

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LABOUR APPLICATION NO.53 OF 2020

(Original Dispute No. CMA/MZ/ILEM/91/2020/47/2020)

1. STECOL CORPORATION
2. SINOHYDRO CORPORATION LTD } APPLICANTS

VERSUS

JOSEPHINE LUKWETO RESPONDENT

RULING

Date of Last Order: 26.04.2021

Date of Ruling: 30.04.2021

A.Z.MGEYEKWA, J

The applicant filed an application for stay of execution with respect to Misc. Application No. 53 of 2020. The application is brought under Order Section 91 (3) and 94 (1) (f) of the Employment and Labour Relations Act, 2004, Rule 24 (1), (2), (b) (c), (d), (e), (f) (3) (a), (b), (c), (d) and Rule 55 (1) Court Rules, G.N No. 106 of 2007. The application was supported by an affidavit

sworn by Cynthia Mwafongo. Opposing the application the respondent filed a counter affidavit deposed by Josephine Lukweto.

On 12th April 2021 when the matter came for hearing before me via audio teleconference, Mr. Kinango, learned Advocate represented the applicant while Mr. Mazulla, learned counsel represented the respondent. Both parties agreed to dispose of the application by way of written submission whereby the applicant was required to file his application before or on 15th April, 2021. The respondent was required to file a reply before or on 22nd April, 2021, and a rejoinder if any on 26th April, 2021. Both learned counsels complied with the court order.

In support of this application, Mr. Kinango was brief and straight to the point, he urged this court to adopt the applicant's affidavit. He stated that the applicant has filed an application for revision which is now pending for hearing in the High Court. Mr. Kinango went on to argue that the applicant's application has a great chance of success. He argued that there is a matter pending before this court concerning the award which subject to execution. He urged this court to give the applicant a chance to be heard. Mr. Kinango stated that the CMA award ordered the applicant to pay the respondent a total sum of Tshs. 29,465,000/= as compensation for unfair termination. He

went on to argue that the amount so ordered is so colossal given the fact if the application for execution will proceed it will not be possible to recover the full amount from the respondent whose source of income.

Insisting, Mr. Kinango went on to argue that the applicant is given a chance to be heard. To support his submission he referred this court to the case of **Mbeya Rukwa Auto Parts v Jestina George Mwakyoma**, TLR (2003)

251 where the court of Appeal held that:-

"...the right of hearing is a fundamental constitutional right by virtue of Article 13 (6) (a) of the Constitution"... The judge's decision to revoke the right of M/S Kagera and the Appellant without affording them an opportunity to be heard was not only a violation of rules of natural justice but also a contravention of the Constitution hence void of no effect."

On the strength of the above submission, the learned counsel for the applicant urged this court to grant the application for stay of execution of the award of the CMA so that her right be seen to have been protected as guaranteed in the Constitution.

Opposing the application, Mr. Mazulla it is settled principle of law that for application of stay of execution of decree pending the determination of an appeal or application for revision, the applicant has to meet the following factors; that substantial loss may result to the party, the application has been made without unreasonable delay and the security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. To bolster his submission he referred this court to Order XXXIX Rule 5 (3) of the Civil Procedure Code Cap.33 [R.E 2019] and the case of **FINCA Tanzania V Leonard Andrew Karogo**, Misc. Civil Application No. 52 of 2020 and the case of **Felix Emmanuel Mkongwa v Andrew Kimwaga**, Civil Application No. 249 of 2016.

It was Mr. Mazulla's further submission that the applicant was required to ensure the existence of factors or conditions which justify the grant of an order of stay of execution. He went on to state that the same was required to show in the applicant's affidavit. He valiantly stated that neither the chamber summons nor the affidavit supporting the applicant's application has met the standard stated in Order XXXIX Rule 5 (3) of the Civil Procedure Code Cap.33 [R.E 2019].

