

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO 121 OF 2012**

**BEPHA MUGASA.....APPELLANT**

**VERSUS**

**C.M.C MOTORS LIMITED.....RESPONDENT**

Date of Last Order: 21/11/2013

Date of Judgment: 09/05/2014

**JUDGMENT**

**Bongole,J.**

This appeal is against the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu dated the 21<sup>st</sup> May, 2010.

The cranks of the appeal are that the appellant preferred an application for execution of the decree she had been awarded in RM's Court at Kisutu Civil Case No 206 of 1992. She claimed to execute the decree amounting to Tshs. 41,397,454 been her employment entitlements upon termination. The executing court relied on the judgement of it held that the decree holder (appellant) was entitled to payment of Tshs. 362,800/= only. Subsequent to the said decision, the appellant was aggrieved hence this appeal.

The appeal is grounded on three grounds, to wit:-

1. The trial magistrate totally erred in law and formulae relating to the calculation of subsistence allowance, misinterpreted and confused the holding that the decree holder is entitled to subsistence allowance at the rate of monthly salary to mean monthly salary times the number of months times interest of 12% despite the fact that subsistence allowance in this case is calculated on the basis of per diem rate times monthly salary times the number of days in the number of months the principle the decree holder applied.
2. The trial magistrate erred both in law and fact by limiting the period of payment of subsistence allowance to the appellant only to 24 unapproved months yet to date the decree holder has remained unpaid hence continued counting of period until paid.
3. Ordering the appellant's subsistence allowance in the sum of Tshs. 362,800/= is one way the trial magistrate ordering the appellant to be paid monthly salary hence distortion of the original holding of the court that acknowledged the fact that the appellant was no longer in employment hence subsistence allowance at a particular rate per diem.

Before this court Mr. Ukwonga learned Advocate appeared for the appellant and whereas Mr. Maguso learned advocate appeared for the respondent. Both counsels opted to dispose this appeal by way of written submissions.

Mr. Ukwonga submitted that as the appellant was not in service, she ceased to be an employee to be paid salary.

That the appellant was entitled to her terminal benefits and the subsistence allowance. So he said this appeal is an appeal for determination of what subsistence allowance was due to the appellant. According to him, he argued that subsistence allowance is paid at the per diem. He cited S.112(3)(b) of the Employment Act Cap. 366 which provides "*(3) the expenses of repatriation shall include (b) subsistence expenses during...*"

He said, the subsistence allowance payable is not a salary but expenses incurred during the waiting for repatriation. That the appellant was therefore entitled to be paid the subsistence allowance both for herself and her child whose allowance was one half of the appellant.

That the payment of subsistence allowance in this kind of a case is a punishment to the employer and it is paid per diem but at the rate of monthly salary. He invited this court to appreciate the decision arrived in the case of **TANSCAN Timber Company Ltd Vs ATHUR F. KIBONA Civil Appeal No 50 of 2000** (unreported) where the court of appeal dealt with the issue of subsistence allowance. That in the said case the rate of 20,000/= was fixed as per diem while in this case at hand the court fixed the rate at Tshs. 13,500/=.

He faulted the trial magistrate on account of equating subsistence allowance with the monthly salary. Further that the order of the magistrate has created employment relationship between the parties which was not the case. He insisted that the appeal be allowed by ordering the

respondent to pay the sum of Tshs. 41,397,454 as subsistence allowance due to the appellant.

In response, Mr. Maguso learned Advocate argued that the appellant is entitled to the sum of Tshs. 13,500/= per month from 28<sup>th</sup> August, 1992 to 16<sup>th</sup> August 1994 plus interest at 12% per annum amounting to T.Shs. 363,800/=. I think the preposition by Mr Maguso is right as opposed to Mr. Ukwonga's arguments. It is well settled that in a case baring facts like the one at hand, subsistence allowance cannot exceeded one's monthly salary. In the case of **CRDB Vs. Regional Labour Commissioner Rukwa (DC) Civil Appeal No 28 of 1994** (unreported) the Court of Appeal limited the subsistence allowance to mean monthly salary. Hence, the executing court was right in formulae of calculation of subsistence allowance due to the appellant.

Mr. Ukwonga invited this court to determine the subsistence allowance due to the appellant. My understanding is that this appeal is leveled against the decision of the executing court i.e the decision of the ruling delivered by Mugeta SRM and not against the Judgement of Mtotela PRM (the trial court). The said invitation was well determined by Mtotela PRM where he said *"Therefore the decree holder is entitled to subsistence allowance at the rate of monthly salary plus interest at court rate of 12 per cent and costs"*. The plain meaning of monthly salary is that the appellant used to subsist for her monthly salary at her place of work and so the trial court put her in the same position as if she was to subsist at the same rate till the date of repatriation. It is therefore wrong to equate the monthly salary rate to per diem as suggested by Mr Ukwonga.

From what I have tried to endeavor, I am of a settled mind that this appeal has no merit as the decision of the executing court was correct and it is accordingly upheld.

This appeal is therefore dismissed and I award no order as to costs.

S.B. Bongole

**JUDGE**

**09/05/2014**

**9/5/2014**

Coram: S.B. Bongole,J

For the Appellant: Absent

For the Respondent: Mr. Kamala

C.C. Mrangi

**Mr. Kamala:** My Lord the matter comes for judgment.

**Court:** Judgment delivered in the absence of the appellant and in the presence of Mr Kamala learned Advocate for the respondent in my presence this 9<sup>th</sup> May, 2014.

S.B. Bongole

**JUDGE**

**9/5/2014**