

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LABOUR DIVISION)**

**AT ARUSHA**

**MISC. LABOUR APPLICATION NO. 53 OF 2021**

(Arising from Labour Execution No. 19 of 2021 and Labour Dispute No.

CMA/ARS/ARB/473/2020)

**NGILOI ULOMI ENTERPRISES LTD.....APPLICANT**

**VERSUS**

**CLARENCE JULIUS.....FIRST RESPONDENT**

**SALIMU M. EMMANUEL.....SECOND RESPONDENT**

**ADVANCED CREDIT RECOVERY CO. LTD.....THIRD RESPONDENT**

Date: 28/9/2022 & 07/10/2022

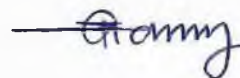
**BARTHY, J.**

**JUDGMENT**

The application for restraining order is brought at the instance of Ngiloi Ulomi Enterprises Limited, the applicant under Rule 24(1), (2)(a)(b)(c)(d), (11) and Rule 55(1)(2) of the Labour Court Rules, 2007 GN No. 106 of 2007 and Order XXXI Rule 57 of the Civil Procedure Code R.E. 2019.

The application is supported by amended affidavit of Patrick Ngiloi Ulomi the Director for applicant authorized via company resolution to represent the applicant.

In opposing the application, the first and second respondents, filed a joint counter affidavit sworn by Clarence Julius and Salim M. Emmanuel and



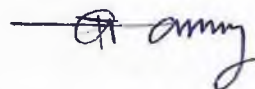
for third respondent amended counter affidavit was sworn by Paul Fanuel Paul the Principal Officer for the third respondent.

For a better understanding of the core of this application I find it pertinent to briefly narrate the facts of this matter. There was the Labour Dispute Matter No. CMA/ARS/ARB/473/2020 pending before the Commission for Mediation and Arbitration Arusha (CMA) that was decided in favour of the first and second respondent against Panone and Company Ltd for unfair termination.

The first and second respondent filed an application before this court as Labour Execution No. 19 of 2021 with the aim of executing the said order of CMA against Panone and Company Ltd. The order to attach and sale the motor vehicle with registration number T. 792 DGP make Mazda Double Cabin was issued with this court.

Aggrieved, the applicant filed this application before this court claiming the property attached did not belong to the party in the originating suit, the applicant in the chamber summons is now praying for the following orders;

- 1. This honourable court be pleased to issue an order to restrain the first respondent, second respondent, third respondent and or his agents' workmen officers or legal representatives, employees, assignee and any other person acting under his power from selling, auctioning or doing any business/activities of any kind to the applicant's motor vehicle with registration number T. 792 DGP made Mazda Double Cabin which has been attached in execution of decree in Labour Execution No. 19 of 2021*



- 2. Costs of this application be borne by the respondents together and severally.*
- 3. Any other reliefs and/or order(s) that this Hon. Court may deem fit and just to grant.*

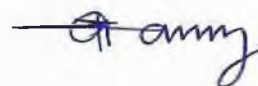
On the date fixed for hearing of this matter all parties were dully represented. The applicant enjoyed the services of Mr. Engelberth Boniphace the learned counsel, whereas the first and second respondent were represented by Mr. Mengo Donald the learned counsel and the third respondent was represented by Mr. Omary Gyunda the learned counsel.

The hearing of the application proceeded orally. Mr. Boniphace supporting the application adopted the amended affidavit together with his chamber summons to be part of his submission. He went on to argue that the labour dispute before the CMA was against Panone and Co. Ltd and Ngiloi Ulomi Enterprises Ltd. was never a party to it.

However, in the matter of execution before this court the property of the applicant was attached as proved by the annexure in the affidavit. He went to argue that, the applicant is the sole owner of the attached motor vehicle with registration number T. 792 DGP make Mazda Double Cabin.

