

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 585 OF 2019

BETWEEN

REHEMA OMARI NKUU APPLICANT

VERSUS

ARDHI UNIVERSITY RESPONDENT

RULING

Date of Last Order: 04/06/2020

Date of Ruling: 03/07/2020

S.A.N. Wambura, J.

This ruling is in respect of the preliminary objection raised by the respondent's Counsel against an application for revision of the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA]. The preliminary objection was on two grounds namely;

- a) That the applicant failed to move the Court properly as the application has been brought under wrong citation of the provision of the law.*

b) That the application is incompetent as it was drawn and filed by freelance person who has no legal right of audience.

With the leave of this court, the preliminary objection raised was disposed of by way of written submissions. I thank both parties for their submissions and for adhering to the schedule.

Submitting on the first ground of the preliminary objection Mr. Sylvanus Mosha the respondent's Advocate argued that the applicant repeated the same mistake of wrong citation of Section 94(1) (b) (i) of ELRA. That the applicant is aware that CMA issued the ruling and not an award contrary to this application therefore the application lacks merit.

On the second ground, Mr. Mosha submitted that the application is incompetent as it was drawn and filed by a freelance person who has no legal right of audience contrary to both, the Code of Good Practice and Section 41 of the Advocate Act. To support his submissions he cited the cases of **The General Manager Pamba Engineering Ltd Vs. The Managing Director and Proprietor of Nyanza Sterilization General Services**, Civil Appeal No. 51 of 1995, **Julius Petro Vs. Cosmas Raphael** (1983) TLR 346, **Naiman Moiro Vs. Nailejiet Zeblon** (1980) TLR 274, **Hassan Magori Vs. Juma Mararo**, Civil Case No. 81 of 1990

and **Ruth Langeni Mfanga v. Ilemela Municipal Council**, Lab. Rev. No. 66 of 2019.

In response to the first ground Mr. Hemedi Omari applicant's Personal Representatives submitted that Section 94(1) (b) (i) of ELRA, was properly cited to move the Court in this application. This is because in Labour Court Rules the word ruling has not been mentioned. What is mentioned is the word decision. This does not deny the applicant's right to challenge what has been decided by the Arbitrator by way of a revision.

He further argued that the Court is duty bound to decide cases justly and pay much regard to the substantive justice as provided under Section 3 of the Written Laws (Misc. Amendment Act), Act No. 8 of 2018 and Rule 55(1)(2) of GN No. 106 of 2007. To cement his argument he made references to the cases of **Yacob Magoiga Gichere Vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017, **Theodory Michale Vs. Sigori Investment**, Rev. No. 95 of 2017 and **Abdulnasser Mohamed v. Musa Hussein Juma**, Land Case No. 06 of 2018.

He thus prayed for the preliminary objection to be overruled.

On second ground, Mr. Omari submitted that Section 56 of the Labour Institution Act, Act No. 7 of 2004, warrants the right of representation including Personal Representatives. He stated that the Labour Court

procedures are governed by specific legislation so as to harmonize the social welfare of the employee's for economic growth.

Mr. Omari argued that the current position pertaining right of representation is well stated in new laws (Employment and Labour Relation Act and Labour Institution Act), the Advocate Act, Cap. 341 RE. 2002 is the law that govern Advocates as far as a right to legal representation. To strengthen his argument, he cited the cases of **Reli Assets Holding Co. Ltd v. Japhet Casmir & 1500 Others**, Rev. No. 10 of 2014 HC. Lab. Div, at Tabora and **Eva Dominick Kamote Vs. Wanyama Hotel Co. Limited**, Rev. No. 687/2018.

He thus prayed for the dismissal of the preliminary objection.

In rejoinder the respondent reiterated his submission in chief but argued on **Abdulnasser's Case** (supra) that this case does not give a chance for someone who slept on his own rights to have the mercy of this Court.

Having carefully considered the submissions from both parties, as well as the relevant labour laws and practice, the main issue to be determined is **whether the preliminary objection has merit.**

A preliminary objection has been defined in the cases of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1

EA 696 and **SELCOM GAMING LIMITED Vs GAMING MANAGEMENT (T) LIMITED & GAMING BOARD OF TANZANIA**, Civil Application No. 175 of 2005 (unreported), where the Court observed that:-

"A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Any alleged irregularity, defect or default must be apparent on the face of the application."

In the case of **Shahida Abdul Hassanali Kasam V. Mahed Mohamed Gulamali Kanji**, Civil Appl. No. 42 of 1999 (unreported) the Court held as herein quoted:-

*"The aim of a preliminary objection **is to save time of the court and of the parties by not going into the merit of an application because there is a point of law that will dispose of the matter summarily.** Examples: Objection to the **jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract to refer the dispute to arbitration**".*
[Emphasis is mine].

