IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

LABOUR REVISION NO. 14 OF 2023

(C/F Labour Dispute No. CMA/MOS/ARB/13/2022 in the Commission for Mediation and Arbitration)

JAMES A. NGOTIKO

AFRICAN B. SANGWE

HADSON W. URASSA .... **APPLICANTS**

ANTHONY R. MREMA

GODLISTEN S. KITOMARI

EVARIST R. SHAO

VERSUS

MGANGA MKUU MFAWIDHI

HOSPITALI YA RUFAA MAWENZI..............................1ST RESPONDENT

MWANASHERIA MKUU WA SERIKALI.......................2ND RESPONDENT

RULING

Date of Last Order: 14.05.2024
Date of Ruling : 11.06.2024

MONGELLA, J.

The applicants herein preferred this application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA, hereinafter) in Labour Dispute No. CMA/MOS/ARB/13/2022. Their application was supported by their jointly sworn affidavit. The

respondents expressed their opposition of the application by a joint counter affidavit sworn by one, Yohana Marco, learned state attorney representing the respondents. Along with their counter affidavit, the respondents filed a notice of preliminary objection with two points of law, to wit:

1. *The application is time barred.*

2. *This application is premature for want of prior notice of intention to seek for revision under* ***Regulation 34(1) of the Employment and Labour Relations (General) Regulations, 2017.***

The preliminary objection was argued orally. The respondents were represented by Mr. Yohana Marco, learned state attorney while the applicants were represented by Mr. Exaud Mgaya, their personal representative.

In his submission in chief, Mr. Marco foremost abandoned the 1st point of objection. Addressing the 2nd point of objection, he averred that **Regulation 34 (1) of the Employment and Labour Relations (General) Regulations, 2017** GN No. 47 of 2017 (hereinafter, the Regulations) provides for Forms to be used where a person wishes to file an application for revision of CMA Award. He said that under the 3rd Schedule there is a Form titled "Notice of Intention to Seek for Revision of Award" which is CMA Form No. 10. Iin his view, the applicants were required to file the said Form prior to filing the application at hand and attach the same to this application.

The learned counsel thus challenged the application alleging that the said Form was not attached to the application at hand. That, had it been so, a copy would have been served to the respondents. He insisted that the opposite party has to be given a copy and as such, if the Form really existed, the respondents would have been served the copy.

Submitting further, he averred that the effect of the omission is for this court to strike out this application. He cemented his argument with the case of **Flomi Hotel Limited vs. Emmanuel Sylvester Manga & Another**, Labour Revision No. 01 of 2022 and **Amina Sangali & 200 Others vs. Saint John's University of Tanzania**, Labour Revision No. 100 of 2023, in which he said that this court struck out applications for non-compliance with **Regulation 34 (1) of the Regulations**.

Mr. Marco further contended that notice of intention to seek revision is vital for expeditious determination of labour disputes. The essence of the same is to have the tribunal prepare necessary record to be forwarded to the court. He blamed the non-forwarding of the records to this court on the applicants' failure to file the notice. He requested that the court finds the requirement mandatory and supports the decisions he cited. In his stance, the omission by the applicant cannot be cured by overriding objective principle as that would render the provision superfluous. In the premises, he prayed for the application to be struck out with costs.

In reply, Mr. Mgaya vehemently opposed Mr. Mgaya's arguments on the preliminary objection. While praying to adopt the

applicants' notice of application and affidavit, he firmly found the matter competent before this court. In his view, the applicants complied with all the procedures in filing the application. He alleged that notice as provided under **Regulation 34 (1) of the Regulations** was served. In the circumstances, he saw that there was mis-communication between the two respondents. He claimed that there was a time when they sent a staff from Mawenzi Hospital and the 2nd respondent never appeared. He held the opinion that since the learned counsel stated that he is representing both of them, he becomes responsible for both of them.

Mr. Mgaya averred that the CMA award was issued on 23.06.2023 and the appellants filed the disputed notice on 10.07.2023. Thus, the notice disputed exists and it was served on the same day through the administrator of Mawenzi Hospital, one named Karia, who also signed on 10.07.2023. He contended that the said Karia is not new in the eyes of the learned counsel as he is part of the management of the 1st respondent.

Mr. Mgaya further prayed for the Court to peruse the CMA record to see for itself that the procedure was indeed adhered to. He alleged that the respondents were not keen in communications between themselves. In addition, he submitted that most of the documents filed by the respondents in the CMA had no appended any stamps. He thus concluded by praying for the preliminary objection to be dismissed with costs and for the applicants to be accorded their right to be heard on merits in this matter.

Rejoining, Mr. Marco maintained his stance that the application was incompetent for want of notice. He averred that he went through the documents presented by the applicants' representative, but found the notice still not attached or pleaded. Regarding service of the notice claimed to be done by the applicants, he challenged that the applicants served the 1st respondent while the address for service was that of the Office of the Solicitor General. Still challenging the pleadings not containing the notice, he echoed the settled legal position that parties are bound by their own pleadings. In the end, while praying to maintain his arguments in his submission in chief, he reiterated his point that the notice was not properly filed and prayed for the application to be struck out.

