

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

MISC. LABOUR APPLICATION NO. 07 OF 2023

SAID KITUNDU SHOLE.....	1 ST APPLICANT
JOHN F. MACHA.....	2 ND APPLICANT
OSCAR F. MAKINDA.....	3 RD APPLICANT
ABDALLAH A. MZUMBE.....	4 TH APPLICANT
JOSEPHA J. PAULO.....	5 TH APPLICANT
SAFIEL E. MJEMA.....	6 TH APPLICANT
ATHUMAN H. SEMSI.....	7 TH APPLICANT
STEPHEN A. MATIAME.....	8 TH APPLICANT
SELEMAN Y. KIMU.....	9 TH APPLICANT
DONATI MASSAWE.....	10 TH APPLICANT
YAHAYA SADIKI	11 TH APPLICANT
THERESIA F. ZOMANYA	12 TH APPLICANT
JUMA ALLY.....	13 TH APPLICANT
ALFRED MALITI	14 TH APPLICANT
EMMANUEL E. MUSHI.....	15 TH APPLICANT
LAWRENCE D. MSAKI.....	16 TH APPLICANT
KHATIBU S. KETO.....	17 TH APPLICANT
JOSEPH A. NDARU.....	18 TH APPLICANT
BRYSON S. NG'AMBI.....	19 TH APPLICANT
RAMADHANI SUKARI.....	20 th APPLICANT
ISRAEL NYARI.....	21 ST APPLICANT
ADOLPH TEMBA	22 ND APPLICANT
FRANK TILYA.....	23 RD APPLICANT
JEROME BASIL	24 TH APPLICANT
TIMOTH J. TIMOTHEO	25 TH APPLICANT
MASUMBUKO S. KABELEGE	26 TH APPLICANT

ELIANGILISA J. MMBANDO.....	27 TH APPLICANT
EMMANUEL GRIMOO	28 TH APPLICANT
PETER OSHRAEL	29 TH APPLICANT
EDES JOHN	30 TH APPLICANT
LUCIA BERNARD	31 ST APPLICANT
JOSIANA RAPHAEL	32 ND APPLICANT
JOHN N. NYEKELEA.....	33 RD APPLICANT
SAIDI M. SAIDI	34 TH APPLICANT
JULIUS MKUMBO	35 TH APPLICANT
SAMWEL L. JAMES.....	36 TH APPLICANT
CUTHBERTH MASURA.....	37 TH APPLICANT
COSTANTINO GEORGE.....	38 TH APPLICANT
ELIMKUNDA SWAI	39 TH APPLICANT
WLLIAM LYIMO.....	40 TH APPLICANT
PETER SHIMWELA	41 ST APPLICANT
JULIUS MAKARIOS	42 ND APPLICANT
GABRIEL FRANCIS.....	43 RD APPLICANT
ESTER W. MSENGI.....	44 TH APPLICANT
AUGUSTINO MAJO	45 TH APPLICANT
YAHAYA R. JUMA	46 TH APPLICANT
SIMON MOHAMED.....	47 TH APPLICANT
EXAVER MWAMAKA	48 TH APPLICANT
RENATUS M. KALINGA	49 TH APPLICANT
HUSSEIN S. MSAWA	50 TH APPLICANT
JOSEPH YONA	51 ST APPLICANT
MONICA D. KIPANDA	52 ND APPLICANT
JOHN SAMWEL	53 RD APPLICANT
AGNES A. MTUI	54 TH APPLICANT
VALENTINA H. MUSHI.....	55 TH APPLICANT
AMANA RAJABU.....	56 TH APPLICANT
KARIM MPONDA	57 TH APPLICANT
ADAM H. SALEHE	58 TH APPLICANT
HAMZA J. FATAKI.....	59 TH APPLICANT
FATUMA J. HAMISI.....	60 TH APPLICANT
EMILIAN ZABRON.....	61 ST APPLICANT
HOIDA T. MTEI.....	62 ND APPLICANT

