

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

AT IRINGA

REVISION APPLICATION NO. 05 OF 2019

BETWEEN

DAVID JOHN APPLICANT

VERSUS

UNILIVER TEA TANZANIA LIMITED RESPONDENT

6/10 & 13/11/2020

RULING

MATOGOLO, J.

The applicant, David John has filed this application asking this court for the following reliefs:-

- (i) To revise the proceedings in execution No. 26 of 2018 and to quash the orders in that proceedings in Execution No.26 of 2018 between David John Versus Unilever Tea(T) Ltd in its Ruling dated 8TH May, 2019 issued by Hon. A.S Chugulu Deputy Registrar and make an order quashing both ruling and proceedings given therein.*
- (ii) That this honourable Court be pleased to declare and order that both proceedings and resultant Ruling given and issued in Execution No. 26 of 2018 between David John Versus Unilever*

Tea (T)Ltd in its Ruling dated 8TH May, 2019 issued by Hon. A.S CHUGULU Deputy Registrar, were a nullity.

(iii) Costs of the application be provided.

(iv) Any other order as the court may deem fit.

At the hearing, the applicant was represented by Mr. Emanuel Kalikenya Chengula assisted by Mr. Byombalirwa learned advocate. The respondent was represented by Mr. Jackson Bidya learned advocate.

The application was argued orally. When the case came for hearing on 06/10/2020, the counsel for the respondent raised preliminary objection on point of law that, the affidavit in support of this application is defective.

He submitted that, in the jurat of attestation, the commissioner for Oaths before whom the deponent has taken oath did not indicate whether or not he knew the deponent or the same was identified to him by another person. He submitted further that, this is a defect which renders the application incompetent, hence he prayed to be heard on that.

In reply Mr. Chengula submitted that, the respondent after being served had a chance to go through the application documents. He submitted further that, counsel for the respondent brought objection on point of law with three points. But he did not raise this point. He contended that, now he is coming with another preliminary objection

which in their opinion does not lead to the matter to be disposed of unlike preliminary objection on jurisdiction and time limitation. He submitted further that, what the respondent counsel has raised as preliminary objection can be rectified. He said the respondent's counsel did not give them notice to allow to prepare themselves, he is taking them by surprise which cannot be permitted. He prayed to proceed with the hearing.

In rejoinder Mr. Bidya submitted that, the applicant's Advocate has submitted that the preliminary objection cannot finally dispose of the matter. but he said, this Court in several cases including revision No.14 of 2019 and revision No. 07 of 2018, parties being ***Lucy Kikoti and 2 others vs. Unilever Tanzania Limited***, the applications were struck out because were supported by defective affidavits on jurat of attestation. He went on submitting that, the Court of Appeal in the case of ***Godfrey Kimbe vs. Peter Ngonyani***, Civil Appeal No. 41 of 2014, found that the application supported by an affidavit with a defective jurat of attestation renders the application incompetent.

He submitted further that, the applicant's counsel is misguiding himself, once the application is brought before the court and point of law is raised it is proper for the court to proceed to determine the same. To support his argument he cited the case of ***Lucy Kikoti and 3 others vs Unilever Tanzania Limited*** (supra) where the court struck out the application after the learned Advocate Mr. Bidya has left to the court to decide on the matter after the point of law was raised. He contended

that, the issue to rectify the complained of document after a preliminary objection is raised is to circumvent the said preliminary objection.

Mr. Bidya submitted that, the applicant's counsel has submitted that, raising the preliminary objection now is to surprise them, he argued that, preliminary objection can be raised orally or by giving notice to the adverse party. He said, the practice is that the preliminary objection when is raised orally and if the adverse party is ready to proceed, the same may be argued. He insisted for the preliminary objection to be determined first.

Upon hearing the submissions by the learned counsel, this court ordered that, the preliminary objection raised be heard along with the main application.

