

TANZANIA / JUDGMENT

SAID KITUNDU AND 136 OTHERS

COURT
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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.....1ST APPLICANT JOHN F.
MACHA.....2ND APPLICANT OSCAR F.
MAKINDA.....3RD APPLICANT ABDALLAH A.
MZUMBE.....4TH APPLICANT JOSEPHA J.
PAULO.....5TH APPLICANT SAFIEL E.
MJEMA.....6TH APPLICANT ATHUMAN H.
SEMSI.....7TH APPLICANT STEPHEN A.
MATIAME..... 8TH APPLICANT SELEMAN Y.
KIMU.....9TH APPLICANT DONATI
MASSAWE.....10TH APPLICANT YAHAYA
SADIKI11TH APPLICANT THERESIA F.
ZOMANYA12TH APPLICANT JUMA
ALLY.....13TH APPLICANT ALFRED
MALITI14TH APPLICANT EMMANUEL E.
MUSHI.....15TH APPLICANT LAWRENCE D.
MSAKI.....16TH APPLICANT KHATIBU S.
KETO.....17TH APPLICANT JOSEPH A.
NDARU.....18TH APPLICANT BRYSON S.
NG'AMBI..... 19TH APPLICANT RAMADHANI
SUKARI..... 20th APPLICANT ISRAEL
NYARI.....21ST APPLICANT ADOLPH
TEMBA 22ND APPLICANT FRANK
TILYA.....23RD APPLICANT JEROME
BASIL24TH APPLICANT TIMOTH J.
TIMOTHEO25TH APPLICANT MASUMBUKO S.
KABELEGE26TH APPLICANT 1 ELIANGILISA J.
MMBANDO.....27TH APPLICANT EMMANUEL
GRIMOO 28TH APPLICANT PETER
OSHRAEL29TH APPLICANT EDES
JOHN30TH APPLICANT LUCIA

BERNARD31ST APPLICANT JOSIANA
RAPHAEL32ND APPLICANT JOHN N.
NYEKELEA.....33RD APPLICANT SAIDI M.
SAIDI34TH APPLICANT JULIUS
MKUMBO 35TH APPLICANT SAMWEL L.
JAMES..... 36TH APPLICANT CUTHBERTH
MASURA.....37TH APPLICANT COSTANTINO
GEORGE.....38TH APPLICANT ELIMKUNDA
SWAI39TH APPLICANT WLLIAM
LYIMO.....40TH APPLICANT PETER
SHIMWELA41ST APPLICANT JULIUS
MAKARIOS42ND APPLICANT GABRIEL
FRANCIS.....43RD APPLICANT ESTER W.
MSENGI.....44TH APPLICANT AUGUSTINO
MAJO45TH APPLICANT YAHAYA R.
JUMA 46TH APPLICANT SIMON
MOHAMED.....47TH APPLICANT EXAVER
MWAMAKA48TH APPLICANT RENATUS M.
KALINGA49TH APPLICANT HUSSEIN S.
MSAWA50TH APPLICANT JOSEPH
YONA51ST APPLICANT MONICA D.
KIPANDA52ND APPLICANT JOHN
SAMWEL 53RD APPLICANT AGNES A.
MTUI54TH APPLICANT VALENTINA H.
MUSHI.....55TH APPLICANT AMANA
RAJABU.....56TH APPLICANT KARIM
MPONDA57TH APPLICANT ADAM H.
SALEHE58TH APPLICANT HAMZA J.
FATAKI.....59TH APPLICANT FATUMA J.
HAMISI.....60TH APPLICANT EMILIAN
ZABRON.....61ST APPLICANT HOIDA T.
MTEI.....62ND APPLICANT 2 AHMED I.
ABDALLAH63RD APPLICANT MALULU J.
KIMONGE64TH APPLICANT EMMANUEL M.
TIWILI.....65TH APPLICANT JOHN S.
NGAMILA.....66TH APPLICANT EUZEBIUS
NGUYU.....67TH APPLICANT SOPHIA N.
KUBEJA.....68TH APPLICANT ESTER
NDUTA.....69TH APPLICANT MARTHA N.
NSALU.....70TH APPLICANT GLORIA A.
MOSES.....71ST APPLICANT JAINA
KARIKENE.....72ND APPLICANT MICHAEL V.