AHMED I. ABDALLAH	63 RD APPLICANT
MALULU J. KIMONGE	64 TH APPLICANT
EMMANUEL M. TIWILI.....	65 TH APPLICANT
JOHN S. NGAMILA.....	66 TH APPLICANT
EUZEBIUS NGUYU.....	67 TH APPLICANT
SOPHIA N. KUBEJA.....	68 TH APPLICANT
ESTER NDUTA.....	69 TH APPLICANT
MARTHA N. NSALU.....	70 TH APPLICANT
GLORIA A. MOSSES.....	71 ST APPLICANT
JAINA KARIKENE.....	72 ND APPLICANT
MICHAEL V. MGOVANO.....	73 RD APPLICANT
SAULO E. MJOGOLO	74 TH APPLICANT
YASIN L. LUKANGA	75 TH APPLICANT
REDEMPHTER J. SHIO.....	76 TH APPLICANT
WILSON NGIMBA.....	77 TH APPLICANT
SYPRIAN R. MAHAVILE	78 TH APPLICANT
MWASIT ABEID	79 TH APPLICANT
NEITIWE MGONJA	80 TH APPLICANT
LEONARD T. CHENGA	81 ST APPLICANT
STAIL L. MSANSHI	82 ND APPLICANT
ASSA K. MWAMPONDALI	83 RD APPLICANT
LAMECK GEREMIAH	84 TH APPLICANT
GRACE M. KAHAWA	85 TH APPLICANT
MARIA YASINTI	86 TH APPLICANT
SAID SALAHE	87 TH APPLICANT
RODGERS MASSAWE.....	88 TH APPLICANT
NJOROYOTA MWANGOKA	89 TH APPLICANT
JOHN PETRO	90 TH APPLICANT
BERNARD HAULE	91 ST APPLICANT
JUMA MSENGI	92 ND APPLICANT
COSMAS HASSANI	93 RD APPLICANT
JOHN V. LUOGA	94 TH APPLICANT
ANNA S. MWAIPAJA	95 TH APPLICANT
SILVIA G. WOISO	96 TH APPLICANT
ABUU KISUWA	97 TH APPLICANT
MANASE YOHANA.....	98 TH APPLICANT

TIMOTHEO NDEHAKI	99 TH APPLICANT
LAMECK KIMATH	100 TH APPLICANT
EDMUND S. MSOFE.....	101 ST APPLICANT
PETER MAJAA	102 ND APPLICANT
OMARY ATHUMAN	103 RD APPLICANT
ROBERT MSENGI	104 TH APPLICANT
ANNA J. MWAMBAYA	105 TH APPLICANT
MWILEE MWANIJEMBE	106 TH APPLICANT
JOHN MICHAEL	107 TH APPLICANT
SALEHE BAKARI	108 TH APPLICANT
AMOS MOSSES	109 TH APPLICANT
NAKAZA ELIESIKIA.....	110 th APPLICANT
HASSAN O. KADIO	111 ST APPLICANT
DONATHA KESSY.....	112 ND APPLICANT
THERESIA NDAWONI.....	113 RD APPLICANT
ALISTARIA SWAI	114 TH APPLICANT
YUDA THADEI	115 TH APPLICANT
LEONARD ISINIKA	116 TH APPLICANT
DAUDI YONAH.....	117 TH APPLICANT
BATISTA POKUMTWA	118 TH APPLICANT
LONGINO MNYEMA	119 TH APPLICANT
SAIDI S. ALFAN	120 TH APPLICANT
DOROTHEA MALUMBA	121 ST APPLICANT
JOHNSON H. KILawe	122 ND APPLICANT
LINDERSON J. MOSHI	123 RD APPLICANT
RAJABU MKATI.....	124 TH APPLICANT
WALTER W. SHOO	125 TH APPLICANT
RAPHAEL NYALILE	126 TH APPLICANT
YAHAYA SAIDI.....	127 TH APPLICANT
ROSE EMMANUEL	128 TH APPLICANT
THERESIA CHAPUCHAPU.....	129 TH APPLICANT
ALEX A. NJAU.....	130 TH APPLICANT
VUMILIA MMARY.....	131 ST APPLICANT
RAJABU JUMBE.....	132 ND APPLICANT
DOUGLAS MAKAMBO.....	133 RD APPLICANT
HUSSEIN S. FONGA.....	134 TH APPLICANT

WILSON JUNGWA.....135TH APPLICANT
AMIRI NGWILIZI.....136TH APPLICANT
SHABAN KIVUMA.....137TH APPLICANT

VERSUS

CHIEF EXECUTIVE OFFICER TPC LIMITED RESPONDENT

RULING

20/03/2024 & 27/03/2024

SIMFUKWE, J.

