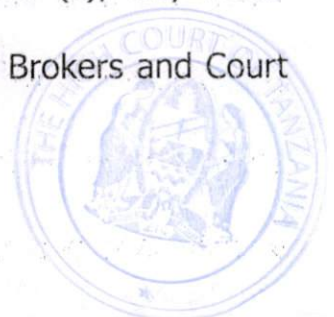
is bad in law for being filed out of time, hence time barred and the same are incurably defective for contravening Rule 24 (4) (a) the Labour Courts Rules, GN. No. 106 of 2007. For ease of reference, the said Rule provides that: -

“(4) A notice of opposition, a counter affidavit both shall:

(a) be filed within fifteen days from the day on which the application is served on the party concerned”.

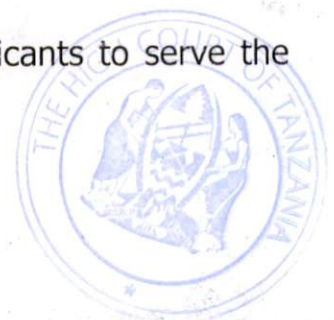
I have examined the purported Annexure A1 which is a copy of a letter written by the Suburb Chairperson at Itonga “A” dated 2nd February, 2023 and signed by him proving that the respondent was duly served on the material date through the respondent’s manager, JOSEPHAT NG’WAHAYA who however, refused to sign. Nevertheless, my finding revealed that, apart from the purported Annexure A1, there is no any other legal document relied upon by Mr. Basesa proving that the respondent was duly served with the chamber summons, notice of application and the affidavit deponed by the applicants.

It is worth noting that, as a matter of procedure, Rule 8 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017 (As amended), provides that, the main function of a process server shall be to serve judicial and extra-judicial documents and shall include serving; (a), summonses, notices, copies of judgments, rulings, decree or orders; (b), notices of engagement to court brokers; and (c), any other documents issued by the court. Again, Guidelines for Court Brokers and Court



Process Servers (the CPS) at paragraph 8.1.1. says; the personal service is conveyed by the CPS to the intended person and the service shall be direct to the person. Proof of service is by endorsement acknowledging receipt of the summons by the recipient. The CPS has to swear or affirm an affidavit showing the time when and the manner in which the summons was served, the names and address of the person (if any) identifying the person served and witnessing the service to the intended person. As I have stated earlier on, my scrutiny on this facet ended with a negative answer that, truly there is no proof of service tendered by the applicants showing that the respondent was duly served as it was claimed by the personal representative of the applicants.

Besides, it is evident from the Court record that, this application was filed by the personal representative of the applicants on 23rd January, 2023 and for the first time, the matter was placed before the Hon. A.W. Mmbando, Deputy Registrar for necessary orders on 25th January, 2023 who adjourned the matter to a nearby date on 28th February, 2023. On 28th February, 2023 the matter was placed before Hon. E. Lukumai, Acting Deputy Registrar and both parties were present in Court. It is on record that, the Counsel for the respondent, Mr. Mwaiteleke informed the Court that, since they were not served with the chamber summons and notice of application, he prayed the Court to order the applicants to effect services of all relevant documents so that in turn, he could file the notice of opposition and counter affidavit. The Court granted the Counsel's prayers and ordered the applicants to serve the



respondent. It is on the basis of order of the Court, the respondent was duly served and through the services of Mr. Mwaiteleke, on 7th March, 2023 the respondent filed a notice of representation, notice of opposition to the applicants' revision and counter affidavit as required by the law.

However, the question that arises here is, whether or not the Acting Deputy Registrar had powers to order the applicants to effect service of chamber summons, notice of application and the supporting affidavit to the respondent. In my considered view, the answer is not far-fetched. Order XLIII, Rules 1 (a) and 4 the CPC (supra), articulates that, the following powers may among others, be exercised by the Registrar or any Deputy or District Registrar of the High Court in any proceeding before the High Court. It reads:

"Rule 1 (a) - to appoint and extend the time for filing the written statement of defence, to give leave to file a reply thereto and to appoint and extend the time for filing such reply under Order VIII, rule 1, 11, and 13.

Rule 4 - All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons".

As gleaned from the Court records, it is undisputed fact that, both parties on 28th February, 2023 appeared before Hon. E. Lukumai, Ag. Deputy



Registrar who at that point in time was assuming (responsibility or control) the duty and powers of the Hon. Deputy Registrar to handle the matter on the material date where she ordered and directed the applicants to serve the respondent. In my view, the duty and powers assumed by the Acting Hon. Deputy Registrar cannot be ignored and taken lightly or easily for a simple reason that she was not the real Deputy Registrar. My standing position on this aspect is that, by then Hon. E. Lukumai, Acting Deputy Registrar was vested with the powers conferred upon the Hon. Deputy Registrar as she was legally performing the duties of the Deputy Registrar.

