

TANZANIA / JUDGMENT

Ruling abbas mbega

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB-REGISTRY OF
MWANZA) AT MWANZA LABOUR REVISION NO. 26693 OF 2023 (Arising from Labour Dispute No
CMA/MZA/MAG/41/2023/28/2023) ABBAS MBEGA MWANKENJA-----
APPLICANT VERSUS SBC TANZANIA LTD -----RESPONDENT

RULING

17th & 26th July 2024 CHUMA, J This ruling is in respect of the Preliminary Objection raised by the respondents on one point that supplementary affidavit is untenable at law as it was filed without leave of the court and no affidavit by him which he is seeking to supplement and prayed this court to struck out the application. When the matter was placed before me for hearing on the raised objection, Peter Makenya appeared as personal representative of the applicant while Ms. Monica Kabadi learned advocate appeared for the respondent. It was submitted by the respondent counsel that the applicant's representative filed a supplementary affidavit without leave of court while pleadings were complete, Ms. Kabadi stated that the law requires the matter to proceed for hearing when pleadings are complete and cited the case of *Muyegi Josephat Gwao V Abdallah A. Gwao Misc. Land Application No. 26 of 2018* (unreported) whereby the judge referred to the case of *Edward Anthony Mwesimo and 7 Others V Joel Sumuba Misc. Civil Application No. 24 of 2012* (unreported) that the supplementary affidavit filed without court leave led to the court striking out the matter. Ms. Kabadi argued that the circumstance of the cited case is similar to this case and prayed this court to strike out this application. On the other hand, Mr. Makenya argued that according to paragraph 15 of the applicant's affidavit, one of the grounds is the arbitrator's several omissions and fabrication in the trial proceedings to damage the respondent's case (now applicant). He submitted that the supplementary affidavit was filed after the CMA's proceedings were delayed and said that the respondent also replied to the supplementary affidavit. He further submitted that the preliminary objection is not based on pure point of law but involves facts requiring proof by evidence and the said proof is included in paragraphs 8th and 9th of the counter affidavit to the supplementary affidavit he referred to cases of *Mukisa Biscuits 2 Manufacturing Company Ltd Vs. West End Distributors Ltd 1969 E. And Karate Ernest and Others V. AG. Civil Revision No. 10 of 2010*. He added that the supplementary affidavit was filed without the court's leave but it cannot be invalid as it was filed before the date of the hearing. And that the same was also served to the respondent who also responded to it. Mr. Makenya went on to argue that due to its importance, the party may seek leave of the court even

after filling the supplementary affidavit. And that even if this affidavit is found fatal, the applicant may seek leave to file it and will be wasting the court's time and cited the case of Khalifa Said V. Abieza Chichiri 1998 TLR 527 and Paulo Osinya V. Republic 1969 E.A 353 and Cheung Sing V. Republic 1956 Vol. 23 EACA 459. Mr. Makenya insisted that failure to seek leave of the court is not fatal as it does not go to the root of the matter. Is a mere technicality that aims at obstructing the dispensation of justice contrary to the dictate of Article 107 A 2(e) of the United Republic of Tanzania Constitution and in the right of the overriding objectives the purported irregularity is also saved. He stated that the cited case of Mjengi is distinguished because in that case, 3 it was incompetent before the court unlike the present one which is competent before the court. Moreover, he submitted that the sought prayer by the respondent to strike out the whole application is misplaced, he also argued that a supplementary affidavit may be filed by any person conversant with the facts whereby in this matter it is only the personal representative who is conversant with the facts in issue. He, therefore, prayed the preliminary objection be dismissed. In rejoinder, Ms. Kabadi submitted that the applicant ought to seek leave and that replying to the supplementary affidavit does not mean consenting to its filing without court leave. She submitted that this position was also decided in the case of the Registered Trustee of St. Anita's Green Land School and Others V. Azania Bank Ltd. Civil Application No. 158/15 of 2020 (unreported). Mr. Kabadi argued that in the instant matter, the affidavit was filed by the applicant, not his representative and that means there was no affidavit seeking to be supplemented. In the circumstance of this case, the question is whether there was a court leave to file supplementary affidavit and if not, what is the quencequences. As argued by Mr. Makenya, it is correct that a preliminary 4 objection has to be on a pure point of law that does not require proof of facts as it was well established in the case of Mukisa Biscuits (supra) and Ms. Kabadi is of the view that the law requires to seek leave. To respond to this pertinent question, I find this Court is enjoined to revisit the law on what amounts to preliminary objection on point of law. In its decision the Court of Appeal in the case of Alphonse Buhatwa Vs. Julieth Rhoda Alphonse, Civil reference No.9/01/of 2016 (unreported) referred to the case of Ayubu Bendera and 10 others Vs. AICC, Civil Application No. 9 of 2014 (unreported), quoting the case of Mukisa Biscuit Manufacturing Company (supra) and the case of Hezron Nyachiya Vs. Tanzania Union of Industrial and Commercial Workers and others, Civil Application No.79 of 2001 (unreported), on the issue of what is to be considered a preliminary objection, had the following to say: "...to be considered as a preliminary point of objection, the point concerned must raise 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 is to be ascertained or in what entails the exercise of judicial discretion". The above position of the law was explained by the Court in the case of Tanzania Telecommunications Co. LTD Vs. Vedasto Ngashwa and 5 Four Others, Civil Application No.67 of 2009 (CAT-unreported) where the Court established three conditions to be satisfied before the ground is considered as the preliminary point of objection. These are one, the point of law raised must either be pleaded or arise as a clear implication from the proceedings. two, it must be a pure point of law that does not require close examination or scrutiny of the affidavits and counter-affidavits, and three, the determination of such point of law in issue must not depend on the exercise of the Court's discretion. For the foregoing position, applying the above tests to the facts in the instant

