

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA**

MISCELLANEOUS LABOUR APPLICATION NO. 15 OF 2021

(Originating from CMA/MZ/ILEM/235/2019)

THE REGISTERED BOARD OF TRUSTEES OF TAQWA

PRIVATE SECONDARY SCHOOLS..... APPLICANT

VERSUS

FADHILI HAMISI..... RESPONDENT

RULING

Date of Last Order: 15/7/2021

Date of Ruling: 13/08/2021

F. K. MANYANDA, J.

This is a ruling in respect of stay for execution filed under certificate of emergency. It is requesting this Court to stay the enforcement of an award pending determination of an application for extension of time for filing of an application for setting aside *exparte* order for award.

The application is made by way of chamber summons supported with an affidavit and supplementary affidavit affirmed by Godfrey Martin.

It is counted by an affidavit sworn by Innocent Benard. The said documents give the back ground of this matter as follows:-

The applicant is a body corporate which is engaged in a business of running schools. For smooth running of its business it has two bank accounts No. 01j1054215500 maintained by CRDB Bank PLC at Mwanza Branch and No. 01j1054215500 by Azania Bank Ltd at Mwaloni Branch.

The said bank account were on 23/02/2021 restrained following a Garnishee order been issued by this Court in Execution Application No. 59 of 2020. The execution is in respect of an exparte award dated 31/10/2019 by Hon. S. Msuwakollo, Arbitrator.

After been served with the Garnishee order the Applicant came to know of the existence of the exparte award. Since she was out of time, filed an application for stay of execution of the Garnishee order. The Applicant also filed instant application for stay pending determination of the extension of time within which to apply for setting aside the exparte award.

At the hearing the Applicant was represented by Mr. Godfrey Martin, learned Advocate, and the Respondent enjoyed the services of Mr. Innocent Bernard, learned Advocate.

Mr. Martin submitted in support of the application by adopting the chamber summons and the affidavit together with a supplementary affidavit and reply to the counter affidavit. He then proceeded adding that after the Applicant was served with the Garnishee order came to know that the money in the said bank accounts were ordered to be paid to the Court. The source of the Garnishee order was execution of an exparte award.

As a result the Applicant sought to challenge the exparte award hence filed an application for extension of time because she was already out of time.

He also stated that the application before the CMA for extension time stays great chances of success as the exparte award tainted with illegalities.

On the other hand Mr. Benard opposed the application. He adopted the notice of opposition and the counter affidavit and added that there is no evidence in the affidavit to support the application other than hearsay that the deponent was informed by one Shija Magesa. The said Shija Magesa did not swear or affirm any affidavit to support Godfrey Martin's affidavit. The

Counsel was of the views that since the said Godfrey Martin is an advocate, he could not have acquired the facts because he neither perused the Court file nor represented the Applicant before. Since the affidavit contain hearsay, then the same has nothing to support the application. He cited the case of **Sabena Technics Dar Ltd vs Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 (unreported) where the Court of Appeal said an affidavit which mentions another person is hearsay unless that other person swears as well.

After arguing the legal point, Mr. Bernard went an arguing the stay opposition stating that the alleged application for extension of time is not in this Court, but it is in the commission for Mediation and Arbitration. He was of the view that this Court has no power to stay execution pending an application not before it. Additionally, the Counsel submitted that execution has already completed, therefore this application is overtaken by event. He also stated that the Applicant has not furnished any security.

In rejoinder Mr. Martin reiterated his submissions in chief and clarified that the stay is for enforcement of execution which has already been completed. That he cited Rule 55(1) of GN No. 106 of 2007(LRC) which

empower this Court to regulate its law where a matter is not covered. As to appearance, in Court he was of the view that there were no summonses served to them. In regard to the affidavit he stated that the law requires a person named in the body of the affidavit to swear the affidavit not one mentioned in the verification clause as a source of information. He distinguished the **Sabena Technics Ltd Case (supra)** on grounds that the law does not require source of information in a verification clause to swear an affidavit unlike in that case when the source of information was named in the body of the affidavit. Lastly he insisted that he perused the case file however since labour dispute cases don't not have perusal fee, he didn't have any receipt for verification. He repeated his prayers.

