

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

MISCELLANEOUS LABOUR APPLICATION NO. 244 OF 2023

BETWEEN

CRDB BANK PLC APPLICANT

VERSUS

SYLVESTER SAMSON MBOJE RESPONDENT

RULING

Date of last Order: 18/09/2023

Date of Ruling: 11/10/2023

MLYAMBINA, J.

In the instant matter, the Applicant calls upon the Court to extend the time within which to file the Notice of Intention to seek Revision (CMA F.10), to enable the Applicant to file the application for extension of time to file revision out of time against the Award of the Commission for Mediation and Arbitration at Ilala, in *Labour Dispute No. CMA/DSM/ILA/673/2020/349* delivered before Hon. Mbeyale Arbitrator on 21st September 2022 on the following grounds:

- (a) That the Notice of Intention to seek revision together with the *Labour Revision No. 318 of 2022* were timely filed but struck out for technical reason.
- (b) That, the Award of the Commission for Mediation and Arbitration is tainted with illegalities which can only be

rectified if the Court extend the time to file a Notice of Intention to seek revision to enable the Applicant to file the application for extension of time to file revision out of time.

In response to the application, the Respondent's Counsel Mr. Roman S.L. Masumbuko, raised three preliminary objections:

- i. That, the present application is misconceived and bad at law for lack of enabling provisions to entertain the present application on extension of time to file CMA Form No. 10.
- ii. That, the Court is *functus officio* with regard to the application for extension of time to refile the notice of intention to file revision.
- iii. That, the present application is incompetent for being supported with incurably defective affidavit.

When the matter was called for hearing of the preliminary objection, Mr. Masumbuko withdrew the first preliminary objection and remained with the second and third preliminary objections.

With regard to the point of being *functus officio*, Mr. Masumbuko submitted that; on 22/11/2022 through *Revision No. 318 of 2022*, the Applicant prayed for leave to refile the CMA form No. 10 and the revision but the Court refused to grant the same. According to Mr. Masumbuko, such decision made by Hon. Maghimbi, J has never been set aside. He

argued that the only avenue available was to appeal under *Section 5(1)(c) of Appellate Jurisdiction Act*. He insisted that the Applicant's right to refile has been terminated by this Court. He was of the view that what the Applicant is asking now is to set aside the decision of predecessor Judge which is not acceptable in the administration of justice. To support his submission, Mr. Masumbuko referred the Court to the case of **Mohamed Enterprises (T) Ltd v. Masoud Mohamed Nasser** Civil Application No. 33 of 2012 Court of Appeal of Tanzania at Dar es Salaam (unreported), pp 17-18. Mr. Masumbuko urged the Court to find that it is *functus officio* to grant leave to allow refiling of CMA Form No. 10 or revision out of time.

Responding to the second preliminary objection, Mr. Alex Mianga, learned Counsel for the Applicant strongly submitted that the Court is not *functus officio* because it is the requirement under *Rule 55(1), (2) & 56(1) & (3) of the Labour Court Rules* to file an application for extension. He maintained that the application before Hon. Maghimbi was struck out. It was not dismissed. Therefore, the parties are allowed to come back with an application for extension of time.

Further, Mr. Mianga disagreed with the contention that if this Court grants the application will tantamount to settling aside the order of the

predecessor Judge. He was of the view that the preliminary objection would stand only if the application was dismissed. He, therefore, distinguished the cited case of **Mohamed Enterprises (T) Ltd (supra)** to the circumstances at hand.

After considering the rival submissions of the parties, the issue is; *whether the matter is functus officio*. The term *functus officio* was defined in the case of **Omahe Garani v. Wambura Francis**, Miscellaneous Land Appeal No. 31 of 2020, High Court of Tanzania Musoma Sub Registry where the Court stated that:

The phrase *functus officio* means that having discharged his duty and thus ceased to have any authority over a matter. The Black's Law Dictionary defines *functus officio* to mean a task performed. In the case of **School Trustees of Washington City Administrative Unit v. Benner**, 222 N.C. 566, 24 S.E.2d 259, 263, quoted in the dictionary defined the phrase *functus officio* as follows- Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect. **Blanton Banking Co. v.**

Taliaferro, Tex. Civ. App., 262 S.W. 196/ (emphasis is added)

Mr. Masumbuko insisted that this Court is *functus officio* because on 22/11/2022 in *Revision No. 318 of 2022* the Applicant prayed for leave to refile the CMA form No. 10 and the revision but the Court refused to grant the same. I have revisited the order in question. The Court stated as follows:

The Applicant having conceded to the points of objection raised; this application is hereby struck out. I have considered the issue of leave to refile and have noted in all the Applicant's documents, that at no place there is evidence that a principal officer has signed the document, it just says "Applicant" while the Applicant is a body cooperate. I find that the discrepancies leave a lot to be desired and for that reason, *unless it will be shown that the Bank intends to file revision*, this application is hereby struck out without leave to refile. [Emphasis added]

The above order speaks by itself, *Revision No. 318 of 2022* between the parties herein was struck out but left open for the Applicant to seek leave to refile if the Applicant intended to file revision. Under such circumstance, I join hands with Mr. Mianga that this Court is not *functus officio*. That would have been the position if the matter was dismissed or

categorically denied leave to refile by Hon. Maghimbi, as Mr. Masumbuko wants this Court to believe. To the contrary the order only struck out the application leaving the Applicant with a choice to file afresh a competent application by restarting the process afresh. Thus, the objection in question lacks merit and is hereby overruled.