With regard to the preliminary objection raised by the Learned Counsel for the respondent, I think it was not proper for the learned counsel to raise a preliminary objection without giving notice to the other party, and at any time even after the objection which was initially raised is resolved. It is not a good practice and denial of right to the other party since it was raised without giving notice. The respondent was served with the application documents, if had opportunity to raise preliminary objection at initial stage and he did so why not including the present objection. The present objection being not a preliminary objection on point of law basing on jurisdiction and time limitation which can be raised at any stage of the suit as it was decided in the case of ***M/s Tanzania China Friendship (T) Co. Ltd vs Our Lady of the Usambara***

Sisters (supra), raising this objection at this stage and without notice is a bad practice, and entertaining the respondent's application on the raised objection will be laying bad precedent. Thus, the preliminary objection raised cannot be entertained the same is disregarded.

Going to the application, Mr. Chengula prayed to adopt their prayers in their application and an affidavit in support of this application.

He submitted that, the ruling which was given by the Deputy Registrar who lacked jurisdiction to stay execution, an order is revisable. To support his argument he quoted the wise word of the Jurist S. A Charry in his book "Stay order and temporary injunction", 3rd Edition Published in Asia Law House at page 268. He also cited the case of ***Serenity on the Lake vs. Dorcus Martin Nyanda*** Civil Revision No.1 of 2015 CAT at Mwanza in which at page 7, the court held that, the Deputy Registrar does not form part of the High Court.

He also cited the case of ***Kulwa David vs. Rebeca Stephen (1985) TLR 116*** whereby the court set three factors for revision as follows:-

- (1) There must be a decided case.
- (2) It must be decided by the subordinate Court. Under section 57 of the Employment and Labour Relations Act, the Deputy Registrar is not the High Court.

- (3) The subordinate court in deciding the case must appear to have exercised the duty not vested by the law.

Mr. Chengula submitted that, the Deputy Registrar had no jurisdiction to order for stay of execution while there has been no any application for stay of the execution before her. He contended that, the only reason given by the Deputy registrar is that, there was another similar matter pending in the High Court which she did not even mention.

That, in the case of ***Petro Kitule vs. Sietco***, H/Court Labour Division Iringa Execution No. 03 of 2015, Lyimo D.R decided that you cannot issue an order for stay of execution if there is no application before the Court of law, under that circumstances she ordered for execution to proceed.

Mr. Chengula submitted that, there are several cases which set conditions for granting stay of execution, including the case of ***Mohamed Said Seif and Another vs Abduiaziz Hager***, Civil Application No. 09 of 2016, CAT at Mwanza at Page No.7, the court held that, no order for stay of execution shall be made under this rule unless the court is satisfied that:-

1. Substantial loss may result to the parties applying for stay of execution when the order is not made.
2. The application has been made without unreasonable delay.

3. The security has been given by the applicant for the due performance of the decree order as may ultimately be binding upon him.

He argued that, these conditions were not abided to by the Deputy Registrar while giving an order for stay of execution. Thus she exercised duties not vested by law.

Mr. Chengula cited the case of ***Paulina Thomas vs. Prosper Joseph Mutayoba*** Civil Application No. 19/08 of 2016 CAT at Mwanza and the case of ***Nico Insurance and 5 others vs Gulf Bulk Petroleum*** Civil Application No.51 of 2016. In all these cases the court set conditions for granting of stay of execution order.

He submitted further that, as there is no any case before this court, an application for stay of execution pending determination of revision order this court should revise that order issued by the Deputy Registrar who had no jurisdiction and the same is illegal as it was made by a person without jurisdiction.

In reply, Mr.Jackson Bidya prayed to adopt their notice of opposition filed on 17/09/2019 and their counter affidavit in the notice of opposition with two prayers as follows;

1. That the application is misguided and has no legal basis. And contains grounds which are frivolous and vexatious should therefore be dismissed.

2. This honorable court Chugulu DR correctly made its ruling for stay of execution.

He submitted that, this court should not be moved by the applicant to issue the prayed order. The provisions cited by the applicant do not move this Honorable Court to issue and grant the prayer.

He contended that, the other prayer for execution to proceed is not in the notice of application should not be granted.

He went on submitting that, the respondent should not raise any application on execution, as doing so will make the respondent not to exercise its constitutional rights.

He contended that, all statements and prayers made by the applicant are statements from the bar which should not be considered as they are not contained in the affidavit. And if the counsel for the applicant intended to use them he was supposed to file a supplementary affidavit as it was held in Civil Application No. 172 of 2019 ***Mic (T) Ltd vs. Cxc Africa Limited***, at page 14 (unreported) where the court held that, an averment must be made in the affidavit, which was not made is a statement from the bar which was ignored.

