

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT IRINGA

REVISION NO. 09 OF 2019

UNILEVER TEA TANZANIA LIMITED

APPLICANT

VERSUS

MATHIAS MWANDU

RESPONDENT

Date of Last Order: 21/04/2020

Date of Ruling: 21/05/2020

RULING

MATOGOLO, J.

The applicant Unilever Tea Tanzania Limited has filed this application for an order of stay of execution of the Award by the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/IR/MAF/52/2018 dated 28th June, 2019 pending the determination of the application for Revision filed before this court against the said ruling.

The grounds for the application are listed in the notice of application and in the applicant's affidavit. The application is by both chamber summons and Notice of Application made under Section 91(3) of the Employment and Labour Relations Act, No. 06/2004, Rule 24(1)(2)(a)(b)(c)(d)(e)(f) and 3(a)(b)(c) and (d) of the Labour Court Rules, 2007 G.N. No. 106 of 2007.

The grounds for revision raised by the applicant are follows:-

- (a) That, the Arbitrator erred in law and in fact by holding that the Applicant had no valid reasons for termination of Respondent's employment.*
- (b) That, the Arbitrator erred in law and in fact by holding that the procedures to be followed before termination of Respondent's employment were not followed.*
- (c) That, the Arbitrator erred in law and in fact by failing to analyze the exhibits and evidence presented and on record and as a result arrived at an erroneous conclusion.*
- (d) That, the Arbitrator erred in law and in fact by holding that the applicant failed to tender evidence proving that the claimant committed the misconduct when in fact the Respondent called two witnesses to testify to these facts.*
- (e) The Arbitrator erred in law by finding that there is a requirement to prepare a formal investigation report while the law only makes it a requirement to conduct an investigation.*

In his written submission in support of the application for stay of execution, the applicant argued basing on the grounds of application.

In the first ground, it is the submission by the applicant that he has valid reasons to terminate the respondent on ground of insubordination which is in line with rule 12(3) of the Employment and Labour Relations [Code of Good Practice] Rules, G.N No. 42 of 2007.

Also paragraph 11 of the affidavit shows that even the respondent admitted the same. Also there are witnesses who testified to this fact as per

paragraph 12. He said the exhibits that were tendered before the Commission for Mediation and Arbitration of which were annexed to the affidavit supporting the application proves the facts. But the Arbitrator ought to consider the above since rule 9(3) of the Employment and Labour Relation (Code of Good Practice) Rules, GN. No. 42 of 2007 provides for proof on the balance of probabilities and not beyond reasonable doubts.

As to the second ground, it is the submission by the applicant that the procedure for terminating the Respondent as provided under rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules were followed. This is indicated under paragraphs 4, 5, 6, 7 and 8 of the affidavit supporting the application and there are witnesses who testified to this effect at the Commission for Mediation and Arbitration. There is documentary evidence as well which are annexed to the affidavit Annexure UTT-1, Annexure UTT-2, Annexure UTT-3, Annexure UTTL-4 as seen under paragraphs 5-9 of the affidavit which is in line with Section 37(2)(c) of the Employment and Labour Relations Act No. 06 of 2004 which provides that termination of employment is fair if is in accordance with a fair procedure.

Regarding the third ground of application, it is the submission by the applicant annexure UTT-1, Annexure UTT -2, Annexure UTT-3 Annexure UTTL-4, UTTL-6 and UTTL-8 as seen under paragraphs 5,6,7,8,11,13 and 14 in the supporting affidavit provide to that effect. Also the standard of proof in Labour disputes is on the balance of probabilities as provided under rule 9(3) of G.N. No. 42 of 2007.

As to the fourth ground of application the applicant contends that there are witnesses and exhibits tendered before the Commission for

Mediation and Arbitration that proves the fact that evidence were tendered before the Commission for Mediation and Arbitration.

On the contention that there was a requirement to prepare a formal investigation report as alleged in ground No. 5, it is the submission by the applicant that the law only makes a requirement to conduct an investigate to ascertain whether there are grounds for disciplinary hearing to be held. The applicant referred to rule 9(3) G.N. No. 42 of 2007 and its requirements.

Regarding the sixth ground on failure by the arbitrator to analyze and take into consideration the legal arguments that were put forward by the applicant's counsel to the closing submissions, the applicant argued that the respondent's termination of employment was fair substantially and procedurally.

The same was annexed to the affidavit in support of the application for revision as annexure UTTL7 as seen on paragraph 13. He said the Arbitrator was supposed to analyze and take consideration of the same. However the Arbitrator disregarded the same and therefore arrived at an erroneous conclusion it is the applicant's submission that the applicant stands to suffer irreparable loss of the execution if the award is not stayed. And on the balance of conveniences, greater hard ship and mischief is likely to be suffered by the applicant than the respondent.

The applicant prayed to this court to grant the application as it was held by the Court of Appeal in the case of **National Bank of Commerce Limited vs. Alfred Mwita**, Civil Application No. 172 of 2015 (unreported) where application for stay of execution under similar circumstances was granted.

