IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 225 OF 2023

(Arising from the decision of the Minister of State-Prime Minister's Office Labour, Youth, Employment and Persons with Disability)

BETWEEN

JOHN MANSON KAYOMBO
(As an administrator of the Estate of Late Osmunda A. Millinga).....**APPLICANT**

AND

PRIME MINISTER'S OFFICE LABOUR, YOUTH, EMPLOYMENT AND PERSONS WITH DISABILITY .....**1ST RESPONDENT**

ATTORNEY GENERAL.....**2ND RESPONDENT**

RULING

Date of last Order: *17/11/2023*
Date of Ruling: *30/11/2023*

MLYAMBINA, J.

Before the Court is among the first cases that tests the implementation of the *Worker's Compensation Act [Cap 263 Revised Edition 2015]* since the Worker's Compensation Fund came into operation on 1st July, 2015. The major tests rests on the *inter alia* 1st and 2nd herein below preliminary points of legal objection that were raised by the Respondents while resisting the application:

i. *The Application is purely bad in law for being preferred by way of Revision as an alternative to*

Appeal contrary to Section 80 (2) of The Workers' Compensation Act [Cap 263].

ii. *The Application is incompetent for failure to join The Board of Trustees of the Workers Compensation Fund as a necessary party to this Application warranting rights to be heard to her.*

iii. *The Application is purely incompetent for having no notice of representation contrary to Rule 43 (1)(a)(b) of the Labour Court Rules, 2007 G.N No.106 of 2007, Section 56(c) of the Labour Institution Act [Cap. 300 Revised Edition 2019].*

iv. *The Application is incompetent for being accompanied with defective Notice of Application contrary to rule 24 (1), 24 (2),(a),(b),(c),(d),(e),(f), 24 (3)(a), (b),(c),(d), of the Labour Court Rules GN No.106 of 2007.*

v. *The Application is purely incompetent for want of index as provided under rule 46(2) of the Labour Court Rules GN No. 106 of 2007.*

At the first place, there has been a resistance by the Applicant that the above *pre in limine litis* do not qualify the test of what amounts to the preliminary objection on the point of law as they emanate from the facts pleaded or implications of the pleadings.

At the outset, I should point out that the principle of law on preliminary objections were enunciated in the daily cited case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd** (1969) E.A 696, specifically at page 700, where the defunct East Africa Court of Appeal gave the following direction on preliminary objections:

> ...a preliminary objection consists of the point of law which has been pleaded or which arises by clear implication out of pleadings, on which if argued as preliminary objection may dispose of the suit. *Examples on objection to the jurisdiction of the Court, or plea of limitation of time, or the submission that the parties are bound by the contract giving rise to the suit to submit the dispute to arbitration.* [Emphasis added]

Also, time and again it has been held in the case of **COTWO (T) OTTU Union And Another v. Hon. Idd Simba, Minister of Industries and Trade and Others** [2002] TLR 88, that: Preliminary objections rests on five assumptions: (a) It must be pure points of law (b) It must be based on ascertained facts (c) It must arise from the parties' pleadings or necessary inference thereto (d) It must not touch

on the Court's exercise of Judicial discretion and lastly (e) It must be able to dispose of the matter before the Court completely.

It was the Respondent's humble submission that my brethren his Lordship Manyanda J in the cited case of **Fatuma John and 12 Others v. The Registered Trustees of Evangelical Lutheran Church in Tanzania - North East Diocese,** Misc. Civil Application No. 69 of 2022 (unreported), at the last paragraph of page 17 stated the following about preliminary objections on points of law:

> The Applicant's Advocate also argued that advocates should be discouraged from raising objections. I think this argument is misplaced. I say so because *preliminary objections is an arena on which learned minds use to remind each other about development of the law.*[Emphasis added]

I principally subscribe to the afore wording of my brethren Manyanda, J. and I do unhesitatingly reject the more extreme submissions made on either side as regards raising of preliminary objections. I would add that; it remains a principle of the greatest importance that, unless there are compelling reasons for doing otherwise, which will not exist in the generality of cases, preliminary

objections on points of law that brings the matter to the end must be attended at earliest stage of the matter and should not be taken lightly as wastage of time.

Similarly, it seems to me perfectly clear that the preliminary objections that are filed for oblique motives and do not bring the matter to its complete still should be avoided, discouraged and weed out at the earliest opportune time to avoid wastage of time and resources.

As regards the first ground of objection, the Respondent argued that *the application is purely bad in law for being preferred by way of Revision as an alternative to Appeal contrary to Section 80 (2) of The Workers' Compensation Act (supra).* It was the Respondent's submission that circumstances on which the application for Revision can be sought to the Court are provided under *Rule 28 (1) of the Labour Court Rules (supra)* which states:

> The Court may, on its own motion or on application by any party or interested person, call for the record of any proceedings which have been decided by any responsible person or body implementing the provisions of the Acts

and in which *no appeal lies or has been taken* thereto, and if such responsible person or body appears;

(a) to have exercised jurisdiction not vested in it by law; or

(b) to have failed to exercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity; or

(d) that there has been an error material to the merits of the subject matter before such responsible person or body involving injustice,

(e) the Court may revise the proceedings and make such order as it deems fit: [Emphasis added]

The Respondent went on to submit that the Court can only be moved under special circumstances to examine the correctness, legality, and propriety of the finding of any responsible person or body and regularity of its proceedings, but this is not the case in the current application.

Section 80(2) of The Workers' Compensation Act (supra), provides very clearly that:

> Any person aggrieved by a decision of the Minister may, within sixty working days, from the date of decision, appeal against that decision to the Labour Court.

To butress the afore preposition, the Respondent cited the case of **Transport Equipment Ltd v. Devram P. Valambhia** [1995] TLR 161 in which it was stated that:

> If there is a right of appeal then that has to be pursued and, except for sufficient reason amounting to exceptional circumstances.

According to the Respondent, in the present application, the Applicant neither exhausted the right to appeal as required under *Section 80 (2) of the Workers Compensation Act (supra)* nor demonstrated the sufficient reasons to prefer a revision as an alternative to appeal, rather opted to move the Court for both ways as cited in his Application where he cited both *Section 80(2) of the Workers Compensation Act (supra)* for appeal and cited *Rule28 (1) of the Labour Court Rules (supra)* for Revision and therefore wrongly moved this Court.