With regard to the case of ***Serenity*** cited by the counsel for the applicant, he submitted that, the case is distinguishable and should not be applied because the order which was preferred to, O. XLIII R. 1(1) of the Civil Procedure Code that, the Deputy Registrar has powers to order for stay of execution. He said by Notice of the Chief Justice to courts dated

on 13/04/2018 with Ref. No. CAB.50/1011/ specifically states that Deputy Registrars form part of the Labour Court. He contended that, Honourable Chugulu therefore forms part of the Labour Court and has jurisdiction to issue the order complained of.

Mr. Bidya went on submitting that, the applicant's counsel also quoted the word of the jurist mentioned in the book, but that book is not applicable to this court which is guided by Labour laws.

He contended that, even if the Deputy Registrar did not know presence of the Chief Justice Notice this court should take judicial notice that, Chugulu DR has powers to deal with the application just like this court had taken judicial notice in different circumstances, to support his argument he referred the case of ***Khalife Mohamed as Surviving Administrator of the Late Said Khalife vs. Aziz Khalife and Another***, Civil Appeal No. 97 of 2018, CAT (unreported), where the court took judicial notice on certain issue. Hence he prayed this court also to take judicial Notice.

Mr. Bidya said this court should also consider sections 58 and 59 of the Tanzania Evidence Act Cap.6 R.E 2019 which do not require for judicial notice to be proved.

He also cited the case of ***Anthony Mseke and 15 Others vs. The Chief Executive National Environment and Management Council of Tanzania and Another***, Land Case No. 151 of 2012 at page 10, where the court has the same findings on judicial notice.

He went on submitting that, the applicant's counsel has cited the case of ***Kulwa David*** (supra) to ask this court to exercise its revisional powers. But granting a stay order is a court discretion upon considering whether or not the requirements were met. The Deputy Registrar was proper to issue stay of execution.

On the issue that there was no any application pending before this court and lack reasons for her to issue the order. He contended that, the Deputy Registrar gave the reason for her decision.

He submitted further that, The Deputy Registrar forming part of the High Court has the powers to issue order for stay of execution, even though there is no indication that there was a case before this court. Hence he prayed for this application be dismissed.

In rejoinder Mr. Chengula reiterated what he submitted in his submission in chief and submitted further that, he was surprised by the submission made by the learned advocate for the respondent by submitting on Evidence Act, as Labour disputes are guided by the Labour Court Rules GN.No.106/2007 and other relevant labour laws. That, the learned counsel for the respondent also based on judicial notice principle basing on ***Anthony Mseke case*** (supra) in which it was expressly indicated which documents the court can take judicial notice, and the respondent's counsel did not point out the case or cases which were pending before this court.

He contended that, Mr. Bidya misled this honorable court that they have two prayers. But in their Chamber summons where prayers are placed they are praying for execution proceedings. He went on submitting that, it appears that, the learned counsel for the respondent do not understand the concept of revision, this Court is not bound to issue necessary orders which the court find proper including an order for execution of proceedings. He went on submitting that, the respondent's counsel has talked about the chief Justice Notice which he did not even produce it before this court. Hence Mr. Chengula insisted for this application to be granted.

On his part Mr. Byombalirwa, submitted that, the Counsel for the respondent has strenuously submitted on the question of judicial notice. He was of the considered opinion that, this cannot apply to non-existing thing. He submitted that, the counsel for the respondent said there is a notice by the chief justice dated 30th April, 2018 which basically empowers the Deputy Registrar to be part of the High Court Labour Division.

But he worried if the date mentioned is the date the notice by the Chief Justice was issued. He argued that, on 9th and 12th April the case of ***Serenity Ltd*** (supra) was decided by the Court of Appeal at Mwanza. If so the three Justice of Appeal were not acquainted by that Notice and give decision emanating from the decision of the Deputy Registrar High Court Mwanza. He submitted that, the Justice of Appeal ruled that the

Deputy Registrar had no powers to issue an order for stay of execution as he has no such powers.

He concluded by praying to this court to see that it was not possible for the notice to be issued a year back but the Justice of Appeal became unaware of it. Under these circumstances he prayed to this court to satisfy itself to the mentioned notice which may be nonexistent. And if the said Notice is present still the Deputy Registrar did not follow the law in her decision.

