

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
MISCELLANEOUS APPLICATION NO. 559 OF 2016
NATIONAL BANK OF COMMERCE.....APPLICANT
VERSUS
RABIA MURO.....RESPONDENT

RULING

Date of Last Order: 08/02/2018

Date of Ruling 04/05/2018

L.L.Mashaka, J

This is a ruling in respect of preliminary objection raised by the respondent Rabia Muro against the application for extension of time filed by the applicant National Bank of Commerce based on 2 points of law that:

- a) The application is Res Judicata after it was found out to be time barred.*
- b) That the application is incompetent for lack of improper citation of the law.*

The hearing of the preliminary objection was by way of written submissions and noting from the submissions, the respondent's was drawn and filed by Mr. Amani Abdallah, Advocate and those for the applicant was drawn and filed by Mr. Godfrey Tesha, Advocate.

The respondent submitted on the second point of the preliminary objection that the application for extension of time was under non-citation of the provisions of the law to wit Rule 24(11)(b) of the Labour Court

Rules, GN 106/2007 which renders the application incompetent before the Court. That it was undisputed that the application is for extension of time which is not specifically provided under the law thus it is one amongst the applications falling under Rule 24 (11) of the Rules. That failure to cite the same renders the application incompetent before the Court and the appropriate remedy is the same to be dismissed.

The respondent referred this Court to the case of **Airtel Tanzania Limited Vs. Earl Matthysen**, Miscellaneous Application No. 220 of 2014, HCLD at Dar es Salaam (unreported) where the Court held that:-

"In the circumstance, I find that the applicant failed to cite Rule 24(11)(b) of the Labour Court Rules GN 106/2007 and this renders the application incompetent to move the Court to entertain and determine the application for extension of time .The preliminary objection is found to have merit".

Also the respondent referred this Court to the case of **Edna Sylvester Ndile Vs. Standard Chartered Bank**, Revision No. 166 of 2013, HCLD at Dar es Salaam (unreported) where Hon. Wambura, J held that:-

"An application for extension of time is among those applications which fall under the category of Rule 24(11)(b) of the Labour Court Rules as they are not specifically provided under the rules."

In making reference to the Court of Appeal on proper citation of the enabling provisions of the law, the respondent cited the case of **Project Manager Es Ko International Inc. Kigoma Vs. Vicent J. Ndugumbi**,

Civil Appeal No. 22 of 2009, CAT at Tabora (unreported) His Lordship Rutakangwa JA held that:-

"It is now settled law that wrong citation of the law, sub section and or paragraphs of the law or non-citation will not move the Court to do what it is asked to do and accordingly renders the application incompetent."

That from their submissions the application was incompetent before the Court and capable of being dismissed.

On the first point of preliminary objection, the respondent argued that Revision application No. 498 of 2015 was struck out on 14th November 2016 by this Court after it was found to be time barred, and on 6th December 2016 the applicant filed the present application which is res judicata on the reason that the application has the same issue, same parties and it has been determined with the Court of competent jurisdiction hence this Court has no jurisdiction to entertain it.

The respondent in substantiating that made reference to Section 9 of the Civil Procedure Act, Cap 33 R.E 2002 which provides that:-

"No Court shall try any suit or issue in which matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

That from the provisions above, bars the trial of the suit or an issue in which the matter directly and substantially in issue has been adjudicated upon in a previous suit.

Also the respondent, referred this Court to the case of **Kamunye and Others Vs. The Pioneer General Assurance Society Ltd** (1971)EA 263 where the principle of res judicata was enunciated that:-

"the test whether or not a suit is barred by res judicata seems to me to be-is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

From that the respondent concluded that the decision above was too bar multiplicity of suits and guarantee finality of litigation. That it makes conclusive a final judgment between the same parties or their privies on the same issue by court of competent jurisdiction in the subject matter of the suit. Therefore prayed that the application was res judicata and the same be dismissed in its entirety.

In reply to second point of preliminary objection on non-citation of the enabling provisions of the law, at the outset making reference to the case cited by the respondent of **Airtel Tanzania Limited Vs. Earl Matthysen** cited by the respondent, the applicant did concede with the first point of preliminary objection and prayed that the application be struck out and for purpose of protection of justice between parties. The applicant prayed that the Court gives them leave to refile the application within seven days. That prayer by the applicant was cemented by the attached case laws by the respondent in the written submission in support of the raised preliminary objection, that the same cases referred to by respondent were struck out with leave of filing another proper application.

On the first point of preliminary objection, the applicant argued that in order for the matter to be res judicata, such an application or case must be the same, the parties must be the same and it has to be determined by a Court with competent jurisdiction.

That the present case the application is not the same as Revision No. 498 of 2015 which was to call for records, revise and set aside the Arbitrator's award dated 25th day of August 2015 while this current application is for extension of time and cannot be treated to be an application for revision.

The applicant concluded that the first point of preliminary objection lacks merit but the second point has merit therefore the applicant prayed for the matter to be struck out with leave to file competent application within seven days.

In rejoinder, the respondent submitted that they pray the application to be dismissed instead of being struck out and referred the Court to the case of **Chief Executive Faidika Limited Vs. Lydia Pius**, Revision No 18 of 2013, HCLD at Dar es Salaam [unreported] Mipawa,J (as he then was) where the Court dismissed the application for being incompetent before the Court. That the applicant has concede the application to be defective as it offends the provisions of Rule 24(11)(b) of the Labour Court Rule G.N. 106/2007. That giving leave to the applicant to file another application will amount to abuse of Court processes and destroy the aim that litigation should come to an end. The respondent further submitted that on 18th December 2015, Revision No. 498 of 2015 was struck out for being incompetent, and on 6th December 2016 the applicant filed this current application for extension of time with the same mistakes. That the application being the second one should be dismissed without giving them leave to file another application.

Having read written submissions by both parties and gone through Court records and since it is undisputed that the applicant has concede to the second point of preliminary objection which suffices to bring this application to an end, this Court will not therefore labour on the first point of preliminary objection for it will not in any manner change the end result.

The respondent cited the decision of this Court which struck out an application for extension of time in Misc. Application No. 220 of 2014 between **Airtel Tanzania Ltd Vs. Earl Matthysen (supra)** and for certainty in decision making, this Court subscribes to the same and uphold the second point of preliminary objection on failure of the applicant to cite

Rule 24(11)(b) of the Labour Court Rules, GN No. 106 of 2007 in this application.

Since this is the first application for extension of time brought by the applicant, this Court doth order the same to be struck out thereto instead of being dismissed as prayed for by the respondent. This application for extension is struck out from the Court register.

If the applicant still intends to pursue this matter, I grant leave to file a competent application for extension of time within 7 days from today.

It is so ordered.


L.L. Mashaka

JUDGE

04/05/2018