IN THE HIGH COURT OF TANZANIA

HIGH COURT LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 325 OF 2013

BETWEEN

RAMADHANI PAZI & WAMBURA MALIMA..... APPLICANTS

VERSUS

TANZANIA CIVIL AVIATION AUTHORITY..... RESPONDENT

(ORIGINAL/CMA/DSM/KIN/556 & 561/2010)

RULING

24/02/2014 & 30/05/2014

Mipawa, J.

The applicants namely Ramadhani Pazi and Wambura Malima filed the present revision under Rule 24 (1) (2) of the Labour Court Rules GN 106 of 2007 and Section 91 (1) of the Employment and Labour Relations Act No. 6 of 2004 against the Respondent Tanzania Civil Aviation Authority. The applicant had asked the court:-

(i) Make revision (sic) of the award of the Commission for Mediation of (sic) Arbitration CMA/DSM/KIN/556 and 561/10 (Hon. A. Massay, Arbitrator) dated November, 29th, 2010 and set aside the award.

(ii) Any other order and relief this honourable court shall find it just and equitable to grant.

However before the commencement of the hearing, the respondents raised a preliminary objection on point of law which this court has the duty now to dispose it ***in primoloco*** [in the first place]. The respondent's preliminary objection was like this:-

1. That the affidavit supporting the notice of application for revision is incurably defective for contravening Section 10 of the Oaths and Statutory Declarations Act, Cap 34 RE 2002.

The preliminary objection was heard by way of written submissions and the respondent submitted in support of the preliminary objection that the affidavit of Ramadhani Pazi supporting the notice for revision is incurable defective for contravening Section 10 of the Oaths and Statutory Declaration Act Cap. 34 RE 2004 and he proceeded to quote the part of the jurat in the affidavit of the applicant thus:-

> *AFFIRMED at Dar es Salaam by the said Saidi Ramadhani Pazi* ***who is known to me personally identified to (sic) by*** *..... the latter being known to me personally this 19th day of September, 2013 [emphasis added by respondent].*

The respondent went further to submit the requirements of Section 5 of the Oaths and Statutory Declarations Act, Cap 34 RE 2002 which provides that:-

> *Every oath or affirmation made under this Act shall be made in the manner and in the form prescribed by the rules made under Section 8.....*

Under Section 10 of the Oaths and Statutory Declaration Act, Cap 34 RE 2002 the learned counsel for the respondent argued that Section 10 of Cap 34 RE 2002 is mandatory and required the

Commissioner for Oaths to state the deponent whether he was personally known to him or whether he was identified to him by a person known to him. The respondent counsel argued that in the affidavit of Mr. Pazi, the identification statement is ambiquous as it has been left with both statements "**known to me personally"** and **"identified to me by**" [although even the word me is missing]. He submitted that a specific statement of identification has to be given in the jurat of attestation and failure to state or indicate in the jurat of attestation whether or not the deponent is known to the Commissioner for Oath or how he identified the deponent is a material omission which has rendered the affidavit incurably defective. Section 10 of the Oaths and Statutory Declarations Act, Cap 34 RE 2002 quoted by the respondent in his written submission provides [I quote]:-

> *.....Where under any law for the time being in force any person is required or is entitled to make a statutory declaration, the declaration **shall** be in the form prescribed in the schedule to this Act. Provided that where under any written law a form of statutory declaration is prescribed for use for the purpose of the law such form may be used for that purpose .....*[1]

The learned counsel went on to submit on the format of how a statutory declaration should appeared [as per the schedule to the Oaths and Statutory Declarations Act, Cap. 34 RE 2002], on the jurat

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1. Record: Respondent written submission in Rev. No. 325/2013 at page 2 of 5

of attestation like this:-

> *This declaration is made and subscribed by the said A.B. who is known to me personally [or who has been identified to me by ..... the latter being known to me personally] this ..... day of .....*[2] } *signature of the person making declaration*

The respondent insisted that the use of the word **shall** in the format means that the format provided therein shall be complied with except if it falls within the proviso under Section 10 [See also Section 53 of the interpretation of Laws Act Cap.1 RE 2002 where "may" imports discretion and "shall" is imperative, counsel for respondent in support of the above arguments [he] referred this court to the decision of **Peter Mziray Kuga Vs. Anne Kilango Malecela and 2 Others** Miscellaneous Civil Application No. 7 of 2006 where this court at Moshi held that [Mwaikugile, J.].