Having heard the respective submissions by the learned counsels and went through the court record, the main issue to be determined here is whether this application has merit.

The main complaint is that, the Deputy Registrar had no jurisdiction to order for stay of execution while there has been no any application for stay of the execution.

After go through the court records specifically the order made by the Deputy Registrar, there was no any application for stay of execution, for that reason the Deputy Registrar was not moved to order the said order. The Deputy Registrar at page 3-4 of the typed ruling stated:-

"In fact the judgment debtor has also filed the Miscellaneous Labour Application before the Court.

Even though he has filed the application for stay of execution.

I am aware that, the Law is logic. Once you have noticed there is a pendency of an application in the High Court which it has also include the same matter before me. I have mandate not to carry out the execution to the extent that may interfere and prejudice the proceedings pending the Misc. Labour Application in the High Court of Tanzania at Iringa because any party has right to file revision in case he has not dissatisfied with the decision from CMA. Under such circumstance the application for execution would stay pending until the determination of Miscellaneous Labour Application before the High Court of Tanzania at Iringa”

Basing on the above quoted paragraph, there is no dispute that the Deputy Registrar ordered for a stay of execution *suo motto* as there was no application for stay of execution. This was not proper, as the Deputy Registrar was supposed to be moved for her to order for stay of execution and not otherwise, as the law requires that a court cannot order for stay where there is no application for stay, see the case of ***Petro Kitule vs. Sietco (supra)***.

Above all stay of execution cannot be ordered where there is no pending matter in respect of the decision intended to be executed. Stay of execution can only be issued pending occurrence of certain event. If there is no any application for revision pending before this court, and no any application for execution is filed in court, stay order cannot be issued because by issuing the same it may remain in force indefinitely thus

denying the holder of the award to enjoy his right. The learned Deputy Registrar although stated in her ruling that there is an application for revision filed before this court, but she did not even mention its number, even the respondent's counsel did not mention any which means there is no any application for revision pending before this court. If I can borrow from the Civil Procedure Code, Cap. 33 R.E. 2019 the conditions for granting stay of execution are provided under Order XXXIX rule (5)(1), that is there must be an appeal pending in court although an appeal itself is not a bar for execution unless sufficient cause has been shown for the stay. That was also the position in the case of ***E.R. Mutaganywa v. Ahmed J. Aladin and Others [1996] TLR 285***, in which it was held:-

"Order XXXIX rule 5, which gave the court power to grant a stay of execution pending appeal contemplated that an appeal had been filed. The court could not entertain an application for stay where no appeal had been filed".

As there is no any application for revision filed in this court, the Deputy Registrar was not supposed to grant a stay. The applicant complaint has merit.

Mr. Bidya argued that, the Deputy Registrar form part of the High Court, and has the powers to issue an order for stay of execution. In order to resolve this issue we have to look at the law. Section 50(1) of the Labour Institutions Act No. 7 of 2004 establishes the Labour Court, the same provides:-

"50(1) There shall be established a Labour Division of the High Court.

(2) the Labour Division of the High Court shall consist of;

(a) such number of Judges as the Chief Justice may consider necessary

(b) two panels of assessors appointed in terms of section 53.


The above provision does not mention the Deputy Registrar as part of the High Court (Labour Division). And according to section 91(3) of The Employment and Labour Relations Act No. 6 of 2019, it is only the Labour Court which has jurisdiction to stay the enforcement of the award of the CMA pending its decision. For that reason therefore the Deputy Registrar does not form part of the High Court (Labour Division) and had no jurisdiction to issue stay order as she did. This position of law is now settled upon the decision of the Court of Appeal in the case of ***Serenity On Lake Ltd versus Dorcus Martin Nyanda (supra)***. She thus exercised powers not vested to her by the law.

Basing on the above given explanation it is my considered opinion that, this application has merit the same is granted. The order by the Deputy Registrar staying execution of the CMA award is quashed and set aside.

It is so ordered.

DATED at **IRINGA** this 13th day of November, 2020.




