

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

LABOUR REVIEW NO. 07 OF 2023

BETWEEN

SYLVESTER S. MBOJE APPLICANT

VERSUS

CRDB BANK PLC RESPONDENT

RULING

Date of last Order: *16/05/2023*

Date of Ruling: *02/06/2023*

MLYAMBINA, J.

There are three issues of the most general significance arising in this Application. *One*, whether an application for review against the decision of Deputy Registrar in Labour Matters can be brought by way of Chamber Summons supported by affidavit or by way of Memorandum of Review together with a Notice of Review. *Two*, whether a Counsel listed in the notice of representation can hold brief of another Counsel. *Three*, if yes, whether a Counsel holding brief can take and discharge full instructions of the fellow engaged Counsel by the client. The concomitant challenge in resolving the

first issue exist in interpreting the mandatory procedural requirements under the provisions of *Rule 26 (1) of the Labour Court Rules, GN. No. 106 of 2007 (herein the Labour Court Rules)* on the one hand, and *Rule 27 (2) (4), (5), (6), (7), (8) and (9) of the Labour Court Rules (supra)* on the other hand. It calls upon the Court to answering the question; what is the effect of non-compliance with procedural requirements on an application for review of the decision of the Labour Court? In so doing, in my view, the Court will be required: *One*, to strive getting at the real intention of the legislature, by carefully attending to the whole scope of *the Employment and Labour Relations Act (hereinafter ELRA)* to be construed in particular on the provisions of *Sections 77 (9), 94 (1) (c) and 100 (6) of ELRA as well as Rule 26 (1), (2), (3) and (5) of the Labour Court Rules (supra)* thereof which governs review of the proceedings and decisions of responsible body or person. *Two*, impatiently to flexibly interpret procedural provisions of *Rule 24 (1), (2), (3) and 25 (1) of the Labour Court Rules (supra)* which are generic in nature and *Rule 27 (2), (4), (5), (6), (7), (8) and (9) of the Labour Court Rules (supra)* which specifically governs review of Judgements, Decree and Orders of this Court. Before directing the legal mind to those issues, it is albeit important to grasp the brief facts of the application. The Applicant

filed this application asking this Court to review the decision held by Honourable Deputy Registrar E. M. Kassian in the *Application for Execution No. 75 of 2023* dated 22nd March, 2023. Prior hearing, this Court suo moto raised an issue of the application being improperly filed before this Court as it has been brought by way of chamber summons supported with an affidavit instead of memorandum of review contrary to *Rule 27 (2), (4) (5), (6), (7) & (8) of the Labour Court Rules (supra)*. The parties were asked to address the Court on the appropriateness of the application before the Court.

The matter proceeded orally on 16th May, 2023. Both parties were represented by Learned Advocates as indicated in their notices of representation. Ms. Verena Clarence was for the Applicant but on brief of Mr. Roman Masumbuko, whereas Mr. Alex Mianga, Advocate appeared for the Respondent.

Ms. Verena Clarence submitted that; according to *Rule 26 of the Labour Court Rules (supra)*, an application for review is to be brought by chamber application supported by affidavit and the application before the Court was brought under such Rule. She stressed that; *Rule 27(1) (2) (b) & (c) of the Labour Court Rules (supra)* allows the Applicant to bring the said application by way of notice of review to support *Rule 26 of the Labour Court*

Rules (supra). In view of Counsel Verena, the application before this Court was properly filed.

Ms. Verena submitted further that *Rule 27(7) of the Labour Court Rules (supra)* applies when the parties seek to review the decision of another review. However, this application does not seek to review the decision of another review which makes *Rules 27(7) of the Labour Court Rules (supra)* not be inapplicable in the matter before the Court and neither can *Rule 27(8) of the Labour Court Rules (supra)* apply to the matter before the Court for it gives a directive as to what should happen after the application of *Rule 27(7) of the Labour Court Rules (supra)*.

In the alternative, Ms. Verena Clarence prayed that; if this Court finds this application have been improperly filed in line with *Rule 27(7) & (8) of the Labour Court Rules (supra)*, let the Court allow the Applicant to withdraw the application with leave to refile within seven (7) days by considering the interests of justice on the part of the Applicant who waited for his rights from the year 2020.

In response, Mr. Alex Mianga submitted that; this application has been improperly brought before the Court because the same has been brought by the mixture of *Rule 24(1), (2)(a)(b)(c)(d)(e) and (f), 24(3)(a)(b)(c) and (d)*,

25(2)(a)(b) and (c), 76(3), 26(5), 27(1),(2)(b) and (c) of the Labour Court Rules (supra) which signifies that the application is incompetent. He stated that the proper provision is *Rule 27(7) and (8) of the Labour Court Rules (supra)* which dictates that the application for review has to be brought by way of Memorandum of Review.

