

TANZANIA / JUDGMENT

Orica PO ruling as at 28 March 2025

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28 March 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (SHINYANGA SUB-REGISTRY)
AT SHINYANGA MISC. LABOUR APPLICATION NO. 202503021000004674 (Originate from Labour
Revision NO. 202411261000029996) ORICA TANZANIA
LIMITED.....APPLICANT VERSUS

1. HENRY SIMEO NYAMUSHA
2. YAHAYA PUYAGA
3. SAMSON MUHOZYA RESPONDENTS
4. SHASHINHALE AUCTION MART AND GENERAL TRADING COMPANY

RULING

Date of Last Order: 20.03.2025 Date of Ruling: 28.03.2025 MWAKAHESYA, J.: The applicant filed an application seeking an order for stay execution of the award of the Commission for Mediation and Arbitration at Shinyanga in Labour Dispute No. CMA/SHY/55,56&57/2023 issued by Alfred Massay (arbitrator) on 11th October, 2024. The said order is sought pending hearing and determination of Labour Revision No. 202411261000029996. The present application made under section 91(3) of the Employment and Labour Relations Act and rules 24(1),(2)(a)-(f) and 1 24(3), (a)-(d) of the Labour Court Rules, 2007 has been brought by way of chamber summons and is supported by the affidavit of one Daniel John Paul, a Principal officer of the applicant company. The first to the third respondents (the respondents), resisting the application, filed a joint counter affidavit. Before the application could be heard on merit, the respondents raised a preliminary objection to the effect that: “The affidavit in support of the application of the applicant, of one Daniel John Paul, is defective in the sense that, it was verified at Dar es Salaam on 27.02.2025 while in the jurat of attestation it shows that the deponent swore at Shinyanga on the same date, that is 27.02.2025 .” Therefore, it was imperative that the preliminary objection be dealt with first. At the hearing of the preliminary objection, the applicant was represented by Mr. Richard Madibi and Mr. Moses Harrison Mwakyembe, learned advocates. Meanwhile, the respondents enjoyed the services of Mr. Alex Lwoga, learned advocate. The fourth respondent was a no show, despite having been duly served. In support of the preliminary objection, Mr. Lwoga submitted that, the affidavit in support of the application is defective because it was verified in Dar es Salaam on 27.02.2025 while the jurat of attestation shows it was sworn in Shinyanga on the very same date. 2

He submitted further that, the verification clause and the jurat of attestation are inseparable and therefore the applicant's affidavit showing that the deponent was in different parts of the country when attesting (sic) and swearing the same makes it defective. He elaborated that, the jurat of attestation confirms the date, place and authority of the person before whom the oath was made or taken and therefore if the verification was done in one part of the country and the attestation in another part of the country it becomes difficult to confirm where the deponent was situated. It was the learned counsel's prayer that the impugned affidavit be struck out. Mr. Madibi started his reply by assailing the preliminary objection itself. He was of the view that the preliminary objection raised was not a preliminary objection in light of the Court of Appeal case of Nasor Hamis v. Regina Ishemwambura, Civil Reference No. 08 of 2024 (unreported) in which, according to him, it was stated that a ground of objection must state the specific law, principle or decision of the court that has been contravened. In the respondents' case this was not done. He went on to submit that, without prejudice to the objection raised against the preliminary objection, the impugned affidavit shows 3 that it was indeed verified in Dar es Salaam and sworn in Shinyanga. To the learned counsel this was a mere typing error because the deponent had earlier deposed that he was living in Shinyanga and therefore the affidavit was sworn in Shinyanga. The learned counsel rounded off his reply by submitting that, the overriding objective principle under section 3A(1) and (2) of the Civil Procedure Code is applicable in this matter. He beseeched the court to let the impugned affidavit remain on record. In rejoinder, Mr. Lwoga was adamant that the preliminary objection is meritorious even if a specific law has not been contravened as the counsel for the applicant has admitted that the affidavit is defective. He reiterated his prayer for the impugned affidavit to be struck out. Having gone through the respective submissions of the parties' counsel it is now left for this court to determine the merit or otherwise of the preliminary objection. I should start off with the rather unique objection to a preliminary objection, raised by the learned counsel for the applicant, Mr. Madibi. I have gone through the cited decision and did not come across the holding that he boldly asserted. To say the least, it seems that the 4 learned advocate was bent on giving us a tour of his creative faculty. I will leave it at that. It is not in contention that Daniel John Paul deposed in the impugned affidavit that he is a resident of Shinyanga. It is also not in contention that the impugned affidavit was verified in Dar es Salaam on 27.02.2025 and attested in Shinyanga on the same date. The impugned affidavit clearly shows the same and counsel for the applicant avowed as well. The relevant provision of the law that deals with attestation is section 8 of the Notaries Public and Commissioner for Oaths Act. It reads: "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." [Emphasis mine]. An affidavit which contravenes the above cited provision is incurably defective. In the Court of Appeal case of Saada Osman v. Prema Sarah Lalji and 10 Others, Civil Appeal No. 208 of 2019, (unreported) when dealing with an affidavit that was verified in Dar es Salaam and the attestation in Dubai, on the same date, the Court had this to say: "...having scrutinized exhibit D12, we agree with the learned counsel for the appellant that the deponent verified the affidavit on 25th October, 2018 at Dar es Salaam while the affirmation in the jurat of attestation was at Dubai on the same date. This means that the attestation was not made in presence of the deponent thus contrary to the

