IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 312 OF 2021

TANZANIA REVENUE AUTHORITY.....APPLICANT

VERSUS

MULAMUZI BYABUSHA ..... RESPONDENT

RULING

16th & 27th May 2022

Rwizile, J

Before this application came for hearing, the respondent raised a point of objection. It stated that *the application is incompetent for failure to file a mandatory notice of intention to seek revision contrary to regulation 34(1) of the Employment and Labour Relations (General) Regulations GN No. 47 of 2017*. This court was therefore asked to strike out this application.

Mr. Francisco Kaijage Bantu learned counsel, of Eagle Law Chambers' Advocates stood for the respondent, while advocate Ms Jacqueline Chunga was from the Legal department of the applicant.

By way of written submissions, this application was argued. The respondent's main point is that the application is incompetent for failure to file a notice to seek revision of the award before lodging this

application. The learned counsel was clear that the law infringed provides for forms.

It was his view that since CMAF.10, provided for, in the third Schedule was not filed before the CMA, this application is untenable. To cement his view, the learned counsel argued that filing of notice of intention to commence a revision before this court is mandatory. Failure to file it, renders the application incompetent. The wording of the regulation, according to the learned counsel, is coached in mandatory terms, and so the same should be done as provided for under section 53(2) of the Interpretation of Law, Act. The learned advocate was fortified by the decisions of this court, in the cases of **Arafat Benjamin Mbilikila v NMB Bank Plc**, Revision No. 438 of 2020 (unreported) at page 8-9, where it was held that failure to use the specified forms is a fatal defect that cannot be cured by a simple argument.

In yet another case the applicant cited, is **Unilever Tea Tanzania Ltd v Paul Basondole**, Revision No. 14 of 2020 at page 9. This court when sustaining a similar objection, it held that the question of notice is not a technicality, it is a handmaid of justice, which cannot be ignored.

The last decision cited is perhaps the most recent one, it is **Anthony John Kazembe v Inter Testing Services (EA) PTY Limited**, Labour

Revision No. 391 of 2021. The court compared the notice under regulation 34(1) to the Notice of appeal, in both civil and criminal cases, which, when absent the appeal becomes incompetent.

On party of the respondent, Ms Chunga was of the different view. She stated that the application is properly filed before this court, since it was preferred under section 94(1) of Employment and Labour Relations Act (ELRA), and Rules 24,28 and 55 of the Labour Court Rules, GN No. 106 of 2007.

The learned counsel held the view that the aim of rule 34(1) is to inform the CMA that the decision it has made will be contested and should therefore prepare and forward the record to this court for revision as held in the case of **Anthony John Kazembe v Inter Testing Services (EA) PTY Limited**, (supra).

In as much as the applicant admitted none compliance of the regulation, the learned counsel added, that not every none compliance of the law vitiates the proceedings as held by this court in the case of **Alieth Aloyce v Tanzania Posts Corporation**, Revision No. 21 of 2021 at page 12. The learned advocate further submitted that under Written Laws (Misc. Amendment) (No.3) Act No. 8 of 2018, courts are now required to focus on substantive justice, they should not be swayed into procedural

technicality. In this point, she asked this court to refer to the decision in the case of **Ally Ramadhani Shekindo and Another v R,** Criminal Appeal No. 532 of 2017.

To insist on the overriding objectives principle, the applicant cited the following cases, **Bruno Charles Matalu and Mary Juma Masumbuko vs Ndala Hospital**, Labour Application No. 20 of 2018 at page 4 and 5, **Kiko Rajabu Kiko and Another v Bakari Rajabu Kiko, Charles Kimambo v Clement Leonard Kasudya and Another, Yakobo Magoiga Gichele v Peninah Yusuph,** Civil Appeal No. 55 of 2017 and **Gasper Peter v Mtwara Water Supply Authority** (Mtwara) Civil Appeal No. 35 of 2017 .The applicant therefore asked this court to hold that the omission is not fatal.

By way of a rejoinder, it was submitted that the principle of overriding objectives does not apply in the matter at hand.

It was argued that the CMAF.10 should not be filed with the application before this court, but rather it should as matter of law be filed at CMA. It was the learned counsel's view that the cases of **Alieth Aloyce** and **Charles Bruno**(supra) cannot apply here because the principle cannot be blindly applied by ignoring the law. He added that the case of **Mondorosi Village Council and two others v Tanzania Breweries**

Ltd and 4 Others, Civil Appeal No.66 of 2017, it was held that the purpose of the amendments was not to blindly disregard the rules of procedure that are coached in mandatory terms. In his view, let the dictates of section 53(2) of the Application of Laws Act prevail, which makes it mandatory because the word used is "shall" as in this case.

It was his argument further that the notice of revision is important to the extent that an application cannot lie to the Court of Appeal without a notice of intention to appeal. Here, this court was asked to refer to the case of **Kumalija and 17 Others v Iron and Steel Ltd**, Civil Application No. 70 of 2018 and **SGS Societe Generale De Surveille SA vs VIP Engineering & Marketing Limited and Another**, Civil Appeal No. 14 of 2017. The court was therefore asked to strike out this application.

Having heard the submissions of both sides, I think I have to start vouching the essence of the objection raised. As shown before, the point of objection centres on failure on party of the applicant to file a notice of application. It has been stated clearly that failure to file the notice renders this application incompetent. There is not dispute that the record shows, the notice was not filed before the CMA. What I think is important is to see, if failure to file the same notice renders the application incompetent.

