

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWAMBEGELE. J.A., KOROSSO, J.A. And MGONYA, J.A)

CIVIL APPLICATION NO. 122/O2 OF 2022

KCB BANK LIMITED..... APPLICANT

VERSUS

PHINA MUNISHI.....RESPONDENT

**(Application for stay of execution from the Judgment and Decree of the
High Court of Tanzania, Labour Division at Arusha)**

(Mzuna, J.)

dated 11th day of June, 2020

in

Labour Revision No. 164 of 2017

.....

RULING OF THE COURT

6th & 13th November, 2023

MGONYA. J. A.:

By a notice of motion made under rules 11 (3), (4), (5) (a) (b) (c) and 11 (6), 11 (7) (a) (b) (c) (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant sought an order of this Court staying the execution of the decree of the High Court of Tanzania, Labour Division (Mzuna, J.) in Labour Revision No. 164 of 2017 dated 11th June, 2020. The application is supported by an affidavit deposed by Damas Mwangange, the applicant's Litigation Manager.

Upon being served with the Notice of Motion, the respondent resisted the application by filing an affidavit in reply along with a notice of preliminary objection to the effect that; the application is time barred as it was filed after the lapse of more than seven months contrary to rule 11 (4) of the Rules.

The synopsis of the application is that: The respondent was employed by the applicant in the position of customer service supervisor as of 2011 up to 2013 when she was terminated. The stated reason for her termination was the respondent gross negligence after allegedly having authorized a fraudulent electric transaction of USD 6850. Being aggrieved with the termination, the respondent referred the dispute to the Commission for Mediation and Arbitration at Arusha (the CMA) challenging the termination to be unfair.

After hearing of the parties, the CMA found there were valid reasons for termination although there was violation of the procedures as follows: One, there was no investigation report which was tendered while it was said the investigation was conducted. Two; the respondent was not given a notice of 48 hours to present her defence before the disciplinary committee. Three; the respondent was denied right of representation by

a representative from a Trade Union. On that basis, the CMA proceeded to issue an award in favour of the respondent whereby, the applicant was ordered to pay the respondent a total sum of TZS. 43,450,065/= and issued the respondent a certificate of service. The said orders were to be fulfilled within twenty one days from the date of the said award.

Aggrieved, the applicant filed a Labour Revision No. 164 of 2017, before the High Court of Arusha challenging the award issued by the CMA on the ground that the termination was fair and that they complied with the required procedure. Upon hearing of the revision, the High Court partly allowed the revision, it quashed the relief awarded by the Commission save for the repatriation cost and subsistence allowance. That decision on revision did not please the applicant, She unsuccessfully filed an application for extension of time to file an application for review on the ground that she discovered new evidence. Upon hearing, the High Court dismissed the said application for being unmerited. Being irked, the applicant lodged a notice of appeal to challenge the ruling.

On the other hand, in a bid to enjoy the decree, the respondent filed before the High Court, Labour Division Execution No. 05 of 2021. It is the

said application that pushed the applicant to file the instant application praying this Court to stay the intended execution.

When this application was called for hearing, the applicant was represented by Mr. Shepo Magirari learned counsel, whereas Mr. Edwin Silayo assisted by Ms. Jeniffer John both learned counsel represented the respondent.

It is the practice that once there is a notice of preliminary objection, the same should be dealt with first before going into the merits or the substance of the application. See; **Chrisostom H. Lugiko v. Ahmednoor Mohamed Ally**, Civil Application No. 5 of 2013 (unreported). However, in order to expedite the proceedings and dispose of the matter, we invited the counsel to argue on the preliminary objection then continue with the arguments on the merit of the application.

When invited to submit in support of the preliminary objection, Mr. Silayo contended that the application was filed beyond the fourteen days contrary to rule 11 (4) of the Rules. It was his submission that the Rules require an application for stay of execution to be filed within 14 days from the date the applicant received a notice of execution. By referring this Court to annexure PHM1 of their affidavit in reply, he argued that the

applicant was aware of the execution since 10th December, 2021. It was his stance that counting from 10th December, 2021 to 25th January 2022, this application is time barred.

Responding to Mr. Silayo's submission, Mr. Magirari at the outset admitted that the applicant was aware of the execution proceedings even before reaching to this Court. However, he contended that as the matter was still before the lower court, it was not possible to file an application for stay of execution before this Court. It was his stance that the time to file an execution reckoned from 13th January, 2022 as it appears in the summons attached to the affidavit.

In his rejoinder Mr. Silayo disputed the validity of the attached summons. He submitted that, the same was not served by them nor where they aware of such as the application for execution and summons to appear was issued on 28th May, 2021. He went on to state that the said summons to appear for hearing was properly served to the applicant who replied by filing an affidavit in reply in opposition of application for execution on 15th July, 2021. It was Mr. Silayo's further argument that the summons attached to this application was self-created as there was no

need to issue the same while the execution proceeding was already in the court as evidenced by annexure PHM1.

Having submitted on the preliminary objection, both counsel were to argue on the merit of the application. However, we observed that the applicant did not attach a decree which is subject to this application. Mr. Magirari was invited to address the Court on that observation, where he admitted on the omission and asked for leave of the Court to file the missing document. It is upon determination of the preliminary objection this Court will also respond to Mr. Shepo's prayer.

Having considered the submission made by both counsel as far as the preliminary objection is concerned, the main issue for determination is whether the application is time barred.

As rightly submitted by Mr. Silayo, it is rule 11 (4) of the rules which provides for the time limit to file an application for stay of execution. The said rule stipulates that:

"(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made

aware of the existence of an application for execution.”

The counsel in this application were at one that, the application at hand was to be filed within 14 days. However, they parted ways in one respect and it was, while the applicant contended that the period of limitation should be computed from 13th January, 2022 as it appears in the attached summons, the respondent contended that the period of limitation should be computed from 10th December, 2021.

It is patently clear, therefore, from the provision of rule 11 (4) of the Rules that, the time limitation within which to file an application for stay is reckoned from the date the applicant was served with a notice of execution or when he became aware that the execution of the decree is about to happen. Going through the records of this application, especially annexure PHM1 (proceedings of Execution No. 05 of 2021) attached to the affidavit in reply, it is revealed that the respondent filed an application for stay of execution before the High Court on 20th January, 2021. The applicant herein was duly served with the notice of execution and on 15th July, 2021 where she responded to the same by filing an affidavit in reply of the application for execution sworn by Damas Mwangange. Also, it is on record that on 16th July, 2021, Mr. Elpidius Philemon learned advocate who

represented the applicant, entered appearance before the Deputy Registrar to attend the proceedings of an application for Execution No. 5 of 2021. It is from these facts, this Court finds that the applicant herein became aware of the execution on or before 15th July, 2021 when he was served with a notice of execution which she responded to. Therefore, the time to file an application for execution must be reckoned from that period and not on 13th January, 2022 as contended by the applicant. We accordingly reject the applicant's contentions since the same are not backed up by the record.

All in all, counting from 15th July, 2021 to 25th January, 2022 when this application was filed, it is almost six months that have elapsed from when the applicant became aware of the execution. On that basis, we are inclined to agree with the respondent's counsel that this application is timed barred.

It is settled that, the question of time limitation touches on the jurisdiction of the Court to determine the matter before it; See the case of **Muse Zongori Kisere v. Richard Kisika Mugendi & Others**, Civil Application No. 244/01/2019 (unreported). Therefore, having found that the application at hand is time barred, this Court has neither jurisdiction

to entertain the same nor to grant any prayer in relation to it including Mr. Magirari's prayer to file the missing decree to this application as prayed earlier.

All said and done, for the foregoing reasons, the preliminary objection is sustained. Consequently, we strike out the application. Being a labour matter, we make no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 13th day of November, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 13th day of November, 2023 in the presence of Mr. Edwin Silayo, learned counsel for the respondent who took brief for Mr. Mseke Arbogast for the applicant, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL

