

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB-REGISTRY**

**AT MBEYA**

**MISC. LABOUR APPLICATION NO. 26 OF 2022**

*(From Misc. Labour Application No. 17 of 2022 of the High Court of Tanzania at Mbeya)*

**MAURICE SELEMANI MWAMWENDA** (personal legal representative of the estates of the later **PROFESSOR TUNTUFYE SELEMAN MWAMWENDA**, deceased) .....**APPLICANT**

**VERSUS**

**LABOUR COMMISSIONER** .....**1<sup>ST</sup> RESPONDENT**

**THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY FUND**.....**2<sup>ND</sup> RESPONDENT**

**RASHIDI NDITI** .....**3<sup>RD</sup> RESPONDENT**

**MLIMA MBEYA VIEW ACADEMY t/a HIGH SCHOOL** .....**4<sup>TH</sup> RESPONDENT**

**MR. EUGEN TEMIGUNGA t/a FAGIO COURT BROKER** .....**5<sup>TH</sup> RESPONDENT**

**RULING**

*Date of hearing: 21/3/2024*

*Date of ruling: 19/6/2024*

**NONGWA, J.**

The applicant has moved this court through chamber summons and notice of application made under rule 24(1)(2)(a)(3) (a-d), 54, 55(1)(2) and 56(1) of the Labour Court Rules G. N No. 107 of 2007 and section 24(2) of the Law of Limitation Act [cap 89 R: E 2019] is seeking extension of time to apply to set aside *ex-parte* ruling in Misc. Labour Application

No. 17 of 2022. The application is supported by the affidavit of Maurice Selemani Mwamwenda.

The factual background of the matter as found in record goes thus; that Rashidi Nditi, 3<sup>rd</sup> respondent was employed by Mlima Mbeya View Academy t/a High School, 4<sup>th</sup> respondent, terms of employment is silence but it happened that the Labour Commissioner, 1<sup>st</sup> respondent issued compliance order to the 4<sup>th</sup> respondent to pay 3<sup>rd</sup> respondent his salary arrears. On the other hand, the Board of Trustees of the National Social Security Fund, 2<sup>nd</sup> respondent had a case with the 4<sup>th</sup> respondent. Case facts is not stated in the applicant's affidavit but what is clear is that it happened to be Labour Execution No. 12 of 2021 initiated by 2<sup>nd</sup> respondent in which buildings in plot 1350 block "M" Forest area Owned by 4<sup>th</sup> respondent was ordered to be attached and sold. Mr. Eugen Temigunga t/a Fagio Court Broker, 5<sup>th</sup> respondent a court broker was appointed to carry the exercise. Becoming aware of the attachment, the 1<sup>st</sup> respondent filed an application registered as Misc. Labour Application No. 17 of 2022 in which he prayed proceeds in execution No. 12 of 2021 to be apportioned to him, parties in that application were the current respondents. The application was heard *ex-parte* and refused. It is against the decision which has moved the applicant to file the present application seeking 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. 17 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).

The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents resist the application, each filed counter affidavit, 3<sup>rd</sup> and 5<sup>th</sup> respondents did not file counter affidavit. In addition, the 2<sup>nd</sup> and 4<sup>th</sup> respondents raised points of preliminary objection challenging competence of the application. The objection by the 2<sup>nd</sup> respondent goes thus;

1. That the applicant's application is bad in law for non - joinder of the attorney general contrary to the provision of s. 10 of the Government Proceedings Act Cap 6 R: E 2019]
2. That the applicant's application is incompetent for non-issuance of 90 days' notice of intention to sue the government contrary to provision of section 6(2) of the Government Proceedings Act Cap 6 R: E 2019]

The 4<sup>th</sup> respondent raised three objections that;

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

2. The application is drafted and filed by un-qualified person
3. The order sought to be revised and set aside is an interim order

When the matter was called for hearing, the applicant was represented by Mr. Felix Kapinga, learned counsel, Ms. Marieta Matupa, State attorney appeared for the 2<sup>nd</sup> respondent while Mr. Hassan Gyunda represented the 4<sup>th</sup> respondent. Mr Gyunda prayed the counter affidavit and notice of objection which read filed by 3<sup>rd</sup> respondent to read for the 4<sup>th</sup> respondent, the prayer which was not objected by the applicant and 2<sup>nd</sup> respondent. The court granted the prayer and indorse document reading for 3<sup>rd</sup> respondent to read for 4<sup>th</sup> respondent. On 6<sup>th</sup> December 2023 counsel for the 2<sup>nd</sup> and 4<sup>th</sup> respondent prayed hearing of objection to be *ex-parte* against the 3<sup>rd</sup> and 5<sup>th</sup> respondents, the court indorsed the prayer. Parties present prayed and were granted to argue objection by way of written submission.

