**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA;**

**MISC. LABOUR REVISION NO. 5 OF 2022**

**(Originating from Labour Execution No. 3 of 2021, in the High Court of Tanzania, at Iringa).**

**BETWEEN**

**NYAMGURUMA ENTERPRISES CO. LTD..... APPLICANT**

**AND**

**GIVEN ELIAS SINYANGWE ..... RESPONDENT**

**RULING**

**21st July & 21 October, 2022.**

**Utamwa, J.**

The applicant, NYAMGURUMA ENTERPRISES CO. LTD was aggrieved by the decision/order (impugned order) of the Deputy Registrar of this court (as execution officer), in Labour Execution No. 3 of 2021 delivered on 17th February, 2022. She thus, filed the present application, moving this court to do the following: to interpret the points of law and issues in the said impugned order and to declare that, there is an error material to the merits of the said impugned order involving injustice to the parties.

The application is preferred by way of Chamber Summons made under Rules 24(1) (2), (a), (b), (c), (d), (e) and (f), 24(3), (a), (b), (c), (d) and (11), 28(1), (b), (c), (d) and (e), 55(1) and (2) of the Labour Court Rules GN. 106 of 2007 (henceforth LCR). It was also made under any other enabling provision of the law and supported by an affidavit of Mr. Moses Ambindwile, the applicant's counsel.

The affidavit supporting the application deposed that, the respondent instituted a labour dispute in the Commission for Mediation and Arbitration (in Njombe) henceforth the CMA, claiming for unfair termination against the applicant. The dispute was determined *ex parte* as the applicant was not served with summons. The CMA decided in favour of the respondent and awarded him the sum of Tanzanian shillings (Tshs.) 20,996,922/=. The respondent thus, filed an application for execution. The affidavit further averred that, the application for execution was determined without the applicant being served with summons to appear or show cause. The applicant was made aware of the award upon execution being commenced. It further deposed that, the warrant of attachment is tainted with irregularities which are subject of this application.

On the other hand, the respondent filed her counter affidavit disputing the applicant's application. The counter affidavit was deponed by Mr. Leonard Lazaro Sweke, the respondent's learned advocate. He essentially disputed that the applicant was not served with the summons to appear before the CMA. The respondent's counsel further deposed that the

applicant was aware of the application for execution as she was served several times with the summons.

At the hearing of the application, the applicant was represented by Ms Theresia Charles, learned counsel, whereas the respondent was represented by her advocate mentioned above. The application was argued by way of written submissions.

In her written submissions in chief, the applicant's counsel adopt the contents of the affidavit. She added that, the present application is made due to an order of attachment of a Motor Vehicle with Registration No. T. 564 BJR make Toyota Canter. The said order is tainted with irregularities. It was delivered without affording the parties the right to be heard as the applicant was not served with summons to show cause as to why the execution should not be executed against her.

The applicant's counsel further argued that, service of summons to parties is a crucial procedure as it affords a party his right to be heard. This is a basic principle of Natural Justice. Failure to notify a party on the proceedings involving him leads to an infringement of the right to be heard. To emphasize this point, she cited the case of **Attorney General v. M/S Prime Assets (T) Limited, Misc. Land Application No. 366 of 2018, High Court of Tanzania (HCT), Land Division** (unreported). She further contended that, a summons is issued to the defendant to inform him of the case instituted against him so that he can appear and defend the case in court. This is in accordance to Order V of the Civil Procedure Code, Cap. 33 RE. 2019 (The CPC). In the case at hand

however, no summons was issued to the applicant in respect of Execution No. 3 of 2021.

It was also the contention by the applicant's counsel that, the right to be heard has been elaborated in numerous cases such as **Hussein Khan Bhai v. Kodi Ralph Siara, Civil Revision No. 25 of 2014** (unreported), **Abbas Sherally & Another v. Abdul S. H. M Fazalbay, Civil Application No. 33 of 2002** (unreported), **DPP v. Amina Tesha and Others [1992] TLR No. 237** and **M/S Metro Plastic Industry Limited v. Abuu Mkulwa and Richard Mwaifunga t/a Yona Auction Mart Labour Revision No. 62 of 2009** (unreported).

