

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 2 OF 2022

BETWEEN

JUSTUS MASENGO AND 41 OTHERS..... APPLICANT

AND

TANZANIA PORTLAND CEMENT PLC..... RESPONDENT

RULING

Date of the last order: 16/02/2022
Date of Ruling: 25/2/2022

B. E. K. Mganga, J

On 18th January 2022, Justus Masengo and 41 others who are employees of the respondent filed this application seeking the court to issue temporary injunction restraining the respondent or Managers or officers or any agent from making deduction of salaries of the said Justus Masengo and 41 others pending determination of the main case i.e., CMA/DSM/KIN/417/2017 before the Commission for Mediation and Arbitration (CMA) at Kinondoni. The deductions complained of by the said Justus Masengo and 41 others relates to the National Social Security Fund(NSSF). In the affidavit in support of the application, it was deponed that applicants were not in agreement with the respondent for NSSF deductions, because applicants have not been served with any

official letter from NSSF for the said deductions and further that applicants have not consented for the said deductions. In the notice of application, the only name disclosed is that of Justus Masengo, the 1st applicant, but names of 41 others are not disclosed though there are signatures allegedly, being of the said 41 others. In the opening statement in the affidavit in support of the application, applicants mentioned names of 42 applicants and that they are "**adult, male and female, muslim and Christian by faith and resident of Dar es Salaam** **SWEAR/and AFFIRM as follows:-**"

On 10th February 2022, respondent filed both the notice of opposition and a counter affidavit sworn by Evaline Mushi, her Human Resources Director. Respondent also filed a notice of preliminary objections containing four grounds namely:-

1. *The application is incompetent for non-citation of proper enabling provisions of the law;*
2. *The joint affidavit is incurably defective for being affirmed and sworn by a group of deponents;*
3. *The grant of the temporary injunction will pre-determine the arbitration pending at the Commission for Mediation and Arbitration;*
4. *The application is defective for lack of names of other applicants.*

This ruling emanates from these preliminary objections raised by the respondent.

When the application was called for hearing, Mr. Timon Vitalis, counsel for the respondent, prayed to abandon the 3rd ground and argued the 1st, 2nd and 4th grounds of preliminary objections. Arguing the 1st preliminary objection, Mr. Vitalis, submitted that applicants were supposed to bring this application under section 94(1)(f)(ii) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] read together with section 51 of the Labour Institutions Act [Cap. 300 R. E. 2019], but applicants did not cite that provision in the notice of Application. Counsel for the respondent submitted further that, the aforementioned provisions gives exclusive jurisdiction to the Labour Court to determine injunction applications while the matter is at CMA. Mr. Vitalis submitted that, Rule 24 of the Labour Court Rules, GN. No. 106 of 2007 cited by the applicants gives procedures on how applications shall be made to this Court. Counsel for the respondent submitted further that Order XXXVII of the Civil Procedure Code [Cap. 33 R. E. 2019] cited by the applicants does not give this court jurisdiction to issue injunction while the matter is at CMA. He argued that, the said Order is applicable when the dispute is being heard by this court.

On the 2nd limb of the preliminary objection that the affidavit is incurably defective for being sworn by a group of deponents, Mr. Vitalis submitted that, an affidavit is a substitute of oral evidence as it was held in the case of ***Uganda v. Commissioner of Prisons Ex-parte Matovu [1966] EA 514***. He argued that the affidavit of the applicants was supposed to be in conformity with the provisions of the Oaths and Affirmation Rules [Cap. 34 R. E 2002] subsidiary. Counsel for the respondent went on that, in the said Rules, a Muslim solemnly affirms while a Christian solemnly swear. Mr. Vitalis argued further that, the application at hand is not a representative suit where applicants uses the word "we" to show their collectiveness. He went on that, the affidavit by the applicants looks like a plaint.

Arguing on the 4th ground, i.e., that there is no names of the applicants, Mr. Vitalis submitted that, the notice of application was filed by Justus Masengo and 41 others whose names are not disclosed but there are signatures of the alleged 41 others. Mr. Vitalis submitted that, it is unknown who are the applicants in the notice of application. Counsel for the respondent concluded by praying the application be struck out.

Opposing the preliminary objections, Mr. Prosper Mrema, counsel for the applicants, submitted that the application is properly before the court and prayed preliminary objections be dismissed. Responding to the 1st preliminary objection, Mr. Mrema submitted that, the Rules cited in the notice of application are the enabling provisions. He went on that, as the application relates to injunction, citing of Rule 2(1) of Order XXXVII of the Civil Procedure Code [Cap. 33 R. E. 2019] in the notice application was proper as the said Rule gives jurisdiction to this court to issue temporary injunction. Mr. Mrema submitted further that, failure to cite section 94(1)(f)(ii) of Cap. 366 R. E. 2019, (supra), and section 51 of Cap. 300 R. E. 2019, (supra), has no effect to the application at hand. He however, conceded that the application relates to labour issues and that there is specific provisions relating to temporary injunction in labour matters. He conceded further that, when there is a specific law, normally you go to the specific law and not general law. He conceded also that, Rule 2(1) of Order XXXVII of cap. 33 R. E 2019 is a general law.

