

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(LABOUR DIVISION)  
AT MBEYA  
LABOUR REVISION NO. 65 OF 2017  
(Originate from Complaint No. CMA/MBY/08/2016)**

**PAUL F. MZINGA.....APPLICANT**

**VERSUS**

**PERMANENT SECRETARY**

**MINISTRY OF FINANCE AND PLANNING.....RESPONDENT**

**R U L I N G**

***Date of last order:*** 30/09/2020

***Date of Ruling:*** 30/10/2020

**NDUNGURU, J.**

The applicant, one Paul F. Mzinga filed an application for revision against the award of the Commission for Arbitration and Mediation at Mbeya (herein referred as CMA) in Complain No. CMA/MBY/08/2016.

The application is made under Section 94 (1) (d) (e) and (f) (i)) of the Employment and Labour Relation Act, No. 6 of 2004 and Rule 24 (1) and (2) (a) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) (d) and Rule 28 (1) (d) and (e) of the Labour Court Rules, 2007 G.N. No. 106 of 2007. Upon being duly served with the application, the respondent through the service of Mr. Francis Rogers, learned senior state attorney and Mr. Baraka Mgya, learned state attorney filed notice of representation,

counter affidavit and also raised a preliminary objection the subject matter of this ruling. The preliminary objection is couched thus:

1. That, the Court is not properly moved.
2. That, the application is incompetent for non-citation of the law.
3. That, the application is incompetent for being supported with argumentative affidavit.
4. That, the application is defective for being supported with an affidavit which contain defective verification clause.

In accordance with a well-established practice, once a preliminary point of objection is raised, the Court is duty bound to entertain it first and make a decision thereon before proceeding to hear the substantive matter.

When the matter was placed before me for hearing of the preliminary points of objection, Mr. Joseph Tibaijuka, learned state attorney for the respondent whereas the applicant appeared in person and without legal representation.

In relation the first and second points of objection, Mr. Tibaijuka argued that, the Court is not properly moved and the application is incompetent for non-citation of the law. He also submitted that, the proper section of the law to move this Court for Notice of application for revision, are Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c)

(d) and Rule 28 (1) (a) or (b) or (c) or (d) or (e) of the Labour Court Rules G.N. No. 106 of 2007 and Section 91 (1) (a) or (b) and 91 (2) (a) or (b) or (c), 94 (1) (b) (i) of the Employment and Labour Relation Act No. 6 of 2004.

He added that, the applicant did not cite Section 91 (1) (a) or (b) and 91 (2) (a) or (b) or (c) of the Employment and Labour Relation Act, No. 6 of 2004 and Rule 24 (2) (f) and 24 (3) (a) (b) (c) and (d) of the Labour Court Rules, G.N. No. 106 of 2007. He cited the case of **Mustapha Muhindi & 135 others vs. V.C.R.J.E East Africa Ltd.**, Labour Revision No. 3 of 2019, High Court and **Edward Bachwa & 3 others vs. The Attorney General & another**, Civil Application No. 128 of 2006, Court of Appeal of Tanzania (both unreported).

Regarding the third point of preliminary objection, Mr. Tibaijuka contended that, the application is incompetent for being supported with argumentative affidavit. He added that, the applicant's affidavit is bad in law for containing statements of arguments contrary to Rule 24 (3) of the Labour Court Rules, G.N No. 106 of 2007. He went on to submit that, the applicant's affidavit contain arguments, allegations and opinions this seen at paragraph 6 of the applicant's affidavit.

He also stated that, paragraph 11 of the applicant's affidavit contain issues which are not legal issue arise from the material facts. To reinforce his contention he cited the case of **Uganda vs. Commissioner of Prison, Ex Parte Matovu (1966) EA 514, Mustapha Raphael vs. East Africa Gold Mines Ltd.**, Civil Application No. 40 of 1998, Court of Appeal of Tanzania, and **Attorney General vs. NHC & others**, Misc. Land Application No. 945 of 2017, High Court (Land Division) at Dar es Salaam (both unreported). Therefore, he prayed for the Court to strike out this application.

On the fourth point of objection, Mr. Tibaijuka submitted that, the affidavit in support of the application is incompetent for containing a defective verification clause as the same is not properly verified specifically paragraph 11 and 12 which also contain sub paragraphs to wit paragraph 11 (i) (ii) (iii) (iv) and paragraph 12 (i) (ii) and (iii) which have not been verified at all contrary to Order VI Rule 15 (2) of the Civil Procedure Code (Cap 33 R.E. 2019).

