

NAMUDOPE JUDITH ::::::::::::::::::::APPLICANT

TASCO INDUSTRY LIMITED:.....RESPONDENT

The Hon. Mr. Justice Anthony Wabwire Musana

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

1. Mr. Sulaiman Isota of M/s. Katuntu & Co. Advocates for the Applicant.
2. Ms. Salima Ibrahim Mugisha and Mr. Ali Ssebugwawo of M/s. Sunrise Advocates for the Respondent.

Introduction

- [1]** This ruling concerns an application seeking leave to appeal on matters of fact forming part of the award by Ms. Hilda Nakagga, Labour Officer in Labour Complaint No. MGLSD/L.C/234/2020 delivered on 8th March 2022. It was brought under Section 98 of the Civil Procedure Act Cap 71(*from now CPA*), Section 94 (2),

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of the Employment Act, 2006 (*from now EA*), and Order 52 r.1, 2, and 3 of the Civil Procedure Rules S.I 71-1(*from now CPR*).

- [2] In her supporting affidavit, the Applicant deposed to a question of fact relating to her application for leave, which was denied by the employer, contradicting evidence of hours of work, social security payments, remedies, failure of the Labour Officer to evaluate evidence, and other general questions of evidence on the record.

1st Preliminary matter

- [3] As a preliminary matter, Counsel for the Applicant contends that having been served with a copy of the motion and affidavit, the Respondent declined to file a response and is to be taken as not opposing the application. Counsel cited the cases of **DFCU Bank Limited v Godfrey Muwanga H.C.M.A No 240 of 2018** and **Agro Supplier Ltd v Uganda Development Bank H.C.C.S No 379 of 2005** in support of the proposition that the effect of not filing an affidavit in reply where the law requires one is a fatal omission. Counsel contended that the application was, therefore, unopposed.
- [4] The law on failure to file an affidavit in reply is well settled. Where the applicant supports his application by affidavit or other evidence, and the respondent does not reply by affidavit or otherwise, the supporting evidence is credible, and the facts stand unchallenged.¹ We agree with the very apt dicta of the Honourable Mr. Justice Henry I. Kawesa in **DFCU Bank Ltd v Geoffrey Muwanga H.C.M.A 240 of 2018** that the absence of an affidavit in reply implies that there is no rebuttal to the application. We agree with Counsel for the Applicant that the application stands unopposed.
- [5] The exception to this position, is that a Respondent, who has yet to file an affidavit in reply, would only be entitled to address this Court on points of law. The dicta of the Honorable Dr. Justice Andrew K. Bashaija, in **Pastor Elidad Mulira v Mugisa Julius Kalemera**² is that there is no legal requirement for a Respondent in an application to file an affidavit in reply where the Respondent intends to appear and argue the application only on points of law.
- [6] We will determine the application on its merits. This is so because an application, even though it is unopposed, is required to be proven.

¹ H.G. Gandesha and Kampala Estates Ltd and G.J. Lutaya, SC Civil Application No. 14 of 1989.

² H.C. Civ Revision No. 0010 of 2017. See also Twaha Kikomeko v A.G H.C Taxation Appeal/Ref No. 06 of 2016



Summary of Submissions of Counsel for the Applicant.

- [7] Citing the Court of Appeal decision in **Lubanga Jamada v Ddumba C.A.C.A No 10 of 2011** and **Action Aid Uganda v David Mbarakye Tibekinga LDA 028 of 2016**, it was submitted for the Applicant that questions of fact relating to her application for leave, which was denied by the employer, contradicting evidence of hours of work, social security payments, remedies, failure of the Labour Officer to evaluate evidence and other general questions of evidence on the record were not considered by the Labour Officer. In this way, the Labour Officer erred in law and fact. Further, the Labour Officer omitted to pronounce herself on prayers regarding payment in lieu of notice, compensation for unfair termination, terminal/retirement benefits, general damages, interest, and costs. For these reasons, Counsel prayed that this Court invokes its jurisdiction to grant leave to appeal.

Summary of the Respondent's submissions.

