

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CIVIL REVISION NO. 14 OF 2017**

**NATIONAL INSURANCE CORPORATION.....APPLICANT
VERSUS
MALIGISA MANYANGU AND 24 OTHERS.....RESPONDENTS**

RULING

MASABO J.L:-

The applicant is dissatisfied by the decision of the Ilala District Court in in Execution No. 8 of 2010. He has moved this court by way of chamber summons made under section 79 (c) and section 95 of the Civil Procedure Code Cap 33 RE 2002; and section 31(1) and (2) and section 44(1) (b) of the Magistrate Courts Act Cap 11 RE 2002 praying that this court be pleased to call and inspect the order for attachment of its accounts No. 011103002777 at NBC Bank Corporate Branch and Account No. 0400118027 at City Bank and a *garnishee nis* issued on 2nd June 2017 so that this court can satisfy itself of the correctness, legality ad propriety of the said orders.

For a better understanding of this case, the Respondents were former employees of the Applicant. In 1999 they were dismissed but successfully challenged the termination before Ilala Conciliation Board in a decision dated 14th September 2001 whereby they were reinstated but under suspension. which ordered their reinstatement. On 5th August 2008 they were paid their

half salary areas from 1999 to July 2008 at tune of TZS 308,610,120.00. In 2009 they were retrenched due to re-organization process whereby they filed an execution proceedings execution No 8/2010 at Ilala districts court to enforce payment of Tshs 685,275,826.20 being half salary from 1999 to 2001, salary increment and house allowances which was unpaid during the retrenchment. The Respondent agreed to pay the Respondent's dues at a tune of TZs 362,893,153 being half of salary but disputed the other claims of housing allowance and salary increment which the Respondent herein had raised. Eventually the parties signed a deed of settlement where the Applicant agreed to pay the uncontested claim at a tune of TZs 362,893,153. The Respondent remained adamant to pursue the reminder of the claims in court. Meanwhile the Respondents together with other former employees of the Applicant filed a complaint before the Commission for Mediation and Arbitration at Ilala claiming for terminal benefit. The complaint was held and determined whereupon the Applicant raised an objection to the execution proceeding claiming that the claims contained in the execution proceeding were determined by the Conciliation Board hence the executions proceeding is res judicata. On 27th January 2017 the presiding magistrate overruled the objection and the Applicant was ordered to show if it has already paid half salary for 2001 to 2009 where by on 9th March 2017 the Applicant adduced proof that half salaries were already paid to the Respondent. That, later on 19th April 2017 the court ordered the Applicant to provide a breakdown of the amount paid to prove whether salary increment and housing allowance was paid. Subsequently on 17th May 2017 and 1st June 2017 the court ordered attachment of the of the Applicants account No 011103002777 at

NBC Corporate Branch and Account No. 0400118027 at Citibank in satisfaction of the Tshs 322,382,671.20. Further, on the 2nd June 2017 the court issued a Garnishee order against the Applicant's account No. 011103002765. The Applicant is challenging the regularity and propriety of the order to submit breakdown of payment, the order for attachment of accounts and the garnishee order.

When the application was called for hearing, Mr. Shepo, learned counsel appealed for the Respondent whereas the Respondents appeared in person. In his submission the Mr. Sheppo, introduced an entirely new claim regarding the identity of the Respondent. He submitted that the execution proceedings and the order thereto was issued in favour of a non-existent person in that it was written Maligisa Manyangu and 24 others but these 24 others are not specified, their identity is not stated. He argued this is a serious irregularity because it may cause people who are not part of the proceedings to benefit from the proceedings. It is the requirement of the law that all parties be identified. On this basis he prayed that this court set aside the proceeding so that the parties can identify the 24 persons. He supplied this court with the decision of the Court of Appeal in **Judicate Rumishael v Shoo & 64 others v the Guardian Limited, Civil** Application No. 43 of 2016 to buttress his argument.

He submitted further that the attachment of the garnishee order was not correct because the order dated 17/5/2017, ordered attachment of account No 011103002717 and that on 1/6/2017 the Hon Magistrate ordered

attachment of account no 0400118927 City Bank Account but the account which was attached in the course of execution was account No 011103002765 NBC account. Finally he submitted that the court erred in law because it gave an order while it was functus officio after giving its 1st ruling in that on 27/1/2017 the Ilala district Court having considered the submission of the parties, it called upon the parties to submit whether the application had already paid half salary from 2001-2009. That, consequently on 9/3/2017 the applicant provided proof that the salary had been paid to the Respondents later the Magistrate but was subsequently ordered to appear on 19/8/2017 to produce a breakdown of the amount paid to prove whether salary, increment, and housing allowance was paid. He reasoned further that the magistrate erred in his ruling in respect of salary, increment and house allowance as the same were covered under the ruling of 27/1/2017.