To cement his submission he cited the case of **Mlela Ramadhani vs. Mahona Batungulu**, Misc. Land Application No. 20 of 2019, High Court (unreported). In conclusion, he submitted that, the applicant's application is tainted with grave procedure defects and no way be saved.

Responding to the points of preliminary objection, the applicant argued that, the person who draw and filed the notice of preliminary of objection and written submission, they are not named in the notice of representation. He added that, the notice of representation named one Francis Rogers as the legal representative of the respondent.

Also, he argued that, the notice of preliminary objection and its written submission to support it, they were drawn and filed by Baraka Mgaya and Joseph E. Tibaijuka respectively, identify themselves as state attorneys. He cited Rule 43 (1) and (2) of the Labour Court Rules G.N No. 106 of 2007 to bolster his argument.

He continued to submit that, if there is a change in a representation, the respondent and the office of the Solicitor General shall comply with Rule 43 (2) and 43 (4) (a) (b) of the Labour Court Rules, G.N. No. 106 of 2007. He added that, he is aware with contents of the written submission in support of the notice of preliminary objection, but he did not reply the same because such written submission drawn and filed by improper person.

Further, he submitted that, the notice of preliminary objection filed under wrong enabling provision of the law. He added that, the matter in dispute before this Court is statutory and constitutional right. He cited Article 22 (1) and 23 (2) of the Constitution of the United Republic of

Tanzania. Finally, he prayed for the Court to allow this application because the Court proceedings is already damaged and injure him. Also, he prayed for the Court to refer this matter to the CMA for mediation and arbitration process.

In rejoinder, Mr. Tibaijuka contended that, the applicant's act of rising preliminary objection through his reply submission to the submission filed by the respondent on top of preliminary objection is to pre-empt preliminary objection already raised and filed in this Court. He cited the case of African Marble Company Limited Versus Presidential Parastatal Sector Reform Commission, Civil Appeal No. 47 of 2007 to support his submission.

On the issue of notice of representation, Mr. Tibaijuka rejoin that, the respondent in this suit is the Permanent Secretary Ministry of Finance and Planning represented by the office of the Attorney General which include Deputy Attorney General, Law Officer, Solicitor General and State Attorney. He cited Section 3 and 5 (2) (3) of the Office of Attorney General (Discharge of Duties) Act (Cap 268 R.E. 2019) to buttress his submission.

He further submitted that, the state attorney who appears for hearing of the preliminary objection by way of written submission come from the office of the Solicitor General and by virtue of his employment



he is duly employed by office of Solicitor General. Also, he stated that, he take precedence over the matter because the respondent is the officer of the government. He went on to submit that, the notice of representation require the respondent to be represented by any state attorney from the office of Solicitor General.

Again, Mr. Tibaijuka submitted that, Section 44 of the Advocate Act (Cap 341 R.E. 2019) require the instrument to be endorsed with the name and address of the drawer, and the written submission of the respondent in support was well endorsed with the name and address of the drawer. Finally, he reiterated his prayer in chief.

I have carefully gone through the written submissions and the pleadings filed before this Court, the issue calling for determination is whether the preliminary points of objection raised hold water or not.

In the first place, I feel profoundly to address the question whether the applicant was right or not to rise the preliminary point of objection in his reply written submission over the respondent's preliminary points of objection. I answer this issue in negative way, I hold so because the applicant brought his preliminary objection through the backdoor the things which are not acceptable in the legal practice.

Again, it is settled law, once a preliminary point of objection is raised, the Court is duty bound to entertain it first and make a decision thereon before proceeding to hear the preliminary point of objection raised by other side thereafter. Therefore, this Court cannot hear the preliminary objection raised by the applicant through backdoor without given notice to the respondent and to the Court.

Turning to the merits of the preliminary points of objection raised by the respondent, I wish to start with the first and second limbs of objection.

My determination is that, it is true that the applicant did not cite Section 91 (1) (a) or (b) and 91 (2) (a) or (b) or (c) of the Employment and Labour Relation Act, No.6 of 2004 and Rule 24 (2) (f) and 24 (3) (a) (b) (c) and (d) of the Labour Court Rules, G.N. No. 106 of 2007.

