

TANZANIA / JUDGMENT

20131206 TZHC Dar es Salaam

COURT
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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISC. LABOUR APPLICATION NO.136 OF 2013

- I SALMA MOHAMED & 12 OTHERSAPPLICANT VERSUS FIDA HUSSEIN & COMPANY LTD RESPONDENT

RULING

01/10/2013 & 06/12/2013 Aboud, J. The applicants filed an application No.146 of 2012 which I was struck out by the court on 3/7/2013 for being incompetent before the court. The applicants were allowed to file a fresh application within seven days from the date of order. The applicants failed to comply with the order of the court hence filed the present application for extension of time under Rule 24 (1), I (2), (3), (11) (b), (c) and 55 (1), (2} and 56 (3) of the Labour Court Rules, GN. No.106 of 2007 and any other enabling provision of the law. The applicants ;sought to move the court to condone the non compliance with period of limit~tion prescribed 1 by the court on 3/7/2013 in Misc. Labour Application No.146 of

2012. I I The respondent raised four points of preliminary objection that; I !

1. The applicants' application is :defective for being brought .. under the wrong provision of law. I
2. The applicants' application is' defective for offending the I provisions of Rule 44 (1) arid (2) of the Labour Court Rules GN.106 of 2007. I I
3. The applicants' application is untenable before the court and devoid of merit. , . 'I 4, The affidavit in support of the applicants' application .is incurably defective for want or proper jurat of attestation. The court ordered parties to argue the preliminary objection by way of written submissions of vyhich both_ parties c:omplied with. I 1 . I Arguing the first point of preliminary objection the respondent submitted that the applitants' application is brought under the wrong provision of law, tHat is Rule 55 (1) and (2) of I the Labour Court Rules. He submitted that the above cited Rules I have been wrongly cited by the applicants since they only deal I with procedures specifically not provided for in the Labour Court 2 ' Rules. He supported his submission by various cases among them is Fadhila Yahaya vs. The DPP, Criminal Application No.1/2008, Court of Appeal of Tanzania at Arusha where the court held

that: ' "It is now settled law that wrong citation of a provision of law or rule which an application has been made renders the application incompetent." In reply the applicants submitted that they have adduced sufficient reasons as required under Rule 56 (3) of the Labour Court Rules for not complying with the court order. Therefore even without citing the law, the court can exercise its discretion to condone the delay for the interest of justice. •. According to the records it is clear that the applicants moved the court with Rule 24 (1), (2), (3), (11) (b), (c) and 55 (1), (2) and 56 (3) of the Labour Court Rules. It is clear that the provision which guides the court to entertain application for extension of time is rule 56 of the Labour Court Rules which was as well cited by the applicants. The provision of Rule 55 (1), (2) of the Labour Court Rules which is the gist of this point of preliminary objection provides that; ' 3 . I

- I "1)-. Where a situation arises in proceedings or contemplated proceedings which these rules do not provide the Court may adopt any procedure that it deems appropriate in the circumstances. {2)- In the exercise and performance of its powers and functions, or in any incidental matter, the Court may act in a manner that it considers expedient in the circumstances, to achieve the objects of the Act and, or the good ends of justice. " Basing on the provision above, it is clear that it applies in a circumstance where the rules are silent. In the present application the rules which govern the court is clearly provided under Rule 56 of the Labour Court Rules. Therefore I agree with the respondent that the Rule 55 (1), (2) of the Labour Court Rules is irrelevant in the present application. However, I do not agree with the respondent that the application is incompetent before the court for this point. The applicants have cited Rule 56 (3) of the Labour Court Rules which is the appropriate provision to move the court in the present application. I have considered the authorities cited by the respondent like the case of Fadhila Yahaya (supra) to support his argument, however I find it distinguishable from the case at hand. In the present case the applicants cited the appropriate provision to move the court for the application sought, only that he added Rule 55, (1), (2) of the Labour Court Rules which is not a relevant provision. Moreover to my view Rule 55 is not wrong because sub rule (2) invites the court in exercise and performance of its powers to act in a manner that it considers expedient in the circumstances to achieve the good ends of justice. Therefore I find the first point of preliminary objection baseless. On the second point the respondent submitted that the applicants are thirteen in number therefore they had to comply with Rule 44 (1) and (2) of the Labour Court Rules to apply first for leave of the court for Salma Mohamed to represent the rest of the applicants. He supported his argument with the case of Lucy K. Ndossy vs. Sunflugs (T) Limited, Revision Application No. 174 of 2010 where the court held that; "the application has been filed as a representative suit with Lucy K. Ndossy purporting to act on behalf of 284 others yet there is nothing on record to show that the representative has been permitted by the court to appear and prosecute this representative suit in terms of rule 44 {2} of the Labour Court Rules GN.106 of 2007." He further submitted, since Salma Mohammed has never obtained leave to represent the rest of the applicants, she has no locus to represent them. He prayed for the application to be struck out. In reply the