The Applicants hereinabove, filed this application seeking extension of time to lodge notice of appeal against the decision of the High Court in Labour Revision Application No. 33 of 2015 dated 20th July, 2015. The application has been preferred under **section 57 of the Labour Institutions Act**, [Cap. 300 R.E 2019] and **sections 5(1)(c) and 11(1) of the Appellate Jurisdiction Act**, [Cap. 141 R.E 2019]. In response, the respondent's counsel raised four Preliminaries Objections as follows:

- 1. That, this matter has not been properly brought before this Honorable court, the same has never been heard at the CMA nor the Labour Court. Hence this Honourable court has no jurisdiction to entertain it.*
- 2. That, the affidavit in support of the Application contains prayers, see paragraphs 11 and 13 of their affidavit*

3. That, the applicants have not signed their Notice of Representation as directed by the law.

4. That, the applicant is sworn before an advocate contrary to section 8 of the Notary Public and Commissioner for Oaths Act Cap 12.

The hearing of this preliminary objections proceeded by way of written submissions whereas the applicants were represented by Mr. John Faustine Materu, the learned counsel and the respondent enjoyed the service of Mr. David Shilatu, also learned counsel.

Supporting the first limb of Preliminary Objection, Mr. Shilatu submitted that, this matter was filed improperly due to the fact that it has never been heard neither at the CMA nor the Labour court. He stated that, under the labour laws, the disputes handling machineries commences with the Commission for Mediation and Arbitration (CMA), followed by the High Court Labour Division and lastly the Court of Appeal. In that regard, the learned counsel averred that, the High Court is not a proper forum for the parties to initiate the matter as they were first supposed to refer it to the CMA for determination. Mr. Shilatu buttressed his contention with the decision in **Dangote Industries Ltd Tanzania vs Warnercom (T) Limited**, Civil Appeal No. 13 of 2021 which at page 9 ruled that one

cannot go for remedies or any action to a higher court if there are remedies at the lower court. From the foregoing authority, Mr. Shilatu insisted that, this Court is not a proper forum for the parties to initiate the matter.

Regarding the second limb of preliminary objection, Mr. Shilatu contended that, the applicant's affidavit in support of this Application contains prayers. He referred this court at paragraphs 11 and 13 of the affidavit in support of the application and lamented that it contravenes the general rule of practice and procedure. To bolster his argument, Mr. Shilatu cited the case of **Jamal S. Mkumba and Abdallah Issa Namangu vs Attorney General, Civil Application No. 240/01 of 2019** (CAT) and The Case of **Mustapha Raphael Vs East African Gold Mines Mines Ltd**, Civil Application No. 40 (sic) (Unreported), which held that, an affidavit should only contain elements of facts and circumstances to which the witness disposes either of his own personal knowledge or from information which he believes to be true. That, such an affidavit must not contain an extraneous matter by way of objection or prayer or legal arguments or conclusion. He opined that this application failed to adhere to the general rule of practice and procedure.

On the third limb of preliminary objection, Mr. Shilatu averred that, the applicants did not sign the Notice of Representation which renders this application incompetent as per **section 56(c) of the Labour Institution Act** (Cap. 300) and **Rule 43(1) of the Labour Court Rules GN No 106 of 2007**. To cement his argument the learned counsel referred the case of **Alex Situmbura Vs Mohamed Nawayi**, Revision Application No. 13 of 2021 (unreported) at page 5 & 6 and the case of **Hamza Omary Abeid Vs Pro Mining Services**, Labour Revision No. 54 of 2019 (unreported) at page 4 and 5. Basing on the above authorities the learned counsel submitted that it is the requirement of the law that, where the party in a labour matter choose to be represented, the notice of representation is mandatory.