The mentioned above provisions of the law are mandatory provisions in making an application for revision before this Court. But, now it is settled principle of law that, the non-citation of the law or wrong citation of the law cannot render the application to be incompetent. The only remedy available to the applicant is to insert the said missed provisions of the law through the hand right.



To reinforce my view, I opt to borrow the imports of Rule 9 of the Court of Appeal Rules G.N. No. 345 of 2019 which amends Rule 48 of the Court of Appeal Rules of 2009 by adding sub Rule (1) in the said Rule 48 though the Court of Appeal Rules are not applicable to this Court, but this Court can borrow the wisdom of the Tanzania Court of Appeal (Amendment) Rules G.N. No. 345 of 2019. The amendment reads:

*Provided that where an application omits to cite any specific provision of the law or cites wrong provision but the jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the Court may order that the correct law be inserted."*

The same position is well emphasized by this Court in the case of **Alliance One Tobacco and 2 other vs. Mwajuma Hamisi (As the administratrix of the estate of Philemoni R. Kilenyi) and another**, Misc. Civil Application No. 803 of 2018, HC (unreported) where the Court inter alia stated that:

*"It must be noted, however, that the imported wisdom of Rule 48 (supra) into this Court is limited to circumstances where an application has omitted to cite any specific provision of the law or has cited a wrong provision, but the jurisdiction to grant the order sought exist. It does not cover where the application has cited a wrong law altogether."*

Coming to the third limb of objection, my determination is that, there is no fast and hide rules binding the Court in its determination and assessment whether or not the statement is argumentative, in which case the test remains subjective. On that regard, it is my opinion that, the said paragraph 6 of the applicant's affidavit does not contain argumentative statement as alleged by the respondent. Therefore, this point of objection must fail.

Further, the allegation that, the paragraph 6 of the applicant's affidavit contains allegations and opinions are baseless and an afterthought, I hold so because such issues does not form part of the preliminary points of objection raised by the respondent. And even the allegation that the paragraph 11 of the applicant's affidavit contain issues which are not legal issue arise from the material facts are baseless because the respondent did not raise the same in his notice of the preliminary of objection filed in this Court.

In respect to the fourth limb of the objection, my determination is that, the law required the person who makes verification of the pleading to specify and make reference to the numbered paragraphs of the pleading. This mandatory requirement is well stipulated under Order VI Rule 15 (2) of the Civil Procedure Code (Cap 33 R.E. 2019). Looking the applicant's affidavit it is clear that the applicant did not make reference

to the sub paragraphs contained in the paragraph 11 and 12 of the affidavit.

On that regard, it is true that, the applicant offended Order VI Rule 15 (2) of the Civil Procedure Code (Cap 33 R.E. 2019). Therefore, if this Court expunge paragraph 11 and 12, the applicant's application remain meaningless. In other words this point of objection hold water hence this Court sustains this point of objection.

Furthermore, the labour disputes are of their own nature, they affect the parties to the disputes as well as those who depend on the employment as a means of their livelihood. Granting leave to file a proper application as it has been done as the practice of this Court to my view does not prejudice to either of the parties rather it serves time to both parties and ensures speed determination of the dispute.

From the above observation and for meeting good ends of justice between the parties, using power vested in this Court under Rule 55 (1) and (2) of the Labour Court Rules, 2007 (G.N. No. 106 of 2007, hereby grant the applicant leave to refile proper application for revision within 21 days from the date of this ruling. No order as to costs.

It is so ordered.



  
**D. B. NDUNGURU**  
**JUDGE**  
30/10/2020

**Date: 30/10/2020**

**Coram:** D. B. Ndunguru, J

**Applicant:** Absent on Notice

**Respondent:**

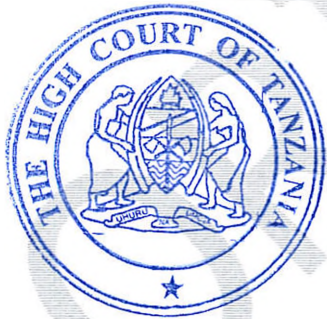
**For the Respondent:** Mr. Tibaijuka – State Attorney

**B/C:** M. Mihayo

**Mr. Tibaijuka – State Attorney:**

We are ready for ruling.

**Court:** Ruling delivered in the presence of Mr. Tibaijuka State Attorney and in the absence of the applicant, his absence is on notice brought by Aggrey Sapali.



  
**D. B. NDUNGURU**

**JUDGE**

30/10/2020