- [8] In their written submissions filed in Court on the 27th of March 2023, Counsel for the Respondent submitted by raising two preliminary objections. The first of these objections was that the claim did not disclose a cause of action as the Respondent was never the Applicant's employer. Secondly, the Claim was initially filed against the wrong party.
- [9] Regarding the first ground of objection, it was argued that the Respondent contracted WIDE CONCEPTS SERVICES LTD. This independent recruitment agency provided casual labourers at the Respondent's premises, and the original claim arose against the recruitment agency. **Citing National Social Security Fund v MTN Uganda Ltd & Anor H.C.C.S No. 94 of 2009**, Counsel contended that the agency was solely responsible.
- [10] Regarding the second ground, it was submitted that there was no employer/employee relationship between the Applicant and the Respondent. Had the Labour Officer addressed herself to this fact, she would have found that the Appellant (Applicant) had sued the wrong party.
- [11] In the alternative, the appeal had no merit as the Applicant had not raised arguable grounds for serious judicial consideration. There was no evidence of an employment contract, and thus, the Labour Officer misdirected herself and arrived at the wrong conclusion.



2nd Preliminary Matter

- [12] In paragraph 4 above, we observed that the Respondent, who had not filed an affidavit in reply, was only entitled to raise arguments of law. The failure to file an affidavit in reply places the Respondent in some difficulty. The first is that objections now raised before this Court are matters that should have been raised before the Labour Officer. A perusal of the ruling of the Labour Officer indicates that the Respondent did not participate in the proceedings. The matter of cause of action was not placed before the Labour Officer before she rendered her decision. It is also raised by way of written submissions. There is no affidavit in reply to support the assertion that the employment contract was made with a third party, not the Respondent. Essentially, Counsel for the Respondent attempts to place evidence from the Bar. This Court is not inclined to accept such evidence.³
- [13] Secondly, such evidence would be additional or new evidence before this Court. The considerations for admission of additional evidence on appeal are set out in Order 43 Rule 22 CPR, and these are that the lower court has refused to admit the evidence which ought to have been admitted and secondly that the High Court requires any document to be produced by any witness or other substantial cause. None of these conditions obtain in the matter before us, and it is not appropriately presented for a just resolution.
- [14] The other difficulty that the Respondent finds or has placed itself in is that these objections do not relate to points of law regarding an application for leave to appeal. We are, therefore, constrained to consider them.

The issue for determination.

- [15] From the Applicant's pleadings and submissions, the issue for determination is:

- *Whether the application raises matters of fact or mixed law and fact?*

Analysis and Decision of the Court

- [16] Under **Section 94(2) of the Employment Act 2006**(*from now EA*), an appeal shall lie on a question of law, and with leave of the Industrial Court, on a question of fact forming part of the decision of the Labour Officer. The provision is reproduced in Rule 24 of the Labour Disputes (Arbitration and Settlement) (Industrial Court

³ See Mayanja Joshua Kajubi V Wasswa Amon Bwogi & Anor H.C.M.A No 44 Of 2016

Procedure) Rules 2012(*from now on, the LADASA Rules*). The import of these provisions is that an intending appellant must seek leave to appeal on a question of fact forming part of the decision. In the case of **Bureau Veritas Uganda Limited vs. Davlin Kamugisha**,⁴ this Court, citing the English case of **Geogas SA vs. Tranno Gas Limited (the Balears)** 1993 1 Lloyd's Rep 215 at 228, emphasized the rationale of the provisions of **Section 94(2) EA**⁵ that the legislature intended to preserve the autonomy of Labour Officers as an arbitrator and facts would be evaluated by the lower courts while points of law would be left to the Appellate Court.