So a preliminary objection must first raise a point of law based on ascertained facts and not on evidence. Secondly if the objection is sustained, it should dispose of the matter as it was held in the case of **COTTWU (T) OTTU UNION AND ANOTHER AND HON. IDDI SIMBA MINISTER OF INDUSTRIES AND TRADE AND OTHERS**, Civil Application No. 40 of 2000 (unreported).

In respect of the first ground of the preliminary objection raised that the Court was not properly moved by citing Section 94(1)(b)(i) of ELRA and Rule 55 of GN No. 106 of 2007 which provides that:-

"Section 94(1) Subject to the Constitution of the United Republic of Tanzania, 1977 the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of this Act and to decide –

(b) reviews and revisions of –

(i) Arbitrator's awards made under this Part;

*"Rule 55(1) where a situation arises in a proceeding or contemplated proceeding which **these rules do not provide the Court may adopt any procedure that it deems appropriate in the circumstances.***

*(2) In the exercise and performance of its power and functions, or in any incidental matter, **the Court may act in a manner that it consider expedient in the circumstances, to achieve the objects of the Act and, or the good ends of justice.***

[Emphasis is mine].

In the cases of **Coca Cola Kwanza Ltd v. Emmanuel Mollel**, Application No. 28/2008 HC Labour Division DSM Registry (Unreported), **TPAWU v. Robert Karinako**, Rev. No. 109/2008 and **Tanzania Telecommunication Company Ltd v. Bwire Nyamwero**, Rev. No. 01/2012 the Court *inter alia* held that:-

".....Labour Court Rules do not outline the procedure to be followed in filling an application for revision under Rule 28. Therefore the said lacuna can be filled by adopting mutatis mutandis, the procedure provided for review under Rule 26 which outlined the application to be filed by chamber application."

I have noted that on 20th June, 2019 Revision No. 349 of 2018 filed by the same applicant was struck out for citing Section 94 of ELRA, which is in respect of an award and not a ruling. The same has been repeated by the applicant in this application, this indicates the applicant's negligence.

In the case of **Leocadia Eustadi v. Clavery Buyombo**, Misc. Application No. 60 of 2018, it was held that, since the application was brought under the wrong provisions of the law, this Court is not properly moved to hear the application. Likewise this Court has not been properly moved. Therefore the first ground of preliminary objection is sustained.

In respect of the second ground that the application is incompetent as it was drawn and filed by a freelance person, I was forced to look into the provisions of Section 56 of the Labour Institution Act, Act No. 7 of 2007 [herein to be referred to as LIA] which states that:-

"Section 56 In any proceeding before the Labour Court, a party to the proceeding may appear in person or be represented by-

a) an official of a registered trade union or employers' organization; or

*b) **a person representative of the party's own choice***

c) an advocate."

[Emphasis is mine].

In the case of **Gasper Msuya v. Bulyanhulu Gold Mine Ltd**, Rev. No. 16 of 2018, at page 3 the Court quoted Rule 2 of GN No. 106 of 2007 which provides that:-

"Representative" means any person authorized under Section 56 of the Act to represent a party."

This means a party to Court proceedings, includes a person representing a party, in terms of Section 56 of the Act No. 7 of 2007 and Section 88 of ELRA.

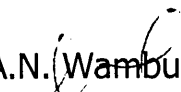
In the case of **Eva Dominick Kamote Vs. Wanyama Hotel Co. Limited** (supra) the said argument raised by the respondent was overruled by the Court by stating that whereas the Advocates Act is a general Act, the LIA clearly specifies who has legal capacity to appear before this Court's proceedings.

Since the applicant's representation is covered under Section 56(b) of LIA, then the second ground of the objection is hereby overruled.

However, as the instant application is incompetent before this Honourable Court for failure to cite the relevant provision of the law, the application is hereby struck out.

Applicant to engage the proper remedies if he still intends to pursue the matter.

It is so ordered.


S.A.N. Wambura
JUDGE
03/07/2020

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REHEMA OMARI NKUU APPLICANT

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ARDHI UNIVERSITY RESPONDENT

Date: 03/07/2020

Coram: Hon. F.A. Mtarania, Deputy Registrar

Applicant:

For Applicant: Mr. Mosha Advocate for Hemedi Omari Personal
Representative

Respondent:

For Respondent: Mr. Mosha Advocate

CC: Lwiza

COURT: Ruling delivered today in presence of Advocate Mosha for the Respondent who is also appeared for Hemedi Omari Personal Representative for the Applicant.


F.A. Mtarania

DEPUTY REGISTRAR

03/07/2020