On the 2nd ground of the preliminary objection, Mr. Mrema counsel for the applicants, submitted that the affidavit is not defective. He argued that the Oaths and Statutory Declaration Act [Cap. 34 R. E.

2019] does not prohibit a joint affidavit. He argued further that, the ***Exparte Matovu's case***, (supra), did not prohibit joint affidavit to be filed in court. Arguing the 4th ground, counsel for the applicants submitted that the affidavit in support of the application contains names of all applicants. Counsel for the applicants submitted that, the 4th ground of preliminary objection does not qualify to be regarded as a preliminary objection. Counsel cited the case of ***Karata Ernest and Others v. Attorney General***, Civil Revision No. 10 of 2010, CAT(unreported) as to what amounts to the preliminary objection on point of law. In due course of his submission, counsel for the applicants conceded that, there are no names of the applicants in the notice of application but only their signatures. He conceded further that in absence of their names, this court cannot ascertain who are the applicants. Counsel concluded by praying the preliminary objections be dismissed.

In a brief rejoinder, Mr. Vitalis, counsel for the respondent, submitted that the affidavit has names of deponents and not applicants. Mr. Vitalis argued further that, an advocate can be the deponent but not the applicant. Counsel for the respondent prayed preliminary objections be sustained and the application be struck out.

I have examined the notice of application filed in this application and find that it was made under Order XXXVII Rule 2(1) of the Civil Procedure [Cap. 33 R. E. 2019], Rule 24(1), **24(2)(a)(b)(c)(d)(f)** and **24(3)(a)(b)(c)(d)**, 25(2)(a), 25(7) of the Labour Court Rules, GN. No. 106 of 2007 and any other enabling provisions of the law. I should point out here that, there is no Rule **24(2)(a)(b)(c)(d)(f)** and **24(3)(a)(b)(c)(d)** in the Labour Court Rules, GN. No. 106 of 2007 but we have Rule **24(2)(a), (b), (c), (d), (f)** and **24(3)(a), (b), (c)** and **(d)**. I take it that the drafter of the said notice of application intended to cite these provisions but he/she forgot to put comma where it is supposed to be. I therefore, find that the omission is not fatal.

It was argued by Mr. Vitalis, counsel for the respondent that Rule 2(1) of Order XXXVII of Cap. 33 R.E 2019, (supra), cited by the applicants in the application is not applicable in the application as applicants are applying for temporary injunction pending determination of the dispute at CMA. On the other hand, Mr. Mrema, counsel for the applicants submitted that, the notice application properly moved the court to issue the order prayed for and conferred jurisdiction to this court to issue temporary injunction. Mr. Mrema was of the view that failure to cite section 94(1)(f)(ii) of Cap. 366 R. E. 2019,(supra) and

section 51 of Cap. 300 R. E. 201, (supra), has no effect to the application. In my view, the submission by Mr. Mrema, counsel for the alleged applicants is not correct. Section 94(1)(f)(ii) of the Employment and Labour Relations Act (supra) is clear that the Labour Court has exclusive jurisdiction on an application for injunction. This section provides:†

"94(1) Subject to the Constitution of the United Republic of Tanzania, 1977, the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provisions of this Act and over any employment or labour matter falling under common law, tortious liability, vicarious liability or breach of contract and to decide-

(f) applications including -

(i) N/A

(ii) an injunction.

In addition to the foregoing, section 51 of the Labour Institutions Act, (supra), gives exclusive jurisdiction to the Labour Court on matters relating to labour laws. The said section reads:-

"51. Subject to the Constitution and the labour laws and over employment matter falling under common law, tortious liability, vicarious liability or breach of contract within the pecuniary jurisdiction of the High Court, the Labour Court has exclusive civil jurisdiction over any matter reserved for its decision by the labour laws".

From the foregoing, Section 94(1)(f)(ii) of the Employment and Labour Relations Act, supra, is a specific provision giving exclusive jurisdiction to the Labour Court to hear and decide an application for

temporary injunction on any matter relating to labour laws. There is no doubt that the application at hand relates to labour laws. It was rightly conceded, in my view, by counsel for the applicant that, this is a specific provision, unlike Rule 2(1) of Order XXXVII of the Civil Procedure Code, supra, which is of general applications. In addition, counsel for the applicants, correctly conceded that, when there is a specific provision, normally a resort is to that specific provision and not to the general provision. It was not proper for the applicant not to cite section 94(1)(f)(ii) of the Employment and Labour Relations, supra, that gives this court exclusive jurisdiction to grant temporary injunction relating to labour matters. The notice of application was therefore defective.

In the 2nd ground of preliminary objection, it was argued by Mr. Vitalis, counsel for the respondent, that the joint affidavit offended the provisions of the Oaths and Affirmation Rules [Cap. 34 R. E 2002] and that the same looks like a joint plaint for being improperly sworn or affirmed. On the other hand, Mr. Mrema, counsel for the applicants submitted that the said Rule did not prohibit joint affidavits to be made.