applicants' representative submitted that the applicants filed an application for extension of time of which all ' the applicants signed the affidavit in support of the application. The applicant maintained that they are not seeking permission of this court to file the application to represent other persons. After considering parties arguments in light of the records of this application, I need not to dwell much on this point, it is clear that the applicants' joint affidavit is signed by all the applicants. To my view the application indicates clearly that each applicant wishes to stand on his/her own capacity, therefore there is no need to seek for leave as required under Rule 44 of the Labour Court Rules. I am not aware of the circumstance in the case of Lucy K. Ndossy (supra) cited by the respondent, however basing on the doctrine of precedent the decision of the court is not binding, therefore I decided to differ from the above position . 6 I basing on the circumstance of the present application. Thus the second point of objection is also found baseless. 1 On the third point of objection the respondent contended that, the applicants have not stated any good cause so that the court condones their delay as requires under Rule 56 of the ' Labour Court Rules. I In reply the applicants submitted that the preliminary I objection has been raised on uncertain factual matters therefore the point does not qualify to be preliminary objection. He supported his argument with Labour Revision No.20 of 2008, TUICO vs. Tanzania TOBACCO Processing LTD. I After considering their arguments and in the light of the 'I facts in this case with respect of this point of objection I find that I the same is not based on pure point of law, rather it is a question of facts. To decide this point, it would be necessary to ascertain facts including whether or not the applicants adduced sufficient ' reasons to be granted extension of time. For that reason the issue cannot be properly decided I as a preliminary objection basing on a long established principle of law and practice regarding what amounts to a preliminary objection as defined in the case of Mukisa Biscuits Manufacturing Co. Ltd V. West End Distributors Ltd (1969) EA 696. The court held, I quote; 1 . 7 "...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.....a preliminary objection is in a nature of what is used to be a demurrer. I It raises a pure point of law which is argued on I the assumption that all the facts pleaded by I the other side are correct. It cannot be raised if ; I any fact has to be ascertained or if is sought I the exercise of judicial discretion." I . I Consequently, this point of objection is baseless as well. ' ' 1 As regard to the fourth point the respondent submitted that I . the affidavit in support of the application was witnessed and I attested by Antony W. Teye Advocate, I who represented the applicants before the court on 10th September 2013. He further contended that the Postal address of the Commissioner for Oaths is the same address of the office that filed the applicants' application. He said the application is nullity since in the eyes of the law the same person to act as the representative of a party in . I the proceedings and a COMMISSIONER or attesting officer of the same affidavit render the application ~ nullity. I 8 The applicants submitted that the jurat of attestation of the affidavit in support of the application is proper as it complies with the law as provided under Section 8 of the Notary Public or Commissioner for Oaths Act (Cap 12 R.E 2002). They submitted further that the address of the I Commissioner for Oaths corresponding with that of the

drawer of Affidavit does not, in itself, make the Affidavit incompetent. I I According to the records it is undisputed that the official address of the drawer of the affidavit is the same as that of the I Commissioner for Oath who attested the affidavit. It is also not I disputed that Mr. Antony Teye, who i~ the Commissioner for Oath appeared before . the court representing I the applicants before the Registrar on 10th September 2013. From that facts the inference drawn here is that the drawer of the affidavit and the attester are I . Advocates from the same law firm therefore he has interest in the ' matter. From the foregoing, the question that naturally follows is whether the act of the Commissioner for Oath attesting the affidavit prepared by his fellow Advocate from the same law firm I makes it incurably defective. " / With n1uch respect I am of the view that the law bars Commissioners for Oath to exercise their" powers as a commissioner for oaths in any proceedings to which they have I r . 9 interest. Section 7 of the Notaries Public and Commissioners for Oaths Act (Cap 12 R.E 2002) provideJ that; I "No commissioner for oaths shall exercise any I of his powers as a commissioner for oaths in I any proceedings or matter in which he is \ . advocate to any of the parties or in which he is I interested." I From the provision and discus~ion above I agree with the respondent that the affidavit in I support of the chamber application is incompetent before !the court as the jurat of attestation contravenes the law in !particular the provisions of I Section 7 of the Notaries Public and G:ommissioners for Oaths Act. Hence the forth point of objection is ~pheld. I . Under the circumstance the Iapplication is incompetent before the court for want of proper attestation. In the result the application is struck out. It is so ordered. I.D. ABOUD I JUDGE I 06/12/2013 I 10 . Date: 06/12/2013 Cram: Hon. I.D. Aboud, Judge Applicants: Present For Applicant: Mr. Mrugaruga, representative Respondent: Present For Respondent: Mr. Maenda, representative CC: J. Kalolo. Order: Ruling delivered on 06/12/2013 in the presence of Mr. Mrugaruga for the Applicants and Mr. Maenda for the respondent. Both Applicants and Respondent are present. I. . boud JUDGE 06/12/2013 11

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