

**IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 387 OF 2019
(ARISING FROM REVISION NO. 808 OF 2018)**

DAUD GODFREY MACHA.....APPLICANT

VERSUS

MEK ONE GENERAL TRADERS.....RESPONDENT

RULING

Date of Last Order: 01/04/2020

Date of Ruling: 22/05/2020

A. E. MWIPOPO, J

The respondent in this application for setting aside the dismissal order in Revision No. 808 of 2018 of 30/05/2019 have filed the Notice of Preliminary Objection on the point of law on the ground that the applicant's affidavit is incurably defective for containing prayers on paragraph 8 and 9 contrary to the law. When the case came for hearing of the preliminary objection on 01/04/2020 the Court ordered that the hearing of the case to proceed by way of written submissions. Both parties have complied with the

court orders and they have filed their submissions within the time fixed by the Court.

The respondent have submitted that the Applicant filed an Application by way of chamber summons supported by the affidavit sworn by the Applicant. Under paragraph 8 of the said affidavit the Applicant states:

8. That, I have diligently and without delay filed this application **praying for restoration of the dismissed revision no. 808 of 2018** and that I have shown sufficient reasons for granting the prayer.

Furthermore, under paragraph 9 of the said affidavit the Applicant states:

9. That, it is for interest of justice and the reasons above that I am praying this application be granted and the dismissed Revision No. 808 of 2018 be restored to its original position so that the case can be adjudicated upon on its merits by this Honourable Court.

The Respondent argues that the law, rules and principles governing affidavits prohibit affidavit to contain prayers as it makes the whole affidavit incurably defective. Order XIX Rule 3(1) of the Civil Procedure Code, Cap. 33 R.E. 2002 provides that;

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted"

In the case of **Mustapha Raphael Vs. East African Gold Mines Ltd, Civil Case No. 40 of 1998, Court of Appeal of Tanzania, at Dar es Salam**, it was held that;

"An affidavit is not kind of a superior evidence. It is simply a written statement an oath. It has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers and conclusions".

In another case of **Ignazio Messina Versus Willow Investments SPRL, Civil Application No. 21 of 2001, Court of Appeal of Tanzania, at Dar es Salaam**, it was held that;

"The rules governing the forms of affidavit cannot be deliberately flouted in the hope that the court can always pick the seed from the chaff, but that would be

abuse of court process. The only assistance the court can give in such a situation is to strike out the affidavit”

Since the affidavit is defective, it renders the whole application incompetent as decided by this Honourable Court in many occasions. In the case of **Nicodemus G. Mwita Vs. Bulyanhulu Gold Mine Ltd, [2013] LCCD 97** at page 172 the High Court held that;

“On the issue whether or not a defective affidavit is a matter of technicalities, a defective affidavit affects the whole application it supports and therefore going to the roots of the matter.”

Since it’s now a third time the Applicant brings the application which is defective, this Honourable Court has powers to dismiss the application with costs and without leave to refile the same. And in considering that it is now eight (8) years since this case was filed in 2013, it should come to an end in the interest of justice. In the case of **Athanas Augustiono Zullu Versus M/S Sengerema Engineering Group Ltd, Civil Application No. 17 of 2018**, High Court of Tanzania at Bukoba, at page 21 held that;

“I think this dispute may come to an end. It should be noted by parties in this application that this is an era of

expeditious justice which requires end of litigation. This is not only to the interest of the parties and the judges, but also the state in Tanzania. This dispute was filed in court in 2014 and it has taken more than five (5) years. I do not think if this dispute needs more years in the court of law. Case law have shown that disputes must have an end”.

In light of the submission, the respondent prayed for the dismissal of this suit in it’s entirely with costs.

In the reply submission the applicant stated that the Applicant filed a Notice of Application, Chamber Summons supported by an Affidavit of the applicant in terms of Rule 24(1), Rule 24(2) (a) (b) (c) (d) (e) (f), Rule 24(3) (a) (b) and Rule 36(1) and Rule 38(2) of the Labour Court Rules, GN No. 106 of 2007. Under Rule 24(3) (d) of the Labour Court Rules it is a mandatory to give prayers or to ask for reliefs from the Court. It is clearly stipulated under this Rule that “the applications shall be supported by an affidavit, which shall clearly and concisely set out the reliefs sought”.

He submitted further that the averments in paragraph 8 and 9 respectively of the applicant’s affidavit are in line with the Labour Court Rules

GN No. 106 of 2007. In the case of **Magnet Construction Ltd Versus Peter J. Makorere, Revision No. 14 of 2013**, The High Court of Tanzania, Labour Division at Musoma, Honourable S. A. N Wambura, Judge, held in respect to a Preliminary Objection, at page 2 last paragraph and page 3 first paragraph that;

"it is the finding of the Court that the counter affidavit filed is in conformity with Rule 24(2) and 24(4) and especially 24(3) (b) and (c) which allows contents of an affidavit to include statements of facts and legal issues. It provides as herein quoted;-

Rule 24(3) the application shall be supported by an affidavit, which shall clearly and concisely set out.

(a)

(b) A Statement of the material facts in a chronological order, on which the application is based.

(c) A Statement of the legal issues that arise from the material facts; and

(d) The relief sought.

Moreover, it is a rule of law that the use of the Civil Procedure code is only applicable in execution proceedings or where there is lacuna in the Labour Laws. Since the procedure of filing an affidavit is provided for in the Labour Court Rules, then the provisions of the CPC are inapplicable. I thus dismiss this ground".