According to Mr. Mianga, as much as there was laxity and negligence on the part of the Applicant in bringing the incompetent application that contravenes *Rule 27(7) and (8) of the Labour Court Rules (supra)*, let the prayer of the Applicant of withdrawing the incompetent application be granted subject to the law of limitation. But, if the Court decides otherwise in respect of the incompetent application, he prayed for the application to be struck out with no leave to refile.

In rejoinder Ms. Verena Clarence reiterated her submission in chief and stated that the Counsel for the Respondent has declined to submit on the provision of *Rule 26(1) & (2) (supra)*, instead, he has mentioned other provisions but did not talk about *Rule 26(1) and (2) (supra)* on which the Applicant brought the application. In her view, Mr. Mianga could not show any confusion or mixture of the Rules.

Ms. Verena submitted that there was no negligence at all for bringing the application under *Rule 26(1) & (2) of the Labour Court Rules (supra)*.

After considering all parties' submission, I find there is no dispute that this application is for review of Honourable Deputy Registrar's decision in the *Execution Application No. 75 of 2023*. The dispute is as to; *whether this application is properly filed in this Court. Or whether this Court has been properly moved by the Applicant.*

The first step worth of consideration is the reading of the provision of *Rule 26 (1), (2) (b) and (c) of the Labour Court Rules (supra)* which specifically provides for the review on decisions made by responsible person or body performing a reviewable function. *Rule 26 (supra) inter alia* provides:

*1. A party seeking to review **a decision or proceedings of a responsible person or body** performing a reviewable function justifiable by the Court, shall **file a chamber application of review to the body or person and to all other affected parties***

(2) The chamber applications shall be made by a chamber summons supported by an affidavit setting out the factual and legal grounds upon which the Applicant can have the decision or proceedings corrected or set aside,

(b) call upon the responsible person or body to show cause why the decision or proceedings should not be reviewed or corrected

(c) require the responsible body or person to dispatch within ten days the chamber application to the registrar the record of the proceedings ought to be corrected or set aside together with such reasons as required by law or as are required by law or desirable to provide and to notify the Applicant that this has been done. (Emphasis is mine).

The above shows that the provision of *Rule 26 (1) (supra)* deals with the review of the decision made by a person or body whose decision is reviewable by the Court and not the decision of the Court itself. For that reason, the procedure applicable are: *First*, to file a chamber application of review supported by an affidavit to that responsible person or body. *Two*, the responsible body or person is mandatorily required to dispatch the chamber application, the impugned record of proceedings together with the reasons thereof to the Deputy Registrar of this Court. *Three*, the responsible body or person to notify the Applicant on the above first and second procedure undertaken.

For further enlightenment to the Counsel, the responsible person or body includes the Minister and Essential Service Committee. One of

examples in which a review of the decision of the Minister was done by this Court is the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) v. The Attorney General, Minister for Labour and Youth Development and Managing Director Tanzania China Friendship Textiles Co Limited**, Misc. Application No. 1 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported). This was a review application on the exemption order made by the Minister on 28th December, 2007. It was alleged that the employees of China Friendship Textiles Co Limited as well as their Trade Union were not consulted before the exemption order was made. It was argued that the application for review filed under *Rule 24 (2) (supra)* was invalid because *Rule 24 (2) (supra)* is reserved for general applications where the prescribed form is Form No. 4. It was further contended that the appropriate Rule which could be used to move the Court was *Rule 27 (1) of the Labour Court Rules (supra)* under Form No. 6. Upon hearing of the preliminary objection, it was undisputed that the chamber application filed by the Applicant citing *Sections 94 (1) (c) and 100(6) of ELRA* as well as *Rule 26 (1) of the Labour Court Rules* was properly before the Court. The remaining issue for determination was in respect of *Rule 24 (1) and Rule 27 (1) of the Labour Court Rules (supra)*.

