IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CIVIL APPEAL NO. 25 OF 2021

PATROBERT ISHENGOMA.....APPELANT

VERSUS

KAHAMA MINING CORPORATION LIMITED.....RESPONDENT

[Appeal from the consolidated decision of the Resident Magistrates Court of Shinyanga at Shinyanga.]

(Hon. M.P. Mrio, PRM.)

dated the 8th day of July, 2021
in
Consolidated Misc. Civil Application No. 18 & 19 of 2019

JUDGMENT

25th August & 24th November, 2022.

S.M. KULITA, J.

The appellant herein filed a memorandum of appeal seeking to challenge the ruling and order of the Resident Magistrate's Court of Shinyanga in a Consolidated Miscellaneous Civil application for execution No. 18 and 19 of 2019. In the application No. 18 of 2019 the appellant sought to execute decree of the Kahama Labour Conciliation Board

whereas in Application No. 19 of 2019 the Appellant sought to execute the decision of the Minister for Labour matters.

In a nut shell, the information as can be gathered from the available records is that, the Appellant was an employee of the respondent till 30th August, 2003 when he was terminated. Aggrieved with the termination, the appellant referred his grievances to the then District Labour Conciliatory Board of Kahama through Labour Dispute No. KAH/CB/35/2003. The grievances were firstly, on wrongful termination and secondly, on unfair treatment of his personal injuries sustained in the course of employment.

In its final analysis the District Labour Conciliation Board, **firstly**, confirmed termination on 13/10/2003 and **secondly,** it made an order that the respondent should proceed to provide the appellant with medical services and that repatriation process of the appellant was suspended pending the final medical report.

Fortified, that he was wrongfully terminated, the appellant appealed to the Minister responsible for Labour matters, who lastly, decided in his favor. That was on 25th November, 2006. Following that defeat, it was the Respondent's turn by then, who, being aggrieved, on 21/12/2007 applied for orders of Certiorari and Mandamus in the High

Court of Tanzania at Dar es Salaam through Misc. Civil Cause No. 97 of 2007 intending to quash the decision of the Minister. This application was granted.

Consequently, the Appellant got aggrieved and applied for revision against it, to the Court of Appeal. As the appellant was not made a party to Misc. Civil Cause No. 97 of 2007, thus the Court of Appeal through Civil Application No. 172 of 2016 decided in favor of the appellant by nullifying and setting aside the decision in the said Misc. Civil Cause No. 97 of 2007.

As firstly, the Minister's decision has been restored, and secondly, as the order of the District Labour Conciliation Board concerning the appellant's personal injuries treatment and compensation were not challenged, then the Appellant applied for execution in the Resident Magistrate's Court of Shinyanga through Misc. Civil Application No. 19 of 2019 and No. 18 of 2019 respectively.

In the Resident Magistrates Court, on 30th November, 2020 the two applications were ordered to be heard separately through written submissions. By the time of composing judgment, the presiding Magistrate consolidated the two applications for executions. In it, Misc.

Civil Application No. 18 of 2019 was refused while Misc. Civil Application No. 19 of 2019 was granted.

That decision aggrieved the appellant, hence this appeal with 15 grounds. On 29th March, 2022 the appeal was scheduled for hearing through written submissions. Both parties complied with. The appellant was represented by Mr. Musa K.D Mhingo, Advocate whereas the respondent was represented by Ms. Caroline Kivuyo, Advocate.

Before his submission Mr. Mhingo prayed to withdraw grounds of appeal number 9, 10 and 12. Then for convenience purposes he expressed his wish to make submissions on the rest of the grounds into groups, except grounds number 11 and 14.

Submitting in respect of grounds of appeal number 2, 4, 5, 6, 7, 8, 13 and 15 Mr. Mhingo stated that, on those grounds the main area of complaint is to the effect that, the application for execution in Misc. Civil Application No. 18 of 2019 based on a distinct, independent, lawful and enforceable decision of the Labour Conciliatory Board dated 13th October, 2003. Thus, it was wrong to consider it as an ancillary to the Minister's decision dated 25th November, 2006, making it incapable of execution by itself.

