

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 371 OF 2021

BETWEEN

SHOMAR S. KIDUNDA & OTHERS..... APPLICANT

AND

KHALSA SPORTS CLUB (PUNJAB)..... RESPONDENT

RULING

Last Order: 22/02/2022

Date of Ruling: 28/2/2022

B. E. K. Mganga, J

Applicants filed this application seeking extension of time within which to file an application for revision against an award issued on 29th July 2016 by Hon. Alfred. A, arbitrator, in labour dispute No. CMA/DSM/ILA/R.850/307 before the Commission for Mediation and Arbitration at Ilala. In support of the application, Shomar S. Kidunda filed an affidavit in which the opening statement reads:-

" WE SHOMARI. S. KIDUNDA male adults Muslim and resident of Dar es Salaam DO HEREBY affirms and state as follows:-"

In the said affidavit, there are no names of other applicants. More importantly, the said affidavit was signed by Shomar. S. Kidunda as the

deponent. The notice of application was also signed by the said Shomar S. Kidunda though the title of the notice of application shows the application has been preferred by Shomar S. Kidunda and others.

When the application was called for orders on 22nd February 2022, this court raised an issue of competence of the application before it and asked the parties to make submissions thereof.

Mr. Hamis Rashid, the alleged one of the applicants in this application, conceded that the application was signed by Shomar S. Kidunda alone. He conceded further that there are no names of other applicants although they are ten in number, but the application does not show how many are they. He informed the court that Shomar S. Kidunda died on 27th October 2021. He conceded further that there is no court order showing that the said Shomar S. Kidunda was appointed to represent other undisclosed applicants in this application.

On the other hand, Victoria Mgonja, counsel for the respondent submitted that Shomar S. Kidunda had no power to affirm an affidavit and file this application in court on behalf of the undisclosed applicants. She therefore prayed the application be struck out.

I agree with both Mgonja, advocate for the respondent and Mr. Hamis Rashid, the alleged one amongst the undisclosed applicants that there is not order of the court showing that the said Shomar S. Kidunda was appointed to represent other undisclosed applicants in this application. From where I am standing, there is no proof that the said Shomar S. Kidunda was mandated by other undisclosed applicants to affirm and file an affidavit on their behalf and file in court this application. In my view, there was supposed to be that proof, otherwise, it will be a room for just a single person, for reasons best known to him, to file an application before the court without knowledge and or consent of other parties. The effect thereof is that (i) the court may proceed under wrong assumption that applicant has been mandate to file the application while not, and (ii) the outcome of the application may affect positively or negatively even those who were unaware of its existence. This, in my view, may lead to injustice both to the respondent and those who were not aware and did not consent in filing the application.

As pointed hereinabove, names of other applicants were not disclosed both in the notice of application and in the affidavit in support of the application. This failure, means that, the application has been made in favour of all persons in the world myself inclusive. From my

stand point of view, for sure, I am not party to this application that I can confidently prove. But what about other persons?. That, I cannot prove except for the few ones especially the minors as they have no capacity to enter into employment contract as the law prohibits. This, in my view, is the danger of failure to disclose the names of the parties to the application as it leaves assumptions as to who are the parties.

Even if we narrow it down that the application relates to employees of the respondent, then the issue is, how many are they? Is it that all employees have decided to go against their employers? That may also not be the reality. These questions imply that, the court has been asked to issue an order in favour of unknown persons and that the court's order arising from this application will be uncertain and unenforceable. It is because of these unresolved questions in my mind; I asked the parties to address me whether this court can issue an order in favour of undisclosed applicants. In my view, it cannot. I am of that view because, court orders have to be certain and capable of being enforced. The order prayed by the said Shomar S. Kidunda and undisclosed others in this application cannot be enforced and is uncertain for lack of disclosure of the beneficiaries of the order prayed.

Had it not been the disclosure by Mr. Hamis Rashid that Shomar S. Kidunda died on 27th October 2021, the court could have possibly; proceeded under the assumption that the person who was before it is the said Shomar S. Kidunda. May the Almighty God reward the said Shomar S. Kidunda in accordance to his faith to his God and deeds to his fellow human being and all other living organisms while he was among us on this earth.

It is my considered view, that failure to disclose names of the applicants, creates a room for any busy body to appear and pray for an order and if the order is granted, that is lucky to him. If the order is not granted in his favour, then, he has nothing to loose. Whatever the case, in my view, injustice will be occasioned to the other party in either scenario. All these questions and dangers arising from failure to disclose names of the parties in the matter before the court, in view, were in the minds of justices of Appeal in the case of ***Hsu Chin & 36 Others v. The Republic***, Criminal Appeal No. 345 of 2009(unreported) although the Court of Appeal did not explain so in details. In ***Hsu Chin's case***, supra, the notice of appeal read:-

"TAKE NOTICE that HSU CHIN TAI & 36 OTHERS appeals to the Court of Appeal of Tanzania..."

The Court of Appeal discussed and held as follows:-

"A question we ask ourselves, is this a joint notice of appeal? With respect, we think not. It is only one appellant Hsu Chin who has been identified by name. The rest are referred to as "OTHERS", but who are they? How do we know that the "36 others" were desirous of appealing to this Court? ... The names of all appellants should have been mentioned in the notice of appeal".

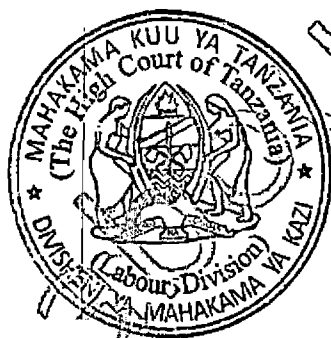
In the Hsu Chin's case, (supra), the Court of Appeal found that the notice of appeal was incompetent and struck it out. In the application at hand, the court was moved by a notice of application that did not disclose names of the applicants and supported by the affidavit sworn by single person without proof that the deponent was mandated by the unknown others to file this application. In the case of **Haidar Thabit Kombo & 10 Others v. Abbas Khatib Haji and 2 Others, Civil Application No. 2 of 2006**, it was submitted by Mr. Mbwezeni, advocate that no where in the affidavit of the first applicant is it claimed that the first applicant was speaking for and on behalf of the other applicants or that he had authority from them to depone as he did in the affidavit. So, the affidavit in the record is in respect of the first applicant only. The Court of appeal (Mroso, J. A, as he then was), having heard that submission of the parties held:-

" I think Mr. Mbwezeleni has a valid point here. It was not enough for the first applicant to say in his affidavit that he had conducted much of the trial of the suit on behalf of the other

*applicants or that he and the other applicants were poor and illiterate on matters of law and courts. **Since the affidavit was drawn up by a lawyer (Mr. Patel), there could be no excuse for not clearly stating that he had authority of the other applicants to depone and swear the affidavit on their behalf**".*

Guided by the above cited Court of Appeal cases, I find that both the notice of application and the affidavit in support of the application, are incurably defective making the whole application incompetent. For all said hereinabove, I therefore struck out this application for being incompetent.

Dated at Dar es Salaam this 28th day of February 2022.




B. E. K. Mganga
JUDGE