IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT SUMBAWANGA

LABOUR REVISION NO 09 OF 2019

(Originating from Labour Dispute No CMA/RK/82/2018)

PARADISE BUSINESS COLLEGE ..... APPLICANT

VERSUS

RUTH F. SAMILA ..... RESPONDENT

R U L I N G

08/07/200 ***&*** *31/8/2020*

MASHAURI, J.:

This is an application for Revision No. 09 of 2019 filed in this court by the Applicant Paradise Business College against the decision of Ngaruka, O. arbitrator in Labour dispute No. CMA/RK/82/2018.

As it appears in the record of this application, upon service of summons by the Applicant to the Respondent, the Respondent has filed notice of opposition under rule 24(4)(a) and (b) of the Labour courts rules, government Notice No. 106 of 2007 to the effect that:-

(i) The application is incompetent for it suffers improper and or non-citation of the enabling provisions of the law.

(ii) That, the purported application is incompetent for it contravenes with the provision of Rule 24 (1) and (2) (a) (b) (c), (d) and (f) of the Labour Rules GN. No. 106 of 2007.

(iii) That, the purported application has no genuine grounds for revision as required under the law to enable this court to revise, set aside or vary with the arbitral award, for it is unmerited and unsubstantial and that, the award dated 15/07/2020 in Labour dispute No. CMA/RC/ 82/2018 by Ngaruka, O. arbitrator is proper, rational, logical and justiciable in the eyes of law.

When this application was called up for hearing on 19/05/2020, counsel for both parties prayed for leave of the court to dispose of the raised points of preliminary objection and this court granted the prayer.

In his written submission in support of the preliminary objection, Mr. Sanga learned counsel for the respondent skipped the 1st port of preliminary objection and started with the 2nd point of preliminary objection.

He submitted in support of the 2nd point of preliminary that, the applicant's application is incompetent as contravening with the mandatory requirement of the law under rule 24(1) and (2) of the rules that all the application of similar nature to our instant application before this court to be made by way of notice of application.

That, further to the foregoing the said rules again mandatorily provides with the contents that must be inciaded in the said application to be the following:-

24(1) Any application *shall* be made on notice to all persons who have an interest in the application.

(2) The notice of application shall substantially comply with form No. 4 in the schedule to the rules, signed by parties bringing the

application and filed and shall contain the following information:-

(a) The title of the matter.

(b) The case number assigned to the matter by the Registrar

(c) The reliefs sought.

(d) An address at which that party with accept notices any services of all documents in the proceedings.

(e) A notice advising the other party that if he intends to oppose the matter, the party shall deliver a counter Affidavit within fifteen days after the application has been served, failure of which the matter may proceed exparte; and

(f) A list and attachment of the documents that are material and relevant to the application.

Mr. Sanga learned counsel for the respondent further went on submitting that, the applicant's application has been brought before this court without **"Notice of Application"** as required in the referred mandatory rules. **The application was brought by filing three documents namely: Chamber Summons, Affidavit and Notice of Opposing the Application for Revision.**

That, it is a rule of thumb the spirit of the fore referred rule; that, application of the similar nature of this instant application must be brought before the court with notice of application, failure of the party to comply with the said rules as what is done by the herein applicant by filing his application without notice renders his whole application incompetent, thus deserves to be struck out.

That, even if he assumed that, the applicant in his application considered the document so named **Notice of opposing an application for revision** to be a notice of application, still, the same is incompetent as it is in contravention with the provision of the rules, to specific rule 24(2) (d), (c) and (f) of GN. No. 106 of 2007 for it does not show the address of service, notice to the respondent to file counter affidavit and a list of documents to be relied which are mandatory requirement.

Having so submitted, he prayed this court to struck the application out.

To back up his submission on the point of striking out the application, counsel for the respondent, Mr. Deogratias P. Sanga cited the case of **Mustafa Fidahussein Esmail v/s Dr. Dosany Juma Madati** Civil Appeal No. 43 of 2003 CAT Dar es Salaam Registry [unreported] in which the Court of Appeal held thus:-

> *"The available remedy consequence is therefore to strike out the appeal as incompetent."*

Upon cited the Mustafa's case [supra] counsel for the respondent prayed this court to struck out the applicant's application.