I have objectively considered the submissions of both parties. The arguments between the parties centres on the provision of **Regulation 34 of the Regulations**. The provision reads:

> "34. (1) The forms set out in the Third Schedule to these Regulations shall be used in all matters to which they refer."

The notice of intention to seek revision is found under CMA Form No. 10 of the said Regulations. The same appears to be a document by a potential applicant to the Labour Court addressed to the CMA. The purpose of the said form is to inform the CMA of his or her intention to seek revision or review to the High Court and requesting the CMA to expeditiously forward certified copies of the impugned award and proceedings to the relevant Court.

In the matter at hand, there appears to be a controversy on whether such notice was filed or not. While the respondents allege that the notice was never served to them implying that it was not filed by the applicants; the applicants, on the other hand, allege that the said notice was filed and served to the respondents. They claim that the said notice was served on 10.07.2023 to the 1st respondent, but it appears there was a miscommunication between the respondents that might have hindered effective service. Despite that explanation from the appellants, the respondents challenged that the notice was improperly served.

It is unfortunate that there is no copy of said notice attached on the applicants' pleading. As argued by Mr. Marco, the applicants also never pleaded any fact on whether they filed the said notice or not. From their pleading, it cannot be told or known whether or not the applicants filed the said notice and the same duly served to the respondents. In the circumstances, such fact can only be ascertained by observing the record of the tribunal taking into account that the said notice is required to be filed at the CMA.

It is settled that preliminary objections are preferred under the assumption that the details pleaded are true. This was well stated in **Safia Ahmed Okash (As Administratrix of the Estate of the Late AHMED OKASH) vs. Ms. Sikudhani Amir & Others** (Civil Appeal 138 of 2016) [2018] TZCA 30 (25 July 2018) whereby the Court of Appeal stated:

> "To discern and determine that point, the court must be satisfied that there is no proper contest as to the facts on the plaint. The facts pleaded by the party against whom the objection has been raised must be assumed to be correct and agreed as they are prima facie presented in the pleadings on record."

Further, preliminary objections are supposed to be on pure points of law, such that there stands no need to ascertain facts to resolve said matter. This was well expounded by the Court of Appeal in **Soitsambu Village Council vs. Tanzania Breweries Limited & Another** (Civil Appeal No. 105 of 2011) [2012] TZCA 255 (17 May 2012) TANZLII, whereby the Court held:

> "A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."

In Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696, the defunct East Africa Court of Appeal stated:

> "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."

See also, **Gideon Wasonga & Others vs. The Attorney General & Others** (Civil Appeal No. 37 of 2018) [2021] TZCA 3534; **Salim O. Kabora vs. TANESCO Ltd & Others** (Civil Appeal No. 55 of 2014) [2020] TZCA 1812; **The Soitsambu Village Council vs. Tanzania Breweries Ltd and Another** (Supra) and; **Karata Ernest and Others vs. The Attorney General** Civil Revision No. 10 of 2010 [2010] TZCA 30 (all from TANZLII).

Considering the arguments by the parties, it is clear that determination of this point of objection shall require reference to the notice whether attached or not. This definitely rips off the point of objection the quality as such. Mr. Marco argued that the filing and service of the notice ought to have been pleaded. As much as non-pleading of the notice can connote non-filing and service of the same, the question is whether the same affects the application in this court and prejudices the rights of the parties.

It is my considered view that the non-filing of CMA Form No. 10 is not fatal as to dispose this application. I have taken note of the case of **Flomi Hotel Limited vs. Emmanuel Sylvester Manga & Another**(supra) and **Amina Sangali & 200 Others vs. Saint John's University of Tanzania** (supra). Both cases are from this court and thus not binding upon me. In fact, there are two schools of thought over this issue settled by this very same court. The other school of

thought, and to which I subscribe, is to the effect that such notice is not vital rendering the omission to file the same inconsequential. This second school of thought has been propounded in a number of cases including, **Godwin Rwegoshora vs. Mantrac Tanzania Ltd** (Labour Revision 26 of 2022) [2022] TZHC 14816; **Tanzania Revenue Authority vs. Mulamuzi Byabusha** (Revision No. 312 of 2021) [2022] TZHCLD 597 and; **Arusha Urban Water Supply and Sanitation Authority vs. Hamza Mushi & 7 Others** (Labour Application 15 of 2020) [2022] TZHC 14219 (all from TANZLII).

As I stated earlier, I subscribe to this school of thought because, in my view, as founded by my learned brothers and sisters in this school of thought, the notice of intention to seek appeal is merely an informative document and addressed to the CMA. The same does not in any way initiate the revision in this court to extent of rendering the matter filed incompetent. It in fact, intends to facilitate expeditious determination of the revision by having the CMA prepare necessary documents and forwarding the same to the Labour Court. However, experience has it that, even with filing of such notice in the CMA, the record records have been delayed in reaching this court.

In addition, the fact that the said notice is filed in the CMA does not preclude a party from filing his revision on time with all required documentation. On the other hand, the omission does not prejudice the respondent in anyway. In my further view, if at all the filing of the notice of intention to seek revision would indeed

facilitate quick determination of the revision, it would have favoured the applicants more than the respondents.

From the foregoing observation, the preliminary objection is found untenable and without merit. The same is hereby overruled. Being a labour matter, each party shall bear its own costs.

Dated and delivered at Moshi on this 11th day of June, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA