

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 759 OF 2019

GIBSON WESTON KACHINGWE & 620 OTHERS....APPLICANTS

VERSUS

**TANZANIA PLANTATION AND
AGRICULTURE WORKERS UNION (TPAWU)...1ST RESPONDENT**

UNITRANS (T) LTD.....2ND RESPONDENT

RULING

Date of last Order: 01/10/2020

Date of Ruling: 23/10/2020

Z.G.Muruke, J.

The matter before this court has history of its own, tracing its way back in 2008 where first respondent instituted a Labour Dispute before Commission for Mediation and Arbitration at Morogoro, against the 2nd Respondent, on a matter of interpretation of law on **the minimum wage order**. Upon failure of mediation the matter was referred to the High Court Labour Division. After the full trial the matter was decided in favour of the first respondent, where the court ordered 2nd respondent to pay her employees minimum wages of Transport Sector. Just a mere declaratory orders and not monetary decree. Later, the Decree Holder, the 1st respondent filed an application for execution and parties in Labour Dispute No. 15/2010 finalized the case as far as implementation of the judgment and decree of the court in Labour dispute No. 15/2010. Thus settlement agreement out of court was signed and filed in the High Court, Labour

division as well as in the CMA on the 21st day of June, 2016. **The applicants were not parties to the Labour dispute No. 15/2010.**

Having noted that, parties have settled, the applicants started filing endless applications since then, some cases in this court, other applications in the Commission for Mediation and Arbitration in Morogoro, prosecuted at the same time. In the present application applicants seeks leave of representative for him to make follow-up of the 1st respondents workers interest following first respondent alleged colluding with 2nd respondent, in terms of paragraph 6,7 and 8 of affidavit sworn by Gibson Neston Kachingwe. Application is supported by an affidavit sworn by Gibson Weston kachingwe who calls himself chairman of the special committee and representative of the applicant. First respondent filed counter affidavit sworn by Rajabu Idd Rajabu principal Officer objecting the application, in particular paragraph 9 read as follows:-

The contents of para 7 and 8 of applicants affidavit are strongly disputed and the applicant is put to strict proof thereto. The 1st respondent reiterate the position in para 4 of this court affidavit, further that the handled the matter to its finality by entering a deed of settlement with the 2nd respondent where as those beneficiaries who were paid below the GN 176/2007 as well as GN 223/2010 under Transport Sector were paid their names, in terms of annexure TP1.

On the other hand 2nd respondent filed counter affidavit to oppose the application sworn by Gasper E. Mwakatuma principal officer, in particular contents of paragraph (3),(4) and (5) read as follows:

- (3) That, the contents of paragraph 1 and 2 of the affidavit are partly noted as far as there is said judgment and decree, the rest of the contents are

vehemently and strongly disputed and the applicant are put to strictest proof of the alleged facts thereof. The 2nd respondent states that the applicants are not beneficiaries of the judgment and Decree dated 06/06/2011 and there is no the so called special committee at the respondent's work place. In 2016 the so called special committee, had 198 people, later in the Misc. Application No. 257 of 2017 filed in the High Court, Labour Division which was dismissed for being incompetent, applicants were 481, also the deponent claimed representing 621 people at certain time and now he is claiming representing 620, at the same time the applicants have a pending matter in CMA where he is representing 631 applicants, how many, exactly are they?

(4) Further to what is stated in paragraph 3 hereinabove, the 2nd respondent states that the applicants list of applicant's attached to the application is defective, it is overtaken by events, it was formed in 2013 not for the purpose of filing a representative suit as it is alleged in the affidavit, it is not signed by some of applicants, for instance No. 100, 329,331,333 and 334 just a few to mention. The list is vague and is made fraudulently. If you go by numbers there are repetitions of names for instance the name of God B. Mweleza No. 473 repeated with the same name Godfrey B. Mweleza No. 474, No. 23 repeated No. 117, No. 33 repeated No. 1119, No. 335 repeated No. 80 and that the applicants were not parties to the Labour Dispute No. 15/2010, the decree which was only a declaratory order and not monetary decree. Parties in Labour Dispute No. 15/2010 have finalized the case as far as implementation of the judgment and decree of the Court in Labour Dispute No. 15/2010 and a settlement Agreement out of Court was signed and filed in the High Court, Labour Division as well as in the Honourable Commission on the 21st day of June, 2016.

(5) That, the contents of paragraph 3,4 and 5 of the affidavit are strongly disputed, the applicants are put to strict proof thereof, the respondent reiterates all what has been stated in paragraph 4 hereinabove. The

respondent states further that the applicants are unknown and that the said decree has been satisfied, parties have settled. The respondent states that for over 8 years the applicants have been acting negligently, inadequately and with ill intention to punish the respondent in terms of costs and inconveniences by keeping refiling endless applications which are equally not founded. Also, the applicants have another pending matter between the same parties at the CMA.