In insisting the same, Mr. Mhingo stated that, their main complaint in all the above grounds of appeal is that, the executing court was wrong to refuse Misc. Civil Application No. 18 of 2019. He went ahead arguing that, the executing court erred for treating the decision of the Board dated 13th October, 2003 not enforceable for the reason that it was not made by the Minister. Mr. Mhingo referred this court to page 10 of the ruling of the executing court where the presiding Magistrate is quoted to have said that, the application No. 18 of 2019 was not emanated from the decree of the Minister hence could not be granted.

On that reasoning, Mr. Mhingo was of the views that, it was a misconception. He gave the reason that, The Security of Employment Act has given mandate to make enforceable the decisions of both, the Labour Conciliatory Board and the Minister. Explaining the same, he said that, those aggrieved with the decision of the employer they appeal to the Board, and those aggrieved with the Board's decision they appeal to the Minister. On that account, he formed a considered opinion that, not all enforceable decisions come from the Minister but the Board too.

To buttress his position Mr. Mhingo cited sections 43, 28 and 4 of the Security of Employment Act [Cap 387 RE 2002]. For that matter he was of strong views that, the extra independent order of the Board on

the complaint of unfair treatment of the appellant's personal injuries which was not appealed by the respondent is a proper decision to be enforced as if it was a decree. He added that, to prove that the same is enforceable, the respondent had once on 13th October, 2003 partly paid the appellant sum of Tshs. 1,000,000/= He made this court refer to Exhibit P21 to the counter affidavit in Misc. Civil Application No. 18 of 2019. He made further reference to Exhibit P34 to the counter affidavit in the same Misc. Civil Application No. 18 of 2019 where Mr. Deo Mwanyika, a Vice President of the respondent admitted the said claim and promised to pay the remaining to the appellant.

Sticking on the same point, Mr. Mhingo stated that, the Labour Commissioner of Dar es Salaam headquarters, on 18th July, 2008 wrote a letter to the appellant with reference No. KZ/U.10/RF/9390/12 clarifying the extra order of the Conciliatory Board. He stated that, the letter made it clear that, the Minister for labour could not deal with the order of the Board as it was neither argued before him nor appealed by the respondent. He said that these are found in Exhibit P25 to the counter affidavit in Misc. Civil Application No. 18 of 2019.

Further, Mr. Mhingo added that, the issue of personal injuries that was dealt under the then Worker's Compensation Act had reached to the

extent that the respondent is required to pay to the appellant Tshs. 4,488,258,800/= as compensation for injuries sustained. He went further stating that, to date there is no pending appeal, revision or proof of satisfaction of that order in full. He wondered as to why the executing court did not execute the order.

However, Mr. Mhingo agreed with the reasoning of the presiding Magistrate in the impugned judgment on paragraphs 1 and 3 at page 8 whereby the presiding Magistrate held that, the judgment debtor's duty in execution was to show cause as to why execution should not procced rather than challenging the award sought. In the same spirit Mr. Mhingo wondered the same presiding Magistrate reverted back against her former findings and herself challenged the Board's decision at the execution stage. On that account, Mr. Mhingo was of the views that, just as what the presiding Magistrate did in the Execution Application No. 19 of 2019, the same treatment ought to have been done in the Execution Application No. 18 of 2019.

Concerning grounds number 1 and 3 Mr. Mhingo stated the same that, their area of complaint is that, consolidation of the two applications was uncalled for and if necessary, it ought to have been done at the earliest stage with parties involved. He added that, both of the two

grounds point at one main complaint that there was a wrong consolidation of the two applications for execution.

Mr. Mhingo stated that the respondent had earlier told the execution court to consolidate the appellant's applications for the reasons that, there were some overlapping prayers in the two appellant's applications for execution. Mr. Mhingo told the court that, the appellant objected to it for the reasons that, the two decisions are different as one is from the Minister and the other is from the Conciliatory Board. Further, he stated that, the Minister's decision refers to terminal benefits while the other Board's decision is concerned with treatment of the appellant's personal injuries acquired in the course of his employment.