Those were the submissions by the Counsel for the parties. It is my turn to determine this matter. The tests for grant of stay as set in the case laws including the case **Ignazio Messina and Another vs Willow Investment and Another**, Civil Reference No. 08 of 1999 (unreported) are as follows: -

1. The Court will grant stay of execution if the Applicant shows that refusal to do so would cause substantial loss to him which cannot be atoned by any award of damages.

2. 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.
3. 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.

Another test was added by the Court of Appeal in the case of **Lomayan Langaramu vs Christopher Pela**, Civil Appeal No. 453/02 of 2018 that:-

"it is clear that the application for stay of a decree may be granted upon compliance of the applicant with three conditions. Firstly, that the application has been made within the prescribed time,

*Secondly, showing that the substantial loss may result if execution is not stayed. **Thirdly that the applicant has given security for the due performance of the decree** (Emphasis added).*

It is trite law that the said tests must be satisfied cumulatively. The Court of Appeal said in the **Lomaya Lungaramu's case (supra)** that: -

"It is trite law that for an application for stay of execution of a decree to succeed the applicant must cumulatively comply with the conditions listed under the law."

The issue in this matter is whether the application cumulatively satisfies the tests set up in the cases cited above.

Starting with the first tests if the Applicant has shown that refusal to grant the stay will result into substantial loss to her which cannot be atoned.

It has been argued for the Applicant that none granting of the stay will cause her suffer irreparable loss. However, no any explanations or details of how she would suffer the loss. A mere assertion that loss is likely to occur is not enough. It is imperative that the Applicant tells the nitty-gritty of the loss. In this application, the Respondent secured an award in the CMA, he has rights to enjoy his award, such rights can be stopped upon stringent reasons been established. In this matter I don't find the same. This tests is not satisfied.

Secondly, the argument of prospect of success of the application of extension for time is for wanting. I say so because the alleged application

for extension of time within which to apply for setting aside an ex parte award is not filed in this Court.

Moreover, a copy thereof purported to be annexure RTZ is not annexed as such. This means there is no evidence supporting the argument that there is an application pending in the CMA.

Even if it is said that there was an application, still an application in the CMA, is not an application pending in this Court. It is a misconception of the law to have a stay of execution in this Court pending a decision in the CMA.

It has been argued also by the Counsel for the Respondent that this application is over taken by event, because the execution has already been completed. The Counsel for the Applicant argued in rejoinder that the stay applied for is intended for staying enforcement of execution. Although he did not explain what he meant I think is that the completion of execution be stopped. To him execution has not been completed.

In this matter the Garnishee order, in my understanding of the law is the very execution of the award. The order directs the banker of the judgment debtor to pay the decree holder instead of the account holder in

respect of the bank account concerned. In other words it is an attachment of the bank account of the judgment debtor.

In this matter, the Counsel for the Applicant concedes that the bank account of the Applicant was attached by way of Garnishee Order. The Counsel for the Respondent submitted that the money in bank accounts was already withdrawn. This means execution has been completed because the money in the Applicant's bank account which was required to satisfy the award has already been withdrawn.

In the circumstances I agree with the Counsel for the Respondent that this application has been overtaken by event.

Lastly, there is a requirement of furnishing security. There is no security furnished by the Applicant as was held in **Lomayan Langaramu's case (supra)**.

In the result, for reasons stated above, I find that the Applicant has failed to meet the standards set up by the case laws stated above to enable this Court exercise its discretionary powers to grant a stay of execution.

Consequently, I do hereby dismiss this application for want of merit with costs. Order accordingly.




F. K. MANYANDA
JUDGE
13/8/2021