The 2<sup>nd</sup> and 4<sup>rd</sup> respondent filed their respective written submissions but the applicant did not file reply thereto thus waived his right to hearing objection based on the laws that failure to file written submission is tantamount to non-appearance on the date the matter was called for hearing. In their submissions the 2<sup>nd</sup> respondent abandoned objection two, likewise the 4<sup>th</sup> respondent abandoned the 2<sup>nd</sup> objection.

In her submission, Ms. Marieta stated that Attorney General was not joined as a necessary party as required by section 10 of the Government Proceedings Act Cap 6 R: E 2019] (the GPA) read together with section 25 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020 which amended section 6(3) of the GPA to make the Attorney General a necessary party in any proceedings involving the government. Elaborating, counsel stated that the 2<sup>nd</sup> respondent is the government corporation, thus Attorney General was to be joined in the application. The case of the **Board of Trustees of the National Social Security Fund vs M/S Mara Security Guard & Patrol Services**, civil Case No. 1 of 2020 and **Chama cha Kutetea Haki na Maslahi ya Walimu Tanzania (CHAKAMWATA) vs the Registrar of Organisation**, Labour Appeal No. 01 of 2021 were cited to support the argument. State attorney concluded that without joining the attorney General as a necessary party makes the application unmaintainable in law deserving to be struck out.

Mr. Gyunda in his submission in respect of the first objection that the applicant had no locus standi to file the application, he stated that the late Prof. Tuntufye Mwamwenda was not party to Misc. Labour Application No. 17 of 2022, thus not entitled to make this application. Counsel for the 4<sup>th</sup> respondent added that if the late Prof. Tuntufye Mwamwenda was a shareholder in the 4<sup>th</sup> respondent then his interest could be dealt with

other laws. He cited the case of **Maurice Selemani Mwamwenda (personal legal representative of the estates of the late Prof. Tuntufye Seleman Mwamwenda, deceased)**, Misc. Labour Application No. 25 of 2022 [2024] TZHC 373 (TANZLII) to bolster his point.

In the 3<sup>rd</sup> objection it was submitted that the order is interim to amenable to appeal, revision or review unless it dispose the case to its finality. The case of **Tunu Mwapachu & Others vs National Development Corporation & Another**, Civil Appeal No. 155 of 2018 CoA was cited to support the argument. Mr. Gyunda added that the order denying the Labour Commissioner to benefit from proceeds in Execution No. 12 of 2021 was interlocutory and no revision could be made. He prayed objections to be sustained with costs.

I have considered the application document, objections and argument of the state attorney and Mr. Gyunda for 2<sup>nd</sup> and 4<sup>th</sup> respondents respectively. The only issue of my determination is whether the objection raised are meritorious.

I will begin with objection of the 2<sup>nd</sup> respondent, it is the argument of the State attorney that Attorney General was not joined as required by the law. From the record, Misc. Labour Application No. 17 of 2022 which has given rise of this application parties were Labour Commissioner as

applicant against the Board of Trustees of National Social Security Fund, Rashid Nditi, Mlima Mbeya View Academy t/a High School and Mr Eugen Temigunga t/a Fagio Court Broker as the respondents. The Attorney General was not party to those proceedings, but the State attorney has a view that ought to be joined in this later proceeding because the 2<sup>nd</sup> respondent is the government.

Indeed, I join hands with the State attorney that Attorney General is a necessary party in all proceedings involving the government, and the 2<sup>nd</sup> respondent is the government in terms of section 16(3) of the GPA as amended by section 26 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2020. The glaring question is can the Attorney General bilaterally be joined by a party to subsequent suit to which was not party to original proceeding. Before a get to the answer to this posed question let me have a glance of the law on power of the Attorney General to be joined in the case. Section 17(1)(2)(a)(b) of the Office of the Attorney General (Discharge of Duties) Act [Cap 268 R: E 2019] provides;

*'17(1) Notwithstanding the provisions of any written law to the contrary, the Attorney General shall through the Solicitor-General have the right to audience in proceedings of any suit, appeal or petition in court or inquiry on administrative body which the Attorney General considers-*

*(a) to be public interest or involves public property; or*

*(b) to involve the legislative, the judiciary or an independent department or agency of the Government.*

*(2) In the exercise of the powers vested in the Attorney General with regards to the provisions of subsection (1), Solicitor-General shall-*

*(a) notify any court, tribunal or any other administrative body of the intention to be joined to the suit, inquiry or administrative proceedings; and*