Regarding the last preliminary objection, Mr. Masumbuko submitted that the supporting affidavit of Paschal Mihayo clearly states at Paragraph 1 that he is the Principal Officer of the Applicant handling all contentious matters and he has all documents relating to this matter. That, his knowledge comes from the document. However, under verification at page 4, he states that paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 & 18 are true to the best of his knowledge.

Mr. Masumbuko went on to submit that the remaining paragraphs 10,11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 23, 24, 25, 26 which are based on the information received from external legal Counsel Alex Mianga, the information he believed to be true are defective. He contended that Alex Mianga is not working with CRDB Bank PLC. But there is no affidavit of Alex Mianga. Therefore, what is deponed is all hearsay and the Court cannot rely on the same. To support his submission, Mr. Masumbuko referred the Court to the case of **Franconia Investments Ltd v. TIB**

Development Bank Ltd, Civil Application No. 270/01 of 2020 Court of Appeal of Tanzania at Dar es Salaam (unreported) p. 4 second para.

In response to that objection, Mr. Mianga submitted that he didn't swear an affidavit because the information stated in the verification clause clearly shows that the deponent obtained the information from Alex Mianga, a seasoned Lawyer who has always been in conduct of this matter. He distinguished the case of **Franconia Investments Ltd** (supra) to the case at hand because in that case it was the Applicant who was giving the inner information of the Respondent without knowing that such information ought to have been given by the Respondent. He added that; the parties to the referred case were distinct to each other. Whereas in this case, the parties are related for engagement and he is listed in the notice of representation.

In alternative, Mr. Mianga submitted that; if their affidavit is considered to be defective, the Counter affidavit will also suffer the same. He added that the Applicant had been seeking and hiding. He therefore prayed not be caught on the web of technicalities and the matter be decided on merits.

In the matter hand, the contested verification clause states as follows:

I **PASCAL MIHAYO** do hereby verify that what is stated herein above in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 18 is true to the best of my own knowledge and belief and what is stated in paragraph 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23, 24, 25 and 26 is based on information received from the Applicant's external legal counsel Advocate Alex Mianga, the information I verily believe to be true.

The deponent clearly stated that some of the information in the mentioned paragraphs are information received from Advocate Alex Mianga. It is Mr. Masumbuko's strong argument that the application should also have been accompanied by the affidavit of the mentioned Advocate. I join hands with Mr. Masumbuko's arguments because it is abundantly clear in numerous decisions including the case of **Franconia Investments Ltd** (supra), that:

...If an affidavit mentions another person, then that other person should also take an affidavit.

Again, in the case of **NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (unreported), the Court held that:

...an affidavit which mentions another person is hearsay unless that other person swears as well.

Furthermore, in the case of **Power and Network Backup Ltd v. Olafsson Sequeira**, Civil Application No. 307/18 of 2021, Court of Appeal, Dar es Salaam (unreported), the Court held that:

It is a settled position of the law that if an affidavit mentions another person, that other person must swear an affidavit otherwise it will be hearsay.

In the premises, since there is no affidavit deposed to prove the contents contained under paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23, 24, 25 and 26, the contents mentioned in the named paragraphs are expunged from the records for being hearsay. An affidavit being oral evidence it cannot contain information which is not true. Mr. Masumbuko strongly urged the Court to dismiss the application for being accompanied by defective affidavit. In the circumstances of this case, I decline Mr. Masumbuko's prayer for the following reasons.

One; The paragraphs which contain information received from the named Advocate are the ones which states the reasons for the delay. Therefore, the same being expunged from the record, leaves the application incompetent. This is also the Court of Appeal's position in the case of **Said Issa Ambunda v. Tanzania Harbours Authority**, Civil Application No. 177 of 2004, Court of Appeal of Tanzania at Dar es Salaam (unreported) where it was held that:

A notice of motion seeking orders for enlargement of time...must be accompanied by an affidavit bearing the grounds for the delay. If the affidavit does not contain the grounds for the delay, the application is incompetent.

The remedy for incompetent application is to strike out and not to dismiss as sought by Mr. Masumbuko. That was also the decision in the case of **Said Issa Ambunda** (supra).

Second; this Court being a Court of record recognizes that numerous applications have been filed by the Applicant to pursue the Court to determine the merit of application. To date the merit of the application has never been heard despite the efforts made by the Applicant.

In the premises, the application is struck out for being incompetent. Let each party bear her/his own costs.

It is so ordered.



Y. J. MLYAMBINA

JUDGE

11/10/2023

Ruling delivered and dated 11th October, 2023 in the presence of learned Counsel Roman Masumbuko for the Applicant and Alex Mianga for the Respondent. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

11/10/2023