

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 177 OF 2017
MIKIDADI JAGALAGA AND 12 OTHERS.....APPLICANTS
VERSUS
TANZANIA PORTS AUTHORITY.....RESPONDENT

RULING

Date of Last submission: 04/04/2018

Date of Ruling: 11/05/2018

L.L.Mashaka, J

This ruling is in respect of the preliminary objection raised by the respondent Tanzania Ports Authority against the application for extension of time to file revision application out of time, filed by the applicants. The notice of preliminary objection filed on 18th August 2017 is to the effect that:-

*" a) This Application contravenes the mandatory provisions of
Section 9 of Part I of the Civil Procedure Code, 1996 on **Res
Judicata.***

b)The application is bad and unmaintainable in law."

During hearing, parties had legal representation. Mr. Hussein Hitu, Advocate appeared for the applicants and the respondent was represented

by Mr. Erasto Lugenge, Advocate assisted by Mr. Ronald Teemba, Advocate.

Learned Counsel Lugenge for the respondent submitted on the 1st point of preliminary objection, that the case before the Court emanates from a case first instituted, heard and conclusively determined as Civil Case No. 194 of 2000 by the High Court of Tanzania before Hon. Massati, J (as he then was). That prior to the institution of the case, the matter was referred for mediation to the Labour Officer and referred to the Temeke District Court and filed as Civil Case No. 11 of 1999. The matter was heard on merit and dismissed accordingly.

That thereafter the applicants were aggrieved and filed appeal to the High Court. The appeal was heard and decided in favour of the applicants. Learned Counsel produced copy of the decision of the High Court in that respect and Learned Counsel for the applicants had no objection on the same.

Learned Counsel submitted further that the applicants have on several occasions attempted to appeal and or make revision on the case, until when the applicants herein and the Court Broker wrote to the respondent claiming for settlement of TZS. 125, 309,908/48 being the decretal sum and commission as per the decree issued by the Temeke District Court and submitted the decree from Temeke District Court for the Court to take judicial notice and Learned Counsel for the applicants had no objection on the same. That following issuance of the decree by the

applicants, the respondent paid the decretal sum through the Court Broker Mwafrika Group Ltd.

Basing on what he had narrated above, Learned Counsel argued that the present application which involves same parties, same cause of action and conclusively determined by a Court of competent jurisdiction, the applicants herein are estopped from instituting the same case as in so doing the applicants contravened Section 9 of the Civil Procedure Code, hence **res judicata**.

Learned Counsel referred this Court to the case of **SAS Co. Ltd Vs. Tangamano Transport Services Co. Ltd & African Banking Corporation**, Comm. Case No. 28 of 2008, High Court at Dar Es Salaam (unreported), where the High Court illustrated the 5 elements of *res judicata* and the respondent herein refers. Learned Counsel did not provide the copy of the said Judgement.

On the 2nd point of law Learned Counsel submitted that the present application lacks the qualification of a proper application pursuant to Rule 24(3) (a) (b) (c) of the Labour Court Rules 2007, GN No. 106 of 2007. That the said Rule 24(3) provides, an application before the Labour Court be supported by an affidavit which shall clearly and precisely set out among others the following (a), (b) (c) of Rule 24(3) of Labour Court Rules 2007. That, is a mandatory requirement; it is not optional as the word used is "shall". That going through the affidavit one cannot see their description and addresses of the parties. Secondly the same Rule 24(3)(c)

of Labour Court Rules, 2007 if one goes through the entire affidavit cannot see any legal issues explained, arising from the material facts.

For the interest of justice and for the avoidance of endless litigation, Learned Counsel prayed the application be dismissed with costs.

This Court required from Learned Counsel for the respondent what was the relation between this application before the Court and the preliminary objection on the 1st point of law.

Learned Counsel for the respondent prayed for adjournment so as to make consultation on the same and it was granted.

When the Court resumed Learned Counsel Temba assisting Learned Counsel Lugenge prayed to submit the ruling of the Temeke District Court in Employment Case No. 11 of 1999. That the applicants had a judgment and decree of the High Court in their favour in Civil Case No. 194 of 2000. He contended that they had to execute the decree in the Temeke District Court which was by application for Execution No. 11 of 1999. That from the said Execution, the applicants were paid in 2014, TZS 117,112,064/=. He prayed to the Court to take judicial notice of the existence of proof of payments, application for execution, a copy and decree of appeal and referred paragraph of affidavit in support of application, that execution was effected in October 2014.

That being dissatisfied with the payment, the applicants went to the High Court to challenge payments in Civil Case No. 167 of 2015. That the

application was dismissed based on technicalities. Surprisingly after the dismissal on the 06/04/2016, they went to the CMA with an application for condonation. That condonation was heard and dismissed and now the applicants have appeared before the Labour Court seeking for extension of time to challenge the CMA decision in dispute No. CMA/DSM/TMK/254/2016 which was dismissed on 20/12/2016 before Hon. Stanislaus.

From the above background, Learned Counsel cemented the 1st point of preliminary objection as admitted at paragraph 4 of supporting affidavit, that the matter was heard, determined and decided by the High Court and later on executed in the Temeke District Court. Therefore the application was res judicata.

