

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY]**

AT ARUSHA

**MISCELLANEOUS LABOUR APPLICATION NO. 37 OF 2017
(C/F CMA/ARS/MED/7/2008)**

TANZANIA BREWERIES LIMITED.....APPLICANT

Versus

HERMAN BILDAD MINJA.....RESPONDENT

RULING

27/08/2020 & 15/10/2020

MZUNA, J.:

Herman B. Minja, the respondent herein (now deceased), was terminated by **Tanzania Breweries Limited**, the applicant herein, on 22nd October, 2007 for gross misconduct as well as misappropriation of company's property by servicing his personal vehicle at the company's garage without authorization.

After several disputed applications, the CMA ordered for reinstatement but that order was not complied with as the respondent was against that order. For undisclosed reasons, Lyimo, the Deputy Registrar vides Execution

No. 42 of 2012, passed a garnishee order to execute Tshs 320,000,000/- against the applicant's Account at NMB, Bank House Dar es Salaam.

In this application, the applicant invites the court to revise and set aside the Application for Execution No. 42 of 2016 on the grounds that:

First, *the award to be executed is for reinstatement not monetary compensation;*

Second, *the respondent is dead and there is no granted application for substitution of his personal legal representative;*

Third, *that the application for revision abated with the death of the respondent;*

And **four**, *that the order of reinstatement is overtaken by events since the respondent is dead and there is no order for substitution.*

The respondent's counsel raised three (3) preliminary points of objection namely:

One, *that the applicant is barred from bring this application since his earlier application (Misc. Application No. 18 of 2016) was struck out without leave to re-file;*

Two, *that the application for stay of execution has been overtaken by events since the application for extension of time has been granted;*

And,

Three, that the application is incompetent for being supported by a defective affidavit.

Hearing proceeded by way of written submissions. Both the raised preliminary objection and application were consolidated and argued together.

Let me start with the preliminary points of objection on the third ground which says the application is supported by a defective affidavit. Mr. Materu submitted that the applicant's affidavit contains legal arguments, hearsay and improper verification clause. He implored the court to strike out the said affidavit and declare this application incompetent.

In response, Mr. James submitted that the affidavit by their Principal Officer of the respondent is competent to support their application. That even if the same is found to contravene the rules, the same can seek refuge of Rule 24 (3) (c) of the Labour Court Rules. He also referred the case of **Reli Assets Holding Co Ltd v. Japhet Casmil & 1500 Others**, Labour Revision No. 10 of 2014, at Tabora (unreported) to stress the point that the Labour law regime was set up to deliver social justice compared to legal justice.

This court after a careful reading of the submissions put forth by the learned counsels, is of the view that such defects to the affidavit can be cured by an amendment or striking the offensive paragraphs only. I say so based on the Overriding Objective Principle as well stated by the Court of Appeal in the case of **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appela No. 55 of 2017 (unreported) where Hon Prof. Juma, C.J, stated at page 13 that:-

*“With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, [ACT No. 8 of 2018] **which now requires the courts to deal with cases justly, and to have regard to substantive justice...**”* [Emphasis added]

Guided by the above, I find that the third point of objection lacks merit and is hereby dismissed.

Now I revert to the first point of the preliminary objection where it is argued that the applicant is barred from bringing this application. Mr. Materu submitted that the Misc. Application No. 18 of 2016 is identical to this application. In that they both seek to dismiss the entire Application for

Execution No. 42 of 2012. According to Mr. Materu since there was not granted leave to re-file, this application is out of sixty (60) days prescribed by item 21 of part III of the schedule to the Law of Limitation Act, Cap 89. He referred the case of **Blue Star Service Station v. Jackson Musseti t/a Musseti Enterprises** [1999] TLR 80 to bolster his submission.

On his part Mr. James submitted that their earlier application being struck out on technicalities there is no requirement of leave to re-file a competent one. On the issue of time limitation the learned counsel referred to section 38 (2) of the Civil Procedure Code to argue that the court can treat objection proceedings as an ordinary law suit. Thus, the application is within time, argued the counsel.

In view of the submissions above, the question remains that in the absence of leave, can this court deal with the present application? It is true, Misc. Application No. 18 of 2016 barred further application. It is indisputable that the said application sought to challenge the Application for Execution No. 42 of 2012. One can safely say, that it is true that the applicant ought to have obtained leave to challenge the orders sought in the present application. However, that remedy for leave was blocked. It is said there is an application pending in the Court of Appeal which however was not clearly

brought to my attention. This court has powers to act suo motto to remedy the anomaly.

Much as the respondent admit the CMA award was for reinstatement, the order by the DR for monetary value was without basis, then even the execution process cannot be maintainable in law. I find for this reason that this court can act to rectify the omission based on technicalities. Inherent powers of review are well stated in the case of **Tanzania Transcontinental Trading Company v. Design Partnership Ltd** [1999] TLR 258, page 263:- "*where there is a manifest error apparent on the (face of) the record.*" (underscoring mine).

I find based on the above case law, that there is a need for leave to be able to re-file an application such as this to rectify the irregularities through review. The first point of objection stands dismissed.

Lastly on whether the application for stay of execution has been overtaken by events, relevant for the second point of objection. Mr. Materu submitted that the execution process was completed by the garnishee order issued and served on applicant's banker on 3rd July, 2015 and 3rd August, 2015 respectively.