Mr. Mazulla did not end there, he argued that the applicant has not furnished security for the due performance of the decree. He went on to argue that the applicants as to the condition available were required to give security for the due performance of such decree as may be binding upon them. To fortify his position he referred this court to the case of *FINCA Tanzania* (supra). He also referred this court to the case of **Tanzania Petroleum Development Corporation v Mussa Yusuph Namwao and 30 Others**, Civil Application No. 602/07 of 2018 and the case of **Aidan George Nyongo v Magese Machenja and 3 Others**, Civil Application No. 237/17 of 2016 (unreported). He argued that the application has no any colour of merit since he has failed to meet all the requirements stipulated in Order XXXIX Rule 5 (3) of the Civil Procedure Code Cap.33 [R.E 2019].

On the strength of the above submission, Mr. Mazulla beckoned this court to dismiss the applicant's application for failure to provide security for the due performance of the application.

Having heard the submissions of both learned counsels, I embark on determining the merit of this application. The conditions for the stay of execution is provided for under Order XX Rule 27 of the Civil Procedure Code Cap.33 which state that:

" Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to the security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."

I have gone through the applicant's affidavit to find out if she has stated any good cause to warrant this court to grant his application as stated under Order XXXIX Rule 1 of the Civil Procedure Code Cap.33. The applicant in his affidavit has moved this court to grant his application by stating that he has high chances of being granted extension of time to file a revision and that the respondent will not suffer anyhow for in an event the award remains unchanged after the application, he can realize his award. Order XXXIX Rule 5 (3) of the Civil Procedure Code Cap.33 provides that:-

" 5 (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the court making it is satisfied-

(a) that substantial loss may result in the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay;

and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.”

As rightly pointed out by Mr. Mazulla that the conditions stated under the above Order must be cumulatively complied with by the applicant for the court to grant the order for stay of execution. In the case of **FINCA Tanzania v Leonard Andrew Karogo** (supra) my brother Hon. Kisanya, J dismissed the application for stay of execution after noting that the applicant has failed to furnish security for the due performance of the decree. The Court of Appeal of Tanzania in the case of **Felix Emmanuel Mkongwa** (supra) stated that:-

“ The above provisions, we think are self- explanatory and need no further expounding. Suffice only to state that, for an application for stay of execution to be granted under the Rules, the above conditions had to be cumulatively complied with, meaning that where one of them could have not been satisfied, the court would decline to grant the order for stay of execution. The duty of the applicant to satisfy all the conditions cumulatively has been constantly reiterated by this court in its several decisions.”

The same situations applies in this instant application, the applicant stated that the applicant will incur loss if the instant application will not be granted. However, he failed to comply with the requirement of Order XXXIX Rule 5 (3), (c) of the Civil Procedure Code Cap.33 which requires the applicant to show if there was an agreement or equivocal declaration of intention to furnish security for the performance of decree. The same was not even attached to the application.

I understand that in the strict sense of it, it does not necessarily mean that a party has to give such security. The same was observed in the case of **Tanzania Petroleum Development Corporation** (supra). I expected the applicant at least could have mentioned in his affidavit that they are making an undertaking for the demanding security for performance. But that was not the case, the applicant has not covered that aspect in both the affidavit and chamber summons.

From the above analysis, there is no doubt that the application is not meritorious for failure to furnish security for the due performance of the decree as may ultimately be binding on him as required by the Order XXXIX Rule 5 (3) (b) and (c) of the Civil Procedure Code Cap.33 [R.E 2019]. Consequently, I proceed to dismiss the application. Nor order as to the costs.

Order accordingly.

Dated at Mwanza this 30th April, 2021.




A.Z.MGEYEKWA

JUDGE

30.04.2021

Ruling delivered on this 30th April, 2021, via audio teleconference whereby Mr. Kinango, learned counsel for the applicant, and Mr. Mazulla, learned counsel for the respondent were remotely present.


A.Z.MGEYEKWA

JUDGE

30.04.2021