F.N. MATOGOLO
JUDGE

13/11/2020

Date: 13/11/2020
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
Applicant: Present
Respondent: Absent
C/C: Grace

Mr. Emmanuel Chengula – Advocate

My Lord I am appearing for the applicant the matter is for ruling on our part we are ready, although the respondent is not present.

COURT:

Ruling delivered.


F. N. MATOGOLO
JUDGE

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MATOGOLO, J.

The applicant, David John has filed this application asking this court for the following reliefs:-

- (i) To revise the proceedings in execution No. 26 of 2018 and to quash the orders in that proceedings in Execution No.26 of 2018 between David John Versus Unilever Tea(T) Ltd in its Ruling dated 8TH May, 2019 issued by Hon. A.S Chugulu Deputy Registrar and make an order quashing both ruling and proceedings given therein.*
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Tea (T)Ltd in its Ruling dated 8TH May, 2019 issued by Hon. A.S CHUGULU Deputy Registrar, were a nullity.

(iii) Costs of the application be provided.

(iv) Any other order as the court may deem fit.

At the hearing, the applicant was represented by Mr. Emanuel Kalikenya Chengula assisted by Mr. Byombalirwa learned advocate. The respondent was represented by Mr. Jackson Bidya learned advocate.

The application was argued orally. When the case came for hearing on 06/10/2020, the counsel for the respondent raised preliminary objection on point of law that, the affidavit in support of this application is defective.

He submitted that, in the jurat of attestation, the commissioner for Oaths before whom the deponent has taken oath did not indicate whether or not he knew the deponent or the same was identified to him by another person. He submitted further that, this is a defect which renders the application incompetent, hence he prayed to be heard on that.

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which in their opinion does not lead to the matter to be disposed of unlike preliminary objection on jurisdiction and time limitation. He submitted further that, what the respondent counsel has raised as preliminary objection can be rectified. He said the respondent's counsel did not give them notice to allow to prepare themselves, he is taking them by surprise which cannot be permitted. He prayed to proceed with the hearing.

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Sisters (supra), raising this objection at this stage and without notice is a bad practice, and entertaining the respondent's application on the raised objection will be laying bad precedent. Thus, the preliminary objection raised cannot be entertained the same is disregarded.

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He submitted that, this court should not be moved by the applicant to issue the prayed order. The provisions cited by the applicant do not move this Honorable Court to issue and grant the prayer.

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He went on submitting that, the respondent should not raise any application on execution, as doing so will make the respondent not to exercise its constitutional rights.

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On the issue that there was no any application pending before this court and lack reasons for her to issue the order. He contended that, the Deputy Registrar gave the reason for her decision.

He submitted further that, The Deputy Registrar forming part of the High Court has the powers to issue order for stay of execution, even though there is no indication that there was a case before this court. Hence he prayed for this application be dismissed.

In rejoinder Mr. Chengula reiterated what he submitted in his submission in chief and submitted further that, he was surprised by the submission made by the learned advocate for the respondent by submitting on Evidence Act, as Labour disputes are guided by the Labour Court Rules GN.No.106/2007 and other relevant labour laws. That, the learned counsel for the respondent also based on judicial notice principle basing on ***Anthony Mseke case*** (supra) in which it was expressly indicated which documents the court can take judicial notice, and the respondent's counsel did not point out the case or cases which were pending before this court.

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But he worried if the date mentioned is the date the notice by the Chief Justice was issued. He argued that, on 9th and 12th April the case of ***Serenity Ltd*** (supra) was decided by the Court of Appeal at Mwanza. If so the three Justice of Appeal were not acquainted by that Notice and give decision emanating from the decision of the Deputy Registrar High Court Mwanza. He submitted that, the Justice of Appeal ruled that the

Deputy Registrar had no powers to issue an order for stay of execution as he has no such powers.

He concluded by praying to this court to see that it was not possible for the notice to be issued a year back but the Justice of Appeal became unaware of it. Under these circumstances he prayed to this court to satisfy itself to the mentioned notice which may be nonexistent. And if the said Notice is present still the Deputy Registrar did not follow the law in her decision.

Having heard the respective submissions by the learned counsels and went through the court record, the main issue to be determined here is whether this application has merit.

The main complaint is that, the Deputy Registrar had no jurisdiction to order for stay of execution while there has been no any application for stay of the execution.