The learned counsel Mr. Boniphace prayed to this court to make thorough investigation on the attached property. He cited the case of **Katibu Mkuu Amani Fresh Club v. Dodo Ubwa Mamboya and another**, Civil Application No 88 of 2022, CAT at Zanzibar held that, the court has the duty to investigate the claim raised by the objector and ask evidence of the claim raised.

To amplify his argument, he stated that the annexure PRA5 is the evidence the property belonged to the applicant.



He went on to state that, the applicant has an interest in the said matter, as the motor vehicle belongs to him and not any other person involved in the labour dispute. To buttress his arguments, he cited the case of **Josia Baltazar Bais and 139 others v. Attorney General** [1997] TLR 32 where the court held that anyone with sufficient interest may seek remedy.

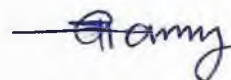
Mr. Boniphace concluded with the prayer to this court their application to be granted and pass an order for the attached property to be released by the respondents severally and he prayed for costs as per Rule 51(2) of Labour Court Rules GN 106 of 2007 as the respondent attached the property without due search.

Responding to the application, Mr. Donald the learned counsel for the first and second respondent prayed to this court to adopt their counter affidavits to form part of his submission.

He admitted on the fact that, the applicant was not the party to the matter before the CMA even before the execution matter before this court. He went on to state that on the claim that the property in question does not belong to Panone Co. Ltd should be scrutinized by this court.

He went further to state that Panone and Co. Ltd and the Applicant are one and the same thing that is why they failed to make her party to this objection proceedings. He added that, the cited case by the applicant has no relevance on this matter.

Mr. Donald added that the court should dismiss this application as it was brought before this court contrary to Rule 24(1) of Labour Court Rules. He concluded by praying to this court to dismiss the application for lacking merit.

A handwritten signature in blue ink, appearing to read "Rammy", is written over a horizontal line.

Responding for third respondent, Mr. Gyunda the learned counsel submitted that the third respondent is the officer of the court whose duty is, to execute the court's order. He went on to state that, the court's orders must be obeyed and acted upon. The third respondent therefore was served with the order of the court, to attach the motor vehicle with registration number T. 792 DGP make Mazda Double Cabin and she acted upon it.

He further contested that Panone and Co. Ltd. was supposed to be joined on this matter as in the case of Dodo **Kubwa Mamboya (supra)**, where both parties arising in the proceedings objected by the applicant were joined.

He went on to counter that, the third respondent has no duty to investigate on the ownership of the property but only execute the order of the court. The fact that the attachment and sale of the said property has been held off, the third respondent is still incurring costs for storage of the subject matter.

To conclude Mr. Gyunda prayed to this court to be granted cost for storage, in whatever decision of the court as the third respondent has no interest in the subject matter.

Rejoining on this application Mr. Boniphace maintained that, the respondents are in agreement that the applicant was not the party to the execution proceedings. Also, the ownership of the motor vehicle was not disputed. He urged the court to consider those facts as admitted.

He added that, Panone and Co. Ltd and the applicant are distinct bodies with different liabilities as proved with the attached document. He pointed



out that, the said fact was not pleaded in the counter affidavit, therefore it is the new fact and should be disregarded by this court.

It was the argument of Mr. Boniphace that, Rule 24(1) of the Labour Court Rules requires the application to join persons with interest. He stated, Panone and Co. Ltd had no interest in the said motor vehicle attached, therefore her presence was irrelevant. He therefore contended that the decision on the case of **Dodo Ubwa (supra) was** misconceived as the facts in the said case are similar to this case.

On the argument raised by Mr. Donald that the application was improper, therefore it ought to have been raised according to the law and serve to the other party. Consequently, the court should disregard the same. With respect to the costs of storage prayed by the third respondent, Mr. Boniphace prayed the same to be borne by the first and second respondent as well as for the costs of the suit.

Having heard the submissions from both parties and examined records on this matter, this court is called upon to determine as to whether the application has the merit.

