

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., LEVIRA, J.A., And KAIRO, J.A.)

CIVIL APPLICATION NO. 110/08 OF 2020

EDWARD JAMES NG'WENGE.....1ST APPLICANT
HAMIS YAKOB WANANI.....2ND APPLICANT
JOSEPH MRIMI.....3RD APPLICANT

VERSUS

PERMANENT SECRETARY, MINISTRY
OF MINERALS.....1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT
JUSTUS MAGIGE @ JUSTUS MAGIGE MARWA3RD RESPONDENT

**(Application for Revision from the Decision of the High Court of Tanzania
Labour Revision at Dar es Salaam)**

(Mwingwa, DR)

dated the 18th day of December, 2008

in

Revision No. 40 Of 2007

.....

RULING OF THE COURT

7th December, 2022 & 19th June, 2023

KAIRO, J.A.:

The parties to this dispute have been in court corridors since 2008, thus a long time matter. By Notice of Motion dated 6th January, 2020, the applicants herein seek to move the Court under section 4 (3) of the Appellate Jurisdiction Act, Cap 141 RE: 2019 and Rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) to call and examine the record of the proceedings of the High Court of

Tanzania, Labour Division in Revision No. 40 of 2007 dated 18th December, 2008 so as to satisfy itself as to the correctness, legality or propriety of the orders therein. The notice of motion is supported by the affidavit jointly deposed by the applicants on behalf of many other fellow ex-employees of the Buhemba Gold Mines @ Meremeta. The application is opposed by the 1st and 2nd respondents through their joint affidavit in reply. The 3rd Respondent did not file a reply affidavit.

Briefly, the factual background which culminated to this application is to the effect that, the applicants were among the ex-employees of the defunct Buhemba Gold Mine and were all members of Tanzania Mines and Construction Workers Union (TAMICO), Buhemba Gold Mine Branch. After the ceasing of their employment, the applicants referred their dispute to the Commission for Mediation and Arbitration (CMA) for mediation which did not succeed. Following the failure of the said mediation, Justus Magige and his fellow 128 ex- employees instituted Revision No. 40 of 2007. The said application ended by signing a Deed of Settlement (the Deed) between the 1st and 2nd respondents on one part (the PS and the AG), and the 3rd respondent, Justus Magige on the other part who alleged to have signed on behalf of the ex-employees. The said Deed was, on 18th December, 2008 presented before the High Court Labour Division, signed and registered as the court's award,

binding upon the parties before Hon. Mwingwa, the Deputy Registrar by then (the Hon. DR). This is what annoyed the applicants as according to them, they were betrayed by the 3rd respondent as the applicants never participated in the negotiation which led to the eventual signing of that Deed. It was their contention that, as a result, their entitlement as per the said Deed is so little and insufficient. Some of them decided to challenge the Deed before the High Court Labour Division in Application for Revision No. 40 of 2007 presided by Hon. Wambura, J. (as she then was) in vain. The above applicants then decided to lodge this application seeking to revise the orders of the Hon. DR who admitted and registered the Deed as alluded to above, to challenge the decision of the High Court on the grounds which can conveniently be paraphrased as follows:

- 1. That, the deed of settlement was registered by the Deputy Registrar, who did not have authority to do so as per labour laws.*
- 2. That, there is no evidence that the representative proceedings which led to the lodging of the said deed of settlement were ever undertaken.*
- 3. That, TAMICO Branch- Buhemba Gold Mine, being a non-existing entity could not act on behalf of the applicants in any legal proceedings.*

When the application was called on for hearing, the applicants were present in persons, unrepresented. On the other hand, Messrs. Kitia Turoke and Mussa Mpogole, both learned State Attorneys represented the 1st and 2nd respondents while Mr. Justus Magige Marwa; an interested party and the 3rd respondent fended for themselves.

