IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA.

LABOUR REVISION NO. 13 OF 2021

(Originating from CMA Dispute No. CMA/IR/MAF/52/2018)

UNILEVER TEA TANZANIA LIMITED ..... APPLICANT

VERSUS

MATHIAS MWANDU ..... RESPONDENT

RULING

Date of last order: *17/03/2022*
Date of ruling: *29/07/2022*

MLYAMBINA, J.

Mr. Jackson Bidya, learned Advocate on behalf of the Applicant, Unilever Tea Tanzania Limited has lodged an application under *section 91(3) of the Employment and Labour Act [Cap 366 R. E. 2019] (herein after to be referred as the ELRA) read together with Rule 24 (1) (2) (a)(b)(c)(d)(e)(f) and (3) (a)(b)(c)(d) and 24(11) of the Labour Court Rules 2007 (GN No. 106 OF 2007),* for an order of stay of the execution of the Award by the Commission for Mediation and Arbitration (CMA) in *Labour Dispute No. CM/IR/MAF/52/2018* before Hon. Joshua Mwaisengela, the Arbitrator dated on 28th June, 2019.

The genesis of the matter as per CMA record is as follows: The Respondent herein was the employee of the Applicant whose contract of

employment was later on 12th October, 2018, terminated by his employer due to the proved misconduct to wit gross insubordination.

Being aggrieved, the Respondent lodged his complaint to the CMA at Mafinga. After hearing on 28th June, 2019, the Hon Arbitrator delivered the Award in favour of the Respondent. The Applicant herein was not satisfied with the Award. Hence, he unsuccessfully filed an application for revision before this Court with registration *Revision No. 10 of 2019*.

The Applicant intended to appeal to the Court of Appeal against the decision of the aforementioned application but it came in his mind that the time to file his intention to appeal had already lapsed. Hence, he lodged the application for extension of time to file the same out of time prescribed by the law claiming *inter alia* that there is a wide chance for his application of extension of time to succeed. He prayed this Court to grant the order for stay of execution of CMA Award pending the hearing and determination of the application for extension of time for the Applicant to file notice of appeal which is still pending in this Court.

On other side, the Respondent withstands the application. He filed a counter affidavit sworn by his legal representative one Moses

Ambindwile which was attached with notice of points of preliminary objection, namely that:

1. *The application is already over taken by event.*
2. *The application amount to abuse of Court processes and procedure, and;*
3. *The application is Res judicata.*

By consent of the Parties, the Points of preliminary objection were argued by way of written submission. Both Parties were represented. The Applicant was represented by Mr. Jackson Bidya, learned Advocate while the Respondent was enjoying the service of Ms. Theresia Charles, learned Advocate.

In relation to the first point of preliminary objection, the Counsel for the Respondent averred that the Applicant's application had been overtaken by event since the application for execution has been heard by this Court and it had been fixed for judgment on 18th November, 2021.

On the second point of preliminary objection, the Counsel for the Respondent submitted that the Applicant's application amount to abuse of Court processes and procedures. He supported his allegation with the case of **Muchanga Investment Limited v. Safari Unlimited**

(Africa) Limited and 2 Others, Civil Appeal No. 25 of 2002(2009) KLR 229 and the case **of R-Benkay Nigeria Limited v. Cadbury Nigeria PLC SC** 29 of 2006, where the concept of the abuse of Court process was defined, thus:

> *1. Institution of multiplicity of actions on the same subject matter against the same opponent on the same issues or multiplicity of action on the same matter between the same Parties even where there exists a right to begin the action,*
> *2. Institution of different actions between the same the same Parties simultaneous in different Courts even though on different grounds,*
> *3. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a Respondent's notice,*
> *4. Where there is no iota of law supporting a Court process or where it is premised on frivolity or reckless,*
> *5. Where an application for adjournment is sought by a party to an action to bring an application to Court for leave to raise of fact already decided by a lower Court.*

It is undisputable facts that, after the decision of the CMA was delivered, the Applicant filed multiple application against the Respondent. All the multiplications of application are on the same

subject matter against the same opponent and on the same issue. The Applicant averred that the application at hand was filed while *Misc. Application No. 9 of 2019* which had the same prayer was instituted and determined by the Court with competent institution; thus, it amount to abuse of Court process and procedure. He supported his argument with the case of **Kagera Tea Company and 3 Others v. Arthur Kirimi Rimberia and Julius Kiangi Mathiu**, Misc. Civil Application No. 282 of 2019 High Court of Tanzania at Dar es Salaam.