On the fourth limb of preliminary objection, Mr. Shilatu submitted that this application is sworn before an Advocate contrary to **section 8 of the Notary Public and Commissioner for Oaths Act** (Cap 12) which requires that it must be a Notary Public and Commissioner for Oaths and not otherwise. To strengthen his assertion, Mr. Shilatu referred to the case of **DPP vs Dodoli Kapufi and Patson Tusale (3)**, Criminal Application No. 11 of 2008 CAT (Unreported).

From the foregoing submission the learned counsel for the respondent urged this court to sustain the raised preliminary objections and continue to dismiss this application in its entirety.

On the adversary side, before countering the grounds of objections, Mr. Materu submitted that, the applicants are seeking extension of time before this court to enable them to lodge notice of appeal against the decision of the High Court in Revision Application No. 33 of 2015 dated 20th of July, 2015. He explained that, the application was filed under **section 57 of the Labour Institution Act**, (supra) and **section 5 (1) (c) and 11 (1) of the Appellate Jurisdiction Act** (supra). Therefore, this court is not dealing with revision application but an application for extension of time to file notice of appeal.

Responding in respect of the first limb of preliminary objection, Mr. Materu averred that this objection is misconceived since the dispute between the parties herein was referred to the CMA Moshi-Kilimanjaro vide Mgogoro wa Ajira Kumb Na. MOS/CMA/ARB/04/2007 between **SAIDI KITUNDU SHOLE NA WENZAKE 149 - WALALAMIKAJI and TPC LTD MLALAMIKIWA**. He submitted further that this dispute was finalised by the CMA on 13th October, 2014. The applicants were dissatisfied with the

decision of the CMA and consequently filed Revision No. 33 of 2015 in the High Court Labour Division at Moshi.

The learned counsel continued to submit that, Revision No. 33 of 2015 was determined on 20th July, 2016. It is the decision in Revision No. 33 of 2015 that the applicants want to appeal against to the Court of Appeal. He said that, the applicants have exhausted the remedies in the CMA and in this court. The applicants now want to appeal to the Court of Appeal as per **section 57 of the Labour Institutions Act**, (supra). Mr. Materu distinguished the case of **Dangote Industries Ltd Tanzania (supra)** from the facts of this case and stated that the cited case is irrelevant since the applicants have exhausted all remedies available before filing the present application.

On the second preliminary objection, Mr. Materu replied that the respondent did not point out the alleged prayers in paragraphs 11 and 13 of the affidavit. He submitted further that the said paragraphs contain only factual matters relating to the application. He opined that, even if the said paragraphs contained prayers, that cannot lead to the dismissal of the application as submitted by the respondent's counsel.

Elaborating more, Mr. Materu explained that in the case of **Jamal J. Mkumba and Abdallah Issa Namangu** (supra) annexed by learned

counsel for the respondent in his written submission, the Court of Appeal of Tanzania held that if it is established that there is offensive paragraph in the affidavit, it can be expunged leaving the other paragraphs intact. Moreover, Mr. Materu opined that, in the event the Court agrees that paragraphs 11 and 13 of the affidavit supporting the application contain prayers, let them be expunged.

Opposing the third point of objection, Mr. Materu strongly argued that the respondent's counsel did not refer any law which requires the applicants to sign notice of representation in order to back up his objection. Furthermore, Mr. Materu contended that it is not the requirement of the law under **Section 56 (c) of Labour Institutions Act**, (supra) and **Rule 43 (1) of the Labour Court Rules** that notice of representation should be signed by a party.