On his part Mr. James stated that this is not an application for stay of execution. To him, the application for execution is complete when the decree holder gets his payment in full.

The question is, does this application seek to stay execution proceedings? I think the answer is in the negative. The record is quite clear that the chamber summons seeks to challenge the execution proceedings on several fronts of illegalities and irregularity. Therefore, I see no reason how it could have been overtaken by the garnishee order issued against the applicant, the order which is not yet satisfied in full. In that one cannot be correct to argue that the execution has been completed. In the results I find no merit in the second point of objection. It is equally dismissed.

Turning to the main application, the main question for determination is whether the Application for Execution No. 42 of 2012 was competent before the court. The applicant argues that it was incompetent since the award it seeks to execute was not in line with the award issued by the CMA. Again, the decree holder died before realization of the award, hence the order for reinstatement has been overtaken by events.

In reply, the respondent's counsel argued that this court cannot dismiss the application which was heard in Application for Execution No. 42 of 2012. According to the learned counsel, Mr. Materu, stated that the order subject of this application is also being challenged by the applicant at the Court of Appeal. He however never supplied evidence of his assertion. To him, the court cannot invoke section 38 of the Civil Procedure Code as the garnishee order has already been issued after consideration of all objection proceedings. Concerning substitution application, Mr. Materu argued that the applicant recognizes very well the administratrix of the respondent, one **Christophina Justin Mkude**. He is of the view that since the applicant impleaded her in the Notice of Appeal to the Court of Appeal, she is well known and recognized in the execution proceedings.

In that, the learned counsel referred to Rules 17 (2) and 49 (2) of the Labour Court Rules to bolster his argument that any interested party or beneficiary is entitled to pursue execution of the award made by the CMA. Mr. Materu concluded his submission by a question that if the court heard and granted the Execution Application No. 42 of 2012 how can the same court dismiss it?

In rejoinder, the applicant reiterated his earlier submission that the CMA award is not executable for being overtaken by events.

Having considered the rival submissions by parties herein, I am of the view that the award made by the CMA was actually based on reinstatement not monetary form. The amount sought to be executed by the respondent Tshs 320,000,000/= does not feature in any of the CMA award.

I would agree with Mr. Materu for the respondent, that where the employer is reluctant to reinstate the employee then he has to compensate him as per the law. Owing to the above, does this court have power to dismiss the said Execution Application No. 42 of 2012?

The said application was heard and granted by this court (Deputy Registrar). The respondent argues that the same is being challenged at the Court of Appeal, albeit without proof. This argument is unassailable. There is an order barring the applicant from bringing any application such as this to this court, which however the applicant's counsel says was made without citing the applicable law.

This court is aware is a court of equity. It has to give effect to Provisions of the Constitution as well stated under section 3 (f) of the

Employment and Labour Relations Act No. 6 of 2004. It cannot allow the illegality by the Deputy Registrar to be executed.

The order by the DR stems from the illegality. Assuming that the order for reinstatement was not executable simply because the employee who was dismissed and then reinstated passed away in January 2013, that order is of 3rd July 2015 almost after two years of the employee's death. The order by DR is without basis and therefore cannot be allowed to stand. In the case of

It was held in the case of **Principal Secretary, Ministry of Defence; National Service v. Devram Valambhia** [1992] TLR 185 (CA) at page 188 that:-

*"In the case before us, however, **the point at issue, in effect is the illegality or otherwise of the garnishee order as a means of executing the Court order against the Government. For, should it turn out that the garnishee order is within the ambit of Section 1 of the Government Proceedings Act, 1967 as urged by counsel for the Principal Secretary Ministry of Defence and National Service, then the order is illegal and hence a nullity. ...To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is,***

in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty it is to uphold the rule of law.” (Emphasis mine).

Surely that order cannot be allowed to remain and executed as it is illegal.

I am aware in that case of **Principal Secretary, Ministry of Defence; National Service v. Devram Valambhia** (supra), the court was dealing with issue of illegality as good cause, one of the grounds to extend time to file appeal out of time. Similarly, even in the present case it can be a ground to nullify an illegal order for the interest of justice. The garnishee order of Tshs 320,000,000/= which does not have its basis is hereby nullified as the record is silent on how this figure was arrived at. In the results, the raised preliminary objections are dismissed.

The applicant has said that so far there is no application for substitution of the legal representative which has been made and granted. In view of the provisions of Rule 49 (2) of the Labour Court Rules 2007, GN No. 106/2007, “any interested party or beneficiary is entitled to apply for execution of the award made by the CMA”. Issue of substitution of legal representative is therefore misplaced.

However, even without that order, the order for reinstatement was made at the time when the said Herman Bildad Minja was still alive. For the interest of justice, the surviving widow and legal heirs are entitled for 12 Months salaries as compensation which the respondent was entitled to at the time of termination under section 40 (1) (c) of the Employment and Labour Relations Act, Act No 6 of 2004. There is no evidence suggesting the salary by then. The District Registrar should sit with parties in this case to determine (based on the available salary slip on record) at the time of termination. It should be multiplied by 12.

Application is allowed with no order for costs.



M. G. MZUNA,
JUDGE,
15. 10. 2020