IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 237 OF 2019

BETWEEN

ROSE ONGARA.....1ST APPLICANT

JANE KIJARI NCHIMBI .....2ND APPLICANT

GODFREY SEMWENDA .....3RD APPLICANT

VERSUS

NATIONAL HEALTH INSURANCE FUND.....RESPONDENT

RULING

Date of Last Order: 27/05/2020

Date of Ruling: 17/07/2020

Aboud, J.

This ruling is in respect of the preliminary objections raised by respondent's State Attorney against the application for revision in opposing the decision of the Commission for Mediation and Arbitration (herein CMA). The preliminary objections are to the effect that:-

a) The application is incompetent and bad in law for being preferred under the wrong enabling provision of law.

b) The application is untenable and bad in law for contravening the mandatory provisions of Rule 24 (2) of the Labour Court Rules GN. No. 106 of 2007, here forth the Labour Court Rules.

c) The application is incurably defective for being supported by an untruthful affidavit.

The preliminary objections were argued by way of written submissions. Both parties complied with the schedule order, hence this ruling. Mr. Alex Mushumbusi, Learned Counsel appeared for the applicants while Mr. Erigh Rumisha, State Attorney represented the respondent.

Before arguing in support of the preliminary objections, Mr. Erigh Rumisha pointed out what preliminary objections should be based on. He referred to what has been elaborated in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd** (1969) E.A. 696 where it was held that:-

> "……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 the judicial discretion ... This has been the position of law since then, which unreservedly subscribe to. We accordingly urge all to strictly adhere to it at all times, in the course of administering justice".

On the first preliminary objection Mr. Erigh Rumisha submitted that, the application is made under section 91(2) (b) of the Employment and Labour Relations Act (herein the Act) by inviting this Court to revise the arbitral award on the ground that the award was improperly procured. He said, it is a trite law that the term or phrase improperly procured refers mainly to misconduct on the part of an Arbitrator. To support his argument he cited the case of **Alaf Limited vs. Asulwisye Mwalupani,** Rev. No. 282 of 2014. He stated that in the application at hand there is nothing to substantiate what has been established by the applicant, that the award was improperly procured.

As to the second objection he submitted that, this application is unmaintainable and bad in law for being supported by the notice of application which does not comply with the requirement set out under Rule 24 (2) of the Labour Court Rules. He stated that the relevant provision requires an application to be signed by a party bringing the application. He defined a party as in accordance with Google dictionary and as defined in the case of **Simon John Vs. BRAC Tanzania Finance Ltd.** Misc. Appl. No. 60 of 2018 where the court held that:-

> "In no any reason an advocate will assume the right and responsibilities of a party in court proceedings including execution of awards and order of the Court..."

He went on to submit that in the Simon John's case (supra) the court asked a question as to whether the notice of application signed by the representative is competent and in conclusion the application was struck for being incompetent as it was not signed by the party who brought the application in Court.

As regards to the last objection Mr. Erigh Rumisha submitted that, affidavit is the substitute of oral evidence as stipulated in the

case of **Uganda vs. Commissioner of Prisons, Exparte Matovu**, and (1966) EA. He said the contents of paragraphs 7 and 8 of the applicant's affidavit is not true that the applicant filed CMA Form No. 1 on August, 2018 rather it was filed on 29th November, 2016.

In rejoinder the respondent reiterated his submission in chief. He added that the applicant did not comply with Court's order of filing written submissions within the schedule time frame. He stated that, the applicant should be considered to have defaulted to make arguments in opposing the notice of preliminary objections filed by the respondent.

After taking into consideration of the respondent's submission it is my view that, this Court is inclined to determine the respondent's preliminary objections without taking into account the applicant's submission which was filed in Court on 22/05/2020, that is seven (7) days after the scheduled date as per the Court order of 17/04/2020. Applicants' inaction to lodge his written submission on 15/05/2020 cannot make this Court impotent. It is an established principle that failure to file written submission as ordered by the court is as good as failure to attend hearing at the date scheduled by the court, which is tantamount to failure to defend or prosecute one's case. This position

was emphasized in the Court of Appeal case of **Godfrey Kimbe vs. Peter Ngonyani** Civ. Appl. No. 41 of 2014, where the Court held that:-

> "In the circumstance we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court is tantamount to failure to prosecute or defend one's case – see: National Insurance Corporation of (T) Ltd. & Another vs. Shengena Limited, Civil Application No. 20 of 2007 and Patson Matonya v. The Registrar Industrial Court of Tanzania & Another, Civil Application No. 90 of 2011 (both unreported). In both cases, among many others, the Court held that failure by a party to lodge written submissions after the Court has ordered a hearing by written submission is tantamount to being

absent without notice on the date of hearing. In the Shengena case, for instance, we observed:-

> "The applicant did not file submission on due date as ordered. Naturally, the Court could not be made impotent by a party's inaction. It had to act....it is trite law that failure to file submission (s) is tantamount to failure to prosecute one's case."