Another irregularity according to the applicant's counsel is that, the order for attachment was issued against the Motor Vehicle (With Registration No. T. 564 BJR- Toyota Canter) which does not belong to the applicant. It belongs to one Ansgar Henrki Mnenuka who was not party to the labour dispute before the CMA. The owner is also not party to the Execution No. 3 of 2021 which is under consideration. The learned counsel added that, in law, a decree holder cannot attach a property which does not belong to the judgment debtor. The said Ansgar has thus, filed objection proceedings registered as Misc. Application No. 7 of 2022 and is still pending in this court. Order XXI Rule 12 of the CPC also provides for the requirement to state the description of the judgment debtor's property. This court thus, need to inquire if the Deputy Registrar in the case at hand complied with the law in making the impugned order.

Additionally, the applicant's counsel contended on the third irregularity that, the impugned order was issued in the applicant's name which is different from the one appearing in the arbitral award. The name of the applicant in the arbitral award was NYAMGURUMA CO. LTD while in the impugned order the name appeared as NYAMGURUMA ENTERPRISES CO. LTD. Moreover, the name of the respondent in the arbitral award was GIVEN SINYANGWE, but in the execution application the respondent's name was GIVEN ELIAS SINYANGWE. She thus, submitted that the change of names in the application for execution makes the application incompetent. The impugned order was thus, a nullity. She supported this stance of the law by citing the cases of **CRDB Bank PLC (Formerly CRDB 1996) Ltd v. George Mathew Kilindu, Civil Appeal No. 110 of 2017, CAT at Dar es Salaam** (unreported), **Afisa Tawala Mkuu Hospitali ya Ndala v. Eunice Meshak Shimba, Labour Revision No. 17 of 2015, High Court of Tanzania at Tabora** (unreported), **Dial "A" Cab Tanzania Limited v. Rashid S. Kinkoro & Others, Misc. Application 313 of 2017, High Court of Tanzania Labour Division** (unreported) and **The Registered Trustees of Umoja wa Wazazi v. Uswege Msika and 2 Others, Misc. Application No. 19 of 2017, High Court of Tanzania at Mbeya** (unreported).

The applicant's counsel therefore, urged this court to set aside and quash the impugned order of the Deputy Registrar.

In his replying submissions, the respondent's counsel argued that, the application is vexatious and devoid of merit, hence liable to be

dismissed. He adopted the contents of his counter affidavit to form part of his submissions. He contended further that, the applicant was duly served with summons to appear and show cause as to why the CMA's award should not be executed. The said Execution No. 3 of 2021 was filed in this court on 6th April, 2021. The applicant was served with the summons on 28th May, 2021 and 29th June, 2021 through her Managing Director one Allen Lutalo. The said Director however, refused to sign the said summons. The respondent thus, prayed to affix a copy of the summons on the outer door or some other conspicuous parts of the applicant's office. The said prayer was granted by the then Deputy Registrar (Hon. Ding'ohi). On 12th August, 2021 the court ordered the matter to proceed *exparte* as against the applicant. Again, on 18th January, 2022 the respondent was ordered by the successor Deputy Registrar (Hon. M. Malewo) to issue summons to the applicant. However, the applicant refused to sign the said summons again. The learned counsel for the respondent therefore, distinguished all the precedents cited by the applicant's counsel on this point.

On the allegation that the motor vehicle is not the applicant's property, the respondent's counsel submitted that, the allegation has nothing to do with the application in question. This is because, the said Ansgar Henrki Mnenuka is not a party to the application at hand hence the applicant has no *locus standi* in law to claim the same. He cited the case of **Lujuna Shubi Balonzi Senior v. Registered Trustees of Chama Cha Mapinduzi (1996) TLR 203** to enhance the position of law.

In relation to the alleged wrong name of the applicant, the respondent's counsel submitted that, the allegation is devoid of merit. The difference in the names is a typing error and the same can be cured as guided by the CAT in the case of **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby, Civil Application No. 475/01 of 2020, CAT at Dar es Salaam** (unreported). He thus, distinguished the precedents cited by the applicant.

Due to the above reasons, the respondent's counsel urged this court dismiss the application at hand.

In her rejoinder submissions, the applicant's counsel underlined that, the applicant was not served with any summons and the said Allen Lutalo is not the Managing Director of the applicant. She added that, the respondent has failed to mention the name of the process server who effected the disputed service. There is also no proof of the said service since no affidavit of the court process server was produced. The law guides that, whoever alleges must prove as guided by section 110(1), (2) and Section 112 of the Tanzania Evidence Act, Cap. 6 RE. 2019. This principle was also underscored in the cases of **Geita Gold Mining Ltd and Another v. Ignas Athanas, Civil Appeal No. 227 of 2017 CAT at Mwanza** (unreported) and **Antony M. Masanga v. Penina (Mama Mgesi) and Another, Civil Appeal No. 118 of 2018** (unreported). Nonetheless, the respondent in the case at hand did not prove the said service of summons.

