

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION NO. 206 OF 2021

KMS TRANSPORT LTD..... APPLICANT

VERSUS

ZAINAB HASSAN MOHAMED..... RESPONDENT

(From the decision Commission for Mediation & Arbitration of Pwani at
Mkuranga)

(Batenga: Arbitrator)

dated 20th January 2020

in

No. CMA/PWN/MKR/07/2019

JUDGEMENT

17th November & 10th December 2021

Rwizile, J

The respondent was employed by the applicant as an accountant. Her employment was terminated in what she felt was unfair termination. She filed a dispute with the Commission for Mediation and Arbitration. The application was heard ex parte. When the ex parte award come to the knowledge of the applicant.

She filed an application asking the commission set it aside. Unfortunately to her, she filed two applications, that were struck out for being defective and was warned to be keen and observe the proper procedures. When she filed the third one, it was dismissed following after a preliminary objection that the affidavit supporting it was defective for offending order V1, Rule 15(2) of the CPC. This application therefore is an attempt to ask this court to set aside the dismiss order of the application. It has been filed by the chamber summons supported by the affidavit of Maria Jackson an advocate of the applicant, stating grounds for which this application ought to be granted as follows;

- i. That the mediator erred in law and in facts for dismissing the affidavit as defective for the reason of containing only an additional verified paragraph*
- ii. That the mediator erred in law by not considering the overriding objective principle rule*
- iii. That the mediator erred in law by failing to give weight to the basic and fundamental rights of being heard.*

Ms Victoria Menrald Njau learned advocate appeared for the applicant and argued this application by way of written submissions. She was of the view

that dismissing an application for the defect of the affidavit supporting it is an apparent error, since it was to only be struck out. She was fortified by the decision in the cases of **Yahya Khamis vs Hamida haji Iddi and 2 Others**, Civil Appeal No. 225 of 2018, CA (unreported). It was submitted further that the same application was incompetent it was not determined on merit, it ought to be just struck out, as held in the cases of **Airtel(T)Limited vs Earl Matthesen**, Miscellaneous Application No. 144 of 2017 (HC) (unreported). The learned advocate referred to article 107A(2)(e) of the Constitution which enjoins the court to protect fundamental rights of the parties. In his view, the right to be heard can be guaranteed by allowing cases to be heard on merit as held in the case of **National Housing Corporation vs Etienes Hotel**, Civil Application No. 10 of 2005, CA. She insisted that procedural law are handmaids to the ends of justice. Further, it was argued that cases should be heard on merit as a form of accessing justice. This was held in the case of **D.T Dobie (T) Ltd vs Phantom Modern Transport** [1985] Ltd, Civil Application No. 141 of 2001. She lastly asked this court to apply the principle of overriding objectives under section 3A (1) (2) of Civil Procedure Code.

Mr. Charles Leonard Yotamu was for the respondent. He submitted in opposing the application as follows; that the application to set aside an award was defective. It was argued that the application was the third one and it was as well supported by the defective affidavit. In his view, filing three applications with defective affidavit is an abuse of court process, it was therefore proper to dismiss it. Dismissing it, it was submitted, was based on the principles of having cases come to finality. He referred to the case of **Johnson Mwakisoma vs IPSOS Tanzania Ltd**, Revision No. 975 of 2019, where it was held that court orders must be respected since they are made for purpose of regulating proceedings. Article 107A (2) (d) of the Constitution is designed to assist in dispensing the rights of the people.

The learned counsel further submitted that cases cited by the applicant are distinguishable in the circumstances of the case.

in his view, it is the law that litigations must come to an end as held in the cases of **New Tabora Textiles (T) Limited vs Tanzania Union of Industrial and Commercial workers** (TUICO) Revision No. 5 of 2016, the court dismissed the applications that were defectively filed

On the right to be heard, it was submitted that the applicant was given a right but did abuse it by filing incompetent applications. Therefore, she held the view that article 107A(2)(b) of the Constitution cannot be applied to prevent ends of justice.

As to the overriding objective principles, it was stated that the case of **Johnson Mwakisoma vs IPSOS Tanzania Ltd (supra)** held that the same cannot be used to paralyze court business. He therefore prayed; the application be dismissed.

By way of rejoinder, the applicant did not have new points to make but added to his previous submission by citing the cases of **Chief Dereko Lesapo vs Noth West Agricultural Bank and another, Ditsobotla**, cases CCT 23/99 and the cases of **MB Automobiles vs Kampala Bus service** EA 480 of 1966 on the right to be heard. It is unfortunate that the cases cited here were not supplied and so will not be considered to support his case.

Having gone through the submissions of the parties in respect of the points raised, I think, I am required to *determine if the mediator was right to dismiss the application on ground that the affidavit supporting is defective.*

I have to note at this juncture that the mediator made such a decision after being prompted by the applicant's failure to file proper affidavits.

It was noted by the commission that the applicant had filed two applications before the impugned one. All of whom were supported by defective affidavits. In order to put to an end, her failure to file applications that are defective, the same was dismissed. In law, dismissal has the effect of determining a matter to its finality and gives no chance to rectify the same. The applicant has submitted that the commission did not consider the right to be heard and was tied with technicalities that ultimately impede ends of justice.

At the last page of the award, the commission was fortified by the decision of this court in the case of **Amos Elijah and 33 Others vs Tanzania National Roads Agency**, Revision No. 09 of 2019. Even without going into details of the decision, in the same application, it is important to note that commission misconstrued the decision of the court. In the quoted extract, which is reproduced here, it states as follows;

"The application is struck out in toto due to the reason as from the records show that the applicants have been severally filing defective

applications and they were given leave to file afresh yet they have slept on their rights, as rights are never meant for people who are asleep but who are awake. Cases must come to an end..."

From the word of the decision, it is crystal clear that the court struck out the application. It added the word, the application is struck out in toto. I think, striking out an application in toto means simply striking out the same. It does not extend to dismissing the same. This court has consistently decided so. As I understand the law, when a pleading contains defects, there are two options to be taken. **First**, the court may allow an amendment. **Second**, it may strike out the matter. This in all, depends on the nature of the pleading before the court and the extent of the defect. Those defects that are curable such as defects in the jurat of attestation as in the impugned application can only be rectified by either an amendment or at the worst a striking out the application with leave to refile or without one. If for instance, the affidavit contains offensive paragraphs the best practice has been to expunge those offensive paragraphs only and leaving the rest intact.

I have visited the law and case laws; I am yet to find an authority of this court or the court appeal which has ruled that the remedy for a defective affidavit is dismissing the application. That being the cases, I find this

application has merit. It is allowed. The application ought to have been struck out. I order no costs.




A.K. Rwizile

Judge

10.12. 2021