IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 18 OF 2021

BETWEEN

HIGHER EDUCATION STUDENTS' LOAN BOARD (HESLB).....APPLICANT

VERSUS

GABRIEL ROBI.....RESPONDENT

RULING

Date of Last Order: 12/08/2021

Date of Ruling: 30/09/2021

I. ARUFANI, J.

This ruling is in respect of a preliminary objection on point of law (hereinafter referred in short as a PO) raised by the respondent Gabriel Robi that; *the court lacks jurisdiction to entertain the matter.* With leave of the court the PO was argued by way of written submission. It is stated in the submission of the respondent which was drawn by advocate Walter Shayo that, the application filed in this court by the applicant is seeking for review of judgment of this court delivered on 31st July, 2019. He stated the application is made under Rule 27 (2) (b) and (7) of the Labour Court Rules, GN. No. 106 of 2007 (hereinafter referred as the Rules).

He argued that, by looking into the provision of the law upon which the application is premised, the application is unmaintainable. He firstly argued that, it is legally incorrect to argue the impugned judgment of this court is not appealable as section 57 of Labour Institutions Act provides for right of appeal against the decision of the Court to the Court of Appeal. He submitted that, as the impugned judgment is appealable it is legally improper to seek review of the judgment under Rule 27 (2) (b) and (7) of the Rules.

Secondly, the respondent stated that, the purported complaint was not and does not feature in the proceedings that led to the judgment which the applicant seeks to be reviewed. Thirdly, he argued the first ground of review was raised by the applicant as a notice of preliminary objection and stated it was argued by both parties and the decision was made on 10th October, 2014 as shown in his concise statement of response to the applicant's memorandum of review. He argued that, if the applicant was aggrieved by the decision, she was required to raise it as one of the grounds of revision in terms of Rule 28 (1) of the Rules. He submitted that, as the applicant failed to raise it in her grounds of revision, she cannot be allowed to bring it through the back door.

To support his argument, he referred the court to the case of **Deogratius Martin Kachangaa Didas and Two Others V. DPP**, Criminal Application No. 1 of 2013, CAT at Arusha (unreported). He also referred the court to the case of **Salim O. Kabora V. TANESCO Ltd and Two Others**, Civil Appeal No. 55 of 2014 CAT at DSM (unreported) and **Fanuel Mantiri Ng'unda V. Herman Mantiri Ng'unda and Two Others**, [1995] TLR 155 which elucidated the need of the court to be satisfied it has jurisdiction to entertain any matter before dwelling into its determination. At the end he prays the court to dismiss the application for want of jurisdiction.

In response to the respondent's submission Mr. Hangi M. Chang'a, Learned Principal State Attorney stated that, the application for review filed in this court by the applicant is based on new facts which was not in the knowledge of the applicant when the matter which was Revision No. 673 of 2018 was heard. He submitted that, the court is vested with jurisdiction to entertain application for review even if appeal against the judgment, decree or order is allowed. To supported his submission, he cited in his submission the provision of Rule 27 (2) (a) and (b) of the Rules and the case of **Kunduchi**

Beach Hotel & Resorts V. Lewis Reuben Ngahunga, Misc. Application No. 143 of 2013.

He argued that, the respondent is misleading the court by submitting the first ground of review was raised as notice of preliminary objection and decided on 10th October, 2014. He submitted that, there is no decision to that regard was attached to support the submission by the respondent. He stated that, the applicant could have not raised the ground of review as one of the grounds of revision under Rule 28 of the Rules because the review is based on new important evidence which was not in the knowledge of the applicant.

He distinguished the case of **Deogratius Martin Kachangaa** (supra) from the present case by stating that, in the said case the applicant was denied right to be heard while the application at hand is based on discovery of new evidence. He also distinguished the case of **Salum O. Kabora** (supra) from the present application by stating that, the court is vested with jurisdiction to entertain the application for review upon discovery of new evidence which was not in the knowledge of the applicant. He submitted that, it is a principle of law

that each case must be determined on its own facts and prays the PO be dismissed for being devoid of merit.

It was stated in the rejoinder made by the respondent that, the review jurisdiction of this court permits the court to review its own judgment. He stated that, as the court has no jurisdiction to take factual evidence during revision it cannot have jurisdiction to review its own judgment on allegation of discovery of new fact that were required to be tendered and admitted during proceeding of the Commission for Mediation and Arbitration (hereinafter referred as the Commission). He submitted it is the Commission that heard the evidence that has jurisdiction to review its decision on account of discovery of new facts. He went on submitting that, if the court will accept the submission by the applicant it will end up reviewing the award issued by the Commission and not its own judgment which is contrary to the limit of the review jurisdiction of the court.

He submitted further that, the case of **Kunduchi Beach Hotel** (supra) is unreported and it has not been attached to the applicant's submission to enable the respondent to scrutinize its applicability in the matter at hand. He argued that, the quoted part of that case is not stating that the court can review its own judgment basing on

discovery of new matter that were not before it. He reiterated what he argued in his submission in chief in relation to the jurisdiction of the court to entertain the present application and prays the application be dismissed for lack of jurisdiction.

Having carefully considered the rival submissions made by both sides the court has found proper to start with the first argument used by the respondent to submit the application at hand is not maintainable. The court has found its jurisdiction to entertain an application for review of its own judgment, decree or order is provided under Rule 27 of the Rules. Rule 27 (1) of the Rules provides for the procedure required to be followed in instituting an application for review in the court which is by way of filing written notice of review to the Registrar within fifteen days from the date of the decision to be reviewed was delivered.

