

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA

MISC. APPLICATION NO. 18 OF 2021

(From Complaint Ref. CMA/MBY/06/2020 in the Commission for Mediation and Arbitration for Mbeya at Mbeya)

JACOB CHAULA.....1ST APPLICANT
WEDDY KAPANGE.....2ND APPLICANT

VERSUS

MOHAMED ENTERPRISES (TANZANIA) LIMITED.....1ST RESPONDENT
GENERAL MANAGER METL G. D. ESTATES TUKUYU.....2ND RESPONDENT

RULING

Date of Last Order : 24/11/2021
Date of Ruling : 10/02/2022

MONGELLA, J.

Through their personal representative, Mr. William Mambo, the applicants have filed the application at hand seeking for:

1. Leave to file representative suit on behalf of themselves and other 58 persons against both respondents in intended application for revision of the Ruling of the Commission for Mediation and Arbitration (CMA) issued in Complaint No. CMA/MBY/06/2020.



2. *Extension of time to the applicants to file an application for revision out of time against the CMA Ruling in Complaint No. CMA/MBY/06/2020.*

The application was however confronted with a preliminary objection from the 1st respondent. The preliminary objection contains four points of law as follows:

- i. *That the applicants' application is hopelessly incompetent for being preferred under wrong provision of the law.*
- ii. *That, the applicants' application is omnibus.*
- iii. *That, the affidavit in support of the applicants' application is incurably defective for not being signed.*
- iv. *That, the affidavits in support of the application are incurably defective for offending the mandatory provisions of Rule 24 (3) (a), (b), (c), and (d) of the Labour Court Rules G.N. No. 106 of 2007.*

While arguing the preliminary objection, by written submission, the 1st respondent's counsel, Mr. Mwambene, Adam dropped the second point. Arguing on the first point, Mr. Mwambene contended that the application has been brought under Rules 44 (1), (2), and (3) (a) and (b) of the Labour Court Rules G.N. No. 106 of 2007. He argued that with the exception of Rule 44 (2) the rest of the provisions invoked to move the court are

irrelevant in the prayer for leave to file a representative suit by the applicants.

In relation to the prayer for extension of time, he argued that the relevant provision is Rule 56 (1) of the Labour Court Rules, however the applicants have included Rules 55 (1) and (2) of the Labour Court Rules, which are only applicable where there is no specific rule for a particular prayer made before the court. He added that Rule 55 (1) and (2) provides for inherent powers of the court like section 95 of the Civil Procedure Code, Cap 33 R.E. 2019, thus not applicable where specific provisions are in place. He referred the court to the case of **OTTU on Behalf of Mwanaisha Juma and Others vs. Ubungo Garments Ltd.**, Misc. Labour Application No. 550 of 2019 (HC Labour Div. at DSM, unreported). He thus prayed for the application to be struck out.

With regard to the third point, Mr. Mwambene challenged the competence of both supporting affidavits on the ground that they lack signature. Referring to Rule 24 (3) of the Labour Court Rules G.N. No. 106 of 2007, he argued that it is mandatory for any application before the Court to be supported by an affidavit. However, he said, since the applicants' affidavits are not signed, they are defective and cannot support their application. He invited the Court to be guided by the principle settled by the Court of Appeal in the case of **Director of Public Prosecutions vs. Dodoli Kapufi and Patson Kasalile**, Criminal Application No. 11 of 2008 (unreported), which enumerated the essential ingredients of a valid affidavit which include signature of the deponent.

On the fourth point, Mr. Mwambene faulted the applicants' affidavits for offending the provisions of Rule 24 (3) (a), (b), (c) and (d) of the Labour Court Rules. He argued that the said provision specifically requires inclusion in the affidavits statement of legal issues, reliefs sought, and list of documents to be relied upon by the applicant, in addition to the material facts stated. Referring to the applicants' affidavits, he argued that the same did not comply with the requirement of the law as provided under Rule 24 (3) (a), (b), (c) and (d) for not including statement of legal issues, reliefs sought and list of documents to be relied upon. In the premises, he contended that the only remedy is to strike out the application.

The applicants engaged a personal representative, one Mr. William Mambo. Mr. Mambo opposed all the points of preliminary objection. Replying on the first point, he found no fault in the applicants' application on the ground that the relevant provisions were included. He argued that the 1st respondent's contention lies on additional provisions included in the application. He added that the respondent's counsel has acknowledged that the relevant provisions were included in the application, but challenged the additional provisions.

Mr. Mambo had a stance that the addition of other provisions does not render the whole application defective. Referring to the case of **Benedict Kilembe vs. The Republic**, Criminal Application No. 03 of 2015 (CAT at Mbeya, unreported), he contended that where there is a relevant provision in the application, the issue of other irrelevant provisions becomes immaterial and not fatal. He distinguished the case of **OTTU vs. Ubungo Garments** (supra), cited by Mr. Mwambene on the ground that

the case only narrated the function of Rule 55 (1) and (2) of the Labour Court Rules and the consequences of failure to cite proper provision or incomplete citation. He prayed for the Court to disregard this point of preliminary objection.

With regard to the second point, Mr. Mambo contended that the provision of Rule 24 (3) of the Labour Court Rules were adhered to. He denied the affidavit to have not been signed. He invited the Court to go through the application documents in the court file and see for itself on whether the respondent's preliminary objection is founded. On the other hand however, he argued that, if the 1st respondent received an unsigned copy then that must have been a mistake which can be cured by serving him with a signed copy. On those bases he distinguished the case of **Director of Public Prosecutions vs. Dodoli Kapufi** (supra) cited by Mr. Mwambene.