> *.....The identify of the deponent in the supporting affidavit* ***must be stated truly in the jurat of attestation.*** *Whether the Commissioner for Oaths knows the deponent in person or has been identified to him by X the latter being personally known to the Commissioner for Oaths all that has to be stated truly in the jurat of attestation. That information of identification has to be clearly shown in the jurat....*[3]

He concluded that in the applicant's affidavit there is no jurat of attestation as the attestation clause is not in the form prescribed in Section 5 and 10 of the Oaths and Statutory Declarations Act, Cap 34

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2. Record: Respondent's written submissions in Rev. No. 325/2013 at page 3 of 5
3. Miscellaneous Civil Application No. 7 of 2006 High Court of Tanzania at Moshi quoted from respondent's written submission at page 3 of 5

RE 2002 and the schedule to the Act aforesaid. Thence the "affidavit" being for the reason incurably defective and incompetent, there is no evidence to support the notice of application for revision and therefore there is no sufficient reasons shown upon which the court could exercise its discretion to grant the application because an affidavit is a document which contains full the grounds upon which the application was made and the application is therefore left without legs to stands. In support of his argument the respondent's counsel quoted the case of **Calico Textile Industries Limited Vs. Zenan Investment Limited and 2 Others,** Miscellaneous Civil Cause No. 10 of 1998 High Court of Tanzania at Dar es Salaam Mackanja, J. where the court held that:-

> *.....In the view of the foregoing I will strike out the affidavit in support of the present application as not been (sic) properly sworn. Order LXIII Rule 2 requires every chamber application to be supported by affidavit. Since there is no affidavit supporting this application, I will strike out the application also.....*[4]

The learned counsel therefore argued the court to struck out the present application for revision for being incompetent as it is supported by an incurably defective affidavit.

In reply to the preliminary objection, the applicant submitted that the applicants were known personally to the Commissioner and

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4. Miscellaneous Civil Cause No. 10 of 1998 (HC) quoted from Respondents written submission at page 4 of 5

that the error was just a clerical error which does not bar access to justice. The act should not be treated as fatal. He referred to this Court the case of **Ramadhani Nyoni Vs. M/S Haule and Company Advocate [1996]** TLR 71 [HC] where the court held that:-

> *.....In a case where a layman, unaware of the process of the machinery of justice tries to get relief before the courts, procedural rules should not be used to defect justice and the irregularities in an affidavit are curable in terms of Section 95 of the Civil Procedure Code.....*[5]

The applicant therefore concluded that the act or skipping to state in the jurat whether or not the deponent is known to the Commissioner for Oath is a minor error which could not defeat justice. In rejoinder reply the counsel for the respondent reiterated further with all strength in his written rejoinder submissions that:-

> *.....The affidavit of Ramadhani Pazi supporting the notice of application for revision is incurably defective for contravening Section 5 and 10 (read together with the schedule to the) of the Oaths and Statutory Declaration Act, Cap 34 RE 2002 where it is mandatory for the Commissioner for Oaths to state whether the deponent was personally known to him or whether he was identified to him by a person known to him.....*[6]

He said although the applicant in reply argue that they (applicants) were known personally before the Commissioner for Oaths failure to state/indicate this fact in the jurat of attestation is a

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5. Record: Ramadhani Nyoni Vs. M/S Haule and Company Advocates [1996] TLR [HC] as quoted from the submission of the applicant at page 1
6. Record: Respondent rejoinder submission in Revision No. 325/2013 at page 1

material omission which has rendered the affidavit incurably defective and not just a clerical error as claimed by the applicants. On the case of **Ramadhani Nyoni Vs. Haule and Company Advocates quoted supra** the respondent counsel argued that the case is not comparable to the present situation because the applicant in that case had no assistance from counsel whereas in the present case the affidavit is drawn by counsel from the legal and Human Rights Centre. The learned counsel for the respondent concluded in his rejoinder submission that:-

> *.....The court should not even trouble itself to grant time to the applicants "to amend and re-file fresh affidavit" because there is no affidavit in the first place hence there is nothing to be amended..... the "affidavit" being incurable defective and incompetent, there is no evidence to support the notice of application for Revision .....*[7]

I have duly considered the submissions of both parties and I have had a cursory glance on the complained affidavit and found that some requirements of an affidavit have not been adhered to. The complained affidavit was indeed as pointed out by the respondent counsel prepared by lawyers of the Legal Clinic Centre styled Legal and Human Rights Centre. It is true as rightly submitted by counsel for the respondent and admitted by the applicant in their submission that the affidavit fell short of correct declaration in the jurat for the Commissioner for Oath not stating whether or not the applicants were

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7. Record: Applicant rejoinder submission in Revision No. 325/2013 at page 2

known to him [the Commissioner] or were identified by a person who is known by the Commission for Oath. In my view the missing or omission of the truly declaration in the affidavit "chilled" the jurat of attestation and the act of the Commissioner for Oath not clearly and legally declaring in the jurat that he either knows the deponents or was identified to them by a person he knows goes contrary to the provisions of Section 10 of the Oaths and Statutory Declaration Act, Cap 34 RE 2002 and Section 10 of the Act reads:-