The applicant prayed for the court to grant the prayer of restoration for ends of justice, because all the cases referred by the respondent are irrelevant to the present case as there is no lacuna in the Labour Law; specifically the Labour Court Rules and moreover the application is not one of execution proceedings.

In rejoinder the Respondent stated that he filed his submission in chief on time and served the Applicant on 16/04/2020 but the Respondent was not served with the reply until on 05/05/2020 when he decided to make follow-up to the Court where he found only a copy of the Court. He requested a Court clerk for a photocopy of the reply filed by the Applicant. Despite of the inconveniences he was able to file the rejoinder on time. The Court appreciate the spirit and the way the respondent handled the delay in serving

the reply submission to that was caused by the applicant. The good thing is that the delay have not caused any injustices to any party.

Then, the respondent submitted in rejoinder that the Applicant has not responded to the preliminary objection raised for including prayers in the affidavit instead, he has opted to come with case authority which is irrelevant to the case at hand. The case of **MAGNET CONSTRUCTION LTD VERSUS PETER J. MAKORERE** was not for the affidavit to include prayers but the affidavit to include statements of facts and legal issues. Statements of legal issues are not prayers. Also, his affidavit does not contain legal issues as he claims.

He argued that the Applicant in his reply submission tried to make this Court to believe that Civil procedure Code is not applicable and there is no lacuna in the Labour Court Rules, GN No. 107 of 2017 due to the fact that Rule 24(3) (c) Labour Court Rules, GN No. 107 of 2017 allowed the Applicant to include legal issues in an affidavit. Our emphasis is that Rule 24(1), 24(2) (a)(b)(c)(d)(e)(f), 24(3) (a)(b), 36(1) and 38(2) cited by Applicant is only applicable on a situation where a party wishes to revise a decision of the Arbitrator of the Commission for Mediation and Arbitration but not in a situation where a matter has been struck out by this Honourable Court and

the Applicant intend the same to be re-admitted. Since the Applicant's intention is to take back the matter which was struck out for want prosecution then he should comply with Order XIX Rule 3(1) of the Civil Procedure Code (Cap 33 R.E 2002) as far as an affidavit is concern. In light of the submission, the respondent prayed for the dismissal of this suit in it's entirely with costs.

The issue for determination in this Preliminary Objection is whether the applicant's affidavit is incurably defective for containing prayers on paragraph 8 and 9 contrary to the law.

The respondent in this application have submitted that the applicant's affidavit is incurably defective for containing prayers on paragraph 8 and 9. The Respondent argues that the law, rules and principles governing affidavits prohibit affidavit to contain prayers as it makes the whole affidavit incurably defective. He relied his submission on the Order XIX Rule 3(1) of the Civil Procedure Code, Cap. 33 R.E. 2002 which provides that;

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted".

In contention the applicant submitted that Under Rule 24(3) (d) of the Labour Court Rules of 2007 it is a mandatory to give prayers or to ask for reliefs from the Court. It is clearly stipulated under this Rule that; - "The applications shall be supported by an affidavit, which shall clearly and concisely set out the reliefs sought". He was of the opinion that the averments in paragraph **8** and **9** respectively of the applicant's affidavit are in line with the Labour Court Rules GN No. 106 of 2007. In the case of **Magnet Construction Ltd Versus Peter J. Makorere, Revision No. 14 of 2013**, The High Court of Tanzania, Labour Division at Musoma, (Unreported).

The affidavit in Labour Court is govern by rule 24(3) of the Labour Court Rules, 2007. The rule reads as follows;

24(3) The application shall be supported by an affidavit, which shall clearly and concisely set out-

(a) the names, description and addresses of the parties;

(b) a statement of the material facts in a chronological order, on which the application is based;

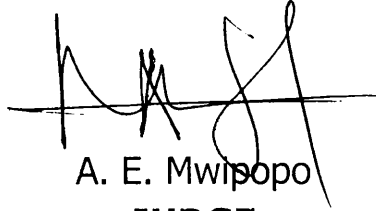
***(c) a statement of the legal issues that arise from
the material facts; and***

(d) the reliefs sought.

From above rule, one of the mandatory requirement of the affidavit is that it shall clearly and concisely set out the relief sought. Paragraph 8 and 9 of the applicants affidavit are in conformity with rule 24(3) (d) of the G.N. No. 106 of 2007 as the paragraphs contains relief sought. Therefore, I am of the same opinion with the applicant that there rule is very clear and there is no lacuna in the rules that require borrowing procedures from the Civil Procedure Code Act. The affidavit in labour disputes before the Labour Court differs with the affidavit in other civil suits as the affidavit in labour Court is governed by the Labour Court Rules, 2007.

As it was heard by this Court in the case of **Magnet Construction Ltd Versus Peter J. Makorere**, the use of the Civil Procedure code is only applicable in execution proceedings or where there is lacuna in the Labour Laws. Since the contents and procedure of filing an affidavit is provided for by the Labour Court Rules, then the provisions of the CPC are not applicable.

Therefore I find the Preliminary Objection to have no merits and I hereby dismiss it. The hearing of the application to proceed on merits.

A handwritten signature in black ink, appearing to be 'A. E. Mwisopo', written over a horizontal line.

A. E. Mwisopo

JUDGE

22/05/2020