

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

AT DODMA

MISC. LABOUR APPLICATION NO. 11 OF 2022

(Arising from Labour Revision No. 21 of 2020 before High Court, Dodoma District Registry)

TANZANIA ELECTRIC SUPPLY CO. LTD..... APPLICANT

VERSUS

FRANK KASINDE & OTHERS.....RESPONDENT

RULING

Last Order: 9th August, 2023
Judgment: 11th August, 2023

MASABO, J.:-

Aggrieved by an order of this court which dismissed her application for labour revision for want of prosecution, the applicant has moved this court for restoration of the application under rule 24(1), 24(2)(a), (b), (d), (e), (f); 24(3); 24(11) and 36(1), (2) and (3) of the Labour Court Rules, 2007 [GN No. 106 of 2007]. Her chamber summons is accompanied by a notice of application, an affidavit by Norbert B. Kazembe and a notice of representation. After the application being instituted and served upon the respondents, they raised a notice of preliminary objection which is the subject of this ruling. The notice has the following three limbs;

1. The application is bad in law as it contravenes the provision of Rule 24(2) of the Labour Court Rules
2. The application is bad in law as it is supported by a defective affidavit

3. The application is bad in law as the affidavit was sworn by the counsel who was not permitted to make oath

At the *viva voce* hearing of the preliminary objection, both parties had representation. Mr. Norbert Beda, learned State Attorney represented the applicant and the respondents had the service of Mr. Shaban Hamis Dinya, Advocate.

Submitting in support of the first limb of the preliminary objection, Mr. Dinya argued that the present application is incompetent as it contravenes the provision of Rule 24(2) of the Labour Court Rules which requires that the notice of application must be signed by a party to the application. He explained that, contrary to this requirement, the notice accompanying the chamber summons was signed not by the party but by the counsel, one Norbert B. Kazembe. As regards the 2nd and 3rd limbs which he consolidated, he submitted that the affidavit accompanying the application is fatally defective as it was not verified by the deponent who is identified in the opening paragraph of affidavit as Norbert B. Kazembe. The verification is by one Norbert Beda who is different from Norbert B. Kazembe.

Objecting the first limb of the preliminary objection, Mr. Beda argued that it is with no merit as it complies with the requirement of section 56 (c) of the Labour Institutions Act and Rule 43(1)(a) and (b) of the Labour Court Rules which requires the filing of a notice of representation notifying the court of the representative of the respective party and that such representative is

liable to file all the pleadings. He argued that this provision was duly complied with. The notice was filed and it was signed by the applicant's Senior Zonal Manager. By that notice, this court was notified that advocate Norbert Beda Kazembe shall be her representative. As for the consolidated 2nd and 3rd limbs, he submitted that these too are with no merit. He proceeded that much as it is true that the verification appears to have been done by Norbert Beda, there is no harm as the said Norbert Beda is one and the same with Norbert B. Kazembe. The anomaly is a mere 'slip of a pen' which should not be accorded any weight as it does not go to the root of the application.

In rejoinder, Mr. Dinya reiterated his prayer and submission in chief. He added that the mandatory requirement of law is that the notice must be signed by a party, not an advocate. As to the disparity on the names, he argued that the anomaly is serious as it depicts two different people. If the counsel used both names, he ought to have sworn an affidavit in substantiation but none was submitted. Therefore, the affidavit and the application have been rendered fatally defective.

I have dispassionately considered the submission in support and in opposition of the three limbs of the preliminary objection. Starting with the consolidated 2nd and 3rd limbs a verification clause, invariably placed at the bottom of the affidavit, is regarded by law as an essential part of a valid affidavit. There is a plethora of authorities on this. Needless to cite all of them. It will suffice, for purposes of authority, to cited the following decision of Court of Appeal of Tanzania in the case of **Jamal S. Nkumba & Another**

vs Attorney General (Civil Application 240 of 2019) [2021] TZCA 756 (15 December 2021) [Tanzlii] which dealt extensively with verification clause.