- [17] The Industrial Court has pronounced itself on considerations for a grant of leave to appeal on a question of fact. In the case of **Action Aid Uganda v David Mbarekye Tibekinga**⁶ the Industrial Court observed that in an application for leave to appeal on questions of fact, the applicant must include reasons why they are seeking to argue points of fact. In the case of **The Aids Support Organisation (U) Ltd V Dr. Kenneth Mugisha**⁷ we noted that the Industrial Court addresses the questions of law, and matters of fact are addressed and deliberated upon by the Labour Officer. We also observed that in the case of the **Attorney General of Burundi and the Secretary-General EAC and Hon. Fred Mukasa Mbidde**⁸ an error on a point of law occurs when a trial Court (i) misapprehends or misapplies a pertinent law or principle of law (ii) misapprehends the nature, quality, and substance of the evidence or (iii) draws wrong inferences from the proven facts. From this decision, therefore, issues or points of law relate to the interpretation and application of the law to the facts, while a question of fact relates to the findings because of the evaluation of evidence.
- [18] What we gather from the legislation and grain of authorities is that the threshold for a grant of leave to appeal is that the intending appellant must satisfy the Court that the question or questions of fact upon which they intend to anchor their appeal must have formed part of the decision of the Labour Officer and that they have reason for seeking to make arguments on question of fact.
- [19] In the matter before us, the Applicant did not file a draft memorandum of appeal. However, in the notice of motion, affidavit in support, and submissions, the applicant listed five intended grounds of appeal. These were:

⁴ Labour Dispute Miscellaneous Application No. 54 & 64 of 2017

⁵ In that case reference is made to Section 92(2) EA. The correct reference should be to Section 94(2) EA. Section 92(2) EA provides for a penalty for failure to pay severance allowance. The context of the ruling does not reflect a reference to the content of Section 92(2).

⁶ Labour Dispute Appeal No. 028 of 2016

⁷ Labour Dispute Miscellaneous Application No. 38 of 2022

⁸ Appeal No. 02 of 2019. See also *Simon Peter Ochileng & Anor v Attorney General of Uganda* Appeal No. 4 of 2015[2015-2017] EACIR 509

- (i) Questions of fact and evidence contradicting the conclusion of the Labour Officer that the agreement ought to show that she applied for leave, and the employer denied it.
- (ii) Questions of fact and evidence contradicting the conclusion of the Labour Officer that it was not part of the claimant's testimony as to how many hours she worked in excess per day
- (iii) Questions of fact and evidence contradicting the conclusion of the Labour Officer that no evidence had been adduced to show the amount of money to be paid by the employer in terms of NSSF benefits.
- (iv) Questions of fact and evidence contradicting the omission of the Labour Officer to pronounce herself on prayers for payment in lieu of notice, basic compensatory order, compensation for unfair termination, terminal benefits, general damages, interest, and costs of the arbitration.
- (v) All other general questions related to evidence on record.

[20] While not set forth concisely, the grounds of the objection to the decision of the Labour Officer suggest that evidence needed to be properly evaluated. The Applicant contends that this affected the award of the Labour Officer. We are of the persuasion that these grounds speak to the statutory provisions on the powers of the Labour Officer to make awards and evaluate evidence. These are points of law. For these reasons, we are inclined to grant the application for leave to appeal the decision of Ms. Nakagga Hilda in MGLSD /L.C/234/2020 on questions of fact.

Final Orders of the Court

[21] We make the following orders and directions:

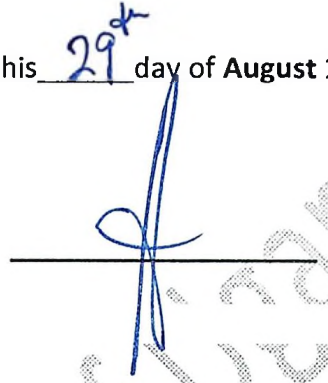
- (i) The Applicant is granted leave to appeal on questions of fact or mixed law and fact.
- (ii) The Applicant shall file and serve the memorandum of appeal and skeletal arguments within 30 days from the date hereof.

(iii) The Parties shall appear before the Court within 45 days from the date hereof for further directions.

(iv) There shall be no order as to costs.

Signed and dated in Chambers at Kampala this 29th day of **August** 2023

Anthony Wabwire Musana
Judge, Industrial Court



THE PANELISTS AGREE:


1. Ms. Adrine Namara



2. Ms. Suzan Nabirye



3. Mr. Michael Matovu



Ruling delivered in open Court this 29th day of August 2023 at 11.48a.m. in the presence of:

1. **For the Applicant:** Mr. Sulaiman Isota
Applicant is not in Court

2. **For the Respondent:** None.

Court Clerk: Mr. Samuel Mukiza



Anthony Wabwire Musana,
Judge, Industrial Court