

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 518 OF 2019

BETWEEN

OLAM (T) LTD..... APPLICANT

VERSUS

ZAKARIA D. MARINYA..... RESPONDENTS

RULING

Date of Last Order: 15/07/2020

Date of Ruling: 14/08/2020

Aboud, J.

This ruling is in respect of the preliminary objections raised by respondent's Counsel against the application for revision of the decision of the Commission for Mediation and Arbitration (herein CMA). The revision application was opposed on the following preliminary objections:-

- a) That this application is bad in law for wrongly citing the name of the Court contrary to the provision of the Labour Court (Labour Division) (Zonal Centre) (Establishment) Rules, GN. No. 157 of 2010.

- b) That this application is bad in law for wrongful citation of the name of the respondent who was the complainant at the Commission for Mediation and Arbitration.
- c) That this application is bad in law for wrongly citing provisions of the law that does not move this Court to grant the orders prayed by the applicant.
- d) That this application is bad in law for not dating the deponent verified contents of the affidavit.
- e) That this application is bad in law for want of proper jurat of attestation.

The preliminary objections were argued by way of written submission. During hearing both parties were represented by Learned Counsels. Mr. Dennis Malamba appeared for the applicant while Mr. Hans Mwasakyeni was for the respondent.

Arguing in supporting the first preliminary objection Mr. Hans Mwasakyeni submitted that, the application is bad in law for wrongly citing the name of the Court contrary to Rule 5 of the Labour Court (Labour Division) (Zonal Centre) Establishment Rules, GN. No.157 of

2010. He stated that the applicant wrote "In the High Court Zone Centre at....." instead of writing "In the High Court of the United Republic of Tanzania, Labour Division". The learned Counsel stated that, the word "SHALL" has been used in the relevant provision. He therefore argued that, where in written law the word has been used shall mean that, the function must be performed as per section 53(2) of the Interpretation Act of Laws Act, Cap.1 of the laws of Tanzania.

On the second preliminary objection Mr. Hans Mwaskyeni submitted that the name of the respondent who was the claimant at the CMA is Zacharia D. Marinya, while in this application the applicant's name is Zakaria D. Marinya. He said they are two different person hence render the application fatal.

Regarding the third ground of preliminary objection Mr. Hans Mwaskyeni submitted that, among the provisions cited by the applicant to move this Court is section 91 (1) (b) of the Act. He stated that, the provisions are relevant where the CMA award is alleged to have been procured improperly involving issues of corruption, fraud and other criminal act of the same nature. Mr. Hans Mwaskyeni said in the application at hand, the applicant did not state how the award was improperly procured.

In respect of the fourth ground of preliminary objection Mr. Hans Mwaskyeni submitted that, the applicant's affidavit did not show when the deponent verified the content of the document contrary to Order VI, Rule 15 (3) of the Civil Procedure Code, [Cap 33 RE. 2019].

As to the last preliminary objection Mr. Hans Mwaskyeni submitted that, the applicant's affidavit is defective for being contrary to Section 47 of Written Laws (Miscellaneous Amendments), Act No. 4 of 2016 of the Notaries Public and Commissioners for Oaths Act, Cap.12 of Laws of Tanzania which requires the attesting officer to insert his or her name in the Jurat of Attestation. To strengthen his argument he referred this Court to different cases including the case of **Elfazi Nyatega, Yona Sarya, Anselem Mroso and Sparrow Wambura v. Caspian Mining Ltd.** Civil Application 44/08 of 2017.

He therefore submitted that since the application is incompetent the same should be struck out.

Responding the first preliminary objection Mr. Dennis Malamba submitted that the counsel for respondent tend to rely on mere format which cannot occasion any injustice, as is not a pure point of law therefore will not dispose the matter. To support his submission

he cited the case of **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji**, Civil Appl. No. 42 of 1999.

Regarding the second preliminary objection Mr. Dennis Maramba submitted that, the issue of different names as they appear in this Court and at the CMA was typo error and can be cured suo motto by the Court. He invited the Court to invoke the doctrine of slip of the pen (***lapsus calami***). In cementing his submission he cited the case of **Christian Mrimi v. Coca Cola Kwanza Bottles Limited**, Civil Application No.113 of 2011.