On those assertions, Mr. Mhingo was surprised by the executing court's decision of consolidating the two applications without assigning some reasons and without considering the parties' submissions on it.

Mr. Mhingo was of the considered views that, the consolidation that has been done by the executing court was wrong. He gave reasons being that, it should have been done by involving parties, before hearing commenced, there must be an order made to that effect after inviting the parties' opinions, one file to control the other and the decision must

indicate that it is for consolidated cases. He cited the case of **Dr. Reginald Mengi Abraham Mengi and Another V. Mganyizi J. Lutagwaba and two Others, Consolidated Misc. Applications No. 198 and 214 of 2016, High Court of Tanzania, Commercial Division, at Dar es Salaam** (reported on tanzlii)

He went further stating that, like in omnibus applications, in a consolidated judgment or ruling the risk of not fully attending one application is very high. He gave an example of Misc. Application No. 18 of 2019 in which he said, the presiding Magistrate did not state its background, did not summarize or analyze affidavits and submissions and even the reasons for decision were not given at all.

He was of strong views that, in it the principles of a good judgment under order XX Rule 4 and 5 of Civil Procedure Code (CPC) were violated. In short, he said that, in that application, it is as good as the parties were not heard at all. To bolster his assertion, he cited the cases of **Mbeya Rukwa Auto parts and Transport Ltd V. Jestina George Mwakyoma (2003) TLR 251** and **Stanbic Bank Tanzania Ltd V. Salvatory Kazoneye Segwenda, Civil Appeal No. 202 of 2019, CAT at DSM.**

On ground number 14 Mr. Mhingo argued that, the trial Magistrate erred in law when she held that the amount representing the appellant's right according to the order of the Minister for Labour was calculated by the Conciliation Board of Kahama. To him this was a serious error which shows that the trial Magistrate was not serious in dealing with the annexed documents to the matter. He added that, had she been serious, she would have known that, calculations were made by the District Labour Officer of Kahama District as per his report dated 10th July, 2018. The amount was approved by the qualified Auditor and Tax Consultant.

Concerning ground number 11 the appellant claims that, the learned trial Magistrate erred in law when she omitted to calculate and add the additional amount of subsistence allowance per diem for the period running from 24/11/2018, which is the deemed date of repatriation, to the actual date of repatriation in Misc. Civil Application No. 19 of 2019 for execution of the Minister's decree which was 25th November, 2006. He went on stating that, the trial Magistrate had in mind that the amount of Tshs 3,120,091,692/= is calculated up to the deemed date of repatriation which was taken to be 24/11/2018. On that account, there was a need to make additional amount of money covering from the deemed date of repatriation to the actual date of

repatriation which is 3rd December, 2021. To that, Mr. Mhingo stated that, though the trial Magistrate recognized it yet she was mute to make calculations on it.

In reply to that, Ms. Kivuyo firstly prayed to raise a point of law regarding competence of the current appeal and the proceedings in the Resident Magistrate's court. She defended this procedure by giving the reason that, a point of law can be raised at any time. To bolster that position, she cited the court of appeal cases including the case of **Tanzania China Friendship Textile Co. Ltd V. Our Lady of the Usambara Sisters [2006] TLR 70.**

Ms. Kivuyo went on stating her point of law being that, the appellant has been substituting or changing the names of the respondent without leave or order of the court. Explaining the same, Ms. Kivuyo stated that, the decisions of the Labour Conciliation Board and that of the Minister for Labour were against the respondent whose name is Kahama Mining Corporation Limited. He added that, surprisingly, in both applications for executions, the Judgment Debtor's name was Kahama Mining Corporation Limited (Barrick Gold Tanzania-Bulyanhulu). She added that, in the ruling of those applications for executions, the respondent's name was written as Kahama Mining Corporation Limited.