On the date set for hearing Learned Counsel Mr. Anthony Kiyanga represented applicant, while first respondent was represented by John Vahange, Deputy General Secretary TPAWU and Mr. Dunstan Kaijage, Learned Advocate represented 2nd respondent. Application was argued by way of written submissions. Both parties submitted along lines their affidavits. Respondents representative, both argued court to dismiss the application for lacks of merits and an abuse of court process by Gibson Weston Kachingwe and 620 others.

Having heard both parties, and perused court records, applicant seeks leave of representative suit. The law Rule 44(2) of the Labour Court Rules GN 106/2007 provides that:

"Where there are numerous person having the same interest in suit, one or more of such person may with the permission of the Court of appeal and be heard or defend in such dispute, on behalf of or for the benefit of all person so interested, except that the court shall in such case give at the complainant's expenses, notice of the institution of suit to all such person either by personal service or where it is from the number of persons or any other service reasonably practicable by public advertisement or otherwise, as the court in each case may direct."

Application for representative suit will be granted only if there are numerous people, who must have common interest. That interest must exist at the time of making an application for a representation order. Equally numerous people must express a willingness of having the applicant for the representation order representing them.

Respondents argued that the applicants have not established that they have a common interest. That they are all not under the same employment; employed by the same employer. That the ruling sought to be challenged does not involves the applicants, the applicants are strangers, and they were not parties to the Execution No. 325 of 2014 which was between the respondents, **thus application should not be allowed**, citing the case of **Abdallah Mohamed Msakandoo & others Vs. City Commission of Dar es Salaam & two others** [1998] T.L.R. 439, that provides required condition for representative suit and it is an important case that stipulates some requirements which must be fulfilled so that one can have a legally a representative suit which are:

"Necessarily, therefore those numerous persons must not only be identifiable, each one of them should append his signature against his name and the list of such persons should be an annexure to the application" (Emphasis supplied).

According to counter affidavits of 1st respondent paragraph 5,6, and 9 more so, 2nd respondent counter affidavit paragraph 4,5 and 6 which has not been contradicted by the applicants. Affidavit being sworn evidence in writings, need to be counter by sworn evidence. There is nothing said by applicants to contradict the above averments. To this court, applicant have not shown how are related to labour dispute No. 15/2010, settled between

1st respondent and 2nd respondent. That being the case, Gibson Kachingwe and others seem to be hanging with no place as between parties to Labour dispute No. 15/2010, the two respondents.

Perusal of affidavit sworn by Gibson Weston Kachingwe, in support of application the applicants attached a list of the applicants made in 2013 **not for the purpose of filing a representative suit as it is alleged in the affidavit, an application which wasn't yet filed.** It is not signed by some of applicants, for instance No. 100,329,331,333 and 334 just a few to mention. The list is vague and is made fraudulently. If you go by numbers there are repetitions of names for instance the name of **God B Mweleza** No. 473 repeated with the same names **Godfrey B. Mweleza** no. 474, No. 23 repeated **No. 117, No. 33** repeated **No. 119, No. 335** repeated **No. 80**. This implies that others **620** applicants have not consented to be represented by Gibson Kachingwe. Execution No. 325/2014 was filed in 2014 and the ruling subject of the present application was delivered on 23/10/2015, so the attached list of names was not intended for such ruling and one would expect that the list to be attached to be of such from sometimes in October, 2015 after the ruling was delivered and not before.

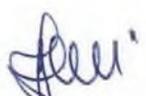
From the above observations as correctly submitted by second respondent counsel Dunstan Kaijage, it is doubtfully if Gibson Weston Kachingwe has consent of the parties to represent them. This court wonders, what this application for while there is an application of execution of decree in dispute number 15/2010, execution number 261 of 2020 before Honourable Mtarania, Deputy Registrar. Equally while there is pending Revision number 29/2020 before this court, yet applicant is before this court seeking for leave of representative suit to be able to file an intended revision.

Is this trial and error court? Certainly not. Applicant has abused court process at the detriment of this court and respondents for almost four years now, since respondents settled their dispute in this court on 21st day of June, 2016. Applicants have filed several applications at the CMA and High Labour Division at Morogoro registry and here at Dar es Salaam to drug respondents to answer for unjustified claims thus, frivolous and or vexatious.

In all Revision, Review, applications, and executions, filed for **four years** by applicants, they have been either dismissed, or struck out. For four years respondents have been prejudiced by ongoing dispute filed by applicants, contrary to the purpose of the Labour Laws, that is geared at regulating and guide relations in the employment and labour industry to come to an end for enhanced efficient and productivity for attainment of social justice.