In reply, the Respondent submitted the ordered garnishee nisi on 2/6/2017 as the Applicant was not entering appearance in court and that the decree nisi is no longer in existent as it was set aside to allow the Applicants time to provide breakdown of the monies already paid. He also argued that the applicant is wastage of court's time because the total claim in execution file no 8/2010 is Tshs 685,275,826.20 and that the Applicant has paid TZS 362,893,153.00 thus TZS 322,382,671.20 is outstanding. On this issue of identity he dismissed it as being baseless in that the parties are well known to the Applicant and that they are now 23 and the 24th is now deceased. In rejoinder Mr Shepo submitted that the parties settled the matter amicably and a deed of settlement was signed by both parties and filled in court in

which the NIC agreed to pay 362,893,153.00 and had already paid the same. Concerning the garnishee order, he rejoined that there is no order showing that the garnishee order has been set aside.

I have considered the submission of both parties and carefully scrutinized by the bulk record of this matter. On the first point, I agree with the Applicant that it is imperative that the identity of the person on whose behalf the representative suit be known.

Order 1 Rule 8.-(1) of the Civil Procedure Code which provides for representative suit states that:

Where there are numerous person having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such.

It is a trite law that the identity of the persons on whose behalf the suit is filed be known. The rationale for this requirement is well captured in In **Abdillah Juma V Salum Athumani** [1988] TZHC 19, this Court underscored this requirement in the following terms:

"...it is necessary that their identities be known to the court. The necessity arises from two principal reasons; Firstly, in terms of O.1 r 8 of the Code, the court is under duty to give notice of the institution of the suit to all such persons. Secondly, the doctrine of res judicata

applies to all such persons. Thus, none of them can institute fresh proceedings for the same relief.”

The position of that while representative suit is allowed in the in the High Court and subordinate courts, the records should clearly indicate the identity of the persons on whose behalf the suit is lodged (see **Tenende s.o Budolela & Salamaba s/o Ntinginya**, Civil Appeal No. 27/2011) . One has therefore to examine the records to see if the identity of represented claimants is provided. Having examined the records, I am inclined to agree with the Respondent that the objection raised by Mr. Sheppo is baseless. First, the list of the 24 persons is provided for in the records. Secondly, the instant matter emanated from the a collective labour action which was conducted in fully compliance with labour and employment laws. The records indicate clearly that the identities of the 24 persons were known to all the parties and that is the reason that, the Applicant never raised the issue of identity at the commencement of this proceedings in 2010 and in the subsequent proceedings above sated. It is also on record that Applicant had already started to effect payment on the persons he now claims to be alien to him. On 9th March 2017 while appearing before Tarimo SRM, Mr. Sheppo, representing the Applicant notified the court that:

“we have documents to show half salary from 2001 to January 2009 has already been paid. There was a memorandum of settlement in which all the decree holders were present. There is also a document of summary of salary areas”

This statement by the Applicant's counsel is loud and clear. It need not be emphasized that the Applicant as well as their counsel are fully aware of the identity of the 24 persons whom Mr. Sheppo loudly acknowledged to have paid. If their identity were unknown, he did the Applicant effect payment? Considering that there is no indication in the court's records to the effect that the Applicant and its counsel retracted the above averment, the principle of estoppel estops them from raising the issue of identity at this state. In my keen scrutiny of the record I did not come across any complaint from either of the parties that the half payment effected by the Applicant went to wrong people. Accordingly, I find no irregularity on this issue.

Regarding the attachment of accounts, I have noted that on 17th May 2017 the Respondents successfully prayed for attachment of the Applicant's account No. 01103002777 at NBC Bank. On 1/6/2017 they made another prayer for attachment of accounts where they prayed for attachment of two accounts to wit: Account No.0400118027 at City Bank and Account No: 01103002765 at NBC Bank. However in granting the prayers, the court ordered attachment of the first account ie. Account No. Account No.0400118027 at City Bank. No order was made in respect of Account No.0400118027 at City Bank. Thus, the attachment of this account is therefore unwarranted and wrong. As for the garnishee order, I will not labour myself on this issue because as rightly submitted by the Respondents the record in file shows that it was lifted on 19th June 2017.

Regarding the 3rd Point, I was able to discern the following from the records: In the application for execution filed the Respondent had a total claim of Tshs 685,275,826.20 part of which was conceded by the Applicant. On 20th May 2016 having identified the uncontested claims, the Applicant and the Respondent concluded a memorandum of settlement in which it committed to pay the decretal sum. The memorandum was dully executed by Maligisa Manyangu, and Shaibu Ng'eve and notarized by Barnaba Luguwa Advocate (on the part of decree holders) and on the part of the judgment debtor Godbles Ulomi (Ag DFA) and in witness thereto was Abraham Ted Mwakifuna, advocate. Part of the content of the Memorandum of settlement deed is reproduced here for clarity:

"memorandum of settlement dated 20th May 2016 filed in court on 24th may 2016

"WHEREAS the above-named decree holder filed execution proceedings No. 8 of 8 of 2010 at Ilala District Court claiming for Tshs 685,275,826.20 as payment of salary arrears for the period from April 1999 up to January 2009 as their entitlement from the decision and order of the Minister dated 26th August 2002

