IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 201 OF 2018

HASSAN TWAIB NGONYANI ..... APPELLANT
VERSUS
TAZAMA PIPE LINE LIMITED .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es salaam)

(Sheikh, J.)

dated 30th day of October, 2014
in
Civil Revision No. 40 of 2012
.....

JUDGMENT OF THE COURT

18th February, & 2nd day of March, 2022

MAIGE, J.A.:

For some time before their relation had become irreconcilable, the appellant and the respondent were in employment relation wherein the former was the employee and the latter the employer. It would appear that, in the 2005 General Elections, the appellant contested for membership of Parliament for Namtumbo Constituency and was, on 21st August, 2005, declared by the National Electoral Commission, as one among the candidates contesting for the respective parliamentary

seat. On the same day, the appellant was summarily dismissed for the reason of absence without leave. On reference to the Conciliation Board ("the Board") in terms of section 40 (1) (a) of the Security of Employment Act [Cap. 387 R.E. 2002] ("the SEA"), the summary dismissal in question was held to be inappropriate. It was thus reversed and substituted with an order that, the employment of the appellant was terminated, by operation of the law, on 21st day of August, 2005 when the appellant was declared a contestant for the Namtumbo parliamentary seat. It thus decreed as follows:

> *"... na kwa mjibu wa aya ya 6.3.4.4. ya Waraka huo mrufani anastahili kulipwa stahili zake zote za utumishi kulingana na Sheria za Nchi na Mkataba wa hiari unaomuhusu."*

Literally translated the afore said words mean:

> *"...and in accordance with paragraph 6.3.4.4. of the said Circular (the Circular of the Chief Secretary No. 1 of 2000), the appellant is entitled to be paid all his terminal benefits in accordance with the laws of the land and the voluntary agreement that relates to his service".*

Pursuant to the decision as aforesaid, the respondent paid the appellant on 12th July, 2006, TZS 26,385,953.05 being his entire due

terminal benefits including TZS 5,030,874.00 as Repatriation benefits and caused him to sign a document described as a discharge certificate.

The above aside, on 3rd day of March, 2008, the appellant instituted, at the District Court of Morogoro ("the executing court"), Miscellaneous Employment Cause No. 11 of 2008 through Form No. CC 10 seeking to realize USD 83,750 as subsistence allowance from 21st day of August 2005 when he was terminated to 12th July, 2006 when he was paid his repatriation benefits.

In response, the respondent filed, vide Miscellaneous Employment Cause No. 14 of 2008, objection proceedings under Order XXI rule 57 of the Civil Procedure Code [Cap. 33 R.E. 2019] (the CPC). She was, in the said application, calling upon the executing court to investigate into the legality and validity of the application for execution on account that, the decree had been satisfied and the appellant signed a discharge certificate to that effect. In paragraph 4 of the affidavit in support of the application, the respondent deposed as follows:

"4. *On 12th July, 2006 the objector did comply and completely discharged her obligation by paying the Respondent a total of Tshs. 26,385,953.05 to cover the entire due terminal benefits derived as follows: employment benefits- Tshs. 19,710,215.40; Accrued Leave- Tshs 362,597.00; Repatriation benefits-Tshs. 5,030,874.00 and Tanzania Pipelines Pension Scheme- Tshs 1,282,266. 65. The said Discharge Certificate is attached hereto and marked Annexure TZM-1"*

In opposing the application, the appellant filed a counter affidavit and in paragraph 5 thereof stated as follows:

"5. *That as regards the contents of paragraph 4 of the affidavit, the respondent notes that he was paid the amount stated, but that he was misled to sign the referred discharge certificate".*

In its decision dated 31st August, 2008 ("the initial decision"), the executing court, while in agreement with the respondent that, the appellant was not justified to make a further claim after receiving TZS 26,385,953.05 and signing a discharge certificate, it struck out the application for execution for being misconceived. Displeased, the appellant preferred an appeal to the High Court vide Civil Appeal No.