*(b) satisfy the court, tribunal or any other administrative body of the public interest or public property involved, and comply with any direction of the court, tribunal or any such other administrative body on the nature of pleadings or measures to be taken for purposes of giving effect to the effective discharge of the duties of the Office of the Attorney General.'*

The above provision gives power to the Attorney General to intervene in a case at any stage in which he considers there is interest of the government. Power of the Attorney General to apply to be joined at any stage of proceedings was discussed in the case of **Isidore Leka Shirima & Another vs The Public Service Social Security Fund (as a successor of PSPF, PPF, LAPF and GEPF) & Others**, Civil Application No. 151 of 2016 where the court stated;

*'...it is only the Attorney General who has a right or could invoke the provisions of section 6 (a) of Act No. 4 of 2005 to apply to the Court to be joined as an interested party in the intended*



*appeal in a case he was not a party in order to safeguard the Government interests...'*

From the above, it is now clear that it is the Attorney General who has power to intervene and to apply to be joined as a party to the case at any stage in which the interest of the government is involved. A person has no right and power to join Attorney General at any stage of the proceedings as she wishes unless it is original proceeding to which the government is sued as a party. Joining Attorney General at later stage is a process by which the court will have to satisfy itself that indeed interest of the government is involved making the inclusion and intervention by the Attorney General to safeguard such interest necessary. That right is not given to any person to join Attorney General at any stage of the case as a party. This would defeat the whole purpose that parties to the case must be the same throughout the proceedings save when the revision is sought by a third party to which the position of the law is that a person who was not a party to the proceedings in which he is interested and a decision is made in his absence, she is entitled to approach Court to seek redress through revision. See **Attorney General vs Tanzania Ports Authority & Another**, Civil Application 467 of 2016 [2020] TZCA 380 (7 August 2020; TANZLII).

In this application I wonder why the State attorney who was well aware that the Attorney General was not party to Misc. Labour Application

No. 17 of 2022 rushed to raise objection on non-joinder of Attorney General instead of invoking the section 17 of the Office of the Attorney General (Discharge of Duties) Act to have him joined in order to safeguard the interest of the 2<sup>nd</sup> respondent.

Flowing from the above, it follows that the state attorney has other means to have Attorney General joined in this application than raising it as preliminary objection. I therefore overrule objection by the 2<sup>nd</sup> respondent

Coming to objections by the 4<sup>th</sup> respondent, from the application documents, it is undeniable fact that in Misc. Labour Application No. 17 of 2022 parties to the case were Labour Commissioner as applicant against the Board of Trustees of National Social Security Fund, Rashid Nditi, Mlima Mbeya View Academy t/a High School and Mr Eugen Temigunga t/a Fagio Court Broker as the respondents. That the said application was heard *ex-parte* against all the respondents.

The objection by 3<sup>rd</sup> 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. 17 of 2022.

Now the application at hand is for extension of time within which the applicant can lodge application to set aside *ex-parte* ruling of this court in Misc. Labour Application No. 17 of 2022, in that application Prof. Tuntufye

Mwamwenda under whom Mr. Maurice Mwamwenda is litigating in this application was not a party. I agree with Mr. Gyunda that the applicant has no right to file the present application. The reason is not far-fetched as late Prof. Tuntufye Mwamwenda was not a party to original proceedings giving rise of this application he thus would not be heard in proceedings of this nature, the caveat which extends to whoever litigate under his title. Just like right of appeal which is only available to persons who were parties to original proceedings, the rule extends to application to set aside *ex-parte* decision save, application for revision. That is even if the time is extended it will be a futile exercise since the applicant will not be able to lodge application to have *ex-parte* ruling set aside on ground that the deceased Prof. Tuntufye Mwamwenda was not a party to Misc. Labour Application No. 17 of 2022 and could not have lodged application to set aside that decision so his representative cannot have such right in those proceedings. The first objection is thus sustained.

The 3<sup>rd</sup> objection, that the order sought to be revised and set aside is an interim order, will not detain me because it was based on the misconception of the application. The matter is for extension of time and not revision as the objection and submission of Mr. Gyunda sought to establish. I therefore overrule the 3<sup>rd</sup> objection.

At the end I dismiss the objection of the 2<sup>nd</sup> respondent and sustain first objection of the 4<sup>th</sup> respondent. The application is consequently struck out, being a labour matter no order as to costs.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA**  
**JUDGE**  
**19/6/2024**

DATED and DELIVERED at MBEYA this 19<sup>th</sup> day of June, 2024 in presence of the applicant and absence of the respondents.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA**  
**JUDGE**