I have examined the joint affidavit and find that, after the names of the 42 persons, it reads:

" an Adult, Male and Female, Muslim and Christian by Faith and Resident of DAR ES SALAAM, DO HEREBY SWEAR/STATE and AFFIRM as follows:-"

It is unclear as to whether the deponent has both gender i.e., male and female because it is stated "an adult male and female". It is further confusing, that the person sworn and affirmed at the same time. I am of that view because of the use of "and" which means conjunctive and not disjunctive. In my view, this is what confused counsel for the respondent. It is clear from the Oaths and Affirmation Rules [Cap. 34 R. E 2002] that either the person has to swear in case of the Christian or affirm in case of the Muslim. A person cannot swear and affirm at the same time. I am in agreement with counsel for the applicants that the said Rules did not prohibit joint affidavit but the way the alleged joint affidavit was drafted, in my view, it is not proper. Counsel for the applicants was supposed to draft it in a such a way that does not create confusion on gender and taking oath or affirmation. The preliminary objection raised by Mr. Vitalis, counsel for the applicant, in my view has merit.

In the last preliminary objection, it was argued by counsel for the respondents that the notice of application has only one name of the applicant namely; Justus Masengo and not others. In his view, this made the whole application to be fatally defective. Responding to this ground,

Mr. Mrema, counsel for the applicants submitted that names of the applicants are in the joint affidavit and that the notice is properly before the court. In brief rejoinder, Mr. Vitalis, counsel for the respondent submitted that the affidavit contains names of the deponents and not applicants because an advocate can be a deponent but not an applicant. It is true that the notice of application was supposed to show the names of the applicants. It is true further that names of the applicants can only be found in the notice of application while the affidavit is expected to contain names of deponents. It was correctly, in my view, submitted by Mr. Vitalis, counsel for the respondent that an advocate can swear or affirm an affidavit as deponent, but that does not make him or her the applicant. An advocate is there to represent the applicant, who at any time, may fire him and engage another new advocate. The advocate in representing his client does not turn to be the owner of the case or become party to the case.

I have read Rule 24(1) and (2) of the Labour Court Rules, GN. No. 106 of 2007 and find that the notice initiates applications in this court and that it has to be signed by a party bringing the application. The said Rules reads:-

"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 these Rules, **signed by the party 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 relief sought;

(d) an address at which that party will accept notices and service of all documents in the proceedings;

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

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

From the quoted Rule and the notice of application in the application at hand, it is undisputed that the person who is indicated that signed the notice of application in terms of this the above Rule is Justus Masengo as his name appears in the said notice. There is no names of other applicants in the notice of application, as such, it is unknown who are the applicants other than the said Justus Masengo though the said

notice of application contains signatures of the unknown persons. Counsel for the applicant contended that so long as the joint affidavit contains names, these are also the same persons who signed the notice of application. That assumption is not correct. By the way, assumptions is not part of legal training. We, lawyers were trained to deal with facts and apply them to the law and not assumptions. We should leave assumptions to the professions which assumptions is order of the day.

I agree with Mr. Vitalis that an affidavit can be sworn or affirmed by any person including an advocate but that does not make him to be applicant. It is therefore wrong to assume that the names and signatures of the deponents in the affidavit is the same as the applicants in the notice of application. In my view, the notice of application was supposed to show clearly, the names of the applicants and their signatures. Failure to indicate names of the applicants in the said notice of application, made the said notice to be defective. The court of appeal was confronted with all most a similar issue in the case of ***Hsu Chin Tai & 36 Others v. The Republic***, Criminal Appeal No. 345 of 2009(unreported). In ***Hsu Chin Tai'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:-

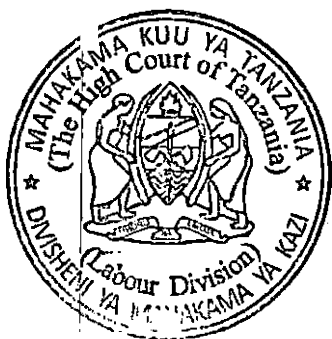
"A question we ask ourselves, is this a joint notice of appeal? With respect, we think not. It is only one appellant Hsu Chin who has been identified by name. The rest are referred to as "OTHERS", but who are they? How do we know that the "36 others" were desirous of appealing to this Court? With respect,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

Consequently, the Court of Appeal found the notice of appeal incompetent and struck it out.

In the application at hand, the notice of application that initiated this application as explained hereinabove, have only the name of Justus Masengo as the 1st applicant, who, I can confidently say, signed the said notice as the 1st applicants. The rest 41 signatures on the said notice of application is not known the owners thereof. Counsel for the applicant conceded that, in absences of the names of the applicants in the notice of application, it cannot be ascertained who are the applicants. I sustain this preliminary objection.

For all explained hereinabove, I sustain all the preliminary objections and struck out this application for being incompetent.

Dated at Dar es Salaam this 25th day of February 2022.



B.E.K. Mganga
JUDGE