Rule 27 (5) of the Rule states categorically that the notice to review shall substantially be as prescribed in Form No. 6 in the Schedule to the Rules. That being the procedure required to be followed in instituting an application for review the court has gone through the application for review filed in this court by the applicant and find there is no notice to review filed in this court as required by

Rule 27 (1) and (5) of the rule referred hereinabove. To the contrary the court has found the application at hand is initiated by filing in the court the memorandum of review and there is no notice of review filed in the court to initiate the review as required by the above cited provision of the law.

To the view of this court the applicant was required to initiate the review of the impugned decision of this court by filing in the court a notice of review as required by Rule 27 (1) and (5) of the Rules. To initiate an application for review of a decision made by the court in a labour matter by using only a memorandum of review without a notice of review is to go contrary to Rule 27 (1) and (5) of the Rules which provides for the procedure and format required to be followed in initiating an application for review of the decision, decree or order of the court. That means the procedure provided for initiating application for review of the decision of the court made in labour matter was not observed by the applicant in initiating the instant application.

Since the respondent argues the application is not maintainable as is made under Rule 27 (2) (b) and (7) of the Rules and the applicant argues the application is maintainable under Rule 27 (2) (a)

and (b) of the Rules, the court has found proper to start by having a look on what is provided in the cited provisions of the law. The Rule state as follows:-

> *"27. (2) Any person considering himself aggrieved by the judgement, decree or order from which:-*
>
> *(a) An appeal is allowed, but no appeal has been preferred; or*
>
> *(b) No appeal is allowed, and who from the discovery of any new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgement or decree was passed or order made, or on account of some mistakes or error apparent on face of record, or for any other sufficient reason, desires to obtain a review of the judgement, decree or order made against him.*
>
> *(c) May apply for a review of the judgment, decree or order to the court".*

After carefully reading the provision of the law quoted hereinabove, the court has found the right of a party aggrieved by judgment, decree or order of the court to apply for its review to the court is exercised in two different situations. As provided under sub rule (2) (a) it can be exercised in a situation where there is a right of appeal but no appeal has been preferred and as provided under sub

rule (2) (b) it can be exercised in a situation where appeal is not allowed.

That being the position of the law the court has found the issue to determine here is whether the court has been properly moved to entertain the instant application. The court has found that, although it is stated in the submission of the applicant that the court has jurisdiction to entertain the application for review under Rule 27 (2) (a) and (b) of the Rules but the instant application is made under Rules 27 (2) (b) and (7) of the Rules.

The court has found that, as the present application is made under Rule 27 (2) (b) of the Rules which is used in a situation where appeal is not allowed, the question to ask is whether the impugned judgment of the court is appealable or not. The court has found that, as rightly argued by the respondent the impugned judgment is appealable under section 57 of the Labour Institutions Act which states as follows:-

> *"Any party to the proceedings in the Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania on a point of law only".*

From the above cited provision of the law, it is crystal clear that the impugned judgment of the court is appealable to the Court of Appeal on point of law. If it is appealable, it is the view of this court that, although it is argued in the submission of the applicant that, the present application is based on discovery of new important evidence which was not in the knowledge of the applicant provided under Rule 27 (2) (b) of the Rules but the application could have not been made under Rule 27 (2) (b) of the Rules which deals with the application for review of a decision of the court which is not appealable.

It is the view of this court that, if the ground upon which the applicant is intending to base the application for review is discovery of new important evidence which was not within their knowledge at the time of hearing and determination of the Revision, he was not required to move the court by using Rule 27 (2) (b) of the Rules as the impugned decision is appealable. To the contrary and as stated in the case of **Puma Energy (T) Limited V. Khamis Khamis**, Labour Review No. 496 of 2019, HCLD at DSM (unreported) the proper provisions of the law upon which the present application would have been made would have been Rule 27 (2) (a) and (c) of the Rules and not under Rule 27 (2) (b) of the Rules.

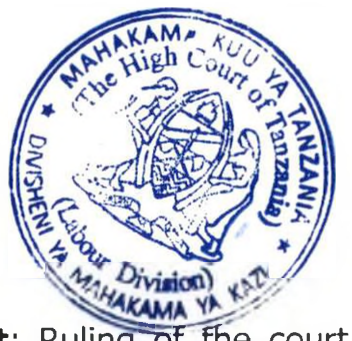
The issue of the court to be moved improperly under wrong provision of the law has been discussed by this court in numerous cases and one of them is the case of **SDV Transami Tanzania Ltd. V. Steven Batanda** [2015] LCCD 24 where several cases including the case of **Mansoor Industries Ltd. V. Iddy Said Katambula**, Revision No. 52 of 2013 HC at Mwanza (unreported) and **Project Manager, ES-KO International Inc. Kigoma V. Vicent J. Ngugumbi**, Civil Appeal No. 22 of 2009, CAT at Tabora (unreported) were referred. The Court of Appeal held in the latter case that:-

> *"It is now settled law that wrong citation of the law, section, subsection and or paragraphs of the law or non-citation of the law will not move the court to do what is being asked to do and accordingly renders the application incompetent".*

The above stated position of the law caused the court to come to the settled view that, as it has not been moved properly to entertain the instant application it has no jurisdiction to entertain the matter which is incompetent. After arriving to the above finding the court has found there is no need of wasting its time to continue to deal with the rest of the arguments raised by the counsel for the respondent as the above finding is sufficient enough to dispose of the instant application.

In the premises the point of preliminary objection raised by the respondent is hereby upheld and the application is accordingly struck out as the court has no jurisdiction to entertain it. It is so ordered.

Dated at Dar es Salaam this 30th day of September, 2021.



I. Arufani
JUDGE
30/09/2021

Court: Ruling of the court delivered today 30th day of September, 2021 in the presence of Mr. Brighton Ndugani, State Attorney for Mr. Stanley Mahenge, State Attorney for the Applicant and in the presence of Mr. Walter Shayo, Advocate for the Respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani
JUDGE
30/09/2021