On the discrepancy of names, the applicant's counsel submitted that, the **Beatrice Mbilinyi** case cited by the respondent is distinguishable from the present case. This is because, in that case the issue was on citing wrong provisions of law while the case at hand is on change of names of parties. She added that, the names of the parties are a central thing in litigations. Changing the names of parties is a fatal irregularity which affects the application. She thus reiterated her prayer in her submission in chief.

I have considered the rival submissions by both parties, the record and the law. The major issue for determination in this matter is *whether the application at hand is meritorious.* In deciding this application, I will test every irregularity complained of by the applicant. I will do so in the following pattern for the sake of convenience: I will commence with the second irregularity (on the contention that the attached motor vehicle belongs to a third person), then the third irregularity (on the discrepancy of the parties' names) and lastly the first irregularity (on denial of the right to be heard).

Regarding the second irregularity (on the applicant's contention that the attached motor vehicle belongs to a third person), *the sub-issue is whether the complaint is tenable under this forum.* I am of the view that, this point of contention should not detain me. Since the applicant claims that the motor vehicle does not belong to her, Order XXI Rule 57(1) of the CPC becomes applicable to that matter. These provisions essentially provide that, when a property which does not belong to the judgement-

debtor is attached in execution of a decree against the judgement debtor, such third person may prefer objection proceedings so that the court may investigate his claim and release the attached property. In the case at hand, the said third person (Ansgar Henrki Mnenuka), has already moved the court for investigating the claim by instituting the Application No. 7 of 2022. This is due to the above narrated contention by the applicant's counsel himself. The applicant cannot therefore, raise the same issue in the present matter. In law, one issue between same parties cannot be considered in two distinct judicial proceedings simultaneously. This is for avoidance of contradictory orders, unnecessary duplication of proceedings and reduction of costs and time for determining the issue.

Besides, the applicant did not justify her *locus standi* in defending the rights for the said third person. In law, the applicant is precluded from doing so for want of *locus standi* as correctly contended by the respondent's counsel basing on the **Lujuna Shubi case** (supra).

Owing to the reasons adduced above, I find that the applicant's complaint under the second category of irregularity is untenable in law.

In relation to the third anomaly (on the discrepancy of the applicant's names) I am of the view that, this fact is not disputed by the parties. The same is supported by the record. According to the record of the Application for Execution No. 3 of 2021 it is indicated that, the applicant (for the execution or decree-holder) was "*Given Elias Sinyangwe.*" The respondent (decree-debtor or Judgement-debtor) was "*Nyamguruma Enterprises Company* Limited." The same names appear in the application at hand

though the judgement-debtor is now the applicant while the decree-holder is the respondent. Nevertheless, the award of the CMA (copy of which is attached to the present application and to the Application for Execution) shows that, the complainant before it was "*Given Sinyangwe*" and the respondent was "*Nyamguruma Co. Ltd.*"There is therefore, no dispute that the names of the parties in the award are distinct from those appearing in the present application and the application for execution.

The crucial sub-issue at this junture is therefor, what is the legal effect of the discrepancy of names of the parties under the circumstances of the case? Indeed, in regard to the decree-holders names, I am of the view that, only his second name was added to the application for execution and to this application. That name did not feature in the award. The applicant in the application at hand did not explain as to how the addition of his second name of the respondent/decree-holder affects justice. She did not even make any allegation that the applicant in the application for execution and the present application is a different person from the decree-holder shown in the award. This discrepancy can thus, be cured by the Slip Rule as a mere typographical error as correctly contended by the learned counsel for the respondent in the present matter. This rule essentially mandates courts to cure minor or clerical errors in court decision at any time. It is reflected under section 96 of the CPC and rule 42 of the Court of Appeal Rules, 2009; see also the cases of **GAPOIL (Tanzania) Limited v. The Tanzania Revenue Authority and 2 others, Civil Appeal No. 9 of 2000, CAT at Dar es Salaam** (unreported) **or ([2005]**

**TZCA 37)** and **Abdiel Reginald Mengi and another v. Jacqueline Ntuyabaliwe Mengi and 6 others, Civil Application No. 618/01 of 2021, CAT at Dar es Salaam** (unreported) respectively.

