

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

LABOUR REVISION NO. 7 OF 2022

(Arising from CMA/KIG/DISP/37/2015)

ANATOLY KAGASHE MIKIMBA APPLICANT

VERSUS

TANZANIA PORTS AUTHORITY RESPONDENT

JUDGMENT

19/9/2022 & 28/10/2022

L.M. Mlacha,J

The applicant Anatoly Kagashe Mikimba filed an application for revision against the award of the Commission for Mediation and Arbitration for Kigoma (the CMA) made in CMA/KIG/DISP/37/2015 dated 31/5/2022. That, the court should find that the award was improperly procured and set it aside. The application was supported by the affidavit of the applicant, Anatoly Kagashe Mikimba stating the reasons upon which the application is based. The respondents, Tanzania Ports Authority resists the revision. They filed a counter affidavit sworn by Shija Charles, a principal officer of the

respondent. They also filed a notice of preliminary objection which reads thus: -

1. The application is incompetent for want of notice of intention to file revision contrary to regulation 34(1) of the Employment and Labour Relations (General Regulations) G.N. 47 of 2017, and
2. That, the application is incompetent being supported with a defective affidavit which contradicts mandatory requirements stipulated under Rule 24 (3) of the Labour Court Rules, G.N. No. 106 of 2007.

With leave of court, parties argued the preliminary objections by written submissions. Both Mr. Ignatus Kagashe for the applicant and Mr. Anold Simeo for the respondent filed their written submissions in time. It was the submission of Mr. Anold Simeo that the application is bad in Law for want of joinder of the Attorney General. Counsel submitted that the respondent is a public corporation and therefore no suit could be filed against it without the Attorney General in terms of section 16(3) and (4) of the Government Proceedings Act as amended by the written Laws (Miscellaneous Amendments) Act No. 1 of 2020. Counsel submitted that subsection (3) of section 16 of the Act is Coached in mandatory terms. He argued the court to struck it out.

Counsel went on to submit that the application is incompetent for want of notice of intention to file revision contrary to Regulation 34(1) of the Employment and Labour Relations (General Regulations) GN 47 of 2017. He referred the court to **Mlenga Kalunde Mirobo v. The Trustees of the Tanzania National Park**, Labour Revision No. 6 of 2021 (High Court Mlyambina J.) where it was held that the filing of the notice important. The court held that Regulation 34(1) has a mandatory requirement of filing a notice of revision.

Counsel proceeded to submit that the application is incompetent for being supported by an incurably defective affidavit which contradicts the mandatory requirements of Rule 24(3) (a), (b) and (c) of the Labour Court Rules for want of addresses and description of parties and issues for determination by the court. He referred the court the decision of this court made in **Anthony Ling'wetu & 156 others v. Tanzania Ports Authority**, Miscellaneous Application No. 98 of 2019 (Mwipopo J.) when an affidavit falling short of compliance to rule 24 was found to be defective and incompetent. Further reference was made to the decision of the court of Appeal made in **Ally Linus and others v. Tanzania Harbours Authority** [1998] TLR 5 on the same subject.

Submitting in reply Mr. Ignatus Kagashe told the court that the preliminary objection on the none joinder of the Attorney General was not pleaded in the notice of preliminary objection which has two points only making it improperly before the court. He argued the court to expunge it off the record. He relief on the decision of the Court of Appeal made in **CRDB Bank Ltd v. Gorge M. Kilindu and the Hon AG**, Civil Application No. 74/2010 where it was held that for a smooth administration of justice, parties generally should always confine themselves to the pleadings or notice instead of raising new issues altogether. This will enable both parties and the court to prepare for hearing and determination of the dispute in question thoroughly. He argued the court to find based on Rule 51 (2) of the Labour Court Rules GN No. 106 of 2007 that the preliminary point of objection was raised frivolously and vexatious and struck it out. He went on to say that this point was raised in this same court in **Janet David Mlasi (as administratrix David Mlasi) v. Tanzania Porta Authority, Labour Revision No. 2 of 2002** and dismissed making the move baseless.

Counsel proceeded to submit that indeed no notice of intension to file a revision was filed but the revision itself was filed in time as required by the Law. He submitted that the requirement for the notice of intension to file the

revision is contained under Rule 34(1) of the Employment and Labour Relations (General Regulations) GN 47 of 2017 while the revision is filed under section 91(1) (a), 91(2) (b), 94 (1) (b) (i) of the Employment and Labour Relation Act, 2004 read with Rules 24(1), 24(2) (a), (b) (c) (d) (e) and (f), 24(3) (a), (b), (c), (d), Rule 28(1), (b), (c), (d) and (e) of the Labour court Rules GN No. 106 of 2007. Counsel submitted that the statute should prevail.

Counsel submitted that lack of notice of intension to file a revision in the circumstance where the revision was lodged in time does not render the revision incompetent. It is a curable omission, he said. He referred the court to the decision of the Court of Appeal made in **Martha Michael Wejja v. Hon. Ag. and three others** [1982] TLR 3 and **D.T. Dobie (Tanzania) Ltd v. Phantom Modern Transport** (1985) Civil appeal No. 141 of 2021 (CAT) and **Cooper v. Smith** [1884] 26 Ch. D 700. In Cooper (supra) it was said that procedural irregularities which does not occasion a failure or miscarriage of justice should be neglected. He argued the court to disregard the omission.

Counsel proceeded to submit on the requirements of rule 24(3) of the Labour Court Rules and said that there was none compliance. He went on to say

that the facts of the case of Anthony Ling'wentu (supra) are different from the facts of this case and thus distinguishable. He referred the court to the decision of this court made in **Benjamini Mugagani v. Bunda District Designated Hospital**, Misc. Labour Application No. 12 of 2021 (Mahimbali J) and use the overriding objective principle to cure the omission.

Having examined the submissions, I will now move to examine the objections. My discussion will not be long for I don't see anything serious to detain us. On the first point of objection, I agree with counsel for the applicant that non joinder of the Attorney General was not pleaded. It was just introduced in the course of submissions. This is what we call 'travelling outside the pleadings' which is a procedural sin in our jurisdiction. See **Hamza Byarushengo v. Fulgencia Manya & 4 others**, (CAT) Civil Appeal No. 246 of 2018. The respondent travelled outside the pleadings to introduce a new matter. That is not allowed making the attempt a fruitless exercise. Further, the joining of the Attorney General at the stage of revision is unworkable in view of the decision of this court made in Janel David Mlasi (As an Administratrix of the estate of the late David Mlasi (supra)). The court said categorically that the Attorney General who was not a party at the CMA and cannot be made a party in this court.

On the failure to file the notice of filing a revision, I would say that the Law is clear. It is a legal requirement and must not be treated as a mere technicality. In the like manner affidavits of Labour matters have their own format contained Rule 24 which must be complied with. The affidavit supporting the revision fail short of the mandatory requirements of Rule 24(3) (a), (b) and (c) of the Labour Court Rules for want of addresses and description of parties and issues for determination by the court. The applicant does not deny this fact. It is also clear on the face of it. It is not a mere technicality which may be neglected as counsel for the applicant wants us to understand. It follows that it contradicted the Law and defective.

Having found that the application was filed without the notice of intention to file the revisions and having established that the affidavit supporting the same is defective, it is obvious that the application cannot be left to stand. It was filed against the Law and therefore improperly before the court.

That said, the application is struck out. It is ordered so.



L.M. Mlacha

Judge

28/8/2022

Court: Judgment delivered. Right of Appeal Explained.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha", is written over a horizontal line.

L.M. Mlacha

Judge

28/10/2022

ORIGINAL