

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE LABOUR COURT DIVISION
(AT DAR ES SALAAM)**

MISC. LABOUR REVISION NO 270 OF 2022

(Arising from Dispute No ('CMA/DSM/KN/741/20/393, Hon, U.N MPULLA Arbitrator)

BETWEEN

LEDGER HOTEL & RESORTS (PLAZA BAHARI BEACH).....APPLICANT

AND

ZEBEDIYA W. CHIKOYA.....RESPONDENT

RULING

19/4/2023 & 27/4/2023

OPIYO, J.

Upon filing counter affidavit, the respondent as well filed notice of preliminary objection on 10/10/2022 to the applicant's application to the effect that the application is defective for being supported by incurably defective affidavit which contravenes Rule 24 (3) (a) of the Labour Court Rules GN, No. 106 of 2007.

In this matter both parties were represented. Applicant enjoyed services of Gilbert Mushi, learned counsel, while respondent was represented by Andrew Chima. In bringing the preliminary objection home, Mr. Chima argued that rule 24 (3) (a) of the Labour Court Rules, (Supra) requires the affidavit to contain the description of parties and their address, but the affidavit in support



of the application by the applicant contains the address of the advocate and not of the parties. He contended that, that constitutes failure to move the court properly. The Rule provides that the application shall be supported by an affidavit which shall clearly and concisely set out the names, description and addresses of the parties:

He argued that, since the word used in the provision is shall, it means, it is a must for the affidavit to contain the said description of parties. He therefore, urged the court to strike out the application. He cited the following cases to substantiate his argument **Jennifer Mlondezi & 3 Others v. Ebrahim Haji Charitable Health Center, Revision Application No 368 Of 2021, Jennifer Mlondezi & 3 Others Versus Ebrahim Haji Charitable Health Center Revision Application No 368 Of 2021, and Ezekiel Andrew Versus African Life Tanzali, Labour Revision No. 346 of 2009, all of HC, Labour Division** (Unreported).

The applicants' counsel, Gilbert Mushi was quick to reply. He started by challenging the submission of the respondent for being misplaced because it made reference to a different application as concerning Labour Revision No. 270/2022, an application for stay of execution, while the applicant did not file



any application for stay of execution. He argued that by filing the submission referring to a different application is tantamount to failure to file submission to the application in question which is a failure to prosecute. He referred to **Misc. Labour Application No. 367 Of 2020 between Marian Boys High School Versus Rugaimukamu Rwekengo** to fortify his argument.

He further submitted that, the applicant's pending application is properly before this Court and it is the respondent herein who is misguided on the interpretation of Rule 24(3)(a) and on the intention of the Legislature. That, the main objective of the rule is to identify the parties to the proceedings and their addresses. In the affidavit supporting this Application, the names and address of the parties are clearly shown. Therefore, he urged the court not to be bound by the authorities cited by the respondent as they are not relevant in our cases and they are of the same court, thus, not binding on this court.

It is the applicant further submission that, affidavit in support should not be read or considered in isolation of Notice of application and Notice of representation. When these documents are read together with the contents of Rule 43(1) (a)(b) and Rule 56(a)(b)(c), then the Court will find out that this application is proper before it.



His further submission is that, if this Court finds out that the affidavit is defective, then the defects is curable because it does not go to the root of the case and the parties are not affected anyhow by such holding. He made reference to the case of **Gaspar Peter V. Mtwara Urban Water Supply Authority (Mtuwasa), Civil Appeal No. 35 Of 2017** where a call to the Court to apply the oxygen principle to save an appeal which had been objected to for having missing documents was accepted under the oxygen principle.

In the view of the above, the applicant submitted that even if the Court finds the affidavit to be defective, the applicant prays to be given leave to amend or to file proper application as the current application was filed on time. The attention of this court was drawn to **Civil Application No. 240/01 of 2019. Between Jamal S. Mkumba & Another v AG.** on possible leave to amend affidavit. He prayed for the preliminary objection to be dismissed.

I had a chance to consider both parties' submission. The law claimed to have been contravened as quoted above clearly specifies that the affidavit which supports the application shall set out the names, description and addresses of the parties. The word used in this rule is shall which means it is mandatory to comply with, as provided under section 53 (2) of the Interpretation of the



Laws, Act Cap 1 RE 2019. For this reason, the binding nature of the provision cannot be undermined. It is unfortunate that, although this would seem a mere technicality that could be easily cured by the overriding objective principle as argued by Mr. Gilbert, but being a mandatory fundamental stipulation of the law, this is not possible. Strength of saying so is gathered from the observation in the case of **Theonance Sichone (supra)** cited by the applicant where it was held that:-

"Regarding the overriding objective principle, we are of the considered view that the same cannot be applied blindly against the mandatory provision of (the procedural law which go to very foundation of the case"

The applicant stated the name and address of the advocates and not the names and address of the parties in their affidavit. I agree that this is in contravention of the law as we cannot be able to know and identify physical address of the parties as it was intended under the law cited. In the case **Jennifer Mlondezi (supra)** also cited by the respondent's counsel, I subscribe to my sister Mteule's holding that:

"The court ruled that, the names of the parties should have been properly described including their physical address. It is not an offence to have the address of their advocate as a postal address for the purpose



of service, but the name of the applicant and (their physical address are important for (the purposes of having an appropriate description required by (the rules. This is the fault which renders the affidavit incurably defective. As such the defective affidavit makes the entire application incompetent before the court. "

From the above observation, it is my finding that affidavit which lacks mandatory contents prescribed by provision of Rule 24(3) of Labour Court Rules (supra) 2007 is incurably defective. The cases cited by the applicant are not relevant as they advocates for expunging the offending paragraph while in our case there is an omission of what is mandatorily required to be included. There is nothing to expunge.

In his reply respondents counsel also argued that the respondent's application is misplaced as it made reference to Rev. No. 270/2022 relating to application for stay of execution, with due respect, provided the same reference number for this application has been referred to a slip of a pen in a submission that it is an application for stay of execution remain insignificant slip of a pen that cannot derail any reasonable mind discussing. In my considered view, a minor slip like the one complained about are readily curable under oxygen principle.



Furthermore, it is true that, the decisions cited by the respondent are of the same court which are not binding upon me. However mere fact that they are not binding is not a certificate for easily departing from them as suggested by Mr. Mushi. It is settled that the court cannot easily depart from its own decision if coherency, consistency and predictability predicted is law is to be maintained (see the case of (see the case of **David David Mbunda v Stanley Joachim Mmanyi, Misc. Land Appeal No. 80 of 2013, HC Land Division, Mansoor, J.**). Therefore, in order to depart from court's own decision, there must be plausible reasons which have not been offered by the applicant. I find the decisions highly persuasive on the matter and therefore subscribe to them all by their holding that I totally pledge to.

That being said the application is therefore, struck out for being supported with incurably defective affidavit as it offends rule 24 (3) (a) of the Labour Court Rules GN no, 106 of 2017. No order as to costs, being a labour matter.



M. P. OPIYO,
JUDGE
27/4/2023