The discrepancy in the names of the applicant (Applicant/judgment-debtor) is also undisputed by the parties. The sub-issue here is this; what is the effect of the discrepancy of the names of the applicant (judgment-debtor in the application for execution?) in the present matter. I hasten to agree with the learned counsel for the applicant that, the same was fatal to the application for execution. This is because, in the first place, the applicant/judgment-debtor is a registered company. It is our law that, names of registered legal persons like the applicant/judgment-debtor in judicial proceedings should be properly cited by their registered names. It is the proper citation of their registered names which identifies and distinguishes them from other legal persons. That particular contention by the applicant's counsel is in fact, supported by the precedents he cited above. To underline this position of the law, the Court of Appeal of Tanzania (The CAT) also, held in the case of **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd, Civil Appeal No. 34 of 2010, [2011] TZCA 123** that, the notice of appeal was defective because the name of the appellant in the trial court was "Jaluma General Supplies Ltd" but in the appeal the name was couched as "Jaluma General Enterprises Ltd."

The rationale for the rule just underlined above is that, it avoids situations whereby a court may give orders in favour or against an unintended legal person. Such course, if not checked may lead to serious

miscarriage of justice and courts may find themselves defeating justice instead of dispensing it.

In his replying submissions the respondent's counsel relied upon the decision by the CAT in the **Beatrice Mbilinyi case** (supra). He also argued that, the discrepancy of the applicant's name can be cured by the slip rule discussed previously. But that precedent is distinguishable as correctly put by the applicant's counsel. This is because, it decided on the effect of wrong citation of the enabling provisos of law in an application. The CAT in that application then held that, wrong citation of the sub-section of the Court of Appeal Rules was a mere slip of a pen and not fatal. The remedy was thus, to insert the proper enabling sub-rule. The precedent does not therefore, save the respondent in any way.

Furthermore, I am aware that, this matter is of labour nature and is before this court as a Labour Court. Rule 3(1) of the LCR guides that, the Labour Court shall be a court of *inter alia*, equity; see also the guidance by the CAT in the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016, at Dar es Salaam** (unreported). In this precedent however, the CAT basically held that, equity could not suppress the law on time limitation. The term "equity" is defined by neither the LCR nor the Interpretation of Laws Act, Cap. 1 RE. 2019 which is our general law of on interpretation. The Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, at page 619 defines "equity" as fairness or impartiality or an even-handed dealing. It further elaborates it as the body of principles constituting what is fair

and right or natural law. The Dictionary adds that, in its popular sense equity is practically equivalent to natural justice.

Courts of this land have also emphasized various principles related to equity. This court (Twaib, J. as he then was) for instance, observed in the case of **Jafari Lazima Binamu (Administrator of the estate of the late Lazima Binamu) v. Hassan Chionda & 2 others [2016] TLR. 377** that, Section 2 (2) of the Judicature and Application of Laws Act (Cap. 358) makes the High Court not only a court of law and justice, but also, a court of equity. Equity is necessary to alleviate the defects of the common law and to correct its rigour or injustice. The learned Judge added that, the principles of equity may be applied in resolving what statute law and the practice of courts have not provided for. Inspired by comments of Prof. Frederick William Maitland in his book, "Equity: Course of Two Lectures [Chaytor, A.H. et al (eds.) 1920: Cambridge University Press, London]: the learned Judge appreciated that, common law and equity are not two rival systems and equity had come not to destroy the law, but to fulfil it. It was also the Judges observations that, the maxim "equity follows the law" ensures that equity will not allow a remedy that is contrary to law. It (equity) was not meant to supersede the common law where a remedy was already an established or certain.

The learned Judge in the **Jafari Lazima case** (supra) further observed that, "equity will not relieve a party of the consequences of his own neglect." In underlining this principle he followed the cases of **Haji Hassan Chimbo v. Mshibe Iddi Ramadhani (1996) T.L.R. 229**

(Maina, J. as he then was) who had also sought inspiration from the case of **Caltex (India) Ltd. v. Bhagwan Devi Marodia [1969] SC 405.** It was a further emphasis by the Judge in the **Jafari Lazima case** (supra) that "equity aids the vigilant, not the indolent" following the case of **Showind Industries Ltd. v. Guardian BankLtd. & Anor [2002] 1 EA 284 (CCK)].**

Furthermore, the CAT observed in the case of **Musa Mohamed v. Republic [2009] TLR. 297** that, it has to resort to equity so as to render justice, but at the same time it had to make sure that the Court records are in order. It also underscored the principle of "Equity treats as done that which ought to have been done."