The Court stated;

"We shall start with what amounts to a verification clause. The Court in **Director of Public Prosecution v. Dodoli Kapufl and Patson Tusalile**, Criminal Application No. 11 of 2008 (unreported) simply defined verification clause as that part of an affidavit which "*shows the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs*". A similar definition was also given in **Paul Makaranga v. Republic**, Criminal Application No. 3 of 2010 (unreported). As to the rationale of verifying an affidavit, the Court in **Lisa E. Peter v. Al- Hushoom Investment**, Civil Application No. 147 of 2016 (unreported) quoted with approval the Indian case of **A.K.K. Nambiar v. Union of India** (1970) 35 CR 121 which explained the importance of a verification clause in affidavit 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".

Basing on the above cited cases, verification clause is one of the essential ingredients of any valid affidavit . [Empasis added].

Guided by this instructive authority of the apex Court, I will now revert to the merit of the 2nd and 3rd limb of the preliminary objection. Both parties agree that there is anomaly in the verification clause in that, the name of the deponent identified in opening clause of the affidavit varies from the one in the verification clause. In my examination of the contested affidavit, I too have observed the anomaly. The deponent introduced in the opening clause to the affidavit is Norbert B. Kazembe. The verification clause bears the name of Norbert Bedder and the Jurat has the name of Norbert B. Kazembe. Thus, there no dispute that the verification under attack is defective. The only contention between the parties is the consequence of the defect. Whereas Mr. Dinya believes that the defect is fatal and has rendered the affidavit incompetent, Mr. Kazembe is of the view that, the anomaly is a mere 'slip of pen' with no consequences whatsoever to the application as it does not touch on the application. He has, in consequences, asked this court to turn a blind eye to it and proceed with the merit of the application.

On the strength of the authority above, I respectfully decline the invitation. As correctly submitted by Mr. Dinya, in the absence of evidence as to the interchangeable use of names, the law will presume, as it now does, that Norbert B. Kazembe and Norbert Bedder are two different persons. The duty to rebut the presumption rested on none other than the applicant. Having noticed the disparity, the applicant ought to have corrected it by producing a supplementary affidavit, a deed poll or any other credible evidence in proof that the deponent uses the two names interchangeably but he did not. Instead, he has made a rebuttal submission in reply to the preliminary

objection. With respect to the counsel, his purported rebuttal is misplaced and does not attract any weight. It is a trite law in our country that, statements from the bar cannot be acted upon by a court. In the case of **Attorney General vs Mkongo Building & Civil Works Contractors Ltd & Another** (Civil Application No. 81 of 2019) [2019] TZCA 229 (10 July 2019) [TANZLII], the Court of Appeal of Tanzania moved to act on a statement from the bar, held thus;

In the case of **Republic v. Donatus Dominic @ Ishengoma and 6 Others**, Criminal Appeal No 262 of 2018 (unreported), we drew inspiration from a Ugandan case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002] 2EA, in which, the Court of Appeal of Uganda took the position that, a matter of fact cannot be proved by an advocate in the course of making submission in Court. In latter case, the said Court stated as follows:

It is well known a statement of fact by counsel from the bar is not evidence and therefore/ court cannot act on.

[See also - **Convergence Wireless Networks (Mauritius) Limited and Three others v. WIA Group Limit and Two others**, Civil Application No. 263 "B" of 2015 (unreported)].

..... Affidavit information being synonymous to oral evidence could not by any means be established by mere submission by the learned counsel from the bar. [emphasis added].

Similarly, in the present application, the anomaly in the affidavit can not be corrected by a mere submission from the bar more so because the defect is in the verification clause which as previously stated is an essential ingredient of any valid affidavit and in its absence, the affidavit cannot be acted upon. Accordingly, the affidavit has been rendered invalid by this fatal defect and

the application has, in consequences, been rendered incompetent for being supported by an invalid affidavit. The 2nd and 3rd limbs of the preliminary objection are upheld.

Having upheld the 2nd and the 3rd limbs of the preliminary objection, I see no need to proceed to the first limb of the preliminary application as the foregoing findings sufficiently disposes of the application.

Accordingly, the application is struck out. As the application has its genesis in a labour matter, there will no costs.

DATED and **DELIVERED** at Dodoma this 11th day of August 2023



J. L. MASABO
JUDGE