Turning to the third preliminary objection Mr. Dennis Maramba submitted that, the Court was properly moved by citing Section 91(1) and (2) of Act in challenging the award. On such basis he submitted that, the respondent's objection lacks legal stand as it is not a pure point of law.

Regarding the fourth preliminary objection the Learned Counsel submitted that, it has no merit because is not a pure point of law as signing of pleading in anyhow cannot be termed as a pure point of law. He therefore, prayed for this Court to invoke the overriding objectives principle. To robust his argument he cited the Court of

Appeal case of **Yakobo Magoiga Gichere vs. Penina Yusuph**, Civ. Appl. No. 55 of 2017 (unreported).

As to the last preliminary objection Mr. Dennis Maramba submitted that, it is not a pure point of law it is just a minor defects which cannot defeat the best end of justice. He argued that, failure to write a name of the attesting officer is not fatal since justice should be done even if there is error on a document at hand. He again prayed for the application of the overriding objective.

In conclusion Mr. Dennis Maramba prays this court to overrule the preliminary objections raised by respondent and hearing of the main application to proceed.

Having carefully considered the submission from both parties, court records, as well as relevant labour laws and practice, my decision on the raised grounds are as hereunder:-

In this matter I found it worth to refresh minds as to what is a preliminary objection. The Court will refer to what has been stated in the leading case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd.**, [1969] EA 696, where it was held that:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit e.g. an objection to the jurisdiction of the court, or a plea in limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer to the dispute to arbitration. Therefore where a preliminary point of law is raised either on the basis of disputed facts which would require extrinsic evidence to be led by parties at a full trial, or where even if allowed, it cannot dispose of the whole suit then it cannot be disposed of as such.”

In the present application the Learned Counsel for the applicant argued that, the points of objection raised do not qualify to be preliminary objections as they are not pure point of law. In my view a pure point of law means that the law mandatorily demands for a certain act or thing to be done as it is stipulated in a certain written

law but a party to a dispute or case did not comply with such requirement. Such an omission should be apparent which do not require long drawn arguments to be proved. I have carefully examined the points of preliminary objections raised by the respondent, in my view they do qualify to be termed as preliminary objections because they are basing from pure points of law except the third point of preliminary objection which need facts and evidence to be proved. In the remaining objections the respondent contends that, the applicant in his application violates some mandatorily requirement of the law therefore, this court is called upon to determine the same.

As to the second preliminary objection it is clear from the record that the respondent's name used in this Court differs from the one which has been addressed at the CMA and the annexed documents. At the CMA the respondent's name was Zacharia D. Marinya. However, in this Court the respondent's name appears as Zakaria D. Marinya. It has been held in a number of cases that parties have to be addressed by their proper names. This is also the position in the cases of **Christina Mrimi Vs. CocaCola Kwanza Bottlers Ltd**, Civil Appeal No. 112 of 2008 (CA) and **National Oil**

vs. Aloyce Hobokela, Misc. Labour Application No. 212 of 2013
(Unreported)

In this aspect I do not agree with the applicant Counsel's submission that, the names difference is a minor defect which can be amended suo motto by the Court. In my view the Court is not placed with the duty to know the right party to be brought before it, such duty is vested to the applicant himself/herself.

On the basis of the above discussion it is my view that the applicant did not bring to court the proper party in this application. In my observation Zacharia and Zakaria are two different persons; hence the applicant ought to have addressed the respondent in his proper name. That being said, the only remedy for such error is to struck out the application and allow the applicant to write properly the name of the respondent. Thus, the application is struck out for being defective.

I find no need to labour much on the remaining objections due to the reason that even if they do have merit the court will not be able to invoke overriding principle to an application which has been struck out already.

In the result I find the second preliminary objection raised by the respondent has merit and is hereby upheld. In consequence I strike out the application. For the interest of justice leave is granted to the applicant to file proper application on or before 31/08/2020.

It is so ordered.

A handwritten signature in black ink, appearing to be 'I.D. Aboud', written in a cursive style.

I.D. Aboud

JUDGE

14/08/2020