On his part the respondent in his reply submission in respect of first ground stated that the intended application has no chance of success as the application has no merit. He stated the chances of success is not a ground or condition to grant an order of stay of execution, the whole submission of the applicant to the first ground are baseless in seeking to stay the said arbitral award. The respondent supported his argument by citing the cases of ***Abel Dotto vs. Modesta J. Mgonji***, Civil Application No. 15 /08 of 2014 CAT at Mwanza (unreported), and ***Mohamed Salum Mohamed vs. Sultan Ali Abdalla Gulamhussein***, Civil Application No. 424/15 of 2015 CAT at Dar es Salaam (unreported). The respondent replied to second and third grounds jointly as they are intertwined. He said the application was prematurely lodged as the respondent has not lodged any application for execution or initiated any action to do so. He said one can only challenge an execution Application when the said application has been lodged in court as stated in ***Mohamed Salum Mohamed*** case (supra). He said the application has, left the following question to be answered:-

- 1. Is there filed in this court an application for execution.*
- 2. What the court will stay if there is no tangible execution lodged at the registry of the court.*
- 3. Is it possible in the eyes of the law for the court to issue an order of stay of execution where there is no tangible Execution Application lodged at the registry of court?*

In regard to the questions above, it is the respondent's firm view that the answer is in the negative and the applicant action to initiate the application lacks merits and prayed for the applicant's submission to be disregarded.

Alternatively, the respondent argued that the applicant has neither furnished nor made a firm understanding to furnish security for due performance of Arbitral Award. Further, the averments stated by the Applicant in his submission concerning furnishing security are pure mere statements or speculation and they do not suffice as per the requirement of the law. The applicant has not made any undertaking toward furnishing security for costs. Failure to do so makes the application not to be granted as held in ***Mohamed Salum Mohamed*** case at page 10-11.

It is the argument by the respondent that the application was brought frivolously and vexatiously as the Applicant has moved and troubled both the court and the respondent to pursue an application which lacks legal justification.

He said although there is no costs in Labour disputes but where the application is frivolous and vexatious costs can be ordered per rule 51(2) of the Labour Court Rules, 2007.

The respondent prayed for the application to be dismissed with costs.

In his rejoinder the counsel for the applicant submitted the respondent in his reply submission is either misconceived or misplaced as there is no provision of the law under which an application for stay of execution can be refused on the ground stated by the respondent in his written submission. He said the cases cited by the respondent in his reply submission are inapplicable in this case as are not originated from the Labour Court.

On the allegation that the application is frivolous and vexatious, the counsel for the applicant submitted that the respondent did not cite any provision showing how the application is either frivolous or vexatious. He said the reply submission by counsel for the respondent is mainly based on the strict compliance with rules of procedure of the Court of Appeal. However he said the proceedings before the Labour Court are not hampered by the strict rules of common law such that certain procedural laws such as evidence Act or Civil Procedure Code are not applicable as it was held in the case of **Stephen Makungu and 11 Others vs. A/S Noremco**, Revision No. 224 of 2013 High Court Labour Division, Dar es Salaam (unreported). He said this court should be guided by the procedures of the Labour court and not the Court of Appeal Rules suggested by the respondent. And he insisted that principle of social justice should be championed and applied in this case as well. Mr. Jackson Bidya learned counsel for the applicant also insisted for this court not to strictly adhere to technicalities as the Labour court is the court of law and equity as it was held in the case of **NBC Ltd vs. Ahmad Mkwepu**, Misc. Labour Application No. 195 of 2013 High Court Labour Division Dar es Salaam (unreported). He therefore prayed for the application to be granted as the respondent will not in any how prejudiced.

Having carefully read the rival submissions by the learned counsel and having read the cases cited in support thereof, the only question for determination by this court is whether this application is meritorious taking into account the nature of the matter and whether or not the applicant has fulfilled the conditions warranting the grant of the application. There are prerequisite conditions before the application for stay of execution can be granted.

Firstly, there must be an appeal or an application for revision or review pending in court.

Secondly, the application for stay of execution should not be lodged after a prolonged delay.

Thirdly, the applicant must demonstrate that substantial loss may result to the party applying for stay of execution unless the order is made.

Fourthly the applicant must furnish security for the due performance of the decree or order sought to be stayed. These requirements are provided in the cases of *E. R. Mutaganywa vs. Ahmed J. Aladin and Others (1995) TLR 285*, *Mohamed Salum Mohamed vs. Sultan Ali Abdulla Gulamhussein*, Civil Application No. 424/15 of 2018, *National Bank of Commerce Limited vs. Alfred Mwita*, Civil Application No. 172 of 2015 and *Abel Doto vs. Modesta J. Magonji*, Civil Application No. 15/08 of 2016. As to the first requirement this has been fulfilled. The applicant has filed an application for revision before this court, Labour Revision No. 10 of 2019 between the same parties. The same is pending hearing.