On the objection that the Applicant's Application is *res judicata,* the Counsel for the Respondent submitted that the application of the same nature between the Parties was filed in this Court on 5th September, 2019. It was an application for stay of execution of the same Award referred in the same application. After hearing on 21st May, 2020, the Court dismissed the application on the ground that the application was baseless and had no merits. Therefore, it was the stand view of the Respondent that the Applicant is precluded from instituting the same application.

The Respondent's Counsel went on to contend that the only remedy was to appeal to the Court of Appeal against the former decision. The Applicant instead of appealing, he instituted this

application. Thus, it therefore amounts to *res judicata.* He backed up his submission with the case of **Salim A. H. Zaidi v. Faud Hussein Humaida** [1960] J;8 92 and Kotak, and the case of **Kotak v. Kuverji** 1969 EA 295. The Court discouraged re-litigation of the previous cause of action. In the case of **North West Water Limited v. Bannier Partmet**, All ER (190) Vol 3 the Court stated that:

> *"It is clear that, an attempt to relitigate in another cause of action which has been fully investigated and decided in former action may constitute an abuse of the process."*

The Respondent's Counsel prayed this application be dismissed with costs.

In response, the Counsel for the Applicant submitted that the application is overtaken by event but the application of *Execution No. 9 of 2021* which he referred was not yet to be determined by the Court. The ruling was set to be issued on 7th December, 2021 and it was later adjoined to 14th December, 2021. The application should have been over taken by event if execution had been conducted. He supported his assertion by the case of **Felix Emmanuel Mkongwa v. Andrew Kimwaga**, Civil Application No. 249 of 2016 (unreported).

Furthermore, the Counsel for the Applicant contended that this point of preliminary objection is not pure point of law but rather a limb of the third Point raised by the Counsel for the Respondent which is; the suit is *res judicata.* He propped up his submission by the case of **Mukisa Biscuit Manufacturing Company Limited v. West End Distributors Limited** [1969] E. A. 696.

The Counsel averred further that the ruling of the previous application was an interlocutory order and the Applicant was prohibited by *section 5(2)(d) of the Appellate Jurisdiction Act [Cap 141 R. E. 2019]* to file any revision, appeal or review on the same. He supported his submission by the case of **Augustino Masonda v. Widmel Mushi,** Civil Application No. 383/13 of 2018 (unreported). It was his submission that, the principle of *res judicata* is not applicable on interlocutory orders was also stated in the case of **Joseph P. M. Gikaro v. Machenes Otaigo,** Land Appeal No. 21 of 2020 (unreported). When the Application for *Revision No. 9 of 2019* was ruled, the application for execution was yet to be filed. Therefore, it was the Respondent's Counsel view that the Applicant has a right to file this application. He prayed for the Court to determine the application on merit.

After carefully consideration, the issue to be determined is; *whether the point of preliminary of objection raised by the Counsel for the Respondent is maintainable*. The Counsel for the Respondent averred that the act of the Applicant herein to file the multiplicity of the application amount to the abuse of Court process and procedure. The case of **Muchanga Investment Limited** *(supra)* filed by the Respondent is only persuasive. There is plethora of decision in our jurisdiction on the same issue. One of the cases is the case of **The Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikwaze and 4 Others,** Civil Appeal No. 210 of 2020, where the Court of Appeal of Tanzania sitting at Mbeya quoted with approval the principle given in the case of **Eastern African Development Bank v. Blue Line Enterprises Limited**, Civil Appeal No. 101 of 2009 (unreported), where the Court stated that:

> *"...we are satisfied that there was an abuse of Court process in the following sense. As already stated, the Applicant was filed the application for extension of time to file a petition for an order to set aside the Award, instead of pursuing this application, the Applicant sought to withdraw it on 14/09/2006 before Mandia, J., having done so the Applicant went to the same Court and filed the petition to set aside the*

Award which was eventually dismissed by Mandia, J. on 22/06/2007 for being time barred. After the desmaisal the Applicant went back to the same Court (Sheikh, J.) and filled an application for extension for extension of time similar to the one which earlier marked withdrawn! Surely by the above sequence of the events the appellant exhibited what may safely term as "forum shopping". This is no doubt an abuse of Court process."

Been guided by the holding quoted above and after going through the record, I noted true that the Applicant filed multiple application since when the Award of the CMA was delivered. In the present case, the Applicant's application was decided to the finality. *Application No. 9 of 2019,* was dismissed for being premature on the ground that the Applicant did not fulfil all condition for the application of stay to stand. Further, the application for execution was yet to be filed.