147 of 2008 attacking the findings of the executing court on both the effect of the receipt of the amount as aforesaid and striking out of the execution proceedings for being misconceived. In its judgment (Shangwa, J) which shall henceforward be referred as "the judgment on appeal", the High Court observed on the first issue as follows:

> *"In my opinion, there was nothing wrong for the Appellant Decree holder to file an Application for execution of the decree arising from the decision of the Conciliation board of Morogoro for further claims in respect of his unpaid terminal benefits to the tune of USD 83,750 which he wanted to enforce through Miscellaneous Employment Cause No. 11 of 2008 by attachment and sale of the Respondent's two houses on plot No. 179 Toure Drive, Masaki, in Dar es Salaam and on plot No. 423 Mhando Street, Masaki in Dar es salaam. Furthermore, I am of the opinion that notwithstanding the fact that the Appellant had signed a discharge certificate prepared by the respondent, yet still the choice was his to make an Application for execution of the decree for the purpose of realizing his unpaid terminal benefits from the Respondent which he claims to be USD 83,750. His application was supposed to be heard by the District Court of Morogoro and determined on merit."*

On the second issue, the High Court observed in the first place, that, it was wrong for the executing court to strike out the Miscellaneous Employment Cause No. 11 of 2008 ("the objection proceedings") while dealing with the Miscellaneous Employment Cause No. 14/2008 ("the execution proceedings") as the two proceedings were different and distinct. In the second place, it was observed that, the respondent being a judgment debtor, was incompetent to bring the objection proceedings. It finally quashed the initial decision and ordered that the execution proceedings be heard on merit.

In pursuance of the direction as aforesaid, the parties were heard by the executing court upon the respondent filing a counter affidavit wherein she contested the application on two grounds. **First,** the decision of the Board was duly satisfied as per the discharge certificate. **Second** , the amount claimed in the application was beyond the decision of the Board. In its ruling ("the decision on execution"), the executing court having considered the rival submissions, held that since the issue of payment of subsistence allowance was not expressly decided by the Board, it was a labour dispute which should have been

dealt with by the Board itself. In reaching to such a conclusion, the executing court observed as follows:

> *"The Decision of the conciliation Board was general that the Decree holder was entitled to be paid all terminal benefits of the voluntary retired employee. If at all the Decree holder found that the Judgment holder miscalculated his benefits, the right procedure was to go back to the Conciliation Board to present his claims and not coming to this court to make execution of the order which was not specifically given. By entertaining this claim will lead this court into the calculation of payments which are mainly done by Conciliatory Board in all cases of this kind. In other words this court has no jurisdiction of entertaining labour cases and if this court will proceed to determine on retirement it will be stepping into the shoes of Conciliatory Board which actually has the jurisdiction on cases of this kind."*

Being aggrieved by the decision, the appellant applied for revision to the High Court vide Civil Revision No. 40 of 2012. In its ruling "(the decision on revision"), the High Court (Sheikh, J.) was guided by one issue namely; *whether in the absence of a specific order by the Conciliation Board an executing court has the jurisdiction (a) to determine whether a decree holder is entitled to repatriation costs*

and subsistence allowance and (b) to compute the amount payable as subsistence allowance and repatriation costs.

Having addressed the issue, the High Court Judge concurred with the executing magistrate that, since it was not express in the decision of the Board that, the appellant was entitled subsistence allowance and/ or repatriation costs, how much and to what extent, the claim sought did not fall within the jurisdiction of an executing court. It thus dismissed the application and remarked that, the appellant was at liberty to refer the matter to the Board.

Once again aggrieved, the appellant has instituted this appeal faulting the decision of the High Court on revision on the following grounds. **One,** in holding that the executing court has no power to investigate on questions arising from execution, discharge and satisfaction of the decree. **Two,** in recognizing the alleged satisfaction of the decree despite not being certified by the executing court. **Three**, in holding that the calculation of the amount due to the appellant should be submitted to the Board notwithstanding that it was defunct and in any case, it had already concluded the matter. **Four**, in not considering the fact that at the time when the Board was making its

decision, the claims as to subsistence allowance was not due. **Five**, in not holding that the executing court in its decision on execution departed from the direction of the High Court in the decision on appeal.

When the appeal was called on for hearing before us, the appellant and respondent were represented by Messrs. Audax Vedasto Kahendaguza and Cornelius Kariwa, learned advocates, respectively. As the law requires, both counsel had, before the hearing, filed written submissions. Each of the counsel in his oral address, adopted his submissions as part of his oral arguments. We sincerely appreciate for the counsel's submissions which have been instrumental in composing this judgment.