In response Learned Counsel Hitu for the applicants submitted that it was not true as submitted concerning the 1st point of preliminary objection because the nature of their application emanates from CMA/DSM/TMK/254/2016 dispute which is quite different from what Learned Counsel for the respondent is trying to explain before the Court.

That as per paragraph 4 of affidavit supporting the application, the nature of their dispute at the CMA was on subsistence allowance and not otherwise. That all other cases especially Civil Case No. 194 of 2000, Civil Case No. 11 of 1999 was a different cause of action presented at the CMA.

Learned Counsel prayed to refer the Court to the case of **Peniel Tota Vs. Gabriel Tanaki & Others**, Civil Appeal Case No. 61 of 1999, (2003) TLR 312, where the Court of Appeal of Tanzania mentioned 5 elements or

conditions for res judicata whereas one condition is that *"the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit."* That according to the Court of Appeal of Tanzania decision and the element he mentioned, the matter in issue was quite different from that, which the respondent has raised preliminary objection on. That the issue at the CMA was on subsistence allowances and not based on termination of employment.

In relation to Civil Case No. 154 of 2015 before Hon. Feleshi, J, Learned Counsel submitted that, Hon. Judge elaborated and held that, *"though this Court is vested with the jurisdiction to try other civil matters, the same is not vested with powers to entertain labour matters, other than those instituted through the established Labour Forum."* That the decision of the High Court to dismiss Civil Case No. 154 of 2015 was based on a wrong forum where the applicants herein had instituted before. After that decision, the applicants went to the CMA and filed dispute No. CMA/DSM/TMK/254/2016 for condonation, which was dismissed, now this present application before this Court.

It was his humble prayer that this application was not res judicata and prayed the preliminary objection be dismissed with costs.

On the 2nd point of preliminary objection, Learned Counsel contended that it is not true because the affidavit had complied with the legal requirements, that there is a description of parties. But while submitting on the point, Learned Counsel prayed to withdraw and start a fresh statement. And therefore submitted that on the 2nd point of preliminary

objection Learned Counsel submitted it is true that in their affidavit it has no description of the parties to this application. On that basis Learned Counsel prayed to the Hon. Court to give them time to make corrections. He prayed to concede to the 2nd point of preliminary objection and more time to make corrections to the affidavit.

In rejoinder Learned Counsel for the respondent submitted on the 1st point of preliminary objection that even in Civil Case No. 167 of 2015, the applicants' cause of action among others was the issue on subsistence allowances. That it was reflected at paragraph 3, page 2 of the ruling of Hon. Feleshi, J which is Annexure MJ 2. It stated clearly it was also claim for subsistence allowances. On that point, he prayed to reiterate that this application is res judicata and has all the ingredients of the same.

On the 2nd point of preliminary objection, Learned Counsel argued that it is crystal clear affidavit is evidence taken under oath and therefore cannot be amended or altered or given any other form of adjustment. He therefore prayed the present application be dismissed in its entirety with costs.

After hearing submissions by both parties and having gone through the records, I will commence to determine the 2nd point of preliminary objection which is on the competence of this application. The affidavit in support of this application contravenes the provision of Rule 24 (3)(a)(b)(c) of the Labour Court Rules, Government Notice No. 106/2007 and Learned Counsel for the applicants has concede to the defects.

Rule 24(3) provides that:-

*24(3). The application **shall be** supported by an affidavit, which shall clearly and concisely set out-*

- (a) The names, description and the address of the parties;*
- (b) A statement of the material facts in a chronological order, on which the application is based.*
- (c) Statement of legal issues that arise from the material facts; and*
- (d) The reliefs sought.*

The applicants' affidavit in support of the application as conceded to by Learned Counsel does not meet the requirements of the cited above provision of the Labour Court Rules, Government Notice No. 106/2007 and as correctly contended by Learned Counsel for the respondent. There is no statement of material facts in a chronological order on which the application is based, and no statement of legal issues.



Affidavits in support of an application to the Labour Court must confirm to the requirements of the law above, short of which renders the affidavit defective hence application incompetent as held by this Court in its decision, a persuasive decision I subscribe to, **Reli Assets Holding Co. Ltd V. Japhet Casmir & 1500 Others**, TBR Revision No. 10/104, [2015] LCCD 1 at p.148. by Hon. Mipawa, J. In that decision the Court explained the contents of an affidavit in support of any application filed in this Court. Learned Counsel for the applicants prayed for more time to make corrections to the defective affidavit. As rightly argued by Learned Counsel

for the respondent an affidavit is evidence taken under oath and cannot be amended or altered or corrected. The defective affidavit in support of this application is accordingly struck out.

Therefore I will not belabor on the 1st point of preliminary objection as the 2nd point of preliminary objection suffices to dispose of this matter based on competence of this application.

The second point of preliminary objection is upheld and the application is hereby struck out.

No orders as to costs as the present application is not frivolously and vexatiously filed by the applicants to make this Court invoke the provisions of Rule 51(2) of the Labour Court Rules Government Notice No 106/2007 to order costs.

For the interest of justice, I grant the applicants leave to file a competent application for extension of time within 7 days from today.

So ordered.


L.L. Mashaka

JUDGE

11/05/2018