Mr. Materu went on to explain that the notice of application filed by the applicants shows clearly at page 5 that, the applicants appointed Faustin M.B. Materu of Materu & Co. Advocates as their representative in this application. That, the name, postal address, place of employment and phone number of the said representative are well shown hence complied with **Rule 43 (1) (a) and (b) of GN No.106 of 2007**. He continued to submit that, on 30th August, 2023 the applicant's advocate filed a formal

notice of representation that was duly served to the respondent's counsel on the same date. Distinguishing the case of **Alex Situmbura** (supra) which was cited by the learned counsel for the respondent, he argued that in the said case no notice of representation was filed which is not the case in this application. He insisted by making reference to page 6 of the said decision where it was held that the representative is the person responsible to file notice of representation and not the parties. He stated that the legal position is also reflected in the case of **Hamza Omary Abeid** (supra) which was cited by learned counsel for the respondent in his submission. Basing on the above-mentioned authority, the learned counsel averred that notice of representation is given by the representative who in this application is an advocate. Mr. Materu was of the view that, the two cited cases hereinabove, did not at all address the issue of non-signing of notice of representation by the applicants, therefore do not support the respondent's preliminary objection.

Coming to the fourth limb of preliminary objection, Mr. Materu submitted that, at page 6 of the applicant's affidavit, it is clearly shown that the deponent Faustin Materu was sworn at Moshi on 17th day of July, 2023 before Chiduo Zayumba Advocate, Notary Public and Commissioner for Oaths. He submitted further that the respondent did not submit on

whether advocate Chiduo Zavumba is not a Notary Public nor the Commissioner for Oaths. That, the affidavit shows the place and the date when the oath was taken and the name of the advocate, Notary Public and Commissioner for Oaths before whom the oath was taken. According to him, the affidavit is therefore properly sworn.

Mr. Materu continued to aver that in the cases of **DPP V. DODOLI KAPUFI AND PATSON TUSALILE** (supra) and the case of **SADICK HASSAN** (supra) that were cited by the counsel for the respondent are easily distinguishable from this application since the defects addressed in those cases do not feature in the affidavit supporting the present application.

Basing on the above stated reasons, Mr. Materu urged this court to overruled all preliminary objections raised by respondent.

Having heard the submissions for and against the raised objections, the issue for determination is ***whether the raised preliminary objections have merits.***

Starting with the first ground of objection, Mr. Shilatu claimed that the matter has not been properly brought for the same has neither been heard at the CMA nor the Labour court. Mr. Materu refuted this objection by stating that the dispute between the parties was referred to the CMA at

Moshi in Kilimanjaro vide **Mgogoro wa Ajira Kumb Na. MOS/CMA/ARB/04/2007**. That, as the applicants were not satisfied, they filed Revision No. 33 of 2015 before this court. Still aggrieved, they intend to appeal to the Court of Appeal.

I hasten to state that this issue will not detain me much. This ground requires evidence in order to determine whether the matter was referred to the CMA or not. This court as well as the Court of Appeal in several occasions declared that if the preliminary objection requires evidence to substantiate it, the same lacks criteria of being treated and determined as preliminary objection. There are a number of authorities to that effect. In the case of **Ibrahim Abdallah (the Administrator of the Estate of the late Hamisi Mwalimu vs Selemani Hamisi (The Administrator of the Estate of the late Hamisi Abdallah)**, (Civil Appeal 314 of 2020) [2022] TZCA 43 Tanzlii at page 9 to 10, it was emphasised that:

"It is settled law that a pure point of law does not arise if there are contentions on facts yet to be ascertained by evidence...

...the emphasis is that a preliminary objection may only be raised on a pure question of law which can be discerned if

the court is satisfied that the pleaded facts are not contentious or if any of the facts has to be ascertained in a proper trial.”

Guided with the above position of the law, I am of the strong opinion that to ascertain if the matter was not referred to the CMA as contended by Mr. Shilatu requires evidence. On that basis, I am satisfied that the first objection lacks criteria of being determined at the preliminary stage.

On the second ground of objection; the learned counsel for the respondent argued that the affidavit in support of the application contains prayers. He particularly referred to paragraph 11 and 13 of the applicants’ affidavit. In reply, Mr. Materu explained that Mr. Shilatu did not point out the alleged prayers. The applicant’s counsel believed that the mentioned paragraphs contain only factual matters.