In the application at hand it is on record the parties were ordered to argue the preliminary objections by way of written submissions. The respondent was to file his submission on or before 01/05/2020, the applicant was ordered to file his written submission in reply to the preliminary objections on or before 15/05/2020. In his own whims without leave of the Court the applicant filed his submission on 22/05/2020. Under such circumstances this Court will proceed to make its decision as if the applicant did not appear at the hearing despite being dully served with the notice of hearing. Parties have to note that they cannot come to court to prosecute their

matter as to when they wishes and chooses. Schedules are set for the purpose of speedy administration of justice therefore they should be adhered without any unreasonable excuse.

As to the first and last preliminary objections on record, in my view they do not fit to the minimum set of what a preliminary objection should be as cited in the case of **Mukisa Biscuit** (supra). The respondent alleged that the applicant wrongly cited section 91 (2) of the Act because he did not state how the award was improperly procured. Such allegation needs fact and evidence to be proved by the applicants, therefore, such objection does not consist a pure fact of law.

As regards to the objection that the affidavit contains untruth information, this is also not a pure point of law. The contention that the applicants filed his CMA Form No. 1 on August, 2018 and not 29th November, 2016 needs evidence to be proved. Taking into account that the CMA file in respect of this matter is not yet in this Court's record, then the Court will not be in a position to determine that issue judiciously.

Turning to the second preliminary objection, that the application is untenable and bad in law for contravening the

mandatory provisions of Rule 24 (2) of the Labour Court Rules, the position in this court is very clear that, the notice of application is generally governed by Rule 24(2) of the Labour Court Rules which provides that:-

> "The notice of application shall substantially comply with Form No. 4 in the schedule to these rules, signed by the party bringing the application and filed and shall contain the following.....".

The term a party was well elaborated in the case of **Simon John** (supra) where a party was defined to mean:-

> "The persons who are directly involved or interested in any act, affair, contract, transaction or legal proceeding; opposing litigants..." "Persons who enter into a contract or other transactions are considered parties to the agreement. When a dispute results in litigation, the litigants are called parties to the law suit. U.S law has developed principles that govern the rights and duties of parties. In

addition, principles such as the standing doctrine determine whether a person is a rightful party to a lawful suit. Also, additional parties may be added to legal proceedings once litigation has begun." In court proceedings, the parties have common designations. In a civil law suit the person who files the law suit is called the plaintiff, and the person being sued is called the defendant. In criminal proceedings, one party is the government, called the state, commonwealth, or the people of the United States, and the other party is the defendant. If a case is appealed, the person who files the appeal is called the appellant, and the other side is called either the respondent or the appellee. Numerous variations on these basic designations exist, depending on the court and its jurisdiction. Assigning party designations allows the legal system and its

observers to quickly determine the basic status of each party to a lawsuit."

A party is also defined under Rule 2(2) of the Labour Court Rules to mean:-

"A party to Court proceedings includes a person representing a party in terms of section 56 of the Act and section 88 of the Employment and Labour Relations Act, 2004."

On the basis of the above provisions, it is my view that in this labour dispute a party bringing the application is either the employer or employee. I am not convinced that a party was defined to include the representative. A party must be a person who is directly affected by the award because a representative will not act on his own to initiate an application unless directed by employee or employer himself. Therefore, any party representing the employer or employee will only remain with the status of representative of a party as provided under section 56 of the Labour Institutions Act but not to automatically acquire the status of signing documents and bringing the application before the Court. It very clear from Rule 24 (2) that if the drafters of such provision had in mind that parties should comply

with form No. 4 in the schedule to the rules, they would have stopped there without adding the words **"signed by the party bring the application".** So I am strongly convinced that the drafters wanted a party or applicant to sigh the notice and no one else. This position was emphasized in the case of **Simon John** (supra) where it was held that:-

> "It is my view a party to court proceedings is the one who brings the case to the court and that representative of the party to proceedings before this court has no automatic right to sign pleadings on behalf of a party to the proceedings because legally he/she is not a party to these proceedings. I would say the drafter of this piece of legislation might overlooked on this point that in no any reason an advocate will assume the right and responsibilities of a party in Court proceedings including execution of awards and orders of the Court. In most of labour court proceedings, parties are either employer

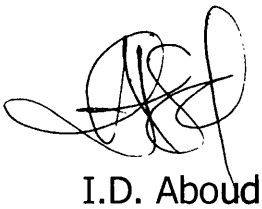
> or employee and this is considered in a wider perspective. That, not only representative of those employers and employees will be entitled to sign the pleadings including notice of application but also they will be bound by the final court decision and have to execute the orders thereto if are regarded as parties to this courts proceeding as defined under Rule 2 (2) of the Labour Court Rules. Thus, when they want to authorize any person to assume the parties position, they have to follow the legal procedures...."

In the application at hand it is crystal clear that the application was wrongly initiated by the applicant's representative who signed the notice of application as a party bringing this application. As discussed above representative will only remain with their status of representative of a party but they do not automatically acquire the status of being a party before this Court.

In the result, I find the second preliminary objection raised by the respondent has merit and is hereby sustained. That being said,

the present application is struck out for being incompetent because the applicants contravened Rule 24 (2) of the Labour Court Rules. For interest of justice applicants are granted leave to refile proper application on or before 30/07/2020 days if they still wish to per sue the matter.

It is so ordered.



I.D. Aboud

JUDGE

17/07/2020