

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA LABOUR DIVISION

AT MBEYA

MISC. LABOUR APPLICATION NO. 17 OF 2022

*(Originating from Labour Execution Case No. 12 of 2021 High Court of
Tanzania Labour Division, Mbeya)*

LABOUR COMMISSIONER APPLICANT

VERSUS

THE BOARD OF TRUSTEE OF NATIONAL

SOCIAL SECURITY FUND 1ST RESPONDENT

RASHIDI NDITI 2ND RESPONDENT

MLIMA MBEYA VIEW ACADEMY LTD t/a

MLIMA MBEYA HIGH SCHOOL 3RD RESPONDENT

MR. EUGEN TEMIGUNGA t/a FAGIO COURT BROKER4TH RESPONDENT

RULING

Date of last order: 22/07/2022

Date of Ruling: 25/07/2022

NGUNYALE, J.

The applicant under certificate of extreme urgency preferred the present application under section 94 (1) (b) (i) of the Employment and Labour Relations Act Cap 366 R. E 2019 and Rule 24 (1) (2) (a) (b) (c) (d) of the Labour Court Rules, GN No. 106 of 2007, Section 45 of the Labour



Institutions Act Cap 300 R. E 2019 and section 95 of the Civil Procedure Code Cap 33 R. E 2019 seeking the following orders of the Court; -

- i. Service of this application be dispensed of in the first instance as the object of the application shall be well defeated if the applicant through the 1st, 2nd, 3rd, and 4th respondents as per the auction of Plot No. 1350, Block "M" located at Forest Mpya, Mbeya City without the applicant's involvement.*
- ii. The Court be pleased to make an order of payment of the applicant the salary arrears of the tune of Tshs 119, 436, 437/= before the distribution of the proceeds of the sale of Plot No. 1350 Block "M" located at Forest Mpya, Mbeya City.*
- iii. Any other relief this Court deems fit and just to grant.*

The application was supported by an affidavit dully sworn by Mbuke Yohana the principal officer of the applicant in this application.

In the very affidavit the deponent stated that the 2nd respondent is a natural person and the decree holder in application for execution No. 12 of 2021, the proceeds thereof shall be subject of this application wherein on Execution No. 12 of 2021 he was granted an order of attachment and sale of Plot No. 1350, Block "M" located at Forest Mpya, Mbeya City.

The deponent went on to state that the applicant being a Labour Commissioner is mandated by the law to effect orders that emanate from his office in which, for the purpose of this application, the applicant entered a compliance order against the 3rd respondent in order for the payment of salary arrears to employees employed by her. The 3rd



respondent did not honour the compliance order, the applicant has applied for execution of the compliance order.

The 2nd respondent has applied for execution through execution No. 12 of 2021 against the 3rd respondent to enforce the decree. The application has been granted thus the 4th respondent has attached for sale the 3rd respondent's property on Plot No. 1350 Block "M" located at Forest Mpya within Mbeya City. The applicant has learned that the execution proceedings and brought this application for an order of recovery of statutory arrears of the employees of the 3rd respondent out of the proceeds of the sale or realization of Plot No 1350 Bock "M" located at Forest Mpya, Mbeya City.

The application was heard *ex parte*, during hearing the applicant under the service of Hassan Gyunda learned Counsel submitted that they have three prayers *ex parte* **one**, hearing without service of notice to the respondents, **two**, the Court be pleased to order the applicant to be paid 119,436,437/= arising from the decree before distribution of the proceeds of the sale of plot No. 1350 Block "M" located at Forest Mpya and three, any other relief. He submitted further that the application has been supported by an affidavit dully sworn by Mbuke Yohana the principal officer of the applicant. In the affidavit she has raised reasons for urgency of the matter.



In the affidavit he submitted that it has further been deponed that the applicant filed application for execution No. 8 of 2020 where the Court ordered attachment of the said plot No. 1350 Block M at New Forest. But the said plot has already been attached by the 2nd respondent in Execution No. 12 of 2021. The order of attachment appointed the 4th respondent to attach and sale the said plot of land. Such discovery that the plot has already been attached forced the applicant to file the present application seeking the Court to order the applicant to benefit from the said intended sale which will be affect any time by the 4th respondent. He prayed the Court to grant the application.

The Court has read through the application, the contents of the affidavit and the submissions of the applicant and noted that; in short, the applicant wants the Court to order him to benefit from the Execution No. 12 of 2021 where the applicant is not a party. The important issue to be answered is whether it is tenable for the applicant to benefit in the execution where he is not a party?

Now on merits of the application, the sought order cannot be granted to the applicant because he is not a party to Execution No. 12 of 2021 in which he prays to be given priority in the proceeds of sale. The payment can only be made to decree holder who has applied for execution.



During submission Mr. Hassan Gyunda submitted that the applicant has filed execution No. 8 of 2021 where there is an order for attachment and sale of plot 1350 Block 'M'. Unfortunately, those averments are not reflected in the affidavit which renders to be of no value. See the case of **Rosemary Stella Chambejairo v David Kitundu Jairo**, Civil Reference No. 6 of 2018, where the court held that;

'Now an affidavit in reply being a substitute of oral evidence ought to be sworn if a party intends to counter any fact deponed in the affidavit in support unless the point is legal, then even without an affidavit in reply, that point can be addressed. In the present situation, respondent's submissions were in response to what was deponed in the affidavit sworn by Ms. Rwechungura elucidating what transpired, but without any affidavit in reply to that effect. The respondent's submission under the circumstance was akin to testimony from the bar, the practice abhorred and discouraged by the Court, ...'

Be that it may, if the applicant wanted to be paid proceeds in execution No. 12 of 2021, she was supposed to move the court to consolidate the two execution files that is execution No. 8 of 2021 and 12 of 2021 so that proceeds to be obtained after sale of the plot to be divided among the decree holders including the applicant.

Having said and done, it is without saying that the court cannot order the applicant to benefit from execution proceedings to which she is not a party. The application is hereby dismissed.




D. P. Ngunyale
Judge
25/07/2022