Unfortunately, applicants have been drugging respondents in court without paying any costs upon failure of their case. According to Section 50(6) of the Labour Institutions Act No. 7 of 2004 as amended by Section 19(b) of the written laws (Miscellaneous Amendment) Act No. 3 of 2010 and Rule 51 of the GN No. 106 of 2007 and Section 88(9) of the Employment and Labour Relations Act No. 6 of 2004 and Rule 34 of the GN No. 64 of 2007, Labour disputes are free of costs, interests and fees, however, costs are only allowed where there is the proof of frivolous and/or vexatious proceedings. Issue of costs in labour cases was also discussed in the case of Tanzania Breweries Limited Vs. Nancy Maronie, Labour Dispute no. 182 of 2015 (unreported) where it was held that;

Whether the dispute or application is before the Commission for Mediation and Arbitration or in the High Court of Tanzania, cost



is awarded only where there is an existence of frivolous and/or vexatious proceedings.

Honourable Vallensi Wambali, Acting Director Arbitration Department in the Commission for Mediation and Arbitration (CMA) in his recent paper titled IS COST FREE THE SOURCE OF DELAY IN HANDLING LABOUR DISPUTE: LAW AND PRACTICE IN TANZANIA, at page 3 paragraph 2 he said. ***The law is designed to make sure that in making decisions on costs orders the CMA and LC seek to strike a balance between on one hand, not unduly discouraging employees, employers, unions and employers association from approaching the Commission for Mediation and Arbitration(CMA) and Labour Court (LC) to have their disputes dealt with and on the other hand not allowing those parties to being frivolous and vexatious case.***

Court of Appeal granted costs upon withdraw of the notice of appeal in a matter originated from labour dispute in **Civil Application No. 600/08 of 2017 Stanbic Bank Tanzania Limited Vs. Bryson Mushi**, for clarity order is reflected below.

Upon the applicant lodging in Court a notice of withdrawal of the application on 22/05/2020 and non –appearance while duly notified to appear, Mr. Steven Emanuel Makwega, Learned Advocate, who appeared for the respondent, had no objection to the prayer to withdraw the application but he pressed for costs.

We indeed, agree with Mr. Makwega that the applicant lodged the aforesaid notice for withdrawal of the application in terms of Rule 58(1) and (2) of the Tanzania Court of Appeal Rules, 2019 (the rules). We accordingly grant the applicant's prayer we mark the application withdrawn under Rule 58(3) of the Rules. The respondent to have costs of the case.

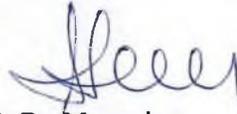
The above Court of Appeal decision is based on withdraw of notice, only, but costs was granted. In the case at hand, applicants has filed frivolous and vexatious applications for 4 years. It is worth insisting that the law is designed to make sure that in making decision on costs the Commission for Mediation and Arbitration (CMA) and Labour Court, seek to strike a balance between on one hand, not **unduly discouraging** employees, employers, unions and employers association from approaching the CMA and Labour Court to have their disputes dealt with and on the other hand not **allowing those parties to bring frivolous and vexatious case.**

According to Vallenci Wambali (supra) cost-free labour litigation as contemplated by the International Instrument had good motive specifically in assisting the **weaker** party who have **genuine claims** to easily access the court and Tribunal with aim of resolving the dispute **fairly** and **quickly** with the spirit of repairing the relationship between capital and labour. At the same time looking the way forward on how to increase efficiency through productivity at work and when doing so, social justice is upheld. The aim of cost -free was not to delay or deny or burry justice rather was to make sure justice is costless and time met.

It should be understood that, cost-free in labour matters is not a leeway or loophole to the parties to waste time and other resource, either in the Commission or in Courts and once this is not observed the court or the Commission will regulate the situation by awarding costs where frivolous and vexation acts have been proved. As demonstrated by series of frivolous and vexations applications filed by applicants for four years, against Respondents, there is a need to award costs to the respondent, for having been drugged in

court unnecessarily, after having settled the dispute, and applicants being not part to the dispute.

Application before this court, does not meet the test of Rule 44(2) of the Labour Court Rules GN No. 106 of 2007, **two** applicants have no cause of action against respondents, **three** application is frivolous, vexatious and it is an abuse of court process. Thus dismissed with costs, to be born by Gibson Wenston Kachingwe in person.



Z.G. Muruke

JUDGE

23/10/2020

Ruling delivered in the presence of Mr. Dunstan Kaijage, Counsel for the 2nd respondent, and in the absence of applicant and first respondent, having notice.



Z.G. Muruke

JUDGE

23/10/2020