MGOVANO.....73RD APPLICANT SAULO E.
MJOGOLO74TH APPLICANT YASIN L.
LUKANGA75TH APPLICANT REDEMPHTER J.
SHIO.....76TH APPLICANT WILSON
NGIMBA.....77TH APPLICANT SYPRIAN R.
MAHAVILE78TH APPLICANT MWASIT
ABEID79TH APPLICANT NEITIWE
MGONJA80TH APPLICANT LEONARD T.
CHENGA81ST APPLICANT STAIL L.
MSANSHI82ND APPLICANT ASSA K.
MWAMPONDALI83RD APPLICANT LAMECK
GEREMIAH84TH APPLICANT GRACE M.
KAHAWA 85TH APPLICANT MARIA
YASINTI 86TH APPLICANT SAID
SALAHE87TH APPLICANT RODGERS
MASSAWE.....88TH APPLICANT NJOROYOTA
MWANGOKA89TH APPLICANT JOHN
PETRO90TH APPLICANT BERNARD
HAULE 91ST APPLICANT JUMA
MSENGI92ND APPLICANT COSMAS
HASSANI93RD APPLICANT JOHN V.
LUOGA94TH APPLICANT ANNA S.
MWAIPAJA95TH APPLICANT SILVIA G.
WOISO96TH APPLICANT ABUU
KISUWA 97TH APPLICANT MANASE
YOHANA.....98TH APPLICANT 3 TIMOTHEO
NDEHAKI 99TH APPLICANT LAMECK
KIMATH100TH APPLICANT EDMUND S.
MSOFE.....101ST APPLICANT PETER
MAJAA102ND APPLICANT OMARY
ATHUMAN103RD APPLICANT ROBERT
MSENGI104TH APPLICANT ANNA J.
MWAMBAYA105TH APPLICANT MWILEE
MWANIJEMBE106TH APPLICANT JOHN
MICHAEL107TH APPLICANT SALEHE
BAKARI108TH APPLICANT AMOS
MOSES109TH APPLICANT NAKAZA
ELIESIKIA.....110th APPLICANT HASSAN O.
KADIO111ST APPLICANT DONATHA
KESSY.....112ND APPLICANT THERESIA
NDAWONI.....113RD APPLICANT ALISTARIA
SWAI114TH APPLICANT YUDA

THADEI	115TH APPLICANT LEONARD
ISINIKA	116TH APPLICANT DAUDI
YONAH.....	117TH APPLICANT BATISTA
POKUMTWA	118TH APPLICANT LONGINO
MNYEMA	119TH APPLICANT SAIDI S.
ALFAN	120TH APPLICANT DOROTHEA
MALUMBA	121ST APPLICANT JOHNSON H.
KILawe	122ND APPLICANT LINDERSON J.
MOSHI	123RD APPLICANT RAJABU
MKATI.....	124TH APPLICANT WALTER W.
SHOO	125TH APPLICANT RAPHAEL
NYALILE	126TH APPLICANT YAHAYA
SAIDI.....	127TH APPLICANT ROSE
EMMANUEL	128TH APPLICANT THERESIA
CHAPUCHAPU.....	129TH APPLICANT ALEX A.
NJAU.....	130TH APPLICANT VUMILIA
MMARY.....	131ST APPLICANT RAJABU
JUMBE.....	132ND APPLICANT DOUGLAS
MAKAMBO.....	133RD APPLICANT HUSSEIN S.
FONGA.....	134TH APPLICANT 4 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 5
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 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. 7 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 Tusalile (3), Criminal Application No. 11 of 2008 CAT (Unreported). 8 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 9 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 10 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 11 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 12 whether advocate Chiduo Zayumba 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 overrule 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 13 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. 15
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 16 (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." 18 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 19 20

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