

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
MISC. CIVIL APPLICATION NO.14 OF 2019**

*(Arising from the Resident Magistrate's Court of Shinyanga in Misc. Civil Application Number
19 of 2019)*

KAHAMA MINING CORPORATION LTD

(BARRICK GOLD TANZANIA-BULYANHULU)APPLICANT

VERSUS

PATROBERT D. ISHENGOMA.....RESPONDENT

RULING

18th September & 16th October, 2020

Mdemu, J.;

This civil application has been filed by the Applicant by way of chamber summons, in terms of the provisions of sections 44(1)(b) of the Magistrate's Court Act, Cap. 11. In the chamber summons, the Applicant prays to this Court to call for and revise the proceedings of the Resident Magistrate's Court of Shinyanga, in Misc. Civil Application No. 19/2019. The application is supported by an affidavit sworn by one Godfrey Kange on 16th September, 2019.

The Respondent was an employee of the Applicant till 30th August, 2003 when he was terminated. Aggrieved by such termination, the Respondent referred a dispute to the then Labour Conciliation Board of Kahama, which in the final analysis, confirmed termination of the Respondent on 13th of October, 2003. Again, fortified that his rights were infringed, the Respondent appealed

to the Minister responsible for Labour matters, who then, decided in his favour on 25th of November, 2006.

The ball then shifted, as it was the Applicant's turn by then, who, being aggrieved, on 21st of December, 2007 applied for orders of *Certiorari* and *Mandamus* in the High Court of Tanzania at Dar es Salaam through Misc. Civil Cause No. 97/2007 intending to quash the decision of the Minister. This application was granted. As usual, the Respondent again got aggrieved and applied for revision against it to the Court of Appeal, which then decided in his favour by nullifying the decision in Misc. civil cause No. 97 of 2007 and remitted the matter to the High Court for hearing

As the Minister's decision was been restored, the Respondent applied for execution in the Resident Magistrate's Court of Shinyanga, through Misc. Civil Application No. 19 of 2019. Before hearing of such an application, the Applicant raised a preliminary objection on point of law to the effect that, the said application for execution was time barred. The said preliminary objection was however overruled. Here now, the Applicant has come, praying for revision of proceedings in Misc. Civil Application No. 19 of 2019

In this application, Mr. Faustine Malongo, learned Advocate represented the Applicant, whereas Mr. Mhingo, learned Advocate represented the Respondent. On 28th of July, 2020 it was ordered that, this application be heard by way of written submissions, of which, both parties complied with the scheduled dates.

Submitting in support of the application, Mr. Malongo said that, Misc. Application No. 19/2019 was for execution of the order of the Minister for Labour dated 25th of November, 2006 such that, the Respondent be terminated

and he be paid all his terminal benefits. He went on saying that, at the Resident Magistrate's Court, the Applicant raised preliminary objections that, the application was time barred and *sub judice* before the High Court, nevertheless the same were overruled.

Elaborating on the first preliminary objection on time limitation, Mr. Malongo said that, the Minister's order sought to be executed, issued under the defunct Security of Employment Act, does not provide for period of limitation for execution. It was Mr. Malongo's views that, with such situation, the applicable law should be the Law of Limitation Act which, under item 20, execution, should be done within 12 years. Mr. Malongo went on saying that, as execution No. 19/2019 was filed on 23rd May, 2019 seeking to execute the Minister's order issued on 25th November, 2006, it means, the application was filed after 12 years and 4 months well beyond time limit. He cited the case of **Zuleia Katunzi & Others v. TPA**, Civil Appeal No. 123 of 2019 (unreported) to bolster his assertion that, the application be dismissed.

As to the second preliminary objection whether Application No. 19/2019 was *sub judice*, Mr. Malongo submitted that, the Respondent appealed to the Court of Appeal against the High Court's decision that quashed the Minister's decision. He further observed that, the Court of Appeal ordered rehearing of the application for prerogative orders, which is still pending in the High Court of Tanzania at Dar es Salaam. It was Mr. Malongo's views therefore that, the pendency of such application for prerogative orders makes the application for execution No. 19/2019 incapable of being executed, thus renders application No. 97/2017 an academic exercise.

However, Mr. Malongo submitted to be aware of Order XXXIX, Rule 5(1) of the Civil Procedure Code, Cap.33 such that, appeal does not operate as a bar to execution. He however emphasized by saying that, according to the peculiar nature of this matter and for the interest of justice, it is better execution be stayed pending findings of the High Court in Application No. 97/2017.

In reply thereto, commenting on the issue of time limit, Mr. Mhingo replied that, as the Respondent was presenting this suit in different courts since 18th of April, 2007 to 20th of May ,2019, he was of the considered opinion that, his Application for execution cannot be time barred because according to section 21(1) of the Law of Limitation Act, Cap. 89, the period the Respondent dwelled in Court premises is excluded.