It became apparent clear to the Court that a proper construction of *Rule 24 (1) (supra)* is that it is a generic Rule for "any application" while *Rule 27 (1) (supra)* provides for a particular type of notice which is a written notice of review. It was further the view of the Court that *Rule 27(1) (supra)* goes in tandem with *Rule 26 (1) (supra)*. After a thorough analysis, this Court speaking through Mandia J (as he then was) was of the following view:

For *Rule 26 (1)* to operate, there must exist proceedings conducted by a responsible person or body performing a reviewable function. There must also exist a Court, which under *Section 2* is the Labour Court. Necessarily, the responsible person or body performing a reviewable function must be an inferior body, and the Court a superior body which sits in review. *Rule 26 (1)* therefore provides for the second type of application, which is a specific type of application involving review of decisions of responsible persons or bodies performing reviewable functions. After filing the notice under *Rule 27 (1)* the party seeking review files the chamber application under *Rule 26 (1)*. The contents of the chamber application and the procedure to be followed are outlined in *Rule 26 (2) through Rule 26 (11)*. *Rule 27 (2)* provides for review of judgements of this Court for which the procedure to be followed is outlined in *Rule 27 (4) to Rule 27 (9)*...

I entirely subscribe in all fours to the finding of my brethren Mandia J (as he then was) in the **TUICO's case** (supra). To dig further and for the benefit of consumers of this decision, *Rule 24 (1) (supra)* requires "any application" must be made on notice. It has been a position of this Court that failure to initiate an application with Notice as required under Rule 24 is fatal. Reference may be made to the case of **Martha M. Mwachemba v. Wanyama Hotel Limited**, Labour Revision No. 324 of 2013 High Court of Tanzania Labour Division at Dar es Salaam (unreported) which cited with approval the case of **Barclays Bank Tanzania Limited v. Kombo Ally Singoma**, Misc. Application No. 14 of 2011, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

For the sake of this application, *Section 94 (1) (c) (ii) (supra)* covers review of decisions, codes, guidelines or regulations by the Minister under ELRA. For a party who wishes to file a review of the decision of the Minister must invoke the provisions of *Rule 26 (1) of the Labour Court Rules (supra)*. For easy of reference *Section 94 (supra)* provides:

(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-

(a) appeals from the decisions of the Registrar made under Part IV;

(b) reviews and revisions of -

(i) arbitrator's awards made under this Part;

(ii) decisions of the Essential Services Committee made under Part VII;

(c) reviews of decisions, codes, guidelines or regulations made by the Minister under this Act;

(d) complaints, other than those that are to be decided by arbitration under the provisions of this Act;

(e) any dispute reserved for decision by the Labour Court under this Act; and

(f) applications including-

(i) a declaratory order in respect of any provision of this Act; or

(ii) an injunction. (Emphasis added)

Equally, *Section 77 (9) (supra)* covers decisions of essential service committee. Whoever aggrieved with the decision of the essential service committee is also mandatorily required to file review before the Labour Court. The same has to be in compliance of *Rule 26 (1) (supra)*. For easy of reference, *Section 77 (supra)* provides:

(1) For the purposes of this Section, "service" includes any part of service.

(2) The following services are essential services:

(a) water and sanitation;

- (b) electricity;
- (c) health services and associated laboratory services;
- (d) fire-fighting services
- (e) air traffic control and civil aviation telecommunications;
- (f) any transport services required for the provision of these services.

(3) In addition to the services designated in subsection (2), the Essential Services Committee may designate a service as essential if the interruption of that service endangers the personal safety or health of the population or any part of it.

(4) Before the Essential Services Committee designates an essential service under subsection (3), it shall;

- (a) give notice in the prescribed manner of the investigation inviting interested parties to make representations;
- (b) conduct an investigation in the prescribed manner;
- (c) make any written representations available for inspection;
- (d) hold a public hearing at which the interested parties may make oral representations; and
- (e) consider those representations.

(5) Where the Essential Services Committee designates a service as an essential service, it shall publish a notice to that effect in the Gazette.

(6) The Essential Services Committee may vary or cancel a designation made under this Section in accordance with the procedure set out in subsections

(4) and (5) *mutatis mutandis*.

(7) Any party to a dispute as to whether or not a service is an essential service or an employer or an employee is engaged in an essential service shall refer the dispute to the Essential Services Committee for determination.

(8) The party who refers the dispute to the Essential Services Committee shall satisfy the Committee that a copy of the dispute has been served on all the other parties to the dispute.

(9) The Essential Services Committee shall determine the dispute as soon as possible.

(Emphasis added)

Moreso, *Section 100 (6) (supra)* covers review of exemption order granted by the Minister. The review thereof has to be in compliance with *Rule 26 (1) (supra)*. For easy of reference, Section 100 (*supra*) provides:

(1) The Minister may exempt any employer or class of employers from any employment standard contained in Sections 19, 20, 23 to 25, 27, 31 to 34, 41, 42 and 43.