Therefore, it was the firm position of the Respondent that the application at hand is purely bad in law for being preferred by way of revision as an alternative to appeal contrary to the intents and purposes of *Section 80 (2) of The Workers' Compensation Act (supra).*

In response, the Applicant conceded that *section 80(2) of the Workers' Compensation Act (supra)* provides for an appeal against the decision of the Minister for Labour. However, he found refugee to the provision of *regulation 29(3) of the Workers' Compensation Regulations, 2016* which provides for revision remedy in the following words:

> A person aggrieved by a decision of the Minister, may within sixty working days make an application for revision to the Labour Court in accordance with the Labour Court Rules.

To demonstrate legal maturity, the Applicant's Counsel went on to accept that when there is a conflicting position of the law between the provisions of the Act and a Regulation, it is the principal legislation that has to prevail. To back up the preposition, the Applicant cited

section 36(1) of the Interpretation of Laws Act [Cap 1 Revised Edition 2019] which provides as follows:

> Subsidiary legislation shall not be inconsistent with the *provisions of the written law* under which it is made, or of *any Act, and subsidiary legislation shall be void to the extent of any such inconsistency. [Emphasis added]*

To buttress the afore position, the Applicant's Counsel cited cases such as **Assurance Co Ltd v. Tanzania Insurance Ambudsman Others,** Misc Civil Cause 26 of 2020 (unreported) and **Karunde Mnubi v. Luti Jeje Mnubi,** Land Appeal 92 of 2021 (unreported).

I would agree with the Applicant's Counsel that it is impractically impossible to have an appeal directly from the Minister and that purposively the Parliament did not mean an appeal rather than revision which the Minister directed under *regulation 29(3) of the Workers' Compensation Regulations, 2016.* However, apart from the reasoning under *section 36(1) of the Interpretation of Laws Act (supra),* the plain

meaning under *Section 80 (2) of the Workers Compensation Act (supra)* suggest that it seems the Parliament meant an appeal.

I also take into consideration that *Section 57 of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019]* provides for an appeal from the decision of the Registrar of Trade Union to the Labour Court.

Again, *Section 48 of the Labour Institutions Act (supra)* provides for an appeal to the Labour Court from the decision of the Labour Commissioner. These referred appeals have been practiced in Labour Court as evidenced by the case of **Bharya Engineering and Contracting Company Limited v. Labour Commissioner**, Appeal No. 1 of 2022 (unreported). There is also a legal worries on how the Quasi-Judicial Institution keeps their records to enable a successful appeal.

As submitted by the Applicant, it is worth noting that in other common law jurisdictions, appeals to the High Court emanates from the Special Tribunals or Lower Courts on matters of workers' compensation. In Malawi for instance, as per the *Workers' Compensation Act [Chapter 55:03],* the objection against

compensation by the dependents like in this matter is filed against the Commissioner for Workers' Compensation as per *Sections 42 and 43 of Chapter 55:03 (supra).*

Appeals against the decision of Commissioner for Workers' Compensation is filed at the Chief Resident Magistrate as per the provisions of *Section 44 of the Workers' Compensation Act Chapter 55:03 (supra).* An appeal against the decision of the Chief Resident Magistrate lies to the High Court which is equivalent to the Labour Court in Tanzania.

Apart from the above Malawian procedures stated in which appeals are not direct from the Commissioner for Workers' Compensation or other authorities to the High Court, the Workers' Compensation Tribunal established by *Section 52 of the Workers' Compensation Act, Chapter 55:03 (supra),* specifically set for appeals against the decisions of the Workers' Compensation Commissioner made under *Section 35 (a)* and the Workers' Compensation Trustee Board in terms of the provisions of *section 54 of the Malawian Workers' Compensation Act (supra).*

According to *Section 55(2) of the Malawian Workers' Compensation Act Chapter 55:03 (supra),* the proceedings of the Workers' Compensation Tribunal are, for all purposes, considered as judicial proceedings. As submitted by the Applicant, this is where there is a dilemma i.e, *can the proceedings of the WCF and the Minister be taken as judicial proceedings to be entertained by the Labour Court via an appeal?*

At last, as per the provisions of *Section 56 of the Malawian Workers' Compensation Act (supra),* an appeal against the Workers' Compensation Tribunal lies to the High Court. It follows that the High Court which is equivalent to the Labour Court of Tanzania entertain an appeal from the Tribunal whose records are considered as judicial proceedings.

Elsewhere, in Zambia, *the Workers Compensation Act No. 10 of 1999* provides the legal framework governing the establishment and administration of the Workers Compensation Fund Control Board in Zambia.

Prior to the enactment of the said legislation, workers were compensated under the *Pneumoconiosis Compensation Chapter 217*

and the Workers Compensation Act of 271. The Workers Compensation Board was responsible for accidents and scheduled diseases arising out of and in the course of employment while the Pneumoconiosis Compensation Board was responsible for lung diseases caused by silica in the mines.

The main purpose of *the Workers Compensation Act No. 10 of 1999* is to provide for:

1. Compensation of workers for disability suffered during the course of employment.
2. Merge the functions provided under aforementioned pieces of the repealed pieces of legislation.
3. The establishment and administration of the fund for the compensation of workers disabled by accidents occurring or diseases contracted during the course of employment.
4. Payment of compensation to the dependents of workers who die as a result of occupational accidents or disease.
5. Payment of contributions to the fund by employers.
6. The appointment and powers of a workers compensation commissioner, functions of a workers

compensation tribunal and matters incidental to the forgoing.

In terms of the procedure to be followed, an employee in Zambia who suffers from a disability or contracts a disease and who comes within the contemplation of *the Workers compensation Act (supra),* must follow what the law provides for.

The power of an employee to seek compensation under the Act emanates from *Section 6 of the Workers Compensation Act* which provides that:

6(1) Where any injury is caused or disease contracted by a worker by the negligence, breach of statutory duty or other wrongful act or omission of the employer, or of any person for whose act or default the employer is responsible, nothing in this Act shall limit, or in any way affect civil liability of the employer independently of this Act.