On the same issue of time limit, Mr. Mhingo added further that, the Applicant deployed a series of acts in order to prevent execution of the Minister's decision. He gave an example of of Misc. Civil Cause No. 97 of 2007 deliberately instituted by the Applicant without joining the Respondent; Civil Revision No. 172/2007 of the Court of Appeal which nullified Civil Cause No. 97/2007 and, ordered the Applicant to join the Respondent and rehearing of the proceedings. It was Mr. Mhingos's assertion that, to date the Applicant has not fulfilled such an order.

Mr. Mhingo observed further that, the Court of Appeal decision revived the Minister's decision and the cause of action too. With those examples above, Mr. Mhingo was of the view that, the twelve years' time limit to apply for execution kept reviving by the judgment debtor's acts preventing execution. He cited section 39(1)(2)(a) of the Civil Procedure Code, Cap. 33 to bolster his assertion.

Being guided by the cited section 39(1)(2)(a) of the Civil Procedure Code, Cap. 33, Mr. Mhingo stated five instances prevented the Respondent from executing the Minister's decree. The **first** instance was, the Applicant's stay of execution filed at Kahama District Court followed the Respondent application for execution filed on 18th of April, 2007. On the **second** instance, Mr. Mhingo showed presence of what he named as "bogus decision", which in his view, was manufactured by the Applicant, purporting the same to be made by the Minister for labour matters, which neither relates to the Applicant nor the Respondent.

On the **third** instance, Mr. Mhingo said, on 03rd of January, 2011 the Respondent again wrote a letter to Kahama District Court so that, the stayed application for execution to go on as against the valid Minister's decision, yet the same was objected as a result of a successful appeal at the High Court by the Applicant.

On **another** instance, Mr. Mhingo condemned the Applicant for purposely not joining the Respondent in the High Court against the Minister's decision so that to conceal the truth that, the Applicant fabricated that the Respondent appealed to the Minister out of time. Commenting on the above instances, Mr. Mhingo was of the view that, in accordance with section 39(1)(2)(a) of the Civil Procedure Code, Cap. 33 which is in *parimateria* with section 48 of the Indian Code of Civil Procedure, each interference and prevention amounts to fraud thereby giving a fresh period of twelve years within which the Minister's decision can be executed.

With that discussion, it was Mr. Mhingo's thought that, as the last Applicant's interference ended on 02nd of October, 2018, the present Respondent's Application for execution filed on 23rd of May, 2019 is not time

barred. He thus distinguished the cited case of **Zuleia Katunzi**(supra), as the Respondent herein has never been idle, unlike the decree holder in the cited case, who never applied for execution for about 20 years from the date the decree/ award got granted.

Commenting on the issue of the Respondent's application for revision being *sub judice*, Mr. Mhingo said that, the same issue should not be attended as it has been raised for the first time. Alternatively, Mr. Mhingo submitted that, the Court of Appeal ordered rehearing of Misc. Civil Cause No. 97 of 2007 on condition that, the Applicant joins the Respondent therein. It was Mr. Mhingo's observation that, to date, the Applicant has not joined the Respondent as a party and such leave granted by the Court of Appeal has already expired and is an abuse of court processes.

Mr. Mhingo pressed further that, as the Respondent has not yet been made a party to the case, and as long as his application for execution is not a suit, then section 8 of the Civil Procedure Code, Cap. 33, that governs the principles of *sub judice*, does not apply here.

In rejoinder, concerning the Respondent's assertion that the Applicant fraudulently prevented execution, Mr. Malongo was of considered opinion that, the same was not raised in the Respondent's affidavit in reply and that, the Respondent's counsel did not prove it to the required standard, as such, he thought, it should be disregarded. In conclusion, Mr. Malongo stated that, the Applicant's endeavor to protect his rights in courts should not be termed as fraud. Both parties' submissions ended up here.

I have carefully read the affidavit, counter affidavit, the entire records of the trial court and also considered submissions of both parties together with

their annexures plus authorities supplied. The issues for determination are; **one**, whether, the Respondent's Application for execution is time barred and, **two**, whether, the same Respondent's Application for execution is *res sub judice* with Misc. Civil Cause No. 97 of 2007 pending in the High Court of Tanzania at Dar es Salaam.

Concerning the first issue as to whether the Respondent's application for execution No. 19/2019 is time barred, parties first do not dispute that, the same was filed on 23rd May, 2019. Parties do not also dispute that, the Minister's order sought to be executed was issued on 25th November, 2006 and that, time limit to apply for execution of a decree is 12 years, as per item 20 of Part 3 of the Schedule to the Law of Limitation Act, Cap. 89.

