

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LABOUR APPLICATION NO. 7 OF 2020

BUGANDO MEDICAL CENTRE APPLICANT

VERSUS

NYAMWERO MAKETU NYAMWERO 1ST RESPONDENT

RASHID HAMZA MALEKELA 2ND RESPONDENT

KUNIGWA MICHAEL MAFURU 3RD RESPONDENT

JACKSON PROJEST KAMUGISHA 4TH RESPONDENT

MATIKO KILIMA MATIKO 5TH RESPONDENT

RULING

18th February, & 29th March, 2021

ISMAIL, J.

This is a ruling on an application for stay of execution of the arbitrator's award issued on 3rd February, 2020, in respect of Labour Dispute No. CMA/MZ/NYAM/632-178, 629-179, 628-180, 623-181, 630-182/2018. In this dispute, the respondents were challenging termination of their employment, on the ground that such termination was procedurally and substantively unfair. Termination of their services followed a



disciplinary hearing in respect of charges of gross dishonesty that caused losses to the applicant. The charges were preferred against the respondents in respect of the transactions that they dispensed in their positions as the applicants' cash handlers.

The Commission for Mediation and Arbitration (CMA), in which the dispute was instituted, was convinced that the reasons for termination and the procedure adopted in laying off the respondents were utterly lacking in fairness. Applying the provisions of section 40 (1) (c) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019, the CMA arbitrator ordered payment of the aggregate sum of TZS. 41,900,000/-, being compensation for unfair termination.

The applicant has taken this decision with a serious pinch of salt. Bemused by it, the applicant has moved to this Court and filed an application for revision, seeking to revise and set aside the CMA award on the grounds stated in paragraph 5 of the supporting affidavit. In the pendency of the revisional proceedings, the applicant is seeking the Court's indulgence to have the execution of the award stayed.

The application for stay of execution is supported by an affidavit, sworn by Anaclet Kamara Laurean, the applicant's legal counsel, and it sets out grounds on which the application for stay of execution is based. Grounds for the orders sought are pleaded in paragraph 7 through to 10 of the affidavit.

The application has been fiercely opposed by the respondents. Through a counter-affidavit sworn by Renatus Lugwisha, their counsel, the respondents have taken the view that the application is devoid of any merit, mainly because there are no pending execution proceedings preferred by the respondents. They also contend that there is no evidence that revisional proceedings have been instituted in this Court.

When the matter came up for orders on 18th February, 2021, both parties were duly represented. On the counsel's concurrence, disposal of the matter was ordered to be by way of written submissions in conformity with the schedule drawn by the Court. By close of business on 4th March, 2021, the date on which the respondents' counsel was scheduled to file his written submission, and until now, nothing had been received at the Court registry, and nothing was heard from the respondents on why the Court order was not complied with. This is unlike the applicant whose submission

was filed three days ahead of the deadline. From this fact, the question that follows immediately is: what is the consequence of the respondents' defiance?

The law is settled in this respect. The consequence of what the respondents' failure is as adverse as a party's failure to enter appearance on the date a matter is set for hearing. This position has been underscored in numerous court decisions. In ***National Insurance Corporation of (T) Ltd & Another v. Shengena Ltd***, CAT-Civil Application No. 20 of 2007 (DSM-unreported), the Court of Appeal held:

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

The same stance was taken by this Court in ***P3525 LT Idahya Maganga Gregory v. Judge Advocate General***, Court Martial Criminal Appeal No. 2 of 2002 (unreported), wherein it was held:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is

equivalent to non-appearance at a hearing or want of prosecution. The attendant consequence of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. The Court decision on the subject matter is bound Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered."

The just quoted excerpt takes up from an earlier decision of the Court in ***Olam Tanzania Limited v. Halawa Kwilabya***, HC-(DC.) Civil Appeal No. 17 of 1999 (unreported), in which it was fabulously held:

"Now what is the effect of a court order that carries instructions which are to be carried out within a pre-determined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to halt or it will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. So, if a party fails to act within prescribed time he will be guilty of indiligence in like measure as if he defaulted to appear This should not be allowed to occur. Courts of law should

always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."

See also: ***Tanzania Harbours Authority v. Mohamed R. Mohamed*** [2002] TLR 76; ***Patson Matonya v. Registrar Industrial Court of Tanzania & Another***, CAT-Civil Application No. 90 of 2011; and ***Geofrey Kimbe v. Peter Ngonyani***, CAT-Civil Appeal No. 41 of 2014 (DSM-unreported).

Inspired by the incisive decisions quoted above, I hasten to order that hearing on the matter be done *ex-parte* against the respondents. I will do this by considering the applicant's supporting affidavit and submissions made by its counsel. In resolving the issue, the question is whether the applicant has satisfied the Court that the facts and circumstances of its case bring this application within the ambit of one or more of principles for which stay of execution may be granted.

It is trite law that stay of execution is grantable on the applicant's demonstration that his application falls within any or all of the principles that govern such grant. These principles are as articulated in ***Ignazio Messina & National Shipping Agencies v. Willow Investment &***



Costa Shinganya, CAT-Civil Reference No. 8 of 1999 (DSM-unreported),
in which the Court of Appeal of Tanzania held as follows:-

"It is now settled that

- (i) The Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage;*
- (ii) It is equally settled that the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory;*
- (iii) Again the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so."*

See also: **SDV Transmi (Tanzania) Limited v. MS STE DATCO**,
CAT-Civil Application No. 97 of 2004 (DSM-unreported).

As stated earlier on, the applicant's quest for stay of execution is predicated on the averments made in paragraphs 6, 7, 8, 9 and 10 of the

supporting affidavit. Key among them is the fact that there is a pending revision against the CMA award, and that the applicant will stand to suffer an irreparable loss as the respondents do not have the means to refund the sum that may be paid out to them. This has been amplified in the written submission filed in support of the application. The argument is that the respondents do not have any security to fall on in case the revisional proceedings that are pending in this Court are decided in the applicant's favour. This contention has not been seriously challenged by the respondents. Apart from questioning if the said revisional proceedings are indeed in existence, the respondents' other concern is that there are no execution proceedings and that they will stand to suffer more if the application is granted.

I am not convinced that the arguments raised by the respondents are formidable enough to form the basis for refusing of this application. I take the view that the applicant has demonstrated that this application has what it takes to succeed. The applicant has shown, sufficiently in my view, that it stands to suffer a substantial irreparable loss if the application is refused, and that success in the intended revisional proceedings will be rendered nugatory if execution of the award is left to proceed. In my considered

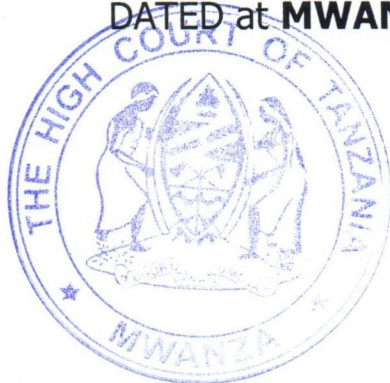


view, these grounds fit squarely in the principles enunciated in ***Ignazio Messina & National Shipping Agencies*** (supra).

In view thereof, I grant the application for stay of execution of the CMA award, pending final determination of the revisional proceedings pending in this Court.

It is so ordered.

DATED at **MWANZA** this 29th day of March, 2021.




M.K. ISMAIL

JUDGE