The applicants adopted their joint notice of motion and the supporting affidavit they filed on 6th January, 2020 together with the written submission in support of the application filed on 6th March, 2020 in which they faulted the Deed entered on 17th December, 2008 in Labour Revision No. 40 of 2007. According to the said affidavit, the alleged complaints are mainly two: **one**, that the Hon. DR of the Labour Court, being the Judicial Officer who recorded the said Deed was not a proper person to do so for lack of jurisdiction; and **two**, that there was no order of the High Court for the applicants to be represented by the 3rd respondent.

The applicants also deponed that, they referred their dissatisfaction with the registration of the Deed to the High Court (Labour Division) through Labour Revision No. 40 of 2007 but their application was struck out by Hon. Justice Wambura, J. on 8th November, 2010 after upholding the preliminary point of objection raised by the 1st and 2nd respondents regarding the competence of the

application. They went on deposing that they later sought for an extension of time to file revision out of time vide Civil Application No. 147/08 of 2019 which was granted on 8th October, 2019. Hence, this application before the Court. In conclusion, the applicants prayed the Court to quash the whole proceedings of the High Court (Labour Division) which culminated into the recording of the Deed at issue for the interest of justice.

In his brief oral submission in favour of the application, the 1st applicant contended that, the 3rd respondent purported to enter into the said settlement on behalf of other 128 ex-employees while he had no mandate to do so, and in a way, all the employees rights as per the suggested Voluntary Contract of Better Conditions of Service between the Defunct Buhemba Gold Mine on the one part and the Gold Mine Workers Union for Mining Construction Energy (TAMCO) as well as Recognition Agreement, were relinquished and disregarded to the detriment of the applicants and other ex-employees.

The 2nd applicant on his part adopted to what was submitted by the 1st applicant adding that, what was presented and agreed by the 3rd respondent in the impugned Deed had no blessings of the applicants and other ex-employees, and thus, a nullity.

The 3rd applicant joined hands with what was submitted by his fellow applicants with no more.

In the joint supplementary affidavit in reply affirmed by Mr. Mussa Idd Mpogole, the respondents deposed that the 3rd respondent was retrospectively selected by his co-employees in a meeting held on 10th March 2008 to represent his fellow employees in the negotiation and court matters related to their employment complaints. They went on to depose that, it was through the said negotiations that the parties agreed to settle the matter and thereby executed a deed of settlement which was recorded in Court on 18th December, 2008 as an award. That after recording it, the 1st and 2nd respondents herein executed the same by effecting the payments to the applicants and other employees as agreed. It was their submissions that the deal was concluded and the applicants cannot surface and come to court six months later to challenge it as rightly held by Hon. Wambura, J in her decision in the High Court Labour Revision No. 40 of 2007. They further deposed that the application, if granted, will prejudice the 1st and 2nd respondents.

The 1st and 2nd respondents went on to depose that there is no error whatsoever on the face of the record to warrant the grant of revision as, in their view, the Deed was executed by the appointed representative and recorded by the Judicial Officer who had the

jurisdiction to do so. The 1st and 2nd respondents also deposed that the grounds for revision as exhibited by the applicants in paragraphs 7.1 to 7.6 of the applicants' joint affidavit do not meet the threshold for the grant of revision sought.

Amplifying the respondents' supplementary affidavit in reply, Mr. Turoke started with the second complaint of the applicants to the effect that the respondent had no mandate to execute the Deed at issue. Mr. Turoke submitted that the matter/Revision application before the court commenced at the Commission for Mediation and Arbitration (CMA) vide complaint No. MUS/MA/NO. 36 of 2007 between TAMICO BRANCH Buhemba Gold Mine and Buhemba Gold Mine where it was taken for mediation which did not succeed. Mr. Turoke further submitted that the dispute was then escalated to the High Court by filing Form No. 1 by TAMICO. He contended that, according to the Form, there were three representatives of the complainant who were listed to be Edward Ng'wenge, Justus Magige and Ismail Masoud. He went on to submit that, the record further reveals that, the said representatives were unanimously selected by 129 employees during the meeting of TAMICO Branch of Buhemba Gold Mine conducted on 10th March, 2008 as per the minutes attached to the joint affidavit of the applicants as Annexure Meremeta 1.