What parties actually differ is; with all the circumstances of this case, whereby the Respondent applied several times for execution and prevented by courts decisions, can it be lawfully termed that, the Respondent's application for execution is time barred?

According to the Applicant's submissions, the Respondent's application for execution of the Minister's decision is time barred as it was filed after 12 years and 4 months. However, simple calculations reveal that, the age of the Minister's decision is 12 years and 6 months from the date the complained application of execution was filed. This means that, going with the Applicant's view, the Respondent's Application for revision is out of time for 6 months. However, section 22 of the Law of Limitation Act, Cap. 89 provides for computation of period of limitation during which the proceedings were suspended, as I hereunder quote it: -

22. In computing the period of limitation prescribed for a proceeding the institution, continuance or conclusion of which has been stayed by injunction or order, the time during which the injunction or order remains in force, shall be excluded.

The word proceedings, has been defined under section 2(1) of the same Law of Limitation Act to mean: -

"proceeding" means a suit, an appeal or an application, and includes proceedings under customary law;

The record at hand shows particularly at paragraph 14 of the Respondent's counter affidavit together with annexure PTRD-2 that, the Respondent made an application for execution of the Minister's decision at the District Court of Kahama through Civil Application No. 12/2007 and the same was successfully stayed on 25th of June, 2007 by an application made by the Applicant. This has never been objected by the Applicant.

The records further reveal that, the Respondent on 03rd of January, 2011 wrote to Kahama District Court so that his application for execution No. 12/2007 which was stayed on 25th of June, 2007 be carried on. It is in the record that, the Applicant stepped in and successfully objected for the reason that, the Minister's decision sought to be executed did not exist. This resulted to the decision of the High Court in application for Prerogative Orders No. 97/2007.

According to the cited section 22 of The Law of Limitation Act, the duration of 3 years and 6 months that counts from 25th of June, 2007 which the Respondent's application for execution was first stayed up to 03rd of January, 2011 when it was conclusively stopped, has to be excluded when computing time limitation for instituting an application for execution.

As the Applicant submitted, the Respondent's application for execution No. 19/2019 was time barred for 4 months; as we have seen, 3 years and 6 months be excluded first when computing time limit to file an application for execution. On that aspect alone, it is vivid that, the Respondent's application is not time barred.

On the second issue, whether the Respondent's Application for Execution No. 19/2019 is *res sub judice* following the pendency of an application for judicial review No. 97/2007 at the High Court of Tanzania, Dar es Salaam, I have the following: As submitted by the Respondent, the Applicant have raised this point during hearing of the application for revision. This is not proper. In the trial District Court, at page 2 – 3 of the ruling, the following was observed: -

Having gone through the submissions made by both counsels, both for and against the preliminary objection raised. The issue is whether preliminary has merit or not. Since the decision of the Court of Appeal of Tanzania revived the decision of the Minister of Labour thus the decision of the Court of Appeal of Tanzania is the valid one for the purpose of the Preliminary objection. Therefore, when the applicant filed this application on 23/05/2019 was

completely within a time. This Court hereby overrules the preliminary objection raised by Mr. Davis learned Counsel as the application is within time. It is so ordered.


From the outset, it is obvious that only one point of preliminary objection regarding time limitation was raised. That was, and is the only matter decided and correctly guided by Ms. Masessa, Learned Senior Resident Magistrate. This one on *res subjudice*, as conceded by the Applicant's Counsel, just came by the way. In his own words deposed in paragraph 12 of the affidavit in support of the application, it is deposed:

"We have also recently noted that the issue of terminal benefits is subjudice to Civil Cause Number 97 of 2007 which is pending in the High Court of Tanzania at Dar es salaam.

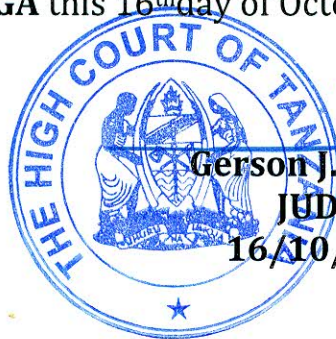
This being the only evidence, it is not clear if that suit is pending or not as the Applicant has not demonstrated compliance of the order of the Court of Appeal for joining the Respondent and re – hear the application for prerogative orders in the High Court. This being a revision proceeding, there would be nothing to revise if the complained matter was not first heard and determined by the lower Court. My hands are thus tied to revise that the application is *res-sub judice*.

That said, and as Applicant's argument have proved failure, then this application is hereby dismissed in its entirety. The Respondent's application for

execution No. 19/2019 is thus remitted back to the trial Court to proceed at the stage it reached. No order as to costs made. Order accordingly.


Gerson J. Mdemu
JUDGE
16/10/2020

DATED at SHINYANGA this 16th day of October, 2020.




Gerson J. Mdemu
JUDGE
16/10/2020