In reply to the submission by counsel for the respondent in support of the points of preliminary objection, Mr. Yahaya Said Zagalo for the applicant Paradise Business College, instead of going into the substance of matter in the application did indulge in explaining the meaning of the word shall as reflected in rule 24(1) and (2) of the labour court rules GN. No. 106/2007 in the alternative of the word mandatory used by counsel for the respondent in his submission in support of the points of preliminary objection. He said that, the use of the word shall does not mean mandatory requirement.

To back up his submission he cited the case of **Herman Henjewele v/s The Republic** Criminal Appeal No. 164 of 2005 CAT [unreported] in which the Court of Appeal held that:-

> *"Until the interpretation of laws Act, 2002 came into force, this court had held that the word* ***"shall"*** *in registration did not always mean or imply that it was mandatory"*

Having cited the said above case to his understanding, the applicant said that, is backed up by the proceedings, what is alleged by counsel for the Respondent is based on Rule 24(1) and (2) of the above cited GN which in a matter of procedure and procedural irregularity which should not vitiate proceedings or override the overriding principle.

He also cited other authorities including article 107A of the constitution of the URT 1977 as amended from time to time so as to back up his submission.

Thereafter, he invited this court to overrule the objections raised by counsel for the Respondent.

The issue to be raised for consideration and decision is:-

1. Whether the purported Application is incompetent for it contravene with the provisions of rule 24 (1) and (2) (a), (b), (c), (d), (e) and (f) or the Labour Court rules G.N. 106 of 2007.

   As produced before, rule 24 (1) is that, any application ***"shall"*** be made on notice to all persons who have an interest in the application.

   On the respondent's side, in so for as the word *"shall"* is used in the statute he said an omission to issue notice as well as failure to cite

proper provision of law enabling to move the court is fatal, the consequence of which renders the application to be struck out.

On his part, the applicant said in his submission that, the use of the word *"shall"* as insisted by counsel for the respondent in his submission is that, the omission is mandatory is not correct. He referred the court to the case of **Herman Henjewele** [supra] in which the court held that; the word *"shall"* in legislation did not always mean or imply that it was mandatory.

He invoked in his submission the principle of overiding objective as well as citing article 107A of the constitution so as to invite the court's condemnation and prayed the court to overrule the objection and proceed hearing of the application interparties.

Section 53(I) of the interpretation Act Cap. 1 RE: 2002 which came in force on 01/09/2004 vide proclamation No. 312 of 2004, the law on the point has changed dramatically. Where the word *"shall"* is used in conferring a function, the word *"shall"* be interpreted to mean that, "The function so conferred must be performed."

Where the use of the word "shall" is not mandatory, the court of Appeal in the case of **Fortunatus Masha v/s Williamu Shija** [1997] TLR 41 said as follows:-

> *"We think that, the use of the word "shall" does not in every case make the provision mandatory. Whether the use of that ward has such effect will depend on the circumstance of the case."*

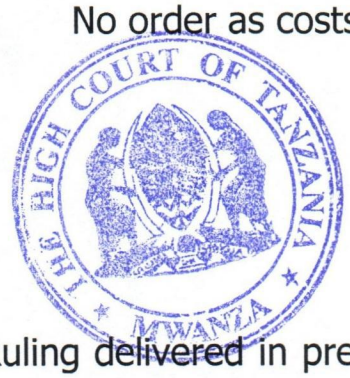
On my part, I am of opinion that, in this case, the use of the word shall under rule 24(I) of G.N. No. 106 of 2007 is mandatory. Rule 24 of G.N No. 106 of 2007 has been enacted by the relevant authority

specifically for guiding courts how to handover applications in labour law and other application of this nature. One cannot therefore be heard saying that the failure to comply with the provisions of rule 24(I) is just like anything free from the hands of law.

In the event, I find this application incompetent at law. The point of preliminary objection to the effect that the purported application is incompetent for it contravenes the provision of rule 24(1) and (2) (a), (b), (c), (d) (e) and (f) of the Labour Court Rules G.N No. 106 of 2007 is sustained.

On that regard, this application for revision is struck out.

No order as costs is made.



W. R. MASHAURI
JUDGE
31/08/2020

Ruling delivered in presence of all parties through virtual court video conference this 31st day of august, 2020.

Right of appeal explained.

W. R. MASHAURI
JUDGE
31/08/2020