application, it is amply clear as correctly submitted by Ms. Kabad's advocate that, the supplementary affidavit was filed without court's leave a fact admitted by Mr. Makenya though with reservation. This fact in my view does not require to be ascertained by evidence. I then find the raised point of objection by the respondents qualifies to be a point of law for meeting the tests established in *Mukisa Biscuits (supra)*, *Tanzania Telecommunications Co. LTD (supra)*, and *Alphonse Buhatwa (supra)*. Insisting on the need to seek leave of the court before filing subsequent pleadings the Court of Appeal in the case of *Tijani Tijani 6 Mahunguhungu V The Registered Trustees of Uamsho wa Wakristu Tanzania*, Civil Appeal No 292 of 2020 (unreported) where the court ordered the Plaintiff to amend the plaint which was complied with, but surprisingly the defendant also amended his written statement of defence to replace the initial one without leave of court and the court in the above case held as follows; - "In so far as the respondent did not seek and obtain leave of the trial court to amend her pleadings in line with the principle that once pleadings have been filed, they can only be altered or amended with the leave of the court specifying parameters within which the alteration or amendments may be effected, we are of the view that it was wrong for the trial court to proceed with the trial based on the amended written statement of defence which was amended without its leave." The submission by Mr. Makenya that the supplementary affidavit though filed without court's leave cannot be invalid as it was filed before the date of the hearing. But also, it was served to the respondent who also responded to it. More so he further argued that due to its importance, the party may seek leave of the court even after filing the supplementary affidavit. I find his argument illogical and out of context. I subscribe to Ms. 7 Kabadis' submission that the court has to be properly moved as decided in the case of *Mujengi Josephat Gwao (supra)*. Pleadings are considered vital to court proceedings, one cannot file any document at any stage which he/she prefers to do so against the dictate of law and procedure. Also see *Jovent Clavery Rushaka & Another V. Bibiana Chacha*, Civil Appeal No 236 of 2020 (unreported). Nevertheless, the supplementary affidavit is sworn by Mr. Makenya who is not the applicant in the instant matter nor a party to this case, this is a confusion that I do not intend to condone. It should be noted that a supplementary affidavit is normally filed to supplement the existing one. In view of the above, the supplementary affidavit filed without court's leave is expunged from the record. The reply to the supplementary affidavit by the respondent suffers a similar stance. The preliminary objection is therefore sustained. DATED at MWANZA this 26th Day of July 2024. W.M. CHUMA JUDGE 8
Ruling delivered in court before Mr. Peter Makenya personal representative for the applicant and Ms. Monica Kabad Learned counsel for the respondent this 26th day of July 2024. J. MSAROCHE
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