Mr. Turoke went on to submit that, the selected trio were mandated to discuss and negotiate on behalf of the employees including the applicants regarding their employment rights and reach a consensus. He contended that when the dispute was at the High Court the representative decided to record it accordingly after striking a deal. It was his further submission that, the one who went to negotiate with the Ministry of Minerals (the Ministry) was the 3rd respondent who was given the power to do so on behalf of other employees including the applicants, being among those selected as per the minutes and Form No. 1.

In his view, the argument by the applicants that the 3rd respondent was not mandated to negotiate with the Ministry and enter settlement is not true and according to him, a misconception.

Mr. Turoke went on to submit that a similar complaint was lodged at the High Court vide Labour Revision No. 40 of 2007. In his view, the High Court made a correct finding that the Deed of Settlement reached was already concluded and executed by the parties to it because the employees, including the applicants have already received their payments as per the settlement and the argument that the 3rd respondent who signed the settlement Deed on behalf of the employees had no authority to do so was held to be baseless.

He further contended, the High Court also found the applicants' claim was filed after the lapse of six months since the settlement was reached and implemented. He referred us to page 5 of the decision of the High Court to back up his argument.

In conclusion, Mr. Turoke pleaded with the Court to dismiss the prayers by the applicants otherwise the respondent will be prejudiced and shall suffer irreparably since what has been agreed upon has already been concluded by the parties.

Mr. Mpogole on his part added to what has been submitted by Mr. Turoke. Reacting to the applicants' contention in complaint no 2 that there is no evidence to prove that the representative proceedings which mandated the 3rd respondent represent the other employees were undertaken, Mr. Mpogole dismissed the argument stating the same to be untrue. He argued that the evidence is in the minutes of 10th March, 2020, which show that 129 employees selected Edward Ng'wenge, Justus Magige and Alex Ndalo to be their representatives. He added that, these are the ones who were sent to represent the workers in negotiation regarding their terminal benefits following the closure of Buhemba Gold Mines @ Meremeta.

When implored by the Court as to whether all the selected representatives executed the Deed and were present during the

registration of the same, Mr. Mpogole answered negatively. He however hastened to add that the record did not state or show whether each of the representative was assigned a specific task or who should go where. Rather, according to Mr. Mpogole, they were all mandated to represent the workers in dispute as regards their terminal benefits.

When further asked by the Court as to whether there was an application by the 3rd respondent to represent his fellow workers, Mr. Mpogole was quick to respond that Form No. 1 in which the 3rd respondent was listed as a representative of his fellow employees sufficed to confer upon him the representative capacity.

Regarding the applicants complains that the Deed of Settlement was recorded and registered by the Hon. DR who had no jurisdiction/powers to do so under the Labour laws, Mr. Mpogole at first was of the view that the Hon. DR had powers to record and register the Deed as he did under Rule 7 of GN No. 106 of 2007 which spells out the powers of the Registrar. But on reflection and after being probed by the Court, he changed his mind and stated that the Hon. DR had usurped his powers. He went on that, in the circumstances, a party aggrieved by what the Hon. DR did was required under section 57 of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA) to take up the grievance to the Labour Court. He amplified that, though the applicants referred

the dispute to the Labour Court in Labour Revision No. 40 of 2007 before Hon. Wambura, J., but it was to be lodged as a reference, and in a separate file and not in the same file as it was the case in the matter at hand wherein even the number of the parties seems to be different. It was Mr. Mpogole's contention that, the pointed-out flaws create confusion.

As a way forward, Mr. Mpogole concluded that the application should be dismissed by the Court with no order as to costs. However, he hastened to add that, despite the said flaws, the applicants were not prejudiced because they conceded to the payments effected to them, attributing that to be a reason why only the applicants came to Court while the rest of the ex-employees were at home. According to him, the said state of affairs signifies satisfaction to the payments effected to them.

The 3rd respondent on his part submitted that he had to travel to Dar es Salaam alone due to financial constraint, but he was keeping the applicants abreast of what was going on including the consensus reached and the Deed of Settlement signed. He further stated that, the applicants also accepted the payments effected to them as per the Settlement they are now disputing and thus, their contention that he

had no mandate to enter into the settlement on their behalf is not true. He prayed the Court to dismiss this application.