Moreso, my brethren Mtogoro J. in his decision, found the application was filed prematurely. It is my findings that this application has a chance to be re-filed when it becomes mature. The case of **Agustino Masonda** *(supra)* which was cited by the Counsel for the Applicant is distinguishable to the facts of the case at hand on ground that the cited case was dealing with the interlocutory orders while the previous matter was determined to the finality.

Coming to the point of preliminary objection that the application was taken by event, the Counsel for the Respondent told this Court that the decision for execution was already delivered since 10th day of December, 2021. He attached the said ruling to prove the same. I went through the submission and noted, as right as submitted by the Counsel for the Applicant, thought the decision was already delivered, the decree has not been executed. Therefore, in such a circumstance one cannot conclude, as rightly as submitted by the Counsel for the Respondent, that the application was taken by event. Reference may be made to the case of **Felix Emmanuel Mkongwa v. Andrew Kimwaga,** Civil Application No. 249 of 2016, Court of Appeal of Tanzania at Dar es Salaam. (unreported).

The issue of *res judicata* is governed under the provision of *section 9 of the Civil Procedure Code [Cap 33 R. E. 2019]* which provides that:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same Parties or between Parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit is in which such issue has

been subsequently raised and has been hears and finally decided by such Court."

From the above quoted provision of the law, it is clear that once a case is decided, it cannot be re-tried. The condition sine qua is that; the Parties must be the same. Also, the same subject matter and by the Court of competent jurisdiction. In the case of **Esta Ignas Lumbano v. Adriano Gedam Kipalile** Civil Appel No 91 of 2014 the Court of Appeal defined *Res judicata* as a fundamental legal doctrine that there must be an end to litigation and its objective is to bar multiplicity of suits and guarantees finality of litigation. The Court of Appeal quoted **Black's Law** Dictionary, Nineth Edition which defines *Res judicata* as follows:

> "An affirmative defence barring the same Parties from litigating a second law suit in the same claim, or any other claim arising from the same transaction or series of transactions and that could have been raised but was not raised in the first suit."

The Court of Appeal went further to quote with Approval the case of **Peniel Lotta v. Gabriel Tanaki and Others** [2003] TLR 312 where the Court stated that:

> "The scheme of section 9, therefore, contemplates five condition which when co-existed, will bar a subsequent suit. The conditions are ; (i) the matter directly and

substantial in issue in the subsequent suit must have been directly and substantially in issue in the former suit, (ii) the former suit must have been between the same Parties or privies claiming under them, (iii) the Parties must have litigated under the same tittle in the former suit; (iv) the Court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

Further, the Court of Appeal went on to give the test of *Res judicata* by quoting with approval the case of **Kamunye and Others v. The Pioneer General Assurance Society Limited** (1971) EA263, where it was started that:

> The test whether or not a suit is barred by res judicata seems to me to be - is the Plaintiff in the second suit trying to bring before the Court, in another way and in the form of a new cause of action, a transaction which he has already put before a Court of competent jurisdiction in earlier proceedings *and which has been adjudicated upon.* (Emphasis added)

The objective and public policy behind the doctrine of res judicata is to ensure finality of litigation. From the record the Applicant filed the case before this case on the same issue praying this Court to stay the

execution of the CMA but the case was dismissed for being filed pre maturely. In the case of **Pravin Girdhar Chavda v. Yasmin Nurdin Yusufali,** Civil Appeal No. 165 of 2019, Court of Appeal of Tanzania at Dar es Salaam, re cited the provision of *section 9 of the Civil Procedure Code (supra),* and went further by elaborating co-existing factors in which the principle of *res judicata* can be applied, as generated from the case of **Peniel Lotta** *(supra).*

In the case at hand, the former application for stay of execution was between the same parties who are the Applicant and Respondent in this matter; the subject matter was the same; the application for stay of the CMA Award, and the former suit was not only decoded to its finality but also by a competent jurisdiction. Therefore, as rightly as submitted by the Counsel for the Respondent this application is *res judicata* in all basis.

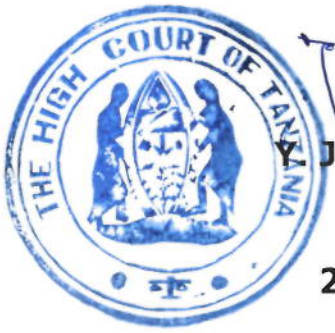
Conclusively, the points of preliminary objection raised by the Counsel for the Respondent are hereby sustained. Consequently, the application stands dismissed. Each Party to bear his own costs. It is so ordered.

Y. J. MLYAMBINA

JUDGE

29/07/2022

Ruling delivered and dated 29th day of July, 2022 through Virtual Court in the absence of both parties.



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JUDGE

29/07/2022