

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

APPLICATION FOR REFERENCE NO.4 OF 2020

*(C/f High court Execution No. 60 of 2019 Originating from Commission for
Mediation and Arbitration Labour Dispute No.*

CMA/MNR/MED16/2018/ARB/02/2018)

Reference Application No. 4 of 2020, Execution No. 60 of 2019)

CHINA RAILWAY SEVENTH GROUP CO. LTD..... APPLICANT

VERSUS

BARAKA RAJABU KIDORI RESPONDENT

RULING

21st October 2021 & 2nd December, 2021.

MZUNA, J.:

In this application, **China Railway Seventh Group Co. Ltd**, the applicant herein is seeking for this court to vary the order of the District Registrar wherein the applicant alleges exceeds what was awarded by the Commission for Mediation and Arbitration (CMA) in favour of **Baraka Rajabu Kidori**, the respondent herein. Mr. Agrey Cosmas Kamazima, the learned counsel, represented the applicant whereas the respondent was ably represented by Melchizedeck Paul Hekima, the learned counsel.

Briefly stated, the respondent worked as a driver. His employment contract was terminated on 30th October, 2020. He successfully sued the applicant for unfair termination. He was awarded reengagement and payment of Tshs 930,000/= or else be paid compensation of twelve months wages due and other terminal benefits from the date of final payment in terms of Section 40(3) of the Employment and Labour Relations Act, Cap 366 R. E 2019 (herein after ELRA) in case the was not willing to reengage him.

This application emerged after the District Registrar allowed the application for execution under Order XX1 rule 15 (4) of the Civil Procedure Act, and rule 49 (2) of the Labour court Rules GN No. 106/2007. An order was made to attach the judgment debtor's motor vehicles as listed in the application for execution. The applicant was ordered to pay the respondent a total of Tshs 36,755,000/= being the accrued amount from the date of CMA order to the date of the application after she had failed to reengage him. In case of such failure, the court further ordered the applicant's motor vehicles with registration Numbers T22 CSE make Toyota Hillux; T866 AZS make Toyota Prado and T992 BSA to be attached and a court broker from

Kibaigwa Auction and Court broker one Jeremiah Mtagwa was appointed to effect the execution.

It is from that order that the instant application has been preferred wherein the applicant says it should be varied and that it was made prematurely.

The applicant's application is supported by the affidavit sworn by the advocate for the applicant Aggrey Cosmas Kamazima. It was strongly opposed by the respondent as per the counter affidavit sworn by himself.

Issues for determination are:- **One, whether the District Registrar's acted in excess of his powers in his ruling?** **Two, whether there is any fault on the part of the applicant or the respondent for failure to comply with the reinstatement order?**

I propose to start with the second issue. Responding to this ground, Mr. Kamazima says reinstatement does not change the employment terms of the parties as opposed to reengagement which involves change of terms. Mindful of that fact, he said that after the CMA order, the respondent never reported to work for process of reengagement. He waited until the expiry of six weeks. He went straight to the High court for execution.

He further argued that the applicant notified the respondent and the DR about the intention of the employer to adhere to the CMA award (copy of the letter was annexed). Despite all that, still the respondent refused to return to work. Instead he asked for payment of compensation of 12 months wages and other terminal benefits under section 40 (3) of the ELRA.

His argument based on the interpretation of that provision is that where the employer opts not to reinstate he has to pay compensation the option which is available to the employer only. It was his view that after the employer had given an option to reengage or reinstate him, the Deputy Registrar or the Executing court, was duty bound to make an order for the respondent to be paid Tshs 930,000/- and then re-engage the respondent. To put emphasis, the learned counsel referred this court to the case of **Hemedi Omari Kimwaga v. SBC Tanzania Ltd**, Labour Case No. 87, Labour case Digest 2011/2012 at page 123-124.

Another illegality is the allegation that the employer did not want to re-engage the respondent while in actual fact it is the respondent who failed to report to work.

In reply, Mr. Hekima submitted that the award talks about re engagement or payment of compensation. That neither did the applicant comply with the award by providing written employment contract nor did he deposit Tshs 930,000/- as ordered. This fault necessitated the respondent to file Execution No. 60 of 2019 as there was non compliance with section 40(3) of the ELRA. The learned counsel further said that the purported letter Annexure 2 was just an afterthought as it was posted on 24th September, 2019 and then received on 26th September through EMS Postal service. This came about after serving the applicant with the execution notice while the award was since 10th May, 2018, almost after 100 days. He insisted that there is no record like a register proving that indeed he never reported at work. He insisted that the applicant failed to engage him as per the CMA award.