We shall start our discussion with the last ground which seeks to criticize the High Court in not holding that, the decision of the executing court dismissing the appeal for want of jurisdiction was contradictory in effect with the decision of the High Court on appeal.

Submitting on this issue, Mr. Kahendaguza began by drawing the attention of the Court that, the issue of jurisdiction of the executing court to determine whether the appellant was to be paid subsistence allowance, was decided in the initial decision in favour of the

respondent. In the decision on appeal, he submitted further, the High Court held that the issue was within the jurisdiction of the executing court and directed the same to hear and determine the application on merit. He submitted therefore that, in reopening the issue and dismissing the application for execution on the same ground of jurisdiction, the executing court committed a fatal error which should have not been confirmed by the same court on revision as the High Court was already *functus officio*. There was no comment from Mr. Kariwa on this issue.

We have taken time to scrutinize the relevant decisions and proceedings and we do not agree with Mr. Kahendaguza that, the concurrent decisions of the executing court and the High Court on revision are in any way contradictory to the decision of the High Court on appeal. As we have noted elsewhere in this judgment, the executing court did not, in the initial decision, resolve the issue of jurisdiction of the executing court to enforce the decision of the Board. It only addressed the issue of whether the appellant having received what was termed as the entire terminal benefits and signed the discharge certificate, was not barred from commencing execution

proceedings. The executing court established at page 50 of the record as follows:

> *"Given the fact that he plainly submitted not to have any problem with the computation in the Discharge Certificate, I partly agree with him that section 123 of the Evidence Act CAP. 6 R.E. 2002 is not applicable but on the other hand, I also do partly agree with the Objector that there is no justification as to why the Respondent should be allowed to make further claims. What he was paid was employment benefits which was in conformity to the decision of the Conciliation Board".*

The decision of the High Court on appeal as we have already noted earlier on, was based on two issues namely; One, whether upon receipt of the terminal benefits and signing a discharge certificate, the appellant was allowed to commence an application for execution. Two, whether the objection proceedings were properly before the executing court. The reversal of the finding that the application for execution was misconceived, was based on the proposition that, the appellant was not barred from filing an application for execution for mere reason that he had received what was termed as the entire terminal benefits and

signed the discharge certificate. In view of the foregoing discussion therefore, the fifth ground has no merit.

We shall now direct our mind on the second ground as to recognition of satisfaction of a decree which was not certified by the executing court. Mr. Kahendaguza's contention on this issue is that; since the payment of the terminal benefits by the respondent reflected in the certificate of discharge was made out of court, it was wrong for the High Court to recognize it without complying with the mandatory requirement of Order XXI rules (1), (2) and (3) of the CPC. He submitted further that, since the executing court has exclusive jurisdiction under Order XXI rule (3) to certify the same, it was wrong for the High Court to direct that the issue be referred to the Board. In any event, he submitted, the Board having made a conclusive decision, was *functus officio* to deal with the same.

On his part, Mr. Kariwa urged the Court to dismiss this ground for the reason of being extraneous the decision of the High Court on revision. The basis of the decision of the High Court, he submitted, was not that the decree had been satisfied but that the claim was not in the decree. We entirely agree with him because the application for

execution, in our careful reading, does not suggest that the executing court recognized the alleged satisfaction of the decree by the Board. Quite apart, the executing court declined to entertain the application on merit for want of jurisdiction. In our considered view therefore, the second ground of appeal is misplaced. It is thus dismissed.

We now proceed with the 1st, 3rd and 4th grounds of appeal which we shall consider them together under the proposition that, the executing court had no jurisdiction to entertain the application. Mr. Kahendaguza in the first place associated the jurisdiction of the executing court with section 38(1) of the CPC which bars questions relating to execution, discharge or satisfaction of the decree from being dealt with by a separate suit and confers exclusive jurisdiction thereon to the executing court. He submitted therefore that, since whether the claim under discussion was covered by the decree is a question which relates to execution, discharge and satisfaction of the decree, it was within the parameters of the respective provision and as such under subsection (2) of section 38 of the CPC, the executing court should have treated the execution proceedings as a suit and receive evidence if it was necessary in giving effect to the decree.