In the present matter however, I do not think if equity stands on the side of the respondent to the extent of supporting him that the wrong citation of the applicant's registered names is a mere clerical error curable under the slip rule. This view is based on the following reasons; firstly, the legal effect of the irregularity in citing the applicant's names (as judgment-debtor) in the applications for execution is that, he impleaded a different person who had not been joined before the CMA. This is because, the discrepancy in such names was too big for being treated as a mere clerical error. Secondly, the respondent was so negligent or indolent in filing the application for execution by not citing the proper names of the judgement-debtor (now applicant). Equity cannot thus, favour him as per the **Jafari Lazima case** (supra) and the **Showind Industries case** (supra). Thirdly, the law guides that, in judicial proceedings registered legal persons should

be cited in their registered names as observed earlier. The law further prohibits changing the names of such parties without prior court order; see the case of **CRDB Bank case** (supra).

The respondent in the present matter (i.e. the decree-holder in the application for execution) did not show in any way that there was a court order justifying him to cite the name of the applicant in the present matter (judgement-debtor) differently from the manner appearing in the award of the CMA. This course thus, offended the law cited above. Principles of equity clearly guide that, equity cannot contradict or destroy the law; see the **Jafari Lazima case** (supra). This position of law was also underlined by the CAT in the **Barclays Bank case** (supra) which essentially recognised that the Labour Court is a court of equity yes, but equity cannot overpower the law of time limitation.

Moreover, I do not think that the irregularity of discrepancy in the names of the applicant can be cured by the principle of overriding objective. Admittedly, this principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and to have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court.

Nevertheless, it cannot be considered that the principle of overriding objective came to suppress other important principles that were also

intended to promote justice like the one under discussion (which requires parties in judicial proceedings to cite names of registered legal persons by the style of their registered names) as underlined by the precedents cited above. The holding by the CAT in the recent case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view that, the principle of overriding objective does not operate mechanically to save each and every blunder committed by parties to court proceedings.

On the reasons shown above, I find merits in the third complaint by the applicant.

In relation to the first complaint (on the applicant's denial of the right to be heard), the sub-issue is whether or not the applicant was denied the right to be heard. I am of the settled view that, the answer to this sub-issue is in the record of the application for execution itself. It is on record that, the application was filed on 6th April, 2021. Summons were issued to the judgement-debtor (now the applicant) in the same wrong name of Nyamguruma Enterprises Company Limited. Now, since I have held above that this name connoted a different person from the judgment-debtor in the award of the CMA, it cannot be said that the judgment-debtor was properly served for being heard in the application for execution. I therefore, agree with the applicant that she was deprived of her right to be heard. This was a serious breach of a fundamental right as correctly contended by the applicant's counsel. It is trite and settled law that, any

decision reached upon violation of the right to be heard, offends the principles of Natural Justice and cannot stand.

Owing to the above reasons, I allow the application to the extent shown above. As to which order should this court make, I am of the view that, in essence, the impugned order was twofold. It firstly granted the respondent/decree-holder's application for execution (No. 3 of 2021). The decree-holder had applied for execution of the award at the tune of Tshs. 20, 996, 922/= (together with interest on the principal sum up to the date of payment), costs of the execution, arrest and detention of the Managing Director of the applicant, one Allen Lutalo as civil prisoner in order to cause the payment of the amount sought in execution. The first part of the impugned order was therefore, granting the execution generally (i.e. to the extent prayed above). The second part of it was specifically to grant the warrant of attachment against the motor vehicle mentioned above in execution of the decree.

Now, due to the reasons adduced above, I answer the major issue posed above partially affirmative and partially negative. I thus, also partially grant the application as shown in the following orders which I hereby make: I nullify the execution proceedings (regarding the Execution No. 3 of 2021). I consequently set aside the first part of the impugned order mentioned above (i.e. the general order for execution to the extent prayed by the decree-holder, now the respondent as demonstrated earlier). In relation to the specific second part of the order (in relation to the warrant of attachment against the motor vehicle), I make no order for

releasing it. This is because, the issue on whether the same can be released is being consider in another forum (Application No. 7 of 2022) and for other reasons I adduced in testing the second irregularity. Each party shall bear its own costs since this is a labour matter by nature. It is so ordered.


JHK UTAMWA

JUDGE

21/10/2022

Court: ruling delivered in the presence of Mr. Cleophace Mheluka advocate, holding briefs for Ms Theresia Charles, advocate and Mr. Leonard Sweke, advocate for the applicant and respondent respectively, this 21st October, 2022.


JHK UTAMWA

JUDGE

21/10/2022