6(2) Any damages awarded to a worker in an action at common law or under any law in respect of any negligence, breach of statutory duty, wrongfully act or omission under subsection (1) shall be reduced by the value, as decided by the Court, of any compensation which has been paid or is payable to

the Fund under this Act in respect of injury sustained or diseased contracted by the worker.

In Zambia, The Workers Compensation Fund Control Board is established under *Section 10(1) of the Workers Compensation Act (supra)*. *Sections 11 of the Workers Compensation Act (supra)* further provides for the function of the board as follows:

> 11(1) Subject to the provision of this Act, the Board shall be responsible for the administration of the Fund and for advising the Minister on any matters in connection with the Fund or this Act.

Section 16 of the Workers Compensation Act (supra) further stipulates that:

> (1) The Minister shall in consultation with the Board appoint the Workers Compensation Commissioner who shall hold office for a period of three years but shall be eligible for reappointment

Section 17 of the Workers Compensation Act (supra) specifies the duties of the Commissioner which include receiving notices of accidents and claims for compensation.

By Virtue of *Section 20(3) of the Workers Compensation Act:*

> The commissioner may after making inquiry or receiving evidence as may be considered necessary, confirm the

award of compensation or order the discontinuance, suspension, reduction or increase of that compensation or in the case of any decision referred to in subsection 2 confirm, set aside or vary the decision.

Section 22 provides that:

> Any person aggrieved by the decision of the commissioner may appeal to the Tribunal within twenty-one days of that decision or within such further period as the Tribunal may allow on cause shown.

The case of **Lafarge Cement PLC v. Patrick Mandona,** Selected Judgment No 15 of 2017 elaborated on the issue of an aggrieved employee. In this case, which was escalated to the Supreme Court, the Court observed at page 26 that:

> Contrary to the impression which the trial Court created, the refusal by the Workers compensation Fund Control Board to medically compensate the Respondent did not preclude him from challenging the decision of the Workers Compensation Fund Control Board by way of Appeal to the Worker Compensation Tribunal with the provisions in *Part XI of the Workers Compensation Act.*

More so, In Zambia, the worker applies to the Board if dissatisfied with the decision of the Commissioner, he may appeal to the tribunal. *Section 123 of the Workers Compensation Act (supra)* provides for the functions of the tribunal as follows:

> 123(1) The functions of the Tribunal shall be:
>
> a. To hear any appeal made to it under the Act.
> b. Perform such functions as are assigned to it under the Act.
> c. Generally, deal with all matters necessary or incidental to the performance of its functions under the Act.

According to *Section 133(1) of the Act:*

> a. Any person being a party to any appeal dissatisfied.
> b. With the determination of the Tribunal as being erroneous in point of law or fact: or with any decision of the chairperson of the tribunal as to the determination by the Tribunal as a matter of fact or a matter of law may appeal therefrom to the High Court within thirty days of the determination.

In the aforementioned **Lafarge Cement PLC** case, the Court made the following observation at page 27:

> In general, therefore, and barring allowable exceptions (including those contemplated in Section 6 of the workers Compensation Act). An employee who suffers from a disability or contracts a disease and who comes within the contemplation of the Workers Compensation Act and whose employer had been observing the requirement of this stature in relation to such employee must look to the statutory remedy available under this law unless such an employee can demonstrate the legality and legitimacy of seeking redress against the employer

In appropriate case where the employer is found culpable, the Supreme Court of Zambia in the case of **Betty Kalunga (suing as Administrator of the estate of late Emmanuel Bwalya) v. Konkola Copper Mine** (2004) ZR 40 expressed itself in the following terms:

> At the end of the day, the Court must send a signal to employers to ensure safe working conditions to employees. We make these remarks against the background that there is no hard and fast rule which has been laid down. In the circumstance each case must be taken and looked at individually.

Succinctly put, an employee begins by applying to the Commissioner, if he is aggrieved, he appeals to the Tribunal. Thereafter, the matter is referred to the High Court and not the Minister. The Minister is involved when it comes to the appointment of the Commissioner.

Despite of the afore stance of the law, I'm not in agreement with the Applicant that filing revision would be the proper way. I agree that the records of the Minister who also picks them from the Workers Compensation Fund are not judicial proceedings. In terms of *Section 94 (1) (c) of the Employment and Labour Relations Act (supra),* it is my humble view that the decision of the Minister should be challenged before the High Court Labour Division by way of review.

Alternatively, of which I would think it may be the appropriate way, is to subject all social security bodies decision including decisions of WCF to an appeal before the Special Tribunal to be formed. An employee, if so desires, will apply to the Director General of the responsible Social Security Body say WCF, NSSF or PSPF, NHIF etc, if she/he is aggrieved, may appeal to the Tribunal. Thereafter, the matter may be referred by way of appeal to the High Court Labour

Division seating as a fully bench of three Judges. Lastly, an appeal may be referred to the Court of Appeal. Such procedure may resemble to that of other bodies such as the Fair Competition Tribunal (FCT), Tax Revenue Appeal Board (TRAB) and Tax Revenue Appeal Tribunal (TRAT). An appeal may lie before the Fair Competition Tribunal against the decision of the Fair Competition Commission (FCC) within 28 days pursuant to *Section 61 of the Fair Competition Act, 2003.* Also, appeal may lie to the FCT against the decision of EWURA, LATRA, TCAA, TCRA and PURA.

Accordingly, in the present case, as the law stands, I agree with both parties that the question of jurisdiction of the High Court Labour Division was conclusively stated by *Section 80(2) of the Workers Compensation Fund Act (supra).* As such, there is a conflict between the provisions of *Section 80 (2) of the Workers Compensation Act (supra)* on the one hand and the *Workers Compensation Regulations (supra)* on the other. The Regulations, in particular, *Regulation 29(3) of the Workers' Compensation Regulations (supra),* is overridden to the extent of the conflict.

The reason for overriding the Regulations is clear under *Section 36 (1) of the Interpretation of Laws Act (supra)* which tacitly declares that subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made, or of any Act, and Subsidiary legislation shall be void to the extent of any such inconsistency. The same position is reflected in the case of **The National Bank of Commerce Limited v. National Chicks Corporation Limited and Four Others**, Civil Appeal No. 129 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported); and the case of **Morogoro Hunting Safaris Limited v. Halima Mohamed Mamuya**, Civil Appeal No. 117 of 2011, Court of Appeal of Tanzania at Dar es Salaam (unreported).