(2) Before the Minister grants an exemption under this Section—

- a) the employer or employers' organization shall satisfy the Minister that they have consulted with the employees affected by the exemption or their registered trade union;
 - b) he shall notify the affected employers and employees or their registered organisations of any proposed exemption and request representations to be submitted within a reasonable period;
 - c) he shall take into account any representations made by the employees or their registered trade union;
 - d) he shall strike a fair balance between the interests of the employers and their employees, taking into account any applicable International Labour Organisation Convention or recommendation.
- (3) An exemption granted under subsection (1) shall;
- a) be in the prescribed form signed by the Minister, and the form shall include a statement of the employers, or category of employers affected by the exemption;
 - b) include any conditions under which the exemption is granted;
 - (c) state the period of the exemption, which may be made retrospective to a date not earlier than the date of the application for exemption; and
 - (d) if the exemption is granted to a class of employers,

be published in the *Gazette*.

- (4) An exemption granted under this Section may be amended or withdrawn by the Minister.
- (5) If the exemption is published in the *Gazette* under subsection (3)(d), the Minister may amend or withdraw the exemption only by notice in the *Gazette* from a date stated in that notice.
- (6) Any person who is aggrieved by the grant, amendment or withdrawal of an exemption or its terms or period, may apply for the review of the decision in the Labour Court.** (Emphasis added)

The Written Laws (Miscellaneous Amendments) (No. 2) Act No. 3 of 2020 via Section 67 which added paragraph (b) to Section 50(2) recognizes the Deputy Registrar as part of the High Court; and so, it excludes him/her as a person or body but rather a Court.

As noted earlier, *Rule 27 (1) and (2) of the Labour Court Rules (supra)* deals with review from Courts decisions (Reviews of judgement in chambers). Unlike the review of responsible body or person performing a reviewable function, a review of the Courts Judgement must follow the procedure outlined under *Rule 27(4) and (5), (6), (7), (8) and (9) (supra)*. For easy of reference *Rule 27 (1), (2), (4) and (5) (supra)* provides:

- (1) *Any review shall be instituted by filing a written notice of review to the Registrar within fifteen days from the date of the decision to be reviewed was delivered.*
- (2) *Any person considering himself aggrieved by a judgement, decree or order from which-*
 - (a) *N/A*
 - (b) *N/A*
 - (c) *N/A*
- (3) *N/A*
- (4) *A copy of the notice to review shall be served on all interested parties.*
- (5) *the notice to review shall substantially be as prescribed in Form No. 6 in the Schedule of these Rules*
- (6) *N/A*
- (7) *On receipt of a copy of the decision of the review, **the Applicant shall within fifteen days file a concise memorandum of review** stating the grounds for the review sought without narratives or arguments (emphasis is mine).*
- (8) *Any party on whom a notice to review has been served may, within fifteen days after the **filing of the Applicant's memorandum of review subject to subRule (7)**, file a concise statement of response in*

respect of the memorandum of review without narratives or arguments.

(Emphasis provided)

This shows that the provision of *Rule 27 (2) (supra)* deals with review of the judgement, decree or order of the Court. In those circumstances, the aggrieved party is mandatorily required to file a concise memorandum of review containing *the grounds for the review sought without narratives or arguments* together with a notice of review. Upon service, the Respondent is required within 15 days to file *a concise statement of response in respect of the memorandum of review without narratives or arguments.*

A typical example of an application for review of the decision of this Court is the case of **Caster Emmanuel Mrema v. Tanzania Ports Authority**, Misc. Application No. 545 of 2020, High Court of Tanzania Labour Division at Dar es Salaam (unreported). As observed in that case, for a Court to invoke its review jurisdiction there must be manifestly an error apparent on the face of the record. An error should not be established by a long-drawn process of reasoning. A review must emanate from a discovery of some new and important evidence in which the Applicant must convince the Court that

the evidence could not be brought to the Court by reasons beyond the Applicant's control or without unnecessary delay.

In this application, Mr. Roman Masumbuko, the Advocate for the Applicant used a chamber summons supported with an affidavit to move this Court for review of its decision. I find such procedure is contrary to application of review on judgement, decree or order of the Court as provided under Rule *Rule 27 (1), (2) (c), (4), (5), (6), (7) and (8) of the Labour Court Rules (supra)* which requires the application to be filed by way of a memorandum of review. The procedure invoked by the Applicant is applicable for review of the decision of the responsible person or body that includes the decision of the Minister and Essential Service Committee.

One important point to be appreciated by both sides is the difference between Revision and Review. There is a logic why the law requires review of the responsible person or body to be made by chamber summons supported with an affidavit and review of the decision of this Court to be made by way of Memorandum of Review. Such discussion, however, is not relevant in this ruling. The centre of discussion here is on the proper procedure only. But for general understanding of the difference between revision and review one may wish to read the case of **Hussein and Others**

v. Gandawega, Misc. Civil Application No. 66 of 2003, High Court of Tanzania Dar es Salaam District registry (unreported).