My position is that the CMA at page 18 of the Award issued compensation to the tune of Tshs 930,000/- plus re-engagement of the complainant in employment. In addition there was an order that:-

"Where the employer decides not to re engage the complainant as ordered above he shall pay the complainant compensation equal to twelve months' wages in addition to wages due and other benefits from the date of

termination to the date of final payment in terms of section 40(3) of the ELRA...”

The question which follows, is who really had the first option to re engage?

The CMA applied the law and gave first option to the applicant to re engage the respondent.

Second, when did the order for re engagement start? The CMA award is silent. Therefore it cannot be said that any party was at fault.

I revert to the first issue. The question relevant for the first issue is, *did the District Registrar award more than what was granted by the CMA?*

According to him, ordering compensation amounts to review of the CMA order after the employer was willing and ready to reinstate him. That the DR dealt with issue of constructive termination or varied the award while he had no such powers as the executing court citing the case of **George Mapunda and Another v. DAWASCO**, Labour Court Digest No. of 2014, page 405.

Lastly even if the CMA award was dealt with in its true sense, the award was Tshs 11,160,000/- not Tshs 30,000,000/- the extraneous costs awarded by the DR. It was his view that the District Registrar acted beyond the powers vested on him.

More seriously he says the execution ruling is ambiguous because there is no exact mentioned amount granted for execution. He prayed for this application to be allowed.

Responding to the issue that the DR acted in excess of his powers, Mr. Hekima said that he was trying to construe the CMA award which was made under section 40 (3) of the ELRA that if he refused to re engage the respondent ought to have paid him compensation from the date of termination up to the date of final settlement. He referred this court to the case of **Aliance One Tobacco Ltd v. George Msingi**, Rev. No. 285 of 2009, High court Lab. Div (Dsm) to emphasize a point that under section 40 (3) of the ELRA, an order for compensation shall be in addition to and not a substitute for any amount to which the employee may be entitled in terms of any law or agreement. He insisted that salary should be paid from the date of termination to the date of full payment after failure to reengage him.

In a rejoinder submission, the applicant said that since the respondent worked on a daily basis and therefore a casual labourer, it was difficult to get his personal details like phone number. He insisted that he never reported to work after the CMA award. He strongly challenged the allegation that the letter calling him to work was an afterthought because the CMA

never provided the exact date of reengagement. That there was need to comply with the first option of restatement or reengagement instead of awarding more than what was issued as did the DR by entertaining constructive termination at the execution stage.

The learned counsel touched as well on the variance between the case of **Aliance One Tobacco Ltd v. George Msingi** (supra) which dealt with a revision case on an order for compensation unlike in this case which was at the execution stage whereby the DR is bound to execute what had been awarded which is re-engagement not compensation. He insisted that there was an erroneous award as well as premature execution. He prayed for this court to dismiss this application for execution.

Let me say right from the outset that the applicant had all along been willing to re engage the respondent. The cited case of **Aliance One Tobacco Ltd v. George Msingi** (supra) dealt with a different material fact. It was held in the case of **Hemedi Omari Kimwaga v. SBC Tanzania Ltd**, (supra) the position which I fully associate myself with, that:-

"...there is evidence that the respondent (in our case the applicant) is willing to reinstate the applicant then he (meaning the District Registrar) could not order compensation

as that would amount to review of the said order."

(Underscoring mine).

That holding applies *mutatis mutandis* to the case under consideration.

Mr. Kamazima is correct to say there was an erroneous award as well as premature execution by the Deputy Registrar. He acted ultra vires or in excess of his powers which he did not have, to review the CMA award. The order of the DR cannot be allowed to stand, the same is hereby set aside.

That said, the order of the CMA should be executed as it is. The applicant is ordered to pay Tshs 930,000/- which includes notice, leave pay and severance pay as well **as re engagement within seven days from today**. Failure to re engage him, after the respondent had reported to work without further notice, he should pay him twelve months' compensation in addition to that amount.

This revision is allowed with no order for costs. The order of the DR is hereby vacated. By order.



**M. G. MZUNA,
JUDGE.**

25th November, 2021.



