

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LABOUR APPLICATION NO. 39 OF 2021

(Originating from Execution No. 59 of 2021)

BETWEEN

THE REGISTERED BOARD OF TRUSTEE OF

TAQWA PRIVATE SECONDARY SCHOOL-----APPLICANT

VERSUS

FADHILI HAMISI-----RESPONDENT

RULING

10/11/2021 & 15/03/2022

F.K. MANYANDA, J

This ruling is in respect of a preliminary objection held out by the Respondent Fadhili Hamisi to the hearing of the application for stay of execution by the Applicant, the Registered Board of Trustees of Taqwa Private Secondary School.

The preliminary objection comprises of two points of law namely;

- i. That the instant application is *res-judicata*
- ii. The application is frivolous and vexatious hence the gross abuse of the court process.



The applicant is applying for orders staying execution of the award in CMA/MZA/ILEM/235/2019 by Hon. S. Msuwakolo, (Mediator) which proceeded *ex parte*. Upon discovery of existence of the said *ex-parte* award, the Applicant decided to challenge it. However, as he was out of time, he applied for extension of time in order to apply for setting aside the award. Meanwhile he was served with a garnishee order issued in execution of the same *ex-parte* award.

The application was resisted by the Respondent who, as stated above, filed a notice of preliminary objection in line with a counter affidavit.

Hearing of the preliminary objection was, with leave of this court, argued by way of written submissions. The parties complied, the submissions by the Respondent were drawn and filed by Mr. Innocent Bernard, learned Advocate, and those of the Applicant were drawn and filed by Ms. Dioniz John Mwasi, learned Advocate.

Mr. Bernard submitted in support of the first point on the preliminary objection arguing that the application at hand is *res-judicata* because prior, the applicant made an application for stay of execution in Misc. Labour Application No. 15 of 29021 which after been heard on merit this court dismissed it on 13/8/2021.

The counsel argued further that on 3/9/2021 the Applicant filed another application registered as Misc. Labour Application No. 39 of 2021 seeking to stay an execution of award in Labour Dispute No. CMA/MZ/ILEM/235/2019 whereas the same award was unsuccessfully sought to be stayed in Misc. Labour Application No. 15 of 2021.

The counsel was of the views that Misc. Labour Application No. 39 of 2021 is *res-judicata* to Misc. Labour Application No. 15 of 2021 because the former concern the same matter as the latter. Both matters concern the same parties and same issue of staying execution of an award in CMA/MZ/ILEM/235/2019 an issue which was finally determined on merit by this Court, a court of competent jurisdiction.

As regard to the second point of objection, Mr. Bernard submitted that the application is incompetent for been frivolous and vexatious hence gross abuse of the court process. The counsel argued that the Applicant been aware that Misc. Labour Application No. 15 of 2021 was determined on merit and the same found to be overtaken by event still filed another identical application, which is the instant Mis. Labour Application No. 39 of 2021.



The counsel was of the views that the instant application is frivolous and vexatious. He relied on the authority in the case of **Jebra Kambole vs AG**, Misc. Civil Cause No. 27 of 2017 which cited with approval the case of **Wangai vs Magambi and Another** [2013] EA 474 that defined the phrase "frivolous and vexatious" to mean a matter has no substance or it is fanciful or where the party is trifling the court or of which setting up a defence is mere wastage of time and it is incapable of reasoned argument.

The counsel submitted that since execution of award in CMA/MZA/ILEM/235/2019 was already completed and the decree holder fully paid and that the previous Misc. Application No. 15 of 2021, which was instituted well after the decree holder fully paid, was found to have been over taken by event; the counsel opined that the instant is frivolous and vexatious.

Lastly the counsel prayed for costs because though this is a labour matter the same is frivolous and vexatious. He cited the cases of **South Nyanza Conference (Kanisa la Waadventista Wasabato) vs Samson Kimune**, Labour Revision No. 43 of 2020 (unreported) and **Tanzania Civil Aviation Authority (TCAA) vs Chilala Mafuru**, Labour Revision No. 86 of 2018 (both unreported) which held that costs

are awardable in labour cases where the matter is frivolous and vexatious. He prayed for the objection to be sustained and the application dismissed with costs.

On the other hand, Ms. Dioniz submitted opposing the first limb of the preliminary objection arguing that the objection is vague thus, fails the tests set out in **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd** [1969] EA 696 and in the **Registered Trustees Archiologese of Dar es salaam vs Adelmarsi Kamili Mosha**, Misc. Land Application No. 32 of 2019 where this court, Hon. Mlyambina, Judge, held *inter alia* that the objection which is not clear cases to be a proper legal objection.

In respect of the second limb of objection Mis. Dioniz submitted that the application is neither frivolous nor vexations, but the same deserves to be determined on merit. The Counsel gave the reasons that the application has substance and legal foundation as it intends to restrain the Respondent from executing the order in Labour Dispute No. CMA/MZ/ILEM/325/2019. He prayed the objection to be overruled and hearing of the application proceed accordingly.

Those were the submission by the counsel for both sides. I am thankful to the Bar. Both Counsel with the usual zeal and eloquence argued their positions well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

The main issues are whether the application is barred by *res-judicata* and if it is in affirmative, whether the said application is frivolous and vexatious.