On the fourth point, Mr. Mambo disputed the 1st respondent's claim that the affidavit did not contain statement of issues, reliefs sought and list of documents. He argued that the applicants complied with the requirement of the law only that they did not put the same under specific headings. He invited the court to see paragraphs 3, 4, 5, 6, 7, 8, 9, and 10 of the applicants' affidavits whereby the statement of legal issues, the reliefs sought and the list of documents have been provided. He further contended that there is no specific format on how the affidavit should be drafted.



With regard to the list of documents, he argued that Rule 24 (3) of G.N. 106 does not put it mandatory that a list of documents be included in the affidavit. He said that in the notice of application, the applicants state clearly the list of documents to be relied upon. On the other hand, citing the case of ***Yakobo Magoiga Gichere vs. Peninah Yusuph***, Civil Appeal No. 55 of 2017 (CAT at Mwanza, unreported) and **Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977, as amended**, he averred that the preliminary objection is based on procedural technicality, which should not entangle the court from dispensing justice substantively. He urged the Court to invoke the overriding objective principle under the law.

After considering the arguments by both parties, I wish to deliberate on the first and second points collectively. On these points the respondent finds the applicants' supporting affidavits defective for including wrong provisions of the law and for not being signed. I, in fact, do not intend to let these points detain me much. As argued by the applicants and admitted by the counsel for the respondent, the correct provisions, that is, Rule 44 (2) and Rule 56 (1) were also listed, only that the applicant added other irrelevant provisions. I thus find this being a minor error and curable under the overriding objective principle by even cancelling the irrelevant provisions by hand. See: ***Alliance One Tobacco Tanzania Limited & Hamisi Shoni v. Mwajuma Hamisi (as Administratrix of the Estate of Philemon R. Kilenyi) & Heritage Insurance Company (T) Limited***, Misc. Civil Application No. 803 of 2018.



With regard to the fourth point, whereby the respondent challenges the competence of the applicants' supporting affidavit for not complying with mandatory provisions of **Rule 24 (3) of the Labour Court Rules**, I wish first to reproduce the said provision for ease of reference as hereunder:

- "(3) The application shall be supported by an affidavit which shall clearly and concisely set out-*
- (a) The names, description and address 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."*

The provision as it goes above provides for the contents of the supporting affidavit to any application made before the Labour Court. The 1st respondent's counsel basically argued that the appellants' affidavits lack the statement of legal issues, the reliefs sought, and the list of documents to be relied upon by the applicants. On their part, the appellants through Mr. Mambo, their personal representative, argued that all the requirements under the law have been complied with. They argued that there is no format in drafting the affidavit whereby some applicants have adopted the style whereby they put specific headings and others, the applicants included, do not put the specific headings. They claimed that the statement of legal issues, reliefs sought and the list of documents have



been included in the affidavit whereby one can find them upon reading the paragraphs.

I agree with Mr. Mambo that drafting of affidavits is a matter of style, however I am of the view that the contents as provided under Rule 24 (3) of the Labour Court Rules have to be complied with. It is unfortunate that while arguing, Mr. Mambo did not specify the paragraphs which contain the items claims by the respondent's counsel to be missing. To this point, I saw it pertinent to thoroughly read the applicants' supporting affidavits. In doing so I found that the affidavits lack the address of the parties and the statement of legal issues. My concern is however on the statement of legal issues arising from the material facts because these are the ones the court is called upon to deliberate upon. They are thus a crucial part of the affidavit and the whole application and the failure to include the same renders the affidavit incompetent.

Such a defect, in my view, cannot be cured under the overriding objective principle, as argued by Mr. Mambo. This is because it is not just a mere technicality, but something of substance within the application and goes to the root of the case. It has been the position of this Court and the Court of Appeal of this land that the overriding objective principle is not applicable in mandatory provisions of the law which go to the root of the matter. See: **Mariam Samburo v. Masoud Mohamed Joshi and Others**, Civil Appeal No. 109 of 2016 (CAT, unreported) and **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 (CAT, unreported).



Mr. Mwambene further faulted the appellants' affidavits for not including a list of documents to be relied upon. He pegged his argument under Rule 24 (3) as well. The Rule however, does not require the affidavit to contain a list of documents to be relied upon. Rather the said requirement is provided under Rule 24 (2) (f) of the Labour Court Rules, which requires a list and attachment of the documents that are material and relevant to the application to be provided and attached to the application as a whole. In his submission however, Mr. Mambo never addressed this issue.

As much as the same is not provided under Rule 24 (3) as argued by Mr. Mwambene, I still find the same crucial and mandatory to the application. The list and attachment of documents informs the Court and the opponent party of the documents it is called upon to deal with. Thus failure to comply with the requirement renders the application incompetent and subject to being struck out. See: **Simon Kamoga vs. Shanta Mining Company Limited**, Labour Revision No. 18 of 2019 (unreported); **Queen Goyayi (supra) Angyelile Elia Mkumbwa v. Coca Cola Kwanza Limited**, Revision No. 27 of 2018 (unreported); **Lugano Chanila v. Tanzania Breweries Ltd**, Revision No. 28 of 2018 (unreported) and that of **Nicholous Sigonda v. Coca Cola Kwanza Limited**, Revision No. 30 of 2017 (unreported).

Considering the non-compliance with the mandatory provisions of the law as discussed above, I find the 1st respondent's fourth point of preliminary objection meritorious and sustain it accordingly. The applicants' application is therefore struck out with leave to re-file within 21 days from



the date of this Ruling. This being a labour matter, each party shall bear his own costs of the suit.

Dated at Mbeya on this 10th day of February 2022.


L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 10th day of February 2022 in the presence of the 1st applicant.




L. M. MONGELLA
JUDGE