From the foregoing, I agree with the submission made by the Counsel for the respondent that until the time the parties appeared before the Hon. Ag. Deputy Registrar on 28th February, 2023, the respondent was still unserved with the chamber summons and notice of application. However, the same were duly served to the respondent after the Court ordered and directed the applicants to effect service of the relevant documents to the respondent. It therefore follows that, reckoning from 28th February, 2023 to 7th March, 2023 is a period of eight (8) days only as the respondent ought to have filed the chamber summons, notice of opposition and counter affidavit on or before 14th March, 2023. As rightly submitted by the Counsel for the respondent, I agree that the first limb of PO has no merit and the same does not meet the standard of being called a preliminary objection as it was expounded by the



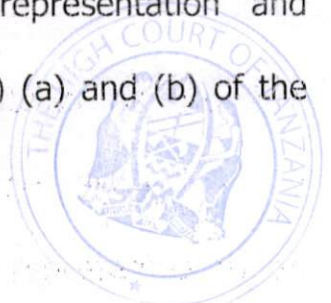
Court in the famous case of **Mukisa Biscuits Manufacturing Ltd Vs. Eastern Distributors Ltd [1969] E.A. 696.**

On the 2nd point of objection, Mr. Basesa contended that the respondent's representative started to represent his client before filing a written notice, and advice the registrar on 28/02/2023, hence contravened the provision of Rule 43 (1) (a) (b) of the Labour Courts Rules, GN. No. 106 of 2007. For ease of reference, I find it apposite to reproduce the provision of the law as hereunder: -

"A representative who acts on behalf of any party in any proceedings shall, by a written notice advice the Registrar and all other parties of the following particulars:

- (a) The name of the representative;
- (b) The postal address and place of employment or business and any available fax number e-mail and telephone number".

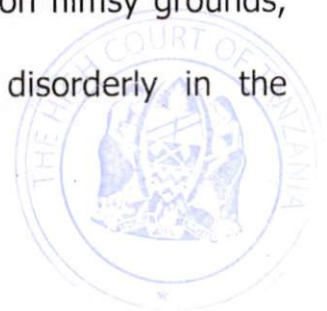
On the other hand, section 56 (c) of the Labour Institution Act, No. 7 of 2004 the law provides that, in any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented by an advocate. During examination of the parties' pleadings, I found that the Counsel for the respondent lodged his notice of representation and accordingly advised the Registrar in-terms of Rule 43 (1) (a) and (b) of the



Labour Court Rules, GN. No. 106 of 2007, and it was filed in this Court on the 7th March, 2023.

With the above finding, sturdily, I am not in agreement with the argument put forward by Mr. Basesa that, the Counsel for the respondent did act under unauthorized representation. Although the record is clear that, Mr. Mwaiteleke entered appearance and addressed the Court on behalf of the respondent on 28th February, 2023 but in my considered view, he did not violate the relevant provisions of the law, hence committed no wrong, taking into account that, at the material time, service of chamber summons and notice of application were still unserved to the respondent. On this point, I tend to agree with the Counsel for respondent that, the second point of objection is misconceived by Mr. Basesa and devoid of merit for a reason that, the order of the Court cannot be impeached by way of raising a preliminary objection. As stated by the Counsel for the respondent, always order of the Court shall remain intact unless and until it is vacated by a lawful order or being set aside by the Court.

I agree that, it is a trite principle of law that, court record being a serious document should not be lightly impeached as there is always a presumption that a Court records represents accurately what happened. See - the case of **Halfani Sudi Vs. Abieza Chichi (1998) TLR 527** at page 529. It follows therefore that, allowing the impeachment of Court record on flimsy grounds, as in the instant case, would lead to anarchy and disorderly in the



administration of justice and ultimately prevent dispensation of justice. Again, this point of objection is unmerited.

For the reasons stated hereinabove, it is my finding that, the points of preliminary objections raised by Mr. Basesa, Personal Representative of the Applicants have no merits and are hereby overthrown over the board with costs. In the premises, hearing of the instant Labour Revision shall proceed on merits. Order accordingly.

DATED at MOROGORO this 23th day of February, 2024.



A handwritten signature in black ink, appearing to read "M.J. Chaba", is written over the seal.

M.J. CHABA

JUDGE

23/02/2024

Court:

Ruling delivered at my hand and Seal of this Court in Chambers this 23rd day of February, 2024 in the presence of the respondent and in the absence of the applicant.


S.P. Kihawa

DEPUTY REGISTRAR
23/02/2024

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.


S.P. Kihawa

DEPUTY REGISTRAR
23/02/2024