In rejoinder, the 1st respondent conceded that they have been paid as per the Deed of Settlement, but not as per the Voluntary Contract of Better Conditions of Service entered between the workers and Buhemba Gold Mine, their employer. He again stated that, all along since this dispute arose, the parties to the dispute were Tanzania Mines and Construction Workers Union (TAMICO) and the PS. Surprisingly, the signatories to the Deed of Settlement were the 3rd respondent and the PS which he contended to be improper.

Other respondents had nothing to rejoin instead they reiterated their prayers to have this application granted.

Having gone through the record of the application together with the oral submissions by the parties, the issues for our determination are; **one**, whether the 3rd respondent had the mandate to represent the ex-employees of Buhemba Gold Mines in the negotiation which resulted into the Deed of Settlement, and **two**, whether the Deputy Registrar had power to record and register the said Deed of Settlement.

The parties are at one that the 3rd respondent was the one who on 17th December, 2008 negotiated with the PS on the rights of the x-employees of the defunct Buhemba Gold Mines and upon reaching a

consensus, he signed the Deed on their behalf. It is also on record that the said parties to the negotiations went ahead and registered the Deed of Settlement reached before the Hon. DR in Labour Revision No. 40 of 2007.

It is the contention of the respondents that the 3rd respondent was selected to represent his fellow ex-employees in the meeting conducted on 10th March, 2008 so as to represent them on their employment rights after their employments ceased. It is therefore their argument that the 3rd respondent was mandated to negotiate and enter into the settlement on behalf of the ex-employees as he did.

This argument was vehemently refuted by the applicants who submitted that, the 3rd respondent was neither mandated to negotiate nor enter into the said settlement on their behalf as he did, and thus, the settlement reached was a nullity.

We wish to acknowledge that, the 3rd respondent was among the three persons who were selected by the ex-employees of Buhemba Gold Mines to represent them to discuss with the relevant authorities regarding their employment rights on 10th March, 2008. The other two selected were the 1st applicant who was the Branch Chairman of Geita Gold Mines and Mr. Alex Ndalo. Going through the Deed, we noted that, the same has been entered by Justus Magige (3rd respondent) and 128

Others on the one part while the PS and the AG were the other part. We further noted at the attestation part that it was only the 3rd respondent, Justus Magige, who signed it which in our view is improper. We expected either all of the said 128 persons to sign it so as to signify their consent, or if signed in a representative capacity, then all of the three selected representatives of the ex-employees would have signed on behalf of them.

We are aware that the 3rd respondent in his oral submission stated that he had to travel to Dar es Salaam alone for the negotiation due to financial constraint and contended that he kept the applicants abreast of what was going on. However, such averment was supposed to be stated in his affidavit in reply, in the absence of which we consider the same to be a mere statement from the bar. As such, the statement has no evidential value and we disregard it. [See: **Ahmed Teja t/a Almas Auto Parts Limited vs. Commissioner General TRA**, Civil Application No. 283 of 2021] (unreported).

We are aware that parties in a labour dispute have the right to be represented by a person of their own choice as per section 56 of the Labour Institution Act No. 7 of 2004. However, under rule 43 (1) (a) and (b) of the Labour Court Rules, GN No. 106 of 2007 a notice to that effect

has to be given to the court by a concerned representative of a respective matter. The rule states:

*43 (1) A representative who acts on behalf of any party in any proceedings **shall, by a written notice**, advise 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.”(emphasis added)

The above provision has been couched in mandatory terms, which means compliance with the requirement is a must. In the matter at hand, the record does not show that the requirement was met by the 3rd respondent to denote that he was representing his two fellow representatives on behalf of the other ex-employees of Buhemba Gold Mines. As such, the purported representation was in contravention of the law and whatever he performed under that purport was a nullity. We therefore agree with the applicants that the 3rd respondent was not mandated to negotiate and reach a settlement on behalf of the ex-employees of Buhemba Gold Mines in the circumstances of this case.