Before addressing the issue at hand, Mr. Donald the counsel for the first and second respondent has stated that, this matter is improper before this court as the court was not properly moved in accordance to Rule 24(1) of Labour Court Rules.

Mr. Boniphace on his rebuttal to this issue he argued the court to disregard it, as it was not pleaded in the counter affidavit of the parties.

Addressing this issue in outset, the court will not detain much time as it was not brought up under oath in the counter affidavit of the first and

second respondent or raised as the preliminary objection. See the case of **Joseph Juma v. Nasibu Hamis**, Misc. Civil Application No. 48 of 201 High Court of Tanzania at Tabora.

Now with respect to the present application, the records reveal that during the early stages of this matter, there were cross preliminary objection raised by both sides. On the date fixed for hearing both sides agreed to abandon their preliminary objections, then with the order of the court dated 9/6/2022 before Justice Kamuzora, the applicant was granted leave to file amended affidavit.

The applicant dully filed the amended affidavit, the first and second respondents filed their counter affidavit respectively but it was not mentioned to be the amended counter affidavit, whereas the third respondent dutiful also filed her amended counter affidavit.

The applicant has the burden to prove on the balance of probabilities on the facts she alleges. During the hearing of this matter, Mr. Boniphace has prayed this court to adopt the chamber summons with the affidavit of Patrick Ngiloi Ulomi to make part of their submission in support of the application.

The learned counsel had faulted the execution proceedings pending before this court were the order to attach and sale the motor vehicle with registration number T. 792 DGP make Mazda Double Cabin was made. The motor vehicle was claimed to belong to the applicant with reference to annexure PRA5, but the applicant was never the party to the execution matter.

It was not in dispute with the respondents that the applicant was not the party in the execution proceedings, but the said annexure PRA5 which



was the proof of ownership of the said motor vehicle by the applicant was not attached to the supplementary affidavit filed here in court.

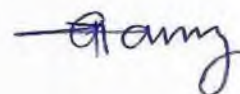
This matter has come to the attention of this court because, as it has been held by various decisions of the Court, upon amendment of a pleading, the previous pleading ceases to have any legal effect. The same was held in the case of **Airtel Tanzania Ltd v. OSE Power Solutions Limited**, Civil Appeal No. 206 of 2017 CAT at Dar es salaam, also quoting the case of **Tanga Hardware and Autoparts Ltd. and 6 Others 19 v. CRDB Bank Ltd**, Civil Application No. 144 of 2005 (unreported).

It has also been held in the case of **Airtel Tanzania Ltd v Ose Power Solutions Limited (supra)** that;

*Upon filing the amended plaint, the consequences were that the original plaint with its annexures BLC 1-4 ceased to exist and had no legal effect. The amended plaint could not be resuscitated by any paragraph in the amended plaint, it be by way of reference, adoption of unavailable pleading or otherwise.*

The essence of this application is to object the motor vehicle attached for execution purpose, to be the property the applicant who was not the party to execution matter. Mr. Boniphace the counsel for the applicant had relied on Annexure PRA5 as deposed in the amended affidavit. However, the same was not annexed in their amended affidavit in support of the application.

The applicant has the duty to prove the ownership of the suit motor vehicle to have the objection proceeding meaningful. It is the cardinal principle that the facts alleged must be proved, see the case of **Abdul**





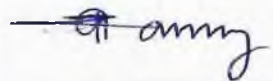
**Karim Haji v. Raymond Nchimbi Aloyce and Joseph Sitol Joseph**  
[2006] TLR 419.

Without the proof of the same the court finds the application is devoid of merit as the applicant could not prove the ownership of the suit motor vehicle. The only remedy therefore is to dismiss the application with costs, the third respondent is also awarded costs for storage.

Order accordingly.

**DATED** at **ARUSHA** this 7<sup>th</sup> day of October, 2022.





**G. N. BARTHY**

**JUDGE**

**07/10/2022**