As rejoined by the Respondent, it must be noted that, generally the Director General has its own power conferred to it by law in decision making. *Section 6 (1) of the Workers Compensation Act* states that:

> There shall be a Director -General appointed by the President from amongst three qualified persons of high integrity and who possess knowledge and experience in

labour issues, insurance, social security or workers' compensation matters recommended by the Minister.

Also, *the Workers Compensation Act (supra)* has provided for the functions of Director General whom independently his decision can be overruled by the Minister through appeal as another person whose power is independent. *Section 7 (1) of the Workers Compensation Act (supra)* states that:

> Subject to the provisions of this Act the Director General shall-
>
> (c) adjudicate on claims and other matters coming before the Director-General for decision.

The Respondent claims are solely basing on *Workers Compensation Act (supra),* where the dispute arose, and all other steps were taken. The Applicant opted to appeal the decision made by the Minister as per *Section 80 (2) of Workers Compensation Act* while at the same time he is seeking revision orders as per *section 28 (1) (c), (d) and (e) of the Labour Court Rules (supra)* which is emanating from *Labour Institutions Act (supra).* Thus, the Respondent was using two laws including *Workers Compensation Act and Rules* which emanating from *Labour Institutions Act (supra).*

Undoubtedly, the matter itself has original place of jurisdiction which need to be entertained. Jurisdiction in terms of place and powers as well. Under this position, I agree with the Respondent that the Applicant is confusing himself when he is applying for revision over the decision which require appeal.

The cited **Benion on statutory interpretation** 5th Edition 2010, states that:

> once there is any inconsistence of two laws/Act the one which shall prevail is the current one that it will supersede the older one.

The Workers Compensation Act (supra) came into operation on 1st July, 2015 while *the Employment and Labour Relations Act (supra)* came into operation 5th July, 2007. On the other side, *the Labour Institutions Act (supra)* came into operation on 28th February 2005, thus, *the Workers Compensation Act (supra)* is the current law as compared to the other cited laws.

At any rate, specific law must be observed entirely as held in the Indian decision in the case of **Ejaj Ahmad v. State of Jharkhand,**

2009, High Court of Jharkhand at Ranchi Cr.M.P. No. 911 2007 where the Court stated:

> Thus, special law is a provision of law, which is applicable to a particular and specified subject or class of subject. In other words, it will apply on special class of case and have no application in general cases. It is well settled that the special law prevails over the general law. Thus the general provision should yield the specific provision. In other words, where there is a specific punishment provided in special Act it takes precedents over the general punishment prescribed under the IPC, but when there is no specific punishment provided under special law then the punishment prescribed under the general law i.e. IPC comes into operation.

Therefore, I hold that the Applicant was supposed to direct himself to appeal against the decision of the Minister to this Court as provided by *Section 80 (2) of the Workers Compensation Act (supra)*. As far as the Applicant was exhausting remedies under Workers Compensation Act, he should seek remedies on the same Act and not any other laws.

Notwithstanding, *Section 94 (1) (c) of the Employment and Labour Relations Act (supra)* state that:

Subject to Constitution of the United Republic of Tanzania the Labour Court shall have exclusive jurisdiction over the application, interpretation and implementation of the provision of this Act and over any employment or labour matter filling under common law tortuous liability, vicarious liability or breach of contract to decide-

C) reviews of the decisions, codes, guideline or regulations made by the minister under this Act. [Emphasis supplied]

The High Court Labour Division has been vested under *section 94 (1) (c) of Employment and Labour Relations Act (supra)* with the power of reviewing the decisions, codes, guideline or regulations made by the Minister. Where the Minister has made decisions which originated from *the Employment and Labour Relations Act (supra)*, the High Court Labour Division has jurisdiction to entertain such matter. But in the matter at hand, the decision by the Minister emanated from *the Workers Compensation Act (supra)*, the proper position was for him to apply for appeal as directed by *section 80 (2) of Workers Compensation Act.* In the case of **Tanroads v. Felix Masatu,** Revision No. 44 of 2017, while referring to the case of **Benezer David Mwang'ombe** *(supra),* it was held that:

> ...despite the fact that Labour Laws cater for disputes between employers and employees' relations as a general rule, where there is specific or special law governing a certain category of employer-employee relationship like the Government and Public Servants as it is, in this case, the specific law should prevail.

The Court went on to reason that:

> It is true that the provisions of *the Public Prosecutions Service Act* empower the DPP to delegate any of his functions, but we do not agree that it has the effect of overriding *GN 191 of 1984.* This is so because, first the National Prosecutions Service Act is a statute of general application. Normally, such a statute would not apply where there is specific legislation in existence on a specific subject unless the wording of the particular provision suggests otherwise.

I entirely agree with both parties that *The Employment and Labour Relations Act (supra)* is a general law, hence it cannot cure the matter at hand while *the Workers Compensation Act (supra)* is a specific law which basically goes to the root of the issue.

As regards the second preliminary objection, the Respondent submitted that the Applicant failed to join the Board of Trustees of the

Workers Compensation Fund as a necessary party to this application warranting rights to be heard.

It was the Respondent's submission that the Board of Trustees of the Workers Compensation Fund is a necessary party because the decision which the Applicant is challenging emanates from the decision of the Director General of the Workers Compensation Fund. Further to that, the remedy so prayed, if granted, will also affect the Board of Trustees of the Workers Compensation Fund as it is the one who will pay the compensation claimed by the Applicant. In case this necessary party is not joined, the determination of the Court in this matter may fall in the risk of not being effective as the outcome can cause the multiplicity of suits seeking to involve the necessary party at late stage which may go outside the objectives of the developed principles of law that sometime litigations have an end.

It was the firm position of the Respondent that failure to join a necessary party renders the application incompetent. To back up the position, the Respondent cited decision of the Court of Appeal in the case of **Mussa Chande Jape v. Moza Mohammed Salim,** Civil

Appeal No. 141 of 2018, Court of Appeal of Tanzania at Zanzibar (un-reported), p. 12 where the Court stated:

> *...it is now an acceptable principle of law (see Mullah Treatise (supra) at page 810) that it is a material irregularity for a Court to decide a case in the absence of a necessary party. Failure to join a necessary party, therefore is fatal (MULLAH at p.1020).*

Part III of The Workers' Compensation Act [Cap 263] provides for the existence of the Board of Trustee of the Workers Compensation Fund of which one of the duties of the Board of Trustees with regard to the assets and liabilities of the fund is stipulated under *Section 16 (3)* to the effect that:

> The Board *shall* be Responsible for the Management, including, the safeguarding of the assets, management of the revenue, expenditure and *Liabilities* of the fund. (Emphasize added)

Upon reading between the line, *section 16 (3) (supra),* connote that one of the liabilities under the management of the Board of Trustees, the Applicant's alleged liability in this matter touches the Worker's Compensation Fund. If the Board of Trustee will not be joined in the alleged liability, still the Workers Compensation Fund will not be

moved properly to execute the judgement and decree which was never involved as a party to it. It is very necessary to add the Board of Trustees of the Workers Compensation as a necessary party to the case.

I have noted the Applicant conceeded to the second preliminary objection. However, in order to ascertain as to who is a necessary party to a suit, some of the tests has been advanced from the Indian Supreme Court, of which got approval in our judicial jurisprudence. Common law is well applicable in Tanzania in case there is lacuna in our laws. In the case of **Benares Bank Ltd. v. Bhagwandas,** High Court of Allahabad, India (1947) the Court laid down two tests for determining the questions whether a particular party is necessary party to the proceedings:

a. There has to be a right of relief against such a party in respect of the matters involved in the suit.
b. The Court must not be in a position to pass an effective decree in the absence of such a party.

The above tests were described as true tests by Supreme Court in **Deputy Commr, Hardoi v. Rama Krishna, 1953.** In its various

decisions, this Court while facing similar issue as to non-joinder of a necessary party and a question as to who is a necessary party and impact for non-joinder of a necessary party, the Court applied the stipulated tests which were used in the supreme Court of India (*supra*). For instance, in the case of **Keneth Anselumu Nshushi v. Nashon William Sabibi**, Misc. Land Appeal No. 47 of 2022, High Court of Tanzania, Kigoma District Registry, p.3, where the Court held that:

> The concept of necessary part is reflected in our *Civil Procedure Code [CAP 33 R.E. 2019]* which has its genesis in the Indian Code of Civil Procedure ..., the full bench of High Court of Allahabad led down two tests for determining the questions whether a particular part is a necessary part to proceedings or not in **Benares Bank Ltd. v. Bhagwandas**, 1947...

In the application at hand, the Board of Trustee meet those propounded tests set, where it is a Board responsible for the management of the assets and liabilities of the Workers Compensation Fund including liabilities claimed by the Applicant herein. If the Applicant will succeed the relief claimed, he must involve the Board of Trustees of the Workers Compensation Fund.

Unfortunately, since necessary party (Board of Trustees of the Workers Compensation Fund) is not a party to a case, this Court will not be in position to pass a decree in the board's absence. Even if it passes, such decree will be unexecutable. The Court of Appeal has always emphasized that the right to be heard is a fundamental principle which is enshrined under the Constitution and the Courts must jealously safeguard the same. See: **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina Mwakyoma** [2003] TLR 251, **Selcom Gaming Limited v. Gaming Management (T) and Gaming Board of Tanzania** [2006] T.L.R 2000.

In Tanzania, the idea of joining a necessary party has been pushed to its utmost limit. The Applicant correctly cited the very recent decision of the Court of Appeal in which it had an opportunity to deliberate on necessary party and a proper party in the case of **Livingstone Michael Mushi v. Asha Magoti Magere& Others,** Civil Application No. 247/08 of 2022 (unreported) specifically pp. 9 to 13. The summary of the deliberations is contained at the last paragraph of page 12 and first paragraph of page 13 in which it is held that:

In the present case, the proceedings in *Miscellaneous Land Application No. 30 of 2021* was conducted and a decision rendered in the absence of the Applicant which, on the face of it, adversely affected his interest in respect of his ownership of the landed property. He was not a party as rightly argued by Mr. Luhigo. As we have endevoured to show above, that case was between **Asha Magoti Magere (Administrator of the late Hamisi Asili) and Hassan Kapuli, Karama Salehe Mansoor and Rock City Takers Ltd**. It is therefore plain that the Applicant, being a proper party, was not accorded the right to be heard. Quite in line with the provisions of *Article 13(6) of the Constitution of the United Republic of Tanzania of 1977* (as amended) which obligates Courts to avail an opportunity to be heard to persons when their rights are being adjudicated before pronouncing the verdict. We are satisfied that the omission to join the Applicant in the proceedings was a fundamental error which denied him the right to be heard which is a violation of a fundamental principle of natural justice as the Court lucidly explained in the case of **21st Century Food and Packaging Ltd vs Tanzania Sugar Producers Association and Two Others,** Civil Appeal No. 91 of 2003 (unreported)...

In the veins of the directives of the Court of Appeal, I join hands with both parties that the decision of the Minister for Labour emanates from the Workers' Compensation Fund which is the one whose denial to pay compensation on the death of the Late Osmunda O. Millinga is challenged. As such, *Section 12(1) and 2 (a) of the Workers Compensation Act (supra)* is authoritative provision to the effect that:

> 12 (1) There is established a Board to be known as the Board of Trustees of the Workers Compensation Fund
>
> (2) The Board shall in its corporate name be capable of
> (a)suing and being sued.

It follows obviously that the Board of Trustees of the Workers Compensation is a necessary party that need to be joined.

Indeed, as submitted by the Applicant, the practice of Labour Laws in the period of the then *Security of Employment Act [Cap 574 Revised Edition 2002]* was the same. In the Act, disputes started with the Conciliation Board as per the provisions of *section 23(1)* and when one was aggrieved he had to file a reference to the Mininster for Labour in terms of *section 26(1).* Since the decision of the Minister was

final, one could only approach the High Court via judicial review. On judicial review the practice shows that the matters were being filed against the Minister, the Attorney General and most importantly the Employer or Employee depending on who was aggrieved by the decision of the Minister. Some of this cases for purposes of reference are like **Tanzania Standard Ltd v. Minister for Labour Employment Youth Others,** Civil Appeal 46 of 2016 and **Swai & Others vs Minister of Labour & Youth Development & Others,** Misc. Civil Cause 29 of 1995. In the later case, it is even specifically stated at the first paragraph of page 1 that:

> On 15/12/2006, the Applicants filed a chamber application for several orders against the 2nd Respondent SHIRIKA LA USAFIRI (UDA) and *the 1st Necessary Party PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION (PSRC).* [Emphasis supplied]

The same practice is also evident on Labour cases involving public servants like in **Daudi Mitumba Ayoub vs Chief Secretary, President's office & Others,** Misc. Application No. 629 of 2019 in which at paragraph 4 of page 4 it is stated as follows:

> Aggrieved by the decision he appealed to the 2nd Respondent, The **Public Service Commission** which upheld the decision of the 1st Respondent. His appeal to the 1st Respondent The **Chief Secretary, President's Office** was again dismissed. He has thus decided to knock at the doors of this Court.

