

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI SUB REGISTRY**

**AT MOSHI.**

**MISCELLANEOUS LABOUR APPLICATION NO. 10 OF 2023**

(C/F Misc. Labour Application No. 5 of 2023)

**SILYVESTRY FRANCIS KOKA ..... APPLICANT**

VERSUS

**VICTOR MICHAEL TESHA ..... 1<sup>ST</sup> RESPONDENT**

**TANGANYIKA COFFEE CURING CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

12/06/2024 & 20/06/2024

**SIMFUKWE, J.**

In this application one Silyvestry Francis Koka, the applicant herein, seeks to be joined in Miscellaneous Labour Application No. 5 of 2023, which is alleged to be pending before this court. He moved this court under **section 95 and Order 1 rule 8(2) of the Civil Procedure Code**, Cap 33 R.E. 2019. The application was supported by the affidavit sworn by Mr.

Emanuel Antony, learned counsel of the applicant. It was contested by the counter-affidavit deponed by one Peter Haygaru the General Manager of the second respondent.

Together with the counter affidavit, Mr. Kipoko learned counsel for the second respondent raised the following preliminary objections on point of law:

- 1. That, the Application is fatally defective as the jurisdiction of the court is not obtained since the law conferring jurisdiction is missing.*
- 2. That, the Application is fatally defective for not disclosing the subject matter of the Application contrary to the law. i.e. Order VII Rule 3 of the Civil Procedure Code, CAP 33 R.E 2023*
- 3. That, the application is fatally defective for:*
  - a. Failure to show cause of action*
  - b. Applicant lacking locus standi.*
- 4. That, the application is based on defective affidavit containing hearsay paragraphs 2, 3 and 4.*
- 5. That, the Application is fatally incompetent as it is based on affidavit with defective jurat by two different persons.*

At the hearing of this application, which proceeded by filing written submissions, the applicant was represented by the learned counsel, Mr. Emanuel Antony, whereas the second respondent was represented by Mr. Elikunda Kipoko, learned counsel.

Supporting his preliminary objections, Mr. Kipoko dropped the first preliminary objection and proceeded to argue the second objection, which is to the effect that the application is fatally defective for not disclosing the subject matter of the application contrary to **Order VII rule 3 of the Civil Procedure Code** (supra). He clarified that the suit land ought to be described by its registration number or even by mentioning its location and boundaries, which renders this application fatally defective and that it should be struck out with cost.

On the third objection, Mr. Kipoko was of the view that the application is fatally defective for failure to show cause of action. He made reference to the prayers in the chamber summons, which reads:

*".... this honorable court be pleased to join the Applicant in the Miscellaneous Labour Application No. 5 of 2023 before her Ladyship madam Simfukwe J as he has the interest in disputed subject matter."*

From the above quotation, Mr. Kipoko informed this court that the cause of action and its relief has expired since the said Miscellaneous Labour Application No. 5 of 2023 does not exist in this registry. He attached a copy of the ruling of the said application and stated that the application was struck out. He argued further that despite the obvious fact that Application No. 5 of 2023 does not exist, the applicant kept this application without withdrawing it for more than five consecutive dates for hearing, and by doing so, he caused unnecessary costs in terms of resources and time to the respondents and this court. He prayed this court to strike out this application with costs.

However, the learned counsel opted to withdraw the preliminary objection in respect of locus standi.

On the fourth ground of objection, Mr. Kipoko submitted that the application at hand is based on a defective affidavit containing hearsay in paragraphs 2, 3, and 4. He elaborated that it is trite law that when an affidavit mentions another person, that other person ought to swear an affidavit to that effect. Short of that, the affidavit is based on hearsay and renders the application fatally defective.

On the fifth preliminary objection, Mr. Kipoko submitted that the application is fatally incompetent as it is based on an affidavit with a

defective jurat by two different persons. In the jurat, the name appearing is Leonard S. Makabara, the advocate before whom the affidavit was sworn, while in the attestation, the officer was Leonard Satu Mashabara. According to the learned advocate, this difference in names renders the affidavit fatally defective, and the application lacks crucial evidence to support it, hence deserves to be struck out.

Lastly, Mr. Kipoko prayed that the application should be strike out with costs.

In reply to the third preliminary objection which concerns the defectiveness of the application for failure to show cause of action; Mr. Emmanuel admitted that Miscellaneous Labour Application No. 05 of 2023, the subject of the current application, no longer exists as it was struck out before this court. This renders the instant application being overtaken by events. Moreover, Mr. Emmanuel blamed the learned counsel for the 2<sup>nd</sup> respondent for his failure to inform them about the outcome of Miscellaneous Labour Application No. 05 of 2023 as early as possible. He said, the records show that the attached ruling of the cited application was delivered on the 15<sup>th</sup> day of December, 2023. Notice of Preliminary Objections was filed on the 24<sup>th</sup> day of October, 2023. The submission in chief in support of the preliminary objection was filed on

the 16<sup>th</sup> day of May, 2024. Thus, the learned counsel for the 2<sup>nd</sup> respondent knew the outcome of Miscellaneous Labour Application No. 05 of 2023.

Mr. Emmanuel insisted that his fellow learned brother had a duty towards other advocates in this application as per **Regulation 82(2) of the Advocates (Professional Conduct and Etiquette) Regulations, GN No. 118 of 2018**. If they were informed, they could have withdrawn the application at hand and saved unnecessary costs.

Furthermore, Mr. Emmanuel averred that the learned counsel for the 2<sup>nd</sup> respondent, as an Officer of the court has a duty to treat this Honourable Court with candour as required under **Regulation 92(1) of the Advocates (Professional Conduct and Etiquette) Regulations**, (supra). He believed that Mr. Kipoko breached that duty intentionally by filing submission in support of his preliminary objections instead of informing the court about the status of the cited application.

In his final remarks, the learned counsel for the applicant implored the court to withdraw this application at hand without costs.

I have keenly considered the submissions of both parties for and against the raised preliminary objections, as well as their pleadings. The issue that

requires the determination of this court is whether the raised objections have merit.

Starting with the 3<sup>rd</sup> ground of objection, the parties are in agreement that the cause of action and its relief have expired since Miscellaneous Labour Application No. 5 of 2023, which the applicant is seeking to be joined, does not exist in this registry as it was struck out.

Admittedly, the gist and core root of this application is Miscellaneous Labour Application No. 5 of 2023 which the applicant implored this court to be joined. If the same is no more, then this application naturally has been overtaken by events as rightly submitted by the learned counsel for the applicant.

The only issue left for determination is *whether this application should be struck out with or without costs*. I agree with Mr. Emmanuel for the applicant that since Mr. Kipoko was aware that the said application was not existing, he ought to inform this court from the very beginning so as to serve the court's time as well as the parties' costs and time. It is for that reason that the 2<sup>nd</sup> respondent does not deserve to be awarded costs. Based on the reasons which I have advanced, I hereby strike out this application without costs.

It is so ordered.

Dated and delivered at Moshi this 20<sup>th</sup> June 2024.



X

A handwritten signature in blue ink, appearing to read "S. H. Simfukwe", is written over a light blue rectangular background.

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S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

**20/06/2024**