It was further submitted for the appellant that, since the nature of the claim as provided for under section of 59 of the repealed Employment Act [Cap. 366 R.E. 2002] is such that it could not be known until the judgment debtor paid repatriation costs, it was wrong for the High Court to hold that, the executing court had no jurisdiction to make computation of the same. The Board, he submitted further, having made a final and conclusive decision that the appellant was entitled of all terminal benefits, it was *functus officio* to recompose itself and address the computation of subsistence allowance.

Submitting in refutation, Mr. Kariwa contended in the first place that, section 38 of the CPC was inapplicable. In his view, the applicability of the said provision is subject to existence of objection as to limitation and jurisdiction. He submitted therefore that, since the law as it stood during that time excluded jurisdiction of ordinary courts in causes of action founded on labour complaints, there was no material errors on the part of the executing court.

On whether the matter could be remitted to the Board which was already defunct, it was his submission that, by the express provision

of the Employment and Labour Relations Act [Act No. 6 of 2004] which is now in force (the ELRA), what would have been done by the Board can now be done by the Commissioner For Mediation and Arbitration (the CMA) which is the successor of the Board. He did not agree with the counsel for the appellant that, the same is *functus officio* since the issue involved is a mere correction of clerical errors.

On whether the appellant was covered by the provision of section 59 of the repealed Employment Act, Mr. Kariwa submitted that the said provision applies in normal incidences of termination and not the instant one. He prayed therefore that, the appeal be dismissed with costs.

We have given the rival submissions on this issue due consideration and it is appropriate to consider who is right. Before doing so, a brief exposition of the laws which governed the matter is necessary. As we noted above, the dispute at hand emanated from a decision by the respondent to summarily dismiss the appellant for absence without leave. Under section 20 of the SEA, an employer could only summarily dismiss an employee on account of breaches of Disciplinary Code and subject to the conditions set out in the Act. A person aggrieved from

such decision, would refer the matter to the Board under section 24(1) of the SEA and on further dissatisfaction, to the Minister under section 27 of the same Act. The decision of the Board or the Minister was final and conclusive, binding to the parties to the reference and could be enforced in any court of competent jurisdiction as if it were a decree. Subsection (2) of section 28 provided as follows:

> *"(2) In addition to its powers to execute any decision which requires the refund of any wages deducted or,* ***expressly or by implication, the payment of any sum to an employee where a dismissal is ordered to take effect as termination of employment****, a court in which it is sought to enforce a decision of the Minster or a Board may make and enforce such orders as are necessary for specific performance of any decision for the reengagement or re-instatement of any employee(notwithstanding that the court would not have power apart from this subsection to make or enforce such orders and may award damages for failure of the employee to carry out any such decision as if he has dismissed the employee concerned wrongfully, and, if Part IV of this Act is in operation in relation to the employee concerned, such damages shall include statutory*

compensation provided for in that Part). (Emphasis ours)

Back to the fact in issue, the decision of the executing court as confirmed by the High Court on revision was based on the proposition that, the amount of subsistence allowance sought to be realized was not expressly decreed in the decision of the Board. In principle, we agree with Mr. Kariwa that, an executing court has no jurisdiction to execute what is beyond the decree. We also agree with him that, the claim as to subsistence allowance was not express in the decision of the Board. What was express in the said decision was that, the appellant should be paid all his terminal benefits in accordance with the law and voluntary agreement relevant to his services. What amounts to the said terminal benefits, the decision of the Board was silent. That being a case, we do not think that, the High Court Judge was right in holding that the application for execution was beyond the decree for the mere reason that, the claim was not express. We have three reasons to rationalize our decision.

First, under section 28 (2) of the SEA, the power of the executing court to execute the payment of money where, like in the

instant case, a dismissal is ordered to take effect as termination of employment, is not limited to an express decision. It extends to decisions which require such payment by implication. The Board, in its decision, decreed that the appellant be paid all his terminal benefits according to the laws and voluntary agreement relating to his employment. It did not specify items of terminal benefits. Obviously therefore, what should be paid to the appellant as terminal benefits was implied by law and voluntary agreement. To give effect to the decree, the executing court was bound to construe the decree in line with the employment laws and voluntary agreement and in so doing it could not be said to have gone beyond the terms of the decree.