In the above case, the Chief Secretary, President's Office was the last authority to make a decision over the employee as it applies to the Minster for Labour, the 1st Respondent in this case. Most importantly, National Audit as the employer and the necessary party is joined. i.e the matter cannot go without according him an opportunity to be heard. Also, in terms of *rule 44(1)&(8) of the Labour Court Rules, 2007 (supra),* this Court may make an order as to the joinder of the Workers' Compensation as this suit cannot be defeated only because of nonjoinder.

On the third ground, the Respondent contended that the application is purely incompetent for having no notice of representation contrary to *Rule 43 (1)(a) (b) of the Labour Court Rules, 2007 G. N No.106 of 2007, Section 56(c) of the Labour Institution Act (supra).*

It was argued by the Respondent that Representation in a Court of law is a constitutional right, which one need to exercise. The Labour Court rules set a procedure requirement under *Rule 43 (1)* where a representative who acts on any party in any proceedings shall, by a written notice, advice the registrar and all other parties of the name and address.

The Respondent was of position that the application by the Applicant lacks a Notice of Representation, which makes the attorney to have no audience as the Court was not informed on his appointment for representation of the Applicant by the said Attorney and therefore makes the Application incompetent.

According to the Respondent, the absence of Notice of Representation is as good as denial or waiver of his right to be represented. Thus, one has to know that it is a proper practice that one has to notify the Court his representative whereby the Court will observe that audience of person representing before conducting its proceedings for the interest of justice as well to avoid encumbrances during hearing. To support the argument, the Respondent cited the

case of **Mhubiri Rogage Mongateko v. Mak Medics Ltd,** Court of Appeal No. 106/2019.

In response to the third ground, the Applicant wrongly submitted that the particulars stated in the chamber summons and notice of application suffices to be a notice of representation in terms of *rule 43 of the Labour Court Rules (supra) and section 56(c) of the Labour Institutions Act (supra).*

Moreover, according to the Applicant, the point which the Court subscribes thereto is that a notice of representation can be filed at any time before hearing by an order of the Court. He cited the case of **Ally Ally Mchekanae & Another v. Hassady Noor Kajuna & Another,** Civil Case No. 03 of 2022, High Court of Tanzania, Songea Sub Registry, p. 60 paragraph 2 in which the Court stated the following:

> The Plaintiff can bring the copy of board resolution within the record by way of additional list of documents within reasonable time prior hearing. If the Plaintiff does not fulfil such requirement up to the hearing stage, the case will abort for lack of *locus standi.*

I do agree that a notice of representation can be filed before hearing of the matter. As replied by the Applicant, in **Mhubiri**

Rogega Mong'ateko case *(supra),* the Court of Appeal of Tanzania did not touch the provisions on the third preliminary objection on notice of representation. Paragraph 2 of p. 7 of the decision stated that:

> The appellant also complained that the High Court contravened the provisions of *rules 2 (2) and 43 (1) (a) and (b) of the Labour Court Rules G.N. No. 106 of 2007* read together with *section 56 (a) (b) and (c) of the Labour Institutions Act No. 7 of 2004, now Cap 300 R.E. 2019 (the Act),* because it denied him a constitutional right to representation when it refused his personal representative to act on his behalf during the hearing of the application for revision.

However, there is nowhere in the decision the Court of Appeal reacted to such submission to entitle the Respondent Counsel to make reference to it in this matter.

At any yard of reasoning, representation in Labour Court is governed by *Section 56 of the Labour Institutions Act (supra)* which provides that:

> In any proceedings before Labour Court, a party to the proceedings may appear in person or be represented by

(a) an official of a registered trade union or employer's organization;

(b) a personal representative of the party's own choice; or

(c) an advocate.

Again, the manner of representation in Labour Court is governed under *Rule 43(1) of the Labour Court Rules (supra)* which provides:

> A representative who acts on behalf of any party in any proceedings shall, by a written notice, advice the Registrar and all other parties of the following particulars-
>
> (a) the name of the representative;
>
> (b) the postal address and place of employment or business; and any available fax number, e-mail and telephone number.

Since the Personal Representative is chosen by the Party bringing or opposing the application before the Court, then it is the Party who has to sign the notice of representation. A Representative cannot authorize himself and act on behalf of a Party to the proceedings. The Representative cannot appoint himself and proceed to notify the Court. Thus, it is the duty of the Party to the proceeding to notify the Court the Representative of his/her own choice. Therefore, the notice must be signed by the Applicant or Respondent only and not his/her

Representative. This is also the Court's position in the case of **Alex Situmbura v. Mohamed Nawayi,** Revision Application No. 13 of 2021, High Court of Tanzania, Musoma Sub Registry (unreported).

The fourth ground of objection was to the effect that *the application is incompetent for being accompanied with defective Notice of application contrary to rule 24 (1), 24 (2), (a), (b), (c), (d), (e), (f), 24 (3)(a), (b), (c), (d), of the Labour Court Rules (supra).*

The Respondent was of submission that *Rule 24 (1) and (2) of the Labour Court Rules (supra)* sets the requirement for the Notice of Application to be signed by the party bringing the application and to comply with *Form No.4 in the Schedules to the Labour Court Rule,* where it states:

> 24 (1) Any application shall be made on notice to all persons who have an interest in the application, (2) The notice of application shall substantially *comply with Form No. 4 in the schedule to these rules, signed by the party* bringing the application ...

