

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(LABOUR DIVISION)
AT ARUSHA**

MISC. LABOUR APPLICATION NO. 59 OF 2021

(C/f High Court of Tanzania Revision Application No. 98 of 2021 and Application for Execution No. 120 of 2021, Emanating from Application No. CMA/MISC/APPL/25/21, Original Labour Dispute No. CMA/ARS/MUS//172/2021)

ORION HOTEL (T) LIMITED APPLICANT

Versus

FRANK CHARLES MFUKO RESPONDENT

RULING

15th & 26th August 2022

Masara, J

The Applicant herein brought this Application requesting the Court to order stay of Execution of Application No. 120 of 2021 which pending before this Court. The Application is supported by the affidavit deposed by Faisal Samson Rukaka, learned advocate for the Applicant. The Respondent did not contest the Application as he neither filed a counter affidavit nor a reply submission as directed by the Court. Thus, the Application was heard ex-parte.

Brief facts of the dispute giving rise to this Application as gotten from the Applicant's affidavit are as follows: the Respondent was employed by the Applicant as a Senior Ranger on 7th September 2018. According to the Respondent, the Respondent was issued with a termination letter on 1st

May 2019. On 17th May 2019, the Respondent lodged a dispute claiming unfair termination vide CMA/ARS/ARB/199/2019 filed at the Commission for Mediation and Arbitration at Arusha ("the CMA"). His application was dismissed on 9th November 2019 for what was held to be "want of jurisdiction".

On 28th September 2020, the Respondent referred a dispute at the Commission for Mediation and Arbitration of Musoma, vide CMA/MUS/190/2020, seeking to transfer the case so that it can be heard in the CMA-Arusha. His application was granted on 12th May 2021. The Respondent had also filed application for condonation at the CMA-Arusha, which was granted on 3rd September 2021. The Applicant then filed Revision Application No. 98 of 2021 in this Court on 20th October 2021, seeking to challenge the order that granted the Respondent condonation. The application is still pending in this Court.

The main case was scheduled for mediation hearing on 25th October 2021 and the Respondent was ordered to serve summons to the Applicant but, according to the Applicant, he did not. The dispute was heard and an ex-parte Award was delivered on 9th September 2021. In that Award, the Respondent's termination was found both substantively and procedurally unfair. The Applicant was ordered to compensate the Respondent TZS

16,800,000/= within 14 days, being 12 months' salary damages. The Respondent filed Execution Application No. 120 of 2021 seeking to execute the CMA Award. It is that Application that the Applicant seeks to stay. Apart from this Application, the Applicant, through its advocate, has also filed another application at the CMA; to wit, CMA/ARS/MISC-APPL/25/2021, seeking to set aside the ex-parte Award issued by the CMA. That application is still pending.

On 12th July 2022, when the Application was called on for hearing, the Respondent prayed that the Application be heard through filing of written submissions. This Court granted the prayer and a filing schedule was set as follows: Submissions by the Applicant by 19/7/2022; Reply submissions by 26/7/2022; Rejoinder, if any, by 29/7/2022 and the matter was fixed for Orders on 1/8/2022. The Applicant filed submissions in chief as ordered. For unknown reasons, the Respondent did not file reply submissions and did not enter appearance on 1/8/2022 and on 15/8/2022 when the Application was last mentioned.

It is trite law that failure by a party to file written submissions as ordered by court is tantamount to failure to enter appearance in court on the day the case is fixed for hearing. In this stance, I am guided by the Court of Appeal decision in **Godfrey Kimbe vs Peter Ngonyani, Civil Appeal**

No. 41 of 2014 which affirmed its previous decision in **National Insurance Corporation of (T) Ltd & Another vs Shengena Limited, Civil Application No. 20 of 2007** (both unreported), where the Court made the following observation:

"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case"

Equally, as pointed out earlier, the Respondent did not file a counter affidavit to oppose the Application. The law is trite that failure of an opposing to file a counter affidavit renders the Application to be uncontested. This position was verified by this Court in the case of **Asha Ramadhan Mwambala vs Mselemu Ramadhani, Misc. Land Application No. 219 of 2018**, where it was held:

"This ruling is based on the failure by the respondent to file the counter affidavit within the set time which was by 4th April, 2018. The position of the law is that where a party fails to file counter affidavit, that means he has no objection to the application."

As already intimated, the Respondent opted not to file both a counter affidavit and the reply submissions. The implication of the inactions is that the Application stands uncontested. But that does not mean that the

Application has succeeded. The onus remains on the Applicant to satisfy this Court that his Application is merited.