I have thoroughly examined the alleged paragraphs, for ease reference, I will reproduce the impugned paragraphs hereunder:

11. That the applicants are now praying for extension of time to file their appeal to the Court of Appeal of Tanzania against the judgment and orders of the High Court of the United Republic of Tanzania in Revision No. 33 of 2015 dated 20th July 2016.

13. That it is in the interest of justice that the Honourable High Court be pleased to grant the applicants extension of time to file notice of appeal and appeal to the Court of Appeal of Tanzania against the the (sic) judgment and orders of the High Court of the United Republic of Tanzania in Revision No. 33 of 2015 dated 20th July 2016.

The above quoted paragraphs speak loudly. Starting with the 11th paragraph, with due respect to Mr. Shilatu, the same does not contain the prayer rather it contains facts whereby the applicants are informing this court the gist of their application. To the contrary, the 13th paragraph contains prayer which was also embodied in the chamber summons. As rightly submitted by Mr. Materu and as per the case of **Jamal S. Mkumba and Another** (supra) the remedy for the paragraph which contains prayer is to expunge such paragraph. Therefore, being satisfied that paragraph 13 of the affidavit in support of the application contains prayer, I hereby expunge it from the affidavit leaving other paragraphs of the affidavit intact.

On the third ground of objection, Mr. Shilatu contended that the applicants have not signed their Notice of representation as directed by the law. He went further by citing **section 56 (c) of the Labour Institutions Act**

(supra) and **Rule 43(1) of the Labour Court Rules** (supra) to support his objection. In rebuttal, Mr. Materu submitted that there is no law which requires the applicants to sign notice of representation. The applicants' counsel added that, the notice of representation in this matter shows that he was appointed as a representative of the applicants.

Section 56 (a), (b) and (c) of the Labour Institutions Act (supra) provides that:

"In any proceeding before the Labour Court, a party to the proceedings may appear in person or be represented by-

(a) an official of a registered trade union or employers' organisation;

(b) a personal representative of the party's own choice; or

(c) an advocate.

From the above quoted provisions, with due respect to Mr. Shilatu, as a matter of practice, Notices of Representation are signed by parties as they are the one who appoints the Representatives. However, failure to sign the notice of representation does not render the application incompetent. Even failure to file notice of representation does not render the application incompetent. The remedy is to grant leave to the party to

file it or to sign the notice. Together with their application of extension of time filed on 20/07/2023 the notice of representation was attached thereto which shows that Mr. Materu was appointed by the applicants as their representative. The said notice was signed by advocate Faustin Materu, as I have already said the same was not fatal. Therefore, the 3rd objection is without merit.

On the last limb of preliminary objection, Mr. Shilatu faulted the applicants for contravening **section 8 of the Notary Public and Commissioner for Oath Act** (supra). On the other hand, Mr. Materu submitted that page 6 of the affidavit shows that the deponent Faustin Materu was sworn at Moshi on 17th day of July, 2023 before Chiduo Zayumba, advocate, Notary Public and Commissioner for Oath.

Basing on the above submissions of the learned counsels, for ease reference I wish to reproduce **section 8 of the Notary Public and Commission for Oath Act** (supra) which reads:

"8. Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

Guided by the above provision of the law, I have scanned the affidavit in support of the application and it is my observation that the affidavit was sworn and verified by Mr. Faustin Materu on 17th of July 2023 at Moshi before Chiduo Zayumba, whose qualification was stated on the same page to be an advocate. His stamp is self-explanatory that he is an advocate and Notary Public and Commissioner for Oaths. In that regard, I have no reason to doubt that Mr. Chiduo Zayumba was not a Notary Public or Commissioner for Oath at the time of administering the oath to Mr. Faustin Materu.

On the strength of the above findings, I am satisfied that the respondent's grounds of preliminary objections are without merit. I therefore, overrule them with no order as to costs. Accordingly, the application should proceed on merit.

It is so ordered.

Dated and delivered at Moshi this 27th day of March, 2024.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

27/03/2024