> ..... *Where under any law for the time being in force any person is required to make a statutory declaration, the declaration shall be in the form prescribed in the schedule to this Act:-*
>
> > *Provided that were under any written law a form of statutory declaration is prescribed for use for the purpose of that law such form may be used for that purpose.....*

I entirely and respectfully agree with the learned counsel for the respondent that the law demands the format to be as which is prescribed to the schedule of the Act, Cap 34 RE 2002 and it puts a mandatory requirement by using the words "**shall**" [that is to say] ***c'est –a-dire*** the format provided in the Act **shall be complied** with except if it falls within the proviso under Section 10 of the Act. Though I am alive with the law that not every where the word "**shall**" is used means that it is mandatory as this depends with circumstances see the holding in the case of **Salum Ndikojeje Vs. Republic**

Criminal Appeal No. 238 of 2004 Court of Appeal at Tabora where it held:-

> *.....The use of the word "shall" does not always meant that there is mandatory requirement. It all depends on the circumstances of each case.....*

However as clearly put by the court above it seems to me that in circumstances where a Commissioner for Oath is required to make a statutory declaration in the jurat of attestation as per Section 10 of the Oath and Statutory Declaration Cap 34 RE and on the strength and importance of affidavits in law the imposition of a mandatory requirement prevails and it cannot be thwarted or washed away by an arguments that the omission to state whether or not the deponent were known to the Commissioner for Oaths or he was identified to them by a person known to him was a mere clerical error. In my view a Commissioner for Oaths who with due diligence executes his legal duties cannot skip that important aspect in the jurat. The declaration **shall be in the form prescribed to the Act stated above** ie. Cap. 34 RE 2002. It is in the circumstance therefore mandatory and the alleged "skip' by the Commissioner for Oath in this case is worse and tantamount to undue diligence of the commissioner to perform his duties as the Commissioner for Oaths. The schedule format clearly states [as pointed by respondent's counsel] that:-

> *This declaration is made and subscribed by the said A.B. who is known to me personally [or who has been identified to me by ..... the later being known to me personally] this..... day of .....*

The format quoted above is the requirement of how an affidavit must be and it indicates ***primafacie*** that it must or should be followed by the Commissioner for Oaths. Defining what is an affidavit a single Judge in the case of **D.B. Shapriya and Co. Ltd. Vs. Bish International BV**, Civil Application No. 53 of 2002 Court of Appeal of Tanzania stated that:-

> *.....Affidavit has been defined as a written document containing material and relevant facts or statements relating to the matters in question or issue and sworn by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit. It follows from this definition that* ***an affidavit is governed by certain rules and requirements that have to be followed****.....*
> *[Emphasis mine].*

The above excerpt from the definition of an affidavit by a Court of Appeal single Judge was quoted with approval by the Justice of Appeal Munuo, J.A. in **Mabi Auctioneers [T] Ltd. Vs. NBC Holding Corporation**, Civil Application No. 176 of 2004 Court Appeal of Tanzania at Dar es Salaam. It is my views that the requirements which govern the affidavit was not followed in the affidavit of the applicants and I subscribe to the holding of this court in **Peter Mziray Kuga Vs. Anne Kilango Malecela and 2 Others** quoted supra in this judgment that:-

> *.....The identity of the deponent in the supporting affidavit must be stated truly in the jurat of attestation. Whether the Commissioner for Oaths knows the deponent in person or has been identified to him by X. The latter being personally known to the Commissioner for Oaths all that has to be stated truly in the jurat of attestation. The information of identification has to be clearly shown in the jurat.....*

The prayers by the applicant's counsel that the omission in the affidavit of the applicants can be amended only, is unsustainable and devoid of merits because once there is a defectiveness in the affidavit which is incurably defective as the applicant's affidavit it cannot be amended because you cannot amend a non existing affidavit in the eyes of law, and an application which is accompanied by an incurably defective affidavit which purports to support the application renders the whole application filed in court being incompetent and the only remedy for an incompetent application is to be struck out because it cannot be adjourned [say for the purpose of allowing the party to amend the affidavit] neither can it be withdrawn by the party in the circumstances.

In the event of the application being supported by a defective affidavit it turns sore and nothing hence I proceed to struck it out. Application for revision is struck out for being incompetent before the court. Preliminary objection sustained.

I.S. Mipawa
JUDGE
30/05/2014

Appearance:

1. Applicants: All present
2. Respondent: M/S Madia Memba Advocate - Present

Court: Ruling has been read today the 30th day of May, 2014 in the presence of the parties as indicated in the appearance above.

I.S. Mipawa
JUDGE
30/05/2014