In the light of the above finding, it serves no useful purpose to discuss the second complaint. However, apart from the said finding

which suffices to dispose this matter, we also wish to point out various flaws which causes confusion in this matter as far as the names of the parties and their number is concerned: Starting from the Deed of Settlement; the parties as well as their numbers were cited as – "Justus Magige & 128 Others vs the PS and the AG". When the Deed went to the High Court before the Hon. DR for registration the parties were "Mohamed Hassan and 20 Others vs the PS and the AG". Again, when the dispute escalated to the High Court Labour Division to challenge the orders of the Hon. DR, the parties as per the citation appeared to be "Mohamed Hassan & 2 Others vs the PS & the AG". However, at the introductory part before Hon. Wambura the parties were stated to be Edward Ngw'enge & 128 Others.

That apart, we also noted that, the names of the parties when the Deed was being recorded before the Hon. Deputy Registrar in Revision No. 40 of 2007 were different in their numbers from those who were cited in the said Deed. The following serves as a reference:-

*"THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION OF THE HIGH COURT
AT DAR ES SALAAM
REVISION NO. 40 OF 2007
MOHAMED HASSAN & 20 OTHERS DECREE HOLDERS
VERSUS
1. PRINCIPAL SECRETARY
MINISTRY OF ENERGY AND MINERALS } ...DECREE DEBTORS*

2. ATTORNEY GENERAL

Date 18/12/2008

Coram: Hon B.B. Mwingwa, Deputy Registrar

Applicant:

For Applicant: Justus Magige - Present

Respondent:

*For Respondent: Mr. Mweyunge State Attorney for
respondent - Present*

CC: E. Kanju

Mr. Mweyunge: For respondent. That we prepared a deed of settlement document between us and the applicant and we both parties are bound by this settlement deed to execute it and we pray this court to take this agreement as an award.

Order: The deed of settlement prepared and signed by both parties is to be considered as an award and it bounds both parties accordingly.

Signed
B. B. Mwingwa
DEPUTY REGISTRAR
18/12/2008

Copy to: Justus Magige
P. O. Box 103
DAR ES SALAAM

"" State Attorney,
Attorney General's Chambers,
Kivukoni Front,
P.O. Box 9050
DAR ES SALAAM."

Flowing from the above excerpt, the parties are Mohamed Hassan & 20 Others as Decree Holders against the PS and the AG as the

Judgment Debtors. As to why the said "Others" are 20 and not 128 stated in the Deed of Settlement is not known. It is not clear either where did Mohamed Hassan come from and cited as the lead Decree Holder. This is because, he is not among the three selected representatives of the ex-employees. Though the record shows that the 3rd respondent was present in Court when the settlement was being recorded and registered, but it is not clear why he did not appear in the citation of the case, being the person who signed the Deed. The situation in our view adds up to the already existing confusion.

As if that is not enough, the parties before us as depicted in the citation herein are again different from those in the three citations above. Even when we perused the citation at the court where the matter emanated, we noted the parties to be TAMICO BRANCH Buhemba Gold Mine vs. Buhemba Gold Mine.

In the presence of the pointed-out confusion and the fact that the Deed of Settlement was negotiated, signed and registered as an award by the 3rd respondent who had no mandate to do so for lack of notice of his representation to the Registrar, we are constrained to quash and nullify the proceedings and orders of the Revision No. 40 of 2007 before Hon. Mwingwa dated 18th December, 2007 together with the subsequent ruling in Revision No. 40 of 2007 before Hon. Wambura, J.

For avoidance of doubt, we order the matter to revert to the stage before settlement and has to proceed from there. Being a labour dispute, no costs is awarded.

DATED at DAR ES SALAAM this 31st day of May, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 19th day of June, 2023 in the presence of 2nd and 3rd Applicants and Mr. Allen Muya, learned State Attorney for the 1st and 2nd Respondents vide video link from High Court Mwanza and in the absence of the 1st Applicant and 3rd Respondent is hereby certified as a true copy of the original.



R. W. Chaungu
R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL