

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
DODOMA DISTRICT REGISTRY  
AT DODOMA**

**MISCELLANEOUS LABOUR APPLICATION NO. 16 OF 2022**

(Arising from Labour Revision NO. 03 of 2022)

**FINCA MICROFINANCE..... APPLICANT**

**Versus**

**JALALA HUSSEIN.....RESPONDENT**

**RULING**

Last Order: 04<sup>th</sup> May 2023.

Date of Ruling: 14<sup>th</sup> July 2023.

**MASABO, J:-**

The applicant has moved this court under Rule 24(1), (2), (3) and rule 56(1) of the Labour Court Rules, 2007 G.N. No. 106 of 2007 (the Rules). She is praying for enlargement of time within which to reinstitute his application for revision of the decision of the Commission for Mediation and Arbitration (the CMA) in Labour Dispute No. RF CMA/DOM/18/2021 which was struck out by this court after it was found incompetent.

After being served, the respondent filed a notice of preliminary objection premised on the following two limbs;

1. The application for revision is incompetent for being supported by a defective affidavit on the part of verification.
2. The application for revision is bad in law for being supported by a defective affidavit on the part of jurat of attestation as it has failed to address whether the

deponent was known or introduced to the commissioner for oaths.

Hearing of the application proceeded in writing as per the schedule set by this court (Hon. Mdemu, J as he then was) on 04<sup>th</sup> May, 2023. Ms. Yusta Peter Kibuga learned counsel represented the applicant whereas Mr. Ramadhan S., identified as the respondent's personal representative, represented the respondent. Both parties complied with the scheduling order by filing their submissions on time.

Submitting in support of the first limb of the preliminary objection Mr. Wakulichombe argued that, the verification of the affidavit accompanying the application is defective for want of disclosure of the source of the information contained in the affidavit deposed by one Beatus Malewa, who is identified as the principal officer of the applicant. Amplifying the defect, he submitted that the verification clause shows that paragraph 12(i), (ii), (iii), (iv), (v), (vi) are deposed from the deponent's personal knowledge while paragraph 12(vii) is from the information received from advocate Yusra Kibuga. But, in essence, paragraph 12 does not contain such sub-paragraphs. He argued further that this shortfall is also repeated in the verification of paragraph 13(a) and (b). He proceeded that, a close look at paragraphs 5 to 11 of the affidavit suggests that the information deposed in these paragraphs did not originate from the deponent's knowledge. It is rather, from information received from Prudence Kamanzi who prepared the charge and disciplinary hearing. The latter was present during disciplinary hearing and took part in the termination of the respondent and the conduct of CMA proceedings.

Thus, the deponent must have received all the information about the award and irregularities thereto from his fellow staff or Advocate Yusta Kibuga. Based on these, he concluded that the application is incompetent and should be struck out.

On the second limb of the preliminary objection, he submitted that, the affidavit is braced by a defective jurat. It does not show whether the deponent was known to the commissioner for oaths or introduced by another person. In his view, this offended the provisions of section 5 of the Oaths and Statutory Declarations Act, Cap. 34 and renders the affidavit fatally defective as was in the case of **Ramadhani Pazi & Wambura Malima vs. Tanzania Civil Aviation Authority**, Labour Revision No. 325/2013 (unreported).

In reply Ms. Kibuga submitted that, it is not the requirement of the law for the deponent to state the source of his knowledge. What the law requires is for deponent to state the source of information and that was the position in the case of **Anatol Peter Rwebangira** (supra). Further, she argued further that, the respondent's argument is misconceived as he has misconstrued the position stated in the cited case. On the assertion that paragraph 12 does not contains paragraphs (i), (ii), (iii), (iv), (v), (vi) (vii) and paragraph 13 contains (a) and (b) while in affidavit it is paragraph 13(i), (ii), (iii), (iv) (vi) and (vii), it was argued that it is an excusable human error and is curable by amendment of the affidavit. She subsequently prayed for the leave of the court to amend the affidavit and cited the case of **Sanyou Service Station Ltd vs. BP Tanzania**

**(Now Puma Energy (T) Ltd**, Civil Application No. 187/17 of 2018 (unreported) to bolster her submission.

On the argument that the information in paragraph 5 to 11 of affidavit appear not to have originated from the deponent's personal knowledge, she submitted that the deponent being an advocate and head of legal applicant's legal Department is aware of all the proceedings conducted by employer and CMA proceedings, in relation to this case. In the alternative she reasoned that, this point does not qualify as preliminary point on law as its determination requires evidence to prove whether the deponent had knowledge on those facts or not. The requirement for proof is not in tandem with the principle in the landmark case of **Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors Ltd** (1969) EA 696 which set out the parameters for preliminary objection. Concluding this point, she prayed that the preliminary objection be overruled.

Regarding the second limb on the defect in the jurat it was argued that, the defect is curable as it does not go to the root of the subject matter. She invited the court to invoke overriding objective principle and order amendment of the affidavit and she cited the case of **Bwanaheri Masauna vs. Ulamu Wisaka**, Misc. Land Application No. 55 of 2020 (unreported) in fortification. Regarding the cited case of **Ramadhani Pazi** (supra), she invited this court to ignore it as it is not binding. Lastly, she invited the court to consider the defects non-fatal, overrule the preliminary objection and order amendment of the affidavit so that the application can proceed on merit.

In rejoinder, respondents argued that the errors are fatal. She added that, the applicant should bear the consequences of the defects considering also that this is the second time she has filed an application braced by a defective affidavit. The first time she did the same was in **Finca Microfinance Bank vs. Jalaa Hussein**, Labour Revision No. 08 of 2022 (unreported) which was struck out after it was established that the affidavit bracing it was fatally defective. He distinguished the case of **Sanyou** (supra) cited by the applicant stating that, in that case the issue was on mis-numbering of paragraphs and other paragraphs were not verified. In the present case, the verification clause does not specify the source of the deponent's knowledge, some of the verified paragraphs are inexistent. As for the argument the points raised require evidence and does stand as preliminary objection, he rejoined that the same is with no merit as they are vivid from the affidavit and annexed documents.

On the second preliminary objection, she rejoined that as the applicant has conceded to the anomaly, the preliminary objection should be sustained. As to the principle of overriding objective, she argued that it does not cure the defect and in fortification, she cited the case of **Juma Busiya vs. Zonal Manager, South Tanzania Portal Corporation**, Civil Appeal No. 273 /2020 (unreported). She argued he prayed the court not to grant a prayer to amend the affidavit because once there is a defectiveness in the affidavit which is incurably defective as the one at hand cannot amended because one cannot amend non-existing affidavit. He cited the case of **Ramadhani Pazi** (supra) to bolster his argument.

On the issue that the commissioner for oath not indicating whether he personally knew the deponent, he rejoined that the same was raised, determined and sustained in the application which the applicant had previously filed against the respondent in this matter but struck out for incompetence. Thus, the applicant cannot escape the consequences.

Having considered submissions by the parties alongside the affidavit and counter affidavit, the main issue for determination before this court is whether the preliminary objection raised by the Respondent is maintainable. As the applicant's counsel has questioned the competence of some of the limbs of the preliminary objection, I will prelude my determination with the concept of preliminary objection as expounded in the land mark case of **Mukisa Biscuits Manufacturing Company LTD v West End Distributors LTD** (supra) where the Court held as follows.

".... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration." Law, J.

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."

**Sir Charles Newbold**

From this decision and numerous decisions of the Court of Appeal of Tanzania which has cited the above principle with approval, the law on preliminary objections is very well settled that, a preliminary objection need be on pure point of law apparent on pleadings, as opposed to fact or a mixture of law and facts (see **Mohamed Enterprises (T) Limited vs Masoud Mohamed Nasar**, Civil Application No. 33 of 2012, CAT (unreported); **Britam Insurance Tanzania Limited vs Ezekiel Kingongogo and another** (Civil Appeal 125 of 2021) [2021] TZCA 579 (Tanzlii) and **Gideon Wasonga & Others vs The Attorney General & Others** (Civil Appeal No. 37 of 2018) [2021] TZCA 3534 (Tanzlii))

Sequel to this is the principle that, an affidavit being a substitute of oral evidence need be factual, free from extraneous matter such as hearsay and should be confined to matters within the personal knowledge of deponent thus he is able of his own knowledge to prove save on interlocutory applications on which statements of belief may be admitted (see **Uganda vs Commissioner of Prisons, Ex-parte Matovu** [1966] EA 514; **Salima Vuai Fom v Registrar Of Cooperative Societies and Three Others** [1995] TLR 75 and **Phantom Modern Transport (1985) LTD v D.T. Dobie (Tanzania) Ltd.** Civil Reference No. 15 2001 and 3 of 2002, CAT.