Second, under section 38(1) of the CPC, Mr. Kahendaguza is correct, the executing court enjoys exclusive jurisdiction to deal with any questions relating to execution, discharge and satisfaction of the decree. Where the resolution of any of the questions requires ascertainment of controversial factual issues, the executing court is entitled, under section 38(2) of the CPC even to convert execution proceedings into a suit. In our view, therefore, in so long as the claim is captured by the decree, whether expressly or constructively, it is

within the power of the executing court to compute the same. Thus, in **Karata Ernest and Others V. The Attorney General,** Civil Revision No. 10 of 2010 (unreported), this Court while considering the provision of section 38(1) of the CPC, observed as follows:

> *" Although ordinarily the trial court has a duty to determine the quantum which the judgment debtor is bound to pay under the decree, where it has left out that question open for consideration subsequently, the executing court has jurisdiction to determine the quantum under this section on the issue."*

In **National Insurance Corporation V. Maligisa Manyangu and 24 Others**, Civil Revision No. 14 of 2017 (unreported), the High Court of Tanzania, Dar es salaam District Registry (Masabo, J) dealing with a revision arising from, like in this matter, enforcement of a decision of the Board under the repealed laws, made the following statement which sounds persuasive to us:

> *" I am also of a settled view that the learned magistrate was justified in ordering the Applicant to provide a breakdown of what has been paid so far so as to ascertain the claims that have been paid and those which remain due. I have noted that, instead of providing the breakdown, the Applicant defied the orders of court and has today failed/ neglected to provide the breakdown. From the events pertaining to this*

case, provision of the breakdown is also imperative in preventing any risk of double payment, thus it is in fact, in the interest of both parties as well as the court that the claim paid so far be known."

We do not agree with Mr. Kariwa that, by the reason of the nature of the decision of the Board, it cannot fall under section 59 of the Employment Act. For, under section 26(1) (b) of the SEA, once the Board or the Minister orders that a dismissal order takes effect as termination, the employee shall, for the purpose of terminal benefits, be deemed to have been terminated by payment of wages in lieu of notice. It provides as follows:

"*(b) that summary dismissal or proposed summary dismissal of an employee shall have effect as termination of employment, the employer shall be deemed to have terminated the employment of the employee otherwise than by summary dismissal on the date of dismissal or suspension (or, if the employee was not suspended, on the day on which the employer informed the employee that he proposed to dismiss him summarily), and* ***the employer shall pay the employee such sums as would have been due had the employment been terminated by payment of wages in lieu of notice*** *and any*

other payments due on the termination of employment in such a case, less any half pay paid during a period of suspension." (Emphasis is ours)

Third, from the application and counter affidavit in opposition to the application, parties were of consensus that, the terminal benefits awarded in the decision of the Board included repatriation costs. That is why, the amount of terminal benefits admitted to have been received by the appellant includes repatriation costs. Section 59(3) of the repealed Employment Act was very clear that expenses of repatriation includes:

"(b) subsistence expenses or rations during the period, if any, between the date of termination of the contract and the date of repatriation".

Since this kind of payment accrues subsequent to the decision and more particularly after the terminated employee is repatriated, it is a matter of common sense that it could not be express in the decision. It being part of the terminal benefits under the law, it was obviously implied in the decision of the Board.

In the final result and for the foregoing reasons therefore, we find the appeal with merit and we allow it. We accordingly quash and set

aside both the decision of the High Court on revision and the decision of the executing court on execution. Since under item 8(1) of the Third Schedule to the ELRA read together with section 103 (1) thereof, any reference concerning a summary dismissal under the repealed laws should be dealt with as if the same had not been repealed, we remit the file to the executing court for determination of the application on merit. It being employment matter, we make no order as to costs.

DATED at **DAR ES SALAAM** this 1st day of March, 2022.

M. A KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of March, 2022 in the presence of M/s Glory Venance holding brief Audax Kahendaguza Vedasto, learned counsel for the appellant and Ms. Glory Venance, learned counsel for the respondent is hereby certified as a true copy of the original.

J. E. Fovo
DEPUTY REGISTRAR
COURT OF APPEAL