As it can be seen from the submissions by the Counsel for the Applicant, it has been argued for the Applicant that since the Counsel for the Respondent didn't cite any law, therefore, the objection is vague, it fails the tests for a preliminary objection. It means, therefore, that the application is not *re-judicata*. On his side, the Counsel for the Respondent strongly argued that the application is *res-judicata* to Misc. Labour Application No. 15 of 2021. However, none of them gave explanations as to how the doctrine of *res judicata* is applicable or not applicable to the instant application.

The phrase "*res judicata*" is Latin, it is defined in the **Black's Law Book Dictionary**, 8th Edition by Bryan A. Garner, at page 1336 to mean: -

"an issue that has been definitively settled by judicial decision."

Under the laws of our land, the doctrine of *res - judicata* is provided under Section 9 of the Civil Procedure Code (CPC), [Cap. 33 R. E. 2019], it is meant to bar multiplicity of suits and guarantee finality to litigation.

Section 9 provides as follows: -

"9.- 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 in which such issue has been subsequently raised and has been heard and finally decided by such Court."

The elements of a *res judicata* were spelt out by this Court in the case of **Eustice Kihyo vs. Vugiri Village Council**, Land Appeal Case No. 47 of 2009 (unreported) where Hon. Fikirini, Judge, as she then was, stated as follows: -

"I am of the considered view that this matter is "res judicata" as the following ingredients in determining whether matter is "res judicata" or not had been sufficiently covered. These are the ingredients:

1. *That the judicial decision was pronounced by a court of competent jurisdiction,*
2. *That the subject matter and the issues decided are substantially the same as the issues in the subsequent suit,*
3. *That the judicial decision was final, and*
4. *That it was in respect of the same parties litigating under same title."*

A question that follows is whether Misc. Labour Application No. 39 of 2021 falls under the tests listed above.

My examination of the ruling in Misc. Labour Application No. 15 of 2021 and the facts in it makes me to answer the above question in affirmative. I say so because: -

- i. Misc. Labour Application No. 15 of 2021 and Misc. Labour Application No. 39 of 2021 concern the same parties namely, The Registered Board of Trustees of Taqwa Private Secondary School and Fadhili Hamisi
- ii. The issues are the same, in Misc. Labour Application No. 15 of 2021, the Applicant applied for stay of execution of an award which was given *ex parte* in Labour Dispute No. CMA/MZ/ILEM/235/2019 dated 31/10/2019 by Hon. S. Msukuwalo, Arbitrator. This is so indicated in the ruling at

pages 1 and 2. In Misc. Labour Application No. 39 of 2021 the Applicant is applying for the same reliefs, that is, stay of execution of an award which was given *ex parte* in Labour Dispute No. CMA/MZ/ILEM/235/2019 dated 31/10/2019 by Hon. S. Msukuwalo, Arbitrator.

- iii. The ruling in Misc. Labour Application No. 15 of 2021 was decided on merit by this Court, which is competent court, that the same was overtaken by events as the execution was already completed and the Respondent dully paid his rights.;
- iv. The ruling in Misc. Labour Application No. 15 of 2021 has not been altered by any higher court, it is final.

I have failed to find any reason for the Applicant to bring the same matter in this Court. If he was aggrieved, he ought to have challenged the same in proper forums.

As regard to the next issue whether the application is frivolous and vexatious is answered in affirmative as well. The phrase frivolous and vexatious was well defined in the case cited by the Counsel for the Respondent, the case of **Jebra Kambole vs. AG (supra)** where the court borrowed with approval a definition from a Kenyan case of



Wangai vs. Magambi and Another [2013]2 EA 474 which defined the phrase in the following wording: -

A matter is frivolous if (i) it has no substance or (ii) it is fanciful or (iii) where a party is trifling with the court; (iv) when to put up a defence would be wasting court's time or (v) when it is not capable of reasoned argumentand is vexatious when it lacks bonafides, occasions to a party unnecessary anxiety, trouble and expense"

In this matter, as explained above, the Applicant knew well that on 13/08/2021 this Court dismissed the application in Misc. Labour Application No. 15 of 2021 for want of merit. However; with no account, he brought the same application in this same Court on 03/09/2021, just hardly 20 days after the ruling. This Court finds it that he was quite aware about the existence of the ruling in Misc. Labour Application No. 15 of 2021 when he filed this application. Then, he is taken to have intended the consequences of his acts including causing annoyance to the Respondent.

The Counsel for the Respondent requested for costs. The Counsel for the Applicant opposed the prayer arguing that the application is with substance capable of been decided on merit. However, the finding of

this Court is that this application is *res-judicata* and nothing but frivolous and vexatious.

Costs are not allowable in labour cases except in frivolous and vexatious matters like in the instant one. See the cases cited by the Counsel for the Respondent of **South Nyanza Conference (Kanisa la Waadventista Wasabato) vs. Samson Kamune (supra)** and **Tanzania Civil Aviation Authority (TCAA) vs. Chilala Mafuru (supra)**.

In the result, for reasons stated above, I find the application incompetent before this Court been barred by *res judicata*. Consequently, I do hereby dismiss the same and order the Applicant to pay the Respondent costs for this application. It is so ordered.




F. K. MANYANDA

JUDGE

15/03/2022