AND WHEREAS the judgment debtor hereto being mindful of their relationship and in the spirit of cutting down the time and costs of prosecuting the said execution proceedings the are desirous and have agree to settle amicably the amount of Tshs 362,893,1153.00 which are not in disputed from the claim sum

Now therefore by consent, the parties herein agrees as follows:

1. That the judgement debtor hereby agrees to pay the decree holder not less that shillings fifty million per month as part of the payment of the

above decretal until the whole sum is made good;
that this settle deed shall take effect from the
date it is signed by the parties hitherto in the
presence of their respective witnesses

2. That each party shall bear its own costs
3. That, the parties hereby pray this settlement
Deed be recorded as a decree of this Honourable
court. [emphasize added]

While registering the memorandum of settlement, the presiding magistrate
Mkasiwa SRM ordered that:

“the rest of the amount should be determined in the hearing”

In preparation of hearing of the disputed claims, on 6th and 10th June 2016
the Respondent herein filed a list of documents to be relied upon in hearing.
The parties were allowed to submit their arguments in writing. The applicant
in his response challenged the issue of salary increment to be resjudicata
citing the decision of the Conciliatory Board in **Lwawire Robert Katura
and 37 others, n NIA, and AG, No. CMA/DSM/ILALA/159/2009**
which he alleged that it considered and finally determined the all the matters
contested by the Respondents in the current application. In her ruling, dated
27th January Tarimo SRM held as follows with reference to the decision of
the CMA:

“I got time to go through the decision of the Board in the
above matter in ref No. CMA/DSM/ILALA/159/2009 which is
dated 18/11/2015. In the later decision reference is made to
the decision of the industrial court over the same matter. It
shows that the J/Debtor had two standards of dealing with
employees facing the same criminal allegations. There are two

groups here which the first group is called Bachwa and the others and the 2nd group is called Maligisu and others. The industrial court in its decision had ordered that all the rights given to Bachwa's group should also be given to Maligisa's group. Going through the 18/11/2016 decision one would see the issue of half salary 2001-2009 was only stated to Cover Bachwa's group and Maligisa's group did not get any payment It is my finding therefore that the present claim is not res judicator and is upon the D/Debtor to show if at all he has already paid had salary from 2001 to January 2009 which is the decision of 18/1/2016"

I too have had time to read the decision in **Lwawire Robert Katura and 37 others v NIC and Attorney General** No. CMA/DSM/ILALA/159/2009 to satisfy myself of the correctness of the decision of Tarimo SRM. In its decision the CMA held that:

"the second category of the complainants is that of Maligisa Manyangu and others..... This group was suspended in 1999 and charged in criminal case No 508/1999. As stated here above they were terminated but termination was quashed by the Conciliation Board and confirmed by Minister of labour matters. NIC was ordered to reinstate them. Instead of reinstating them as ordered NIC decided to pay them half salaries from 1999 to the date of termination. In their opening statement they conceded that such claim is pending for execution. NIC also shared that view in their final submission that the matter is in Ilala District Court before Hon. Mkasiwa District magistrate for execution of which NIC has accepted to pay the complainants half salaries at a total of about tshs 300,000,000/= as there no dispute between the parties

such claim should also be paid if the payment has not been done. These claims alongside others claims that NIC Conceded to wit: Tshs 69,5551,876/= being under payment to half salaries made to Maligisa and 24 others from 2003 to 2004; at increment of 10% and 25% into their salaries; Tshs 20,20. 962,210.34/= arising from underpaid retrenchment arrears and Tshs. 75,182, 251/= being under paid PPF contributions should be paid to the complainants. Respondents should pay the reliefs granted within fourteen days from the date hereof. [emphasis is added]

The excerpt above is very clear in that, it points to specific claim while leaving some of the claims to be determined by Ilala district court. Accordingly, I find the decision of Tarimo SRM to be well founded in that the decision in by the CMA did not render the execution proceeding res judicata. I am also of the 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 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 of 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 claims paid so far be known. Failure by the Applicant/refusal or neglect to provide the breakdown would imply that save for the uncontested amount, no payment has been effected in respect of the contested claims.

Further, considering the order to submit the breakdown was a lawful order of the court failure/neglect or refusal to submit the same amount to contempt which cannot be sanctioned by this this court.

From the above, I have found the records of Ilala District court to be proper save for the order to pay Tsh 322,0000,000/= which is to be determined after the Applicant has submitted the breakdown as per the courts order. In the foregoing, the application is dismissed with costs for lack of merit. The Applicant is hereby ordered to comply with the order of Ilala District Court by submitting the breakdown within 30 days from the date of this ruling.

DATED at DAR ES SALAAM this 7th day of October 2019.



J.L. MASABO
JUDGE

Judgment delivered this 7th day of October 2019 in the presence of Advocate Benjamin Mfwanga representing Mr. Sheppo for the Applicant and the Respondents present in person.



J.L. MASABO
JUDGE