To be able to appreciate that, I have to refer to the wording of the law alleged infringed law. Regulation 34 states as follows;

> *34- (1) The forms set out in the third schedule to these Regulations shall be used in all matters to which they refer*
>
> *(2) the forms made under the regulations may be modified, adopted or altered by the minister in expression to suit the purpose for which they were intended.*

It is as smooth as the surface of the drum that regulation 34(1) creates forms in the third schedule and it clearly states that such forms must be applied in the manner they were designed for or shall be used in all matters to which they refer.

To my understanding, the third schedule referred has two types of forms. First category of forms is the so called "TUF" forms which I think, are referring to issues relating to trade unions. These are TUF.1 to 19, which are made under regulations 18,20(2), 21, 25,28, 29 and 31 as well as 34(1).

The second category are the so-called CMA forms which are dealing with management of disputes at the Commission for Mediation and Arbitration. They are CMAF.1 to 10. The forms are all made under regulation 34(1).

To be clear, there are forms that institute pleadings like CMAF.1, which is used to refer a matter for mediation, CMAF.2 is an application for condonation, while CMAF.3, is the summons to attend mediation and CMAF.4, is a summons for witnesses, this is t mention but a few.

Now the subject matter of the objection is failure to file CMAF.10. This form has the title *"Notice of intention to seek for revision of the award"*. It's wording, which, it has been argued, are in mandatory terms state as hereunder;

CMA F.10

NOTICE OF INTENTION TO SEEK FOR REVISION OF AWARD

(Made under Regulation 34(1))

LABOUR DISPUTE No:**.....**

BETWEEN

.....*APPLICANT*

AND

.....*RESPONDENT*

TAKE NOTICE *that the Applicant/Respondent being dissatisfied with the Commission's award in the above-mentioned Labour Dispute issued on.....by Honourable .....****DO HEREBY*** *intend to seek Revision/Review to the High Court of Tanzania (Labour Division) against the said award.*

Please forward as expeditiously as possible certified copies of proceedings and award to the:

High Court of Tanzania,

(Labour Division)

.....(Place).

Dated at .....this..... day of .....

.....

Applicant

Presented for filing this.....day of .....(year)

.....

Registry Clerk

Copy:

Respondent

The respondent has vehemently argued that failure to file this form is fatal as it has been held in the three cases cited. In **Arafat's** case, it was held that since these are special forms, the same should be used and failure to apply the same renders the application incompetent. This decision was followed in **Unilever** (supra), and later, in the case of **Anthony** (supra). When appreciating the two decisions, in the case of **Anthony** the court

equated it with the notice of appeal which if not filed, no appeal can be entertained.

Having considered the wording of regulation 34(1) and the wording in the notice itself that is CMAF.10. I find nothing that suggests that the application before this court becomes incompetent merely because, the CMAF10 was not filed. I think so because, what the regulation insists is that forms named *shall be used in all matters to which they refer*. The words shall be used to matters which they refer, are plain and need no construction. It means in my view, for instance, one should not use CMA.F1 to filed an application for condonation or where it is directed that CMAF.3 has to be used, it should be used for that purpose only. There is nowhere in the law, where it is categorical that CMA.F10 institutes a revision before this court.

It is not proper therefore to compare the notice stated under CMAF.10 to the Notice of Appeal. If the use of CMAF10 was meant to be mandatory it could have been plainly stated in the rules as it is in Rule 68 of the Court of Appeal rules. It is categorically stated under rule 68 of Court of Appeal Rules, **first**, that a notice of appeal institutes an appeal. **Second**, it provides details of the nature of the order to be appealed against, **third**, it provides for time within which to file the same. In other words, one

cannot have access to the Court of Appeal without first filing the said notice. It is explicit therefore, that a notice stated under regulation 34(1) falls short of this status.

In the case at hand, the notice stated here is just an information to the CMA that one has an intention of filing a revision.

The purpose is for expediting trials before this court. That is why, the Commission is simply urged to prepare the proceedings and then forward the same to this court. It does not require any further details about the award and does not inform this court anything about the intended revision.

Furthermore, the *Employment and Labour Relations (General) Regulations GN No. 47 of 2017* are made under section 98 of the ELRA. They are made by the Minister for purpose of carrying out or giving effect to the principles and provisions of the Act. Therefore, they do not govern the conduct of cases and matters filed or to be filed in the Labour Court. I am saying so, because the conduct of proceedings in the labour court are governed by Labour court rules. It is apparent that Labour Court Rules, GN 106 of 2007 is made under section 55 of the Labour Institutions Act. The same are made by the chief Justice in consultation with the Minister.

It is clear to me, that an application filed before this court may be considered incompetent, if it does not comply with section 94(1) of Employment and Labour Relations Act, Rules 24,28 and 55 of the Labour Court Rules, GN No. 106 of 2007. I therefore hold that none compliance of regulation 34(1), does not affect an application that is already before this court. Striking an application that has been filed before this court merely because the CMA was not informed to prepare the pleadings and forward them to this court, is not different from striking out the matter that was heard interparty before the CMA but without proof that CMAF.3 or CMAF.4, which are summons to the parties and witnesses respectively were not used, or where, parties appear before the court for revision without having been served with the summons renders their appearances illegal. This leads me to the conclusion that not every none compliance of the law renders a particular matter incompetent. Therefore, failure to file a notice under regulation 34(1) is not an incurably fatal illegality. It cannot be used in my view to defeat the letter and spirit of rule 3(1) the Labour Court Rules, which provides that this court is a court of law and equity. Equity as I understand it, regards as done what ought to be done. To hold otherwise will be applying technicalities which are not invited in the spirit of Article 107A of the Constitution of United Republic of Tanzania That

said and done, the objection has no merit. It is overruled with no order as to costs.

A.K. Rwizile

JUDGE

27.05.2022