Be as it may be, I noted on 17th May, 2023, Counsel Roman S.L. Masumbuko, by way of a letter, availed this Court with the decision of the case of **Yakobo John Masanja v. MIC Tanzania Limited**, Labour Revision Application No. 385 of 2022. He insisted that the two applications of *Labour Review No. 6 & 7 of 2023* emanated from the Deputy Registrar's decision. Therefore, to him, the appropriate provision is *Rule 26 of the Labour Court Rules (supra)* and not *Rule 27 of the Labour Court Rules (supra)*.

I agree with Counsel Roman that the proper procedure to challenge the decision of this Court is by way of review and not revision or reference or appeal to the same Court. However, the cited case of **Yacobo Masanja** is distinguishable to the instant case. In the former case, the issue was *whether the High Court has jurisdiction to entertain revision proceedings against the decision of the Deputy Registrar*, whereas in this matter, the issue is; *whether the Court has been properly moved to invoke its review jurisdiction*. With the sense of humility, I incline to observe that it was a slip of the pen to mention *Rule 26 (supra)* in **the case of Yacobo Masanja**.

The proper provision for moving the Court to review its decision is *Rule 27 (1) (2) (c), (4), (5), (6), (7) and (8) of the Labour Court Rules (supra)*.

Again, Mr. Roman Masumbuko has contended that he is conversant with the matter. However, the notice of representation mentions other Counsel including Ms. Verena. For easy reference, the notice of representation provides:

TAKE NOTICE THAT, ROMAN S.L MASUMBUKO, VELENA CLEMENCE, FRATERINE MUNILE and NORBERT TARIMO (Advocates) of M/S Roman Attorneys have been appointed as authorized Representatives of the Applicant in the present matter and their address is as set bellow:

In my understanding, each one of those learned Advocates mentioned in the notice of representation could appear and proceed over such matter. As such, to answer the second issue, a Counsel listed in the notice of representation cannot hold brief of another Counsel, if she does, she should be in the position to proceed.

Again, to answer the third issue; *whether a Counsel holding brief can take and discharge full instructions of the fellow engaged Counsel by the client*. As a general Rule, I hold that; an Advocate holding brief has no

instruction from the client. Instructing an Advocate to do something on behalf of client is the exclusive province of the client. Such Advocate has neither contractual nor legal mandate to instruct another Advocate to handle case on behalf of the client as this is a client's province. But brief does not mean that Advocate should appear and just seek for adjournment. Accepting to hold brief goes with corresponding duties to defend the prayer. It is discouraged for an Advocate to hold brief for adjournment if he/she lacks proper information or knowledge on the prayer. As such, every advocate must abide to the professional ethics and etiquette before accepting a duty of holding brief on any matter.

But if the Advocate is listed in the notice of representation on labour matters, as it is in this application, such Advocate can discharge full responsibility on the matter. For that reason, Ms. Verena had equal authority to handle the instant application with that of Roman Masumbuko.

In the end result, failure to use the proper document in this application for reviewing the Deputy Registrar's decision renders the application incompetent and hence the Court is not properly moved. The remedy to the application improperly filed is to be struck out, as I hereby do. Being a labour

matter, and there being no any injustice occasioned by the Applicant, I issue no order as to costs.

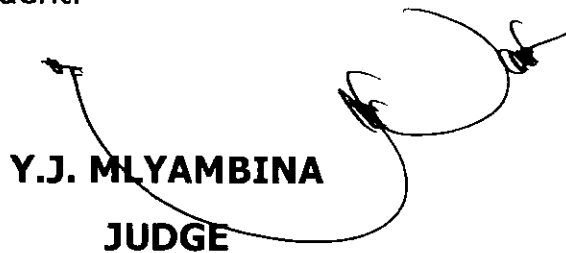
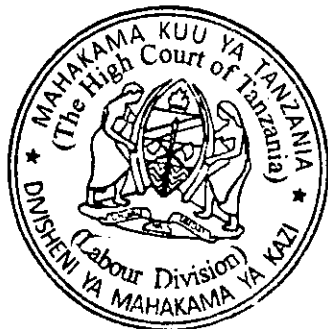


Y.J. MLYAMBINA

JUDGE

02/06/2023

Ruling delivered and dated 2nd June, 2023 in the presence of the Applicant and Learned Counsel Roman Masumbuko for the Applicant and Alex Mianga for the Respondent.



Y.J. MLYAMBINA

JUDGE

02/06/2023