The Respondent advanced five argument. *One*, the Notice of Application was signed by the Advocate contrary to the requirement stipulated under *Rule 24 (2) (supra)* and the same was not served to the necessary party who was not joined to the Application to wit, the Board of Trustees of the Workers Compensation Fund contrary to *Rule 24 (1) (supra).*

Two, the Notice is not in the format required as provided by Form No. 4 to the Schedule. Therefore, the application is incompetent since the interested person who has been mentioned by the Applicant in her revision application to be the alleged one has not been included.

Three, the notice does not contain relief as required under *Rule 24 (2) (C)* as the relief sought mentioned the party who is not joined in this application to wit. The Board of Trustees of the Workers Compensation Fund as a necessary party and therefore incompetent. It was the Respondents' prayer that the Application be dismissed with costs for the reason of being incompetent, frivolous, and vexatious and for abuse of Court process.

Four, the affidavit in support of the application is defective for contravening *rule 24(3) (a), (b), (c), and (d)* since it has been drafted

with absence of mentioned rules. There is lack of reliefs sought and this may have led the Court to find itself difficult to grants the relief, which one did not state. Generally, pleadings need to be completed from the art of writing and properly filed.

Five, if one read between lines the facts of the affidavit it is quite clear that it did not provide descriptions of names detailed, addressee of the parties, no chorological statements some are repetitions there is no flow of facts and absence of legal issues which would have been used to build up the claims. The provision uses the word *'shall'* as an important requirement, meaning it is a mandatory requirement that need to be complied or a function to be performed, when the Applicant prepares the affidavit. To back up the position, the Respondent cited the case of **Reli Assets Holding Company Ltd v. Japhet Kasmir and 1500 Others,** Labour Division TBR Revision No 10 /2014 (2015) LCCD(1) whereby my brethren Mipawa J insisted on the compliance with the simplified rules and requirement of an affidavit as spelt out in the Labour Court rules. The above cited case is empowered by the case of **Johnson Mwakisoma v. Ipsos Tanzania Limited,** Revision No.975/2019 High Court Labour Division, where it was cemented that

if the Applicant fails to follow rules of procedure for filling Labour Dispute before this Court as well to comply with the order such application becomes incompetent.

In reply to the first limb of the fourth objection on the alleged non compliance to *rule 24(2) of the Labour Court Rules, 2007* in which the Advocate has signed instead of the Applicant, it was the Applicant's **wrong submission** that there is no harm for an advocate to sign the notice of application and even the chamber summons. His argument was supported by Form No. 4 which contains the phrase *Signature of the Applicant's Representative* indicating that an advocate is allowed to sign in place of an Applicant.

Moreover, there is no caselaw and the Respondent's Advocate has cited none to the effect that an Advocate is not allowed to sign a notice of Application for his client.

As regards the fourth limb of the fourth preliminary objection on alleged failure to mention *Rule 24(3)(a), (b), (c) & (d) of the Labour Court Rules, (supra),* it was the Applicant's reply that failure to mention the rule is not fatal as the same is just a directive on how the affidavit should be and not a rule which moves the Court.

In the light of the afore submission, it has to be noted that the notice of application is generally governed by *Rule 24(2) of the Labour Court Rules* which provides that:

> The notice of application shall substantially comply with Form No. 4 in the schedule to these rules, *signed by the party bringing the application and filed* and shall contain the following... [Emphasis added]

The term " a party" was well elaborated in the case of **Simon John v. BRAC Tanzania Finance Ltd.** Misc. Appl. No. 60 of 2018, High Court Labour Division at Dar es Salaam (unreported) where " a party" was defined to mean:

> The persons who are directly involved or interested in any act, affair, contract, transaction or legal proceeding; opposing litigants...

A party is also defined under *Rule 2(2) of the Labour Court Rules* to mean:

> A party to Court proceedings includes a person representing a party in terms of *section 56 of the Act and section 88 of the Employment and Labour Relations Act, 2004.*

In the case of **Simon John** *(supra),* the Court went on to hold that:

> It is my view a party to Court proceedings is the one who brings the case to the Court, and that representative of the party to proceedings before this Court has no automatic right to sign pleadings on behalf of a party to the proceedings because legally, he/she is not a party to these proceedings. I would say the drafter of this piece of legislation might overlooked on this point that in no any reason an advocate will assume the right and responsibilities of a party in Court proceedings including execution of awards and orders of the Court. In most of labour Court proceedings, parties are either employer or employee and this is considered in a wider perspective. That, not only representative of those employers and employees will be entitled to sign the pleadings including notice of application but also, they will be bound by the final Court decision and have to execute the orders thereto if are regarded as parties to this Courts proceeding as defined under *Rule 2(2) of the Labour Court Rules*. Thus, when they want to authorize any person to assume the parties' position, they have to follow the legal procedures...

However, in the case of **Ako Catering Services Limited v. Sudi J. Kamugisha,** Misc. Application No. 379 of 2020, High Court Labour

Division at Dar es Salaam (unreported), a party's representative was defined to be included as a party to proceedings. It was held that:

> My more comprehensive conception to *Rule 2 (2) of the Rules* is to the effect that a "party" to Court proceedings includes an official of a registered trade union or employers' organisation, an advocate, and a personal representative of a party's own choice in accordance with *Section 56 of the Act* for purpose of the High Court Labour Division and *Section 88 of Cap 366 R.E. 2019* for the purposes of arbitration proceedings.

Therefore, there are two conflicting decisions properly to be termed as two schools of thought as to who can sign a notice of application. The first position as supported by the case of **Simon John** *(supra)* maintains that the notice of application must be signed by the party bringing the application. That is the employer or employee. The second position maintains that since a party's representative is also a party to the proceedings, he/she is authorised to sign the notice of application. The position is supported by the case of **Ako Catering Services** *(supra).*

I join hand with the position in **the case of Simon John *(supra)*** due to the following reasons: *First*, parties to the proceedings are the ones directly affected by the matter in question. Thus, for the purposes of labour laws an employer and employee in question. *Second*, much as a representative is also a party to the case, he only appears to proceedings on such capacity of representative. He/she cannot acquire the status of a party and proceed to institute proceedings on behalf of a party who is directly affected by a certain decision.