The respondent's counsel has ardently argued that the affidavit bracing the application is incompetent as it bears a fatally defective verification clause which among other things, has verified inexistent facts and matters which, by their very face, did not originate from the deponent but another person. Indisputably, a verification is one of the essential parts of any

valid affidavit. As stated by the Court of Appeal in **Sanyou Service Station Ltd vs. BP Tanzania (Now Puma Energy (T) Ltd** (supra) the verification clause serves a myriad of crucial roles. It helps the court to find the fact which are proved by the parties and to test the genuineness/ authenticity of the averments and to make the deponent responsible. Thus, in the absence of a proper verification, the affidavit will be rendered incompetent. In **Lisa E. Peter vs. Al-Hushoom Investment**, Civil Application No. 147 of 2016 (unreported) the court quoted with approval the Indian Case of **A.K.K. Namibiar vs. Union of India (1970) 35 CR, 121** where it was held as follows:

The reason for verification of affidavits is to enable the Court to find out which facts can be said to be proved on the affidavit evidence or rival parties' allegations may be true to information received from persons or allegation may be based on records. The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence, verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification clause, affidavits cannot be admitted as evidence.

Guided by these principles I will now examine the alleged defects. For easy of reference, I will reproduce the verification clause appearing at the bottom of the 11<sup>th</sup> page of the affidavit. It states;

I, Beatus Malawa, verifies that all what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12(i), (ii), (iii), (iv), (v) and (vi), 13 (a) and (b) and 14 herein is true to the best of my knowledge and what is stated at paragraph (vii) is information received from Advocate Yusta Kibuga.



Undeniably, the verification is pregnant with defects. As argued by the respondent's counsel and conceded by the applicant's counsel, some of the verified paragraphs, notably paragraphs 12 (i), (ii), (iii), (iv), (v) are (vi) are non-existent as paragraph 12 has no sub paragraphs. Similarly defective is the verification of the paragraph 13 as, unlike the varication clause which indicates that it has sub paragraph (a) and (b), this paragraph does not have sub paragraphs. The defect has left paragraph 12 and 13 unverified.

The next contention, concerns the genuineness of the deponent's verification in paragraphs 5, 6, 7, 8, 9, 10 and 11 of the affidavit. Mr. Wakulichombe has argued that, much as the deponent has verified that he has personal knowledge of the facts in these paragraphs, he has no such knowledge as the facts contained in these paragraphs were drawn from disciplinary procedures and the CMA proceedings to which the deponent was neither a party, participant or representative of the applicant hence has no personal knowledge of the same. With respect to the respondent, I will not dwell on this argument because from the face of it, it does not qualify as a preliminary objection. As correctly argued by the Applicant's counsel, it is a blend of law and fact hence outside the realm of preliminary objection set out in the authorities above cited. The question whether the deponent has firsthand information or received the said information from the counsel or other employees certainly requires evidence to resolve. As a preliminary objection cannot be made up of such a blend of law and facts, it is obvious that the argument made by Mr. Wakulichombe is devoid of merit.

A further defect brought to the court's attention is harboured in the jurat as it does not show whether the deponent was personally known to the commissioner of oath or not. Mr. Kibuga has invited this court to invoke the principle of overriding objective and turn a blind eye to these defects so that, the application can proceed to the merit. I respectfully decline the invitation on two reasons. First, and as alluded to earlier while dealing with the first limb of the preliminary objection, a verification is a crucial party of the affidavit as, among other things, it tests the genuineness and authenticity of allegation. As the defect has left the facts in paragraph 12 and 13 unverified, it is obviously unimaginable how this defect can be belittled or cured by the principle of overriding objective considering that the reason for delay is stated in these two paragraphs.

I may also add here that, while still pondering the prayer to invoke the principle of overriding objective and turn a blind eye to the affidavit, I observed that, apart from the two defects above discussed, the affidavit is pregnant with more other defects. *First*, of the 15 paragraphs, only 14 paragraphs were verified. The last paragraph is unverified. *Second*, contrary to the cardinal law on affidavits, that affidavits should not contain prayers and arguments, the last two paragraphs contain arguments and prayers, respectively. Worse still, it is offensive of the principle that when an affidavit mentions another person, such other person should swear an affidavit else the information obtained from such other person will be rendered hearsay (see **Sabena Technics Dar Limited vs. Michael J. Luwaza**, Civil Application No. 451/18 of 2020 (unreported), CAT and **Elihaki Giliad Mbwanbo vs. Mary Mchome Mbwanbo and Another**, Misc. Civil Application No. 449 of 2019 (unreported)). In the

matter at hand, the deponent has named two advocates, namely Mrs Stella Manongi and Yusta Kibuga in paragraph 13(iv) and in paragraph 13(vi) and the verification clause he repeatedly mentioned advocate Yusta Kibuga. Thus, it was incumbent for the said advocate Kibuga to swear an affidavit but there is none on record. Considered conjointly with the above, these defects render the affidavit fatally defective

In the foregoing, the preliminary objection is sustained to the extent above stated and the application is thus struck out for being incompetent. This being a labour matter, there are no orders as to costs

**DATED at DODOMA** this 14<sup>th</sup> day of July, 2023.



  
**J. L. Masabo**  
**JUDGE**