After go through the court records specifically the order made by the Deputy Registrar, there was no any application for stay of execution, for that reason the Deputy Registrar was not moved to order the said order. The Deputy Registrar at page 3-4 of the typed ruling stated:-

"In fact the judgment debtor has also filed the Miscellaneous Labour Application before the Court.

Even though he has filed the application for stay of execution.

I am aware that, the Law is logic. Once you have noticed there is a pendency of an application in the High Court which it has also include the same matter before me. I have mandate not to carry out the execution to the extent that may interfere and prejudice the proceedings pending the Misc. Labour Application in the High Court of Tanzania at Iringa because any party has right to file revision in case he has not dissatisfied with the decision from CMA. Under such circumstance the application for execution would stay pending until the determination of Miscellaneous Labour Application before the High Court of Tanzania at Iringa”

Basing on the above quoted paragraph, there is no dispute that the Deputy Registrar ordered for a stay of execution *suo motto* as there was no application for stay of execution. This was not proper, as the Deputy Registrar was supposed to be moved for her to order for stay of execution and not otherwise, as the law requires that a court cannot order for stay where there is no application for stay, see the case of ***Petro Kitule vs. Sietco (supra)***.

Above all stay of execution cannot be ordered where there is no pending matter in respect of the decision intended to be executed. Stay of execution can only be issued pending occurrence of certain event. If there is no any application for revision pending before this court, and no any application for execution is filed in court, stay order cannot be issued because by issuing the same it may remain in force indefinitely thus

denying the holder of the award to enjoy his right. The learned Deputy Registrar although stated in her ruling that there is an application for revision filed before this court, but she did not even mention its number, even the respondent's counsel did not mention any which means there is no any application for revision pending before this court. If I can borrow from the Civil Procedure Code, Cap. 33 R.E. 2019 the conditions for granting stay of execution are provided under Order XXXIX rule (5)(1), that is there must be an appeal pending in court although an appeal itself is not a bar for execution unless sufficient cause has been shown for the stay. That was also the position in the case of ***E.R. Mutaganywa v. Ahmed J. Aladin and Others [1996] TLR 285***, in which it was held:-

"Order XXXIX rule 5, which gave the court power to grant a stay of execution pending appeal contemplated that an appeal had been filed. The court could not entertain an application for stay where no appeal had been filed".

As there is no any application for revision filed in this court, the Deputy Registrar was not supposed to grant a stay. The applicant complaint has merit.

Mr. Bidya argued that, the Deputy Registrar form part of the High Court, and has the powers to issue an order for stay of execution. In order to resolve this issue we have to look at the law. Section 50(1) of the Labour Institutions Act No. 7 of 2004 establishes the Labour Court, the same provides:-

"50(1) There shall be established a Labour Division of the High Court.

(2) the Labour Division of the High Court shall consist of;

(a) such number of Judges as the Chief Justice may consider necessary

(b) two panels of assessors appointed in terms of section 53.


The above provision does not mention the Deputy Registrar as part of the High Court (Labour Division). And according to section 91(3) of The Employment and Labour Relations Act No. 6 of 2019, it is only the Labour Court which has jurisdiction to stay the enforcement of the award of the CMA pending its decision. For that reason therefore the Deputy Registrar does not form part of the High Court (Labour Division) and had no jurisdiction to issue stay order as she did. This position of law is now settled upon the decision of the Court of Appeal in the case of ***Serenity On Lake Ltd versus Dorcus Martin Nyanda (supra)***. She thus exercised powers not vested to her by the law.

Basing on the above given explanation it is my considered opinion that, this application has merit the same is granted. The order by the Deputy Registrar staying execution of the CMA award is quashed and set aside.

It is so ordered.

DATED at **IRINGA** this 13th day of November, 2020.




F.N. MATOGOLO
JUDGE

13/11/2020

Date: 13/11/2020
Coram: Hon. F. N. Matogolo – Judge
L/A: B. Mwenda
Applicant: Present
Respondent: Absent
C/C: Grace

Mr. Emmanuel Chengula – Advocate

My Lord I am appearing for the applicant the matter is for ruling on our part we are ready, although the respondent is not present.

COURT:

Ruling delivered.


F. N. MATOGOLO
JUDGE

13/11/2020