Third, in labour matters, proceedings are initiated by the notice of application, whereas for a person to act as a representative, he/she must notify the registrar in writing as in accordance with *Rule 43 of the Labour Court Rules*. Therefore, the representative cannot start to sign pleadings such as the notice of application before he/she is authorised by the Court. On that basis, a notice of application must be signed by the Applicant him/herself.

As regards absence of the names, description and addresses of the parties, a statement of the material facts in a chronological order, statement of the legal issues that arise from the material facts and the

reliefs sought, it was replied that except on the allegation on lack of chronological order, the Applicant admitted the things mentioned are not in the affidavit. However, he contended that the same is not a sin. He supported the argument with the case of **Lyamuya Construction Co. Ltd v. Board of Registered of Young Women's Christian Association of Tanzania,** Civil Application 2 of 2010 where the Court at page 5 stated the following:

> The principle that can be extracted from this holding is that the omission to cite the relief in the Notice of Motion is not necessarily fatal, if that relief can be gleaned from the accompanying affidavit. If the principle is taken broadly, it would, I think, also, include the omission to state the grounds as in the present case, from which one may conclude that, it too, is not necessarily fatal, if the grounds are shown in the accompanying affidavit.

Based on the above quotation, it was the Applicant's submission that since the mentioned absent issues are featured in the notice of application and the chamber summons, there is no legal sin committed. The Affidavit has to be read together with the notice of application and the chamber summons.

Much as I may agree with the Applicant, chronological order is the arrangement of things following one after another in time. It is unfortunate that the Applicant has failed to comprehend the supporting affidavit. Going through paragraph 12 of the supporting affidavit, I have noted the Applicant, though not clearly, raised a legal issue on failure by WCF to carry out a medical or scientific evaluation and analysis of issues presented before them. Whether it is true or not, in my view, it suffices to be treated as a legal issue aniticipated under *Rule 24 (3) (c) of the Labour Court Rules (supra).*

Again, I find it to be a legal sin to raise issues in the notice of application and the chamber summons because it is not a legal requirement. Compliance to *Rule 24 (3) (c),* as it applies to other rules, is a requirement which must be adhered its letter in the supporting affidavit and not in other documents as the Applicant wants this Court to believe.

The 5th ground of objection was that *the Application is purely incompetent for want of index as provided under rule 46(2) of the Labour Court Rules GN No. 106 of 2007.*

It was submitted by the Respondent that the Applicant failed to observe rules of filling his application and this obvious renders the application to be incompetent. The rules require index must be shown in order for Court to know the proper document to rely on and ensure the existence of them so as to exercise justice.

In reply to the fifth ground of objection, it was submitted by the Applicant that it is not a preliminary objection in terms of the **Mukisa Biscuit Manufacturing Co. Ltd** *(supra).* According to the Applicant, the Respondent Counsel has not assisted the Court to interpret the word index as intended in the rule and also has not submitted what injustice the same has caused if at all is an issue. It was the Applicant's submission that its admission into the then JSDS is enough to show that the provisions of the rule has been adhered to.

At the end and taking into consideration the conceding in the first preliminary objection, it was the Applicant's proper position that the application cannot be dismissed but struck out. I squarelly agree with the Applicant because the two i.e dismissal and struck out are not just used interchangeably but depends on the situation of the case. With reference to **Ngoni Matengo Co-operation Marketing Union**

Ltd v. Aii Mohamed Osman [1959] I.E.A. 577, the Court of Appeal in **Tanzania Standard Ltd v. Minister for Labour Employment Youth Others,** Civil Appeal No. 46 of 2016, pp. 15 and 16 discusses the effect of dismissal and striking out. When the matter is dismissed, the doors of the Applicant to come back to the same Court with a competent matter is barred while when it is struck out, the doors to come back with a competent matter in the same Court are open. In the circumstances of this case, I hold that the matter deserve a striking out order so that the Applicant can come back subject to time limitation with a competent matter.

Having considered the submission of both parties, it is the observation of the Court that pagination and index are filed pursuant to the provision of *Rule 46 of the Labour Court Rules* which is to the effect that:

> 46. (1) In all contested proceedings, including application for urgent relief, the documents that are filed with the Registrar shall be paginated by the party initiating the proceedings.

(2) The party initiating the proceedings shall compile and serve an index on the other party before the matter is heard.

(3) The parties shall ensure that the copies of the documents filed with the Registrar are paginated in accordance with the index.

In the case of **Adam Lengai Masangwa and Another v Mount Meru Hotel**, Labour Revision No 1 of 2018 (unreported) it was held that:

> ...though, as a matter of fact, the record clearly shows the Applicants did not paginate nor serve a copy of an index to the Respondent as required by law, nevertheless, such defect does not defeat the application because that is irregularity which does neither affect the substantive part nor does it defeat the end of justice.

Furthermore, in the case of **Hamza Omary Abeid v. Pro Mining Service Ltd,** Labour Revision No. 15 of 2023, High Court Labour Division at Mwanza (unreported), the Court was of the view that it is not fatal on failure to file pagination and index. The Court had the following reasoning:

One, the purpose of the index is to only tell what is contained in the application. In context, it serves as a table of content in a textbook. Yes; as the table of content does not articulate the theme of the literature, so is the index in regard of the current application. The index, therefore, does not form the kernel of the application in question. That is my view. *Two*, the Respondent is not or will not be prejudiced if the application is heard on merit.

The Court went on to hold that:

Three, with advent of the overriding objective principle, the Court need be guided by justice rather than being clawed by technicalities. Accordingly, I partly agree with the Applicant that this is a fit case where the Oxygen Principle may be put to use without causing travesty of justice to parties.

I subscribe to the above position. It is not fatal on failure to file pagination and index on the advent of overriding objective. I add that preliminary objection of this nature can be cured with the principle in question. Furthermore, the other Party is not prejudiced in any way if the index is not filed. Therefore, much as it is the requirement of the law, failure to file the same does not render the whole application incompetent.

In conclusion, therefore, the application is hereby struck out. Being a labour matter, and considering the jurisprudential contribution brought by both parties, costs are waived. It is so ordered.

Y. J. MLYAMBINA

JUDGE

30/11/2023

Ruling delivered and dated 30th November, 2023 in the presence of the Applicant, his Advocate Henry Njowoka and learned State Attorney Caroli Chami for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

Y. J. MLYAMBINA

JUDGE

30/11/2023