Submitting in support of the Application, Mr Rukaka, while adopting the affidavit in support of the Application, contended that the Applicant became aware of the ex-parte Award on 15th November 2021. That after realizing the existence of the ex-parte Award, the Applicant filed Misc. Application No. 25 of 2021 at the CMA seeking to set aside the ex-parte Award. Mr Rukaka added that the said application is still pending before the CMA. After filing the said application, the Applicant received summons in respect of Execution Application No. 120 of 2021. It is at that stage that it felt it necessary to file this Application in order to obviate possible mootness of the application to set aside the ex parte Award. It was Mr Rukaka's submission that the execution ought to be stayed since the application to set aside the ex-parte Award is yet to be determined. Further, that staying the said execution will afford the Applicant the right to be heard since the Award was issued ex-parte. Another reason put forth by the Applicant's Counsel is that the Application stands uncontested, indicating that there is no prejudice or irreparable loss to be suffered on the part of the Respondent.

I have thoroughly considered the affidavit and the written submissions by the Applicant. The issue for determination is whether the Applicant has surmounted the onus of proof to deserve the order of stay of execution. The Affidavit in support of the Application unveils a number of applications filed both at the CMA and before this Court with a view to challenge the impugned ex-parte Award. The Applicant states in the affidavit that there is a pending Revision Application No. 98 of 2021, which seeks to challenge the CMA decision which granted the Respondent condonation. Similarly, there is pending Misc. Application No. 25 of 2021 at the CMA, which was scheduled for hearing on 29th July 2022.

Under paragraph 19 of the Applicant's affidavit, it is stated that the Applicant has undertaken to furnish security for due performance of the decree. Grounds upon which an order for stay of execution can be granted were exemplified by the Court of Appeal in the case of **SDV Transami (Tanzania) Limited vs MS STE Datco, Civil Application No. 97 of 2004** (unreported). In that case, the Court of Appeal stated as hereunder:

"The Court will grant a stay of execution;

- i) if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage;*

- ii) 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;*
- iii) 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."*

The question is whether the Applicant in the instant application satisfied the parameters above stated. In his affidavit, Counsel for the Applicant stated that in case the application is denied, the Applicant stands to suffer irreparable loss in the event the pending applications are successful. He added that the Respondent is currently unemployed and his whereabouts are unknown. In case the execution is successful and the due amount is paid to the Respondent, it will not be easy to recover the same in the event the Award is varied. Nothing has been said by the Respondent, as the Application stands unopposed. Novel as the assertions may appear, that remains the only evidence this Court can rely on.

The East African Court of Justice in the case of **British American Tobacco (U) Ltd vs. Attorney General of Uganda, EACJ Reference No. 13 of 2017** also cements the requirements needed for an interim order to be granted. Further in **Ololosokwani Village Council & 3 Others vs The Attorney General of the United Republic of Tanzania, EACJ Application No. 15 of 2017** the EACJ stated the following:

*“We hasten to add that the foregoing position does not negate the applicability of the principles of irreparable injury or balance of convenience to applications for the grant of interim orders or injunctions. Indeed, it is trite law that ‘if damages in the measure recoverable at common law would be an adequate remedy and a respondent would be in a position to pay them, no interim injunction should normally be granted’. See **American Cyanamid Company vs. Ethicon Limited (1975) AC 396 at 408.** It is also well settled law that where an application for an interlocutory injunction cannot be determined on the existence of a serious triable issue or the adequacy of damages to recompense an applicant for possible injury, the court shall decide the matter on a balance of convenience.”*

In this Court’s view, the Applicant has surmounted the onus of proving the tests above outlined. As correctly pointed out by Mr Rukaka, once stay of execution is denied and the Award is executed, the fate of the pending applications in both this Court and the CMA will be rendered ineffectual. Further, the Applicant has sufficiently asserted in his affidavit that if the Execution of the CMA award is not stayed, she stands to suffer irreparable loss. The award shows that the Respondent is entitled to be compensated TZS 16,800,000/= . According to the Applicant, currently the Respondent’s whereabouts are unknown. Unfortunately, the Respondent did not oppose these assertions despite entering appearance on the day of hearing. That leads this Court not to doubt the assertions put forth by the Applicant and

ably argued by his Counsel that the Applicant stands to suffer irreparable loss if the Award is executed prior to the determination of the pending applications. Further, there is no prejudice or loss that has been manifested by the Respondent. That means, even if irreparable loss was not proved, the balance of convenience tilts in favour of the Applicant as opposed to the Respondent.

Fortified by the above, the Applicant has satisfied this Court that an order to stay the execution of the Award as presented in Application No. 120 of 2021 is of paramount significance for the interest of justice. Consequently, I allow the Application. Proceedings in Execution Application No. 120 of 2021 are hereby stayed pending hearing and determination of the applications filed in the CMA and in this Court. This being a labour dispute and since the application is unopposed, each party shall bear their own costs. It is so ordered.




Y. B. Masara

JUDGE

26th August 2022