requirement of section 8 of the Notary Public and Commissioner for Oaths Act, Cap. 12 which requires the affidavit to be made before the Commissioner for Oaths. In the case of the Director of Public Prosecutions v. Dodoli Kapufi & Another, Criminal Application No. 11 of 2008 [2011] TZCA 46 (6 May 2011; TANZLII), we reiterated that: ‘The Notary Public and Commissioner for Oaths is required to certify in the jurat that the person signing the documents did so in his presence, that the signer appeared before on the date and at place indicated thereon; and that he administered the oath or affirmation to the signor, who swore to or affirmed the contents of the affidavit.’ Since the affidavit was not signed in the presence of the Commissioner for Oaths as the deponent was in Dar es Salaam while the Commissioner for Oaths was in Dubai, we find that the affidavit of DW8 was incurably defective.” Needless to say, the Court proceeded to strike out, from the record of appeal, the offending affidavit. In both Saada Osman and DPP v. Dodoli Kapufi (supra) the Court made it imperative for the deponent to be in the presence of the attesting officer. In search of the reasons behind, my research led me to 6 a persuasive decision of the High Court of Uganda (Hon. Justice Boniface Wamala) in Businge Victoria Rusoke v. Kirungi Annet Pamela, Misc. Civil Application No. 051 of 2023 (https://media.ulii.org/media/judgment/107249/source_file/BUSINGE_VICTORIA_RUSOKE_V_KIRUNGI_ANNET_PAMELA.pdf) where in interpreting section 6 of the Oaths Act Cap 19 and section 5 of the Commissioner for Oaths (Advocates) Act Cap 5 of Uganda which are almost in pari materia with section 8 of the Notaries Public and Commissioners for Oaths Act, the learned High Court judge held that: “The courts have taken the view that to comply with the above cited legal provision, the commissioner for oaths must satisfy him/herself that the person named as the deponent and the person that appears before the commissioner are the same and that the person is outwardly in a fit state to understand what he/she is doing...” I am persuaded to hold a similar view that the import of section 8 of the Notaries Public and Commissioners for Oaths Act is that the deponent of an affidavit must be in the presence of the notary public/commissioner for oaths when the attestation is done in order for the notary public/commissioner for oaths to satisfy himself that the person who appears before him and the person named as the deponent is the same and also, equally important, that the said deponent is in a fit state to understand what he is doing. 7

Moving on, as stated earlier, in the impugned affidavit the deponent verified the same in Dar es Salaam while it was attested in Shinyanga on the same day. This leads to the inference that the attestation was not done in the presence of the deponent. In the end, I sustain the preliminary objection that the affidavit in support of the application is incurably defective. And if I might add, the defect is so severe that the overriding objective principle cannot salvage it. The affidavit of Daniel John Paul is therefore struck out. Since it was the sole affidavit in support of the application the application becomes incompetent and is inevitably struck out as well. Since the application emanates from a labour matter I make no order for costs. It is so ordered. N.L.

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