This application was filed before this court on 5th September, 2019 that is about two months from the date of the Commission for Mediation and Arbitration award which was issued to the applicant on 26th July, 2019. With such period, it cannot be said that the application was inordinately filed as the same was filed on 5th September, 2019, the same day the application for revision was filed.

As to the third requirement whether applicant is likely to suffer substantial loss if the application is not granted, for this the applicant has

not adduced sufficient evidence. But what is apparent is that the respondent was the applicant's employee who was employed in the capacity as a medical doctor (surgeon). He was recruited coming from the Bugando Hospital Mwanza. At the date of termination he was receiving monthly salary of Tshs. 10,332,224/73 and was the head of health Department at Unilever. In his submission in support of the application the applicant has argued that he is not aware of any assets owned by the Respondent upon which the refund could be obtained from in the event the Revision is successful after the award is executed and that the amount awarded is substantial and cannot be recovered from the respondent without undue delay. In the case of ***Tanzania Posts and Telecommunications Corporation vs. M/S B.S Henrita Supplies (1997) TLR 141***, the Court of Appeal held:-

- "(i) The fact that the amount of loss and damage the applicant was likely to sustain if no stay order was granted was not a sufficient reason for the granting of an order, the decretal amount, if paid, was capable of being paid by the respondent. The submission that if a stay order is not granted the applicant, a large public corporation, would suffer such irreparable loss that it was incapable of being atoned by way of damages, was unacceptable;*
- (ii) The chances of success of an intended appeal, though a relevant factor in certain situations, could only be meaningfully be assessed later on appeal after hearing arguments from both sides. This was a general principle which was not without exception.*

(iii) The circumstances of the present case were such that even though loss and damage that the applicant was likely to sustain if stay of execution were not granted could be atoned by way of damages, there were still lingering doubts whether a stay was not warranted on account of other factors the prospects of appeal and the balance of convenience. The court accordingly decided to exercise its discretionary powers under Rule 9 (2)(b) and granted a stay subject to the condition that the applicant deposit the decretal amount in court”

Based on the above cited decision, grant of stay order basing on fear to recover the award by the Commission for Mediation and Arbitration in the event the revision is successful would be made, but subject to other conditions, that is applicant furnishing security. In his affidavit supporting the application, as well as in his written submission, counsel for the applicant did not state anything about security for costs. As pointed out above, this is one of the conditions to be fulfilled before the order for stay is granted.

Mr. Jackson Bidya counsel for the applicant appeared to complain against reliance by the respondent's counsel on the decision of the Court of Appeal arguing that doing so amount to strict compliance with the rules of procedure of the Court of Appeal. I think Mr. Bidya learned counsel is no more correct, in its decisions the Court of Appeal laid principles to be followed in the like application for stay of execution although applied the Rules of the Court. But a principle of law laid down is binding regardless the type of litigation be it civil or criminal. There is no any provision on the Labour Court Rules, 2007 excluding application of Principles laid by the Court of Appeal while deliberating on any other matters not Labour matters. Even

this court is not bound by the decision in the case ***Stephen Makungu and 11 Others vs. A/S Noremco*** (supra) amidst principles laid by the Court of Appeal. I have gone through the decision in ***NBC Limited vs. Alfred Mwita*** (supra).

In that case stay of execution was granted but basing on among other conditions, the applicant furnished security by way of a firm undertaking by the applicant to provide security which was found sufficient to move the court to grant the stay order. But in the present application the applicant has not done both, to furnish security or make a firm undertaking of furnishing security. Failure to do so, it is obvious that the applicant has failed to cumulatively fulfilled the conditions for grant of application for stay of execution. After all as it was submitted by Mr. Moses Ambindwile learned advocate for the respondent there was no any notice of the intention by the respondent to execute an award by the Commission for Mediation and Arbitration. Basing on the decision of the Court of Appeal in ***Mohamed Salum Mohamed vs. Sultan Ali Abdalla Gulamhusseln*** (supra), it is the finding of this court that the application is premature, and the applicant did not fulfill all conditions for the application for stay order to be raised. The same is hereby dismissed but no order as to costs.


F. N. MATOGOLO

JUDGE

21/05/2020



Date: 21/05/2020
Coram: Hon. F. N. Matogolo – Judge
L/A: Blandina Mwenda
Applicant: Mr. Jackson Bidya Advocate
Respondent: Mr. Moses Ambindwile
C/C: Grace

Mr. Jackson Bidya – Advocate:

My Lord I am appearing for the applicant.

Mr. Moses Ambindwile – Advocate:

My Lord I am appearing for the respondent.

Mr. Bidya:

My Lord the matter is for ruling we are ready.

COURT:

Ruling delivered today the 21st day of May, 2020 in the presence of Mr. Jackson Bidya learned counsel for the applicant and in the presence of Mr. Moses Ambindwile learned counsel for the respondent.


F. N. MATOGOLO

JUDGE

21/05/2020