On that account, she formed an opinion that, following that change of names without order or leave of the court is fatal irregularity and prayed for the appeal be struck out with costs, as well the proceedings, ruling and orders of the Resident Magistrate's Court be nullified and set aside. To buttress her position, she cited the cases of **Inter Consult Limited V. Mrs. Nora Kassanga and Another, Civil Appeal No. 79 of 2015, CAT at DSM.** (unreported) and **CRDB PLC [Formerly CRDB (1996)] Ltd v. George Mathew Kilindu, CAT at DSM, Civil Appeal No. 110 of 2017** (unreported).

As for the grounds of appeal number 2, 4, 5, 6, 7, 8, 13 and 15 Ms. Kivuyo responded that, the argument of the appellant that the extra independent order of the Conciliatory Board on the unfair treatment of the appellant personal injuries is a proper decision to be enforced as if it were a decree, is not tenable. She said this is as per section 43 of the Security of Employment Act [Cap 387 RE 2002]. To her, according to the provision cited, the finality of the decision of the Board is subject to the decision upon further reference to the Minister.

Ms. Kivuyo argued further that, according to the decision of the Minister dated 25th November, 2006, all the appellant's entitlements were to be executed according to that Minister's decision. To her, the

appellant cannot execute the Minister's decision that acts as an appeal and come again to execute the Board's decision. To bolster her position, she referred to the Book of Mulla, The Code of Civil Procedure, 16 ed, Butterworths, 2001, Vol. 1 at page 568 that interpreted section 36 of the Indian Civil Procedure Code, which is pari materia to section 31 of our Civil Procedure Code Cap 33 RE 2019. On this, she was thus of the opinion that, where the appellate court makes a decree, the decree of the original court is merged into that of the superior court, and it is the latter decree alone that can be executed. It is upon this argument Ms. Kivuyo prayed for the above cited grounds of appeal to be dismissed.

In her submissions Ms. Kivuyo urged this court not to consider the attachment to the memorandum of appeal titled Nyongeza B Maoni ya Wajumbe wa Baraza la Wasuluhishi for the reason that, the same was not part to the documents accompanying application for execution.

Again, she urged this court to disregard the appellant's reference to the documents attached to the counter affidavit giving reasons that, the Resident Magistrate's Court was not executing decisions attached to the counter affidavit but decisions attached to the said application for execution.

She went further contending that, it is not true that the appellant referred two disputes to the Conciliation Board which gave two findings. To her, there was only one dispute referenced as KAH/CB/35/2003. To her, this is a single dispute with a single decision that was appealed to the Minister for Labour.

On another move Ms. Kivuyo stated that, it is wrong to hold that according to the Labour Officer's report the appellant's is entitled to compensation which has reached to the tune of Tshs 4,488,258,800/=, payable under the Workers Compensation Act. She said that, by then the amount payable as compensation in respect of incapacity was Tshs. 108,000/=. She contended that, as long as the appellant does not dispute receiving Tshs. 1,000,000/= then she formed an opinion that, the appellant has already been paid over and above.

Ms. Kivuyo went further contending that, the executing court was authorized by law to determine what is due to the appellant instead of just granting as it did in the application No. 19 of 2019. She gave the reason that, the purported decree of the Board does not state the quantum which the judgment debtor is required to pay. She made reference to the case of **Hassan Twaib Ngonyani V. Tazama Pipe Line Ltd, Civil Appeal No. 201 of 2018, CAT at DSM.**

It was Ms. Kivuyo's assertion that, according to the Board's decision that was attached to the application for execution, the respondent was ordered to provide the appellant with treatment, returning the MEDEX Card to him and pay him compensation under Cap 263. She went further stating that, the appellant has already been paid compensation and the remaining orders were not orders for payment of monies, but could only be enforced by way of compelling the respondent to perform the obligations imposed to him by the said Board's decision. On that account, she had the considered opinion that, the appellant's grounds of appeal must fail.

Concerning grounds of appeal number 1 and 3 Ms. Kivuyo firstly joined hand with the appellant that, the consolidation was done after the hearing of the two applications. She was again of the same views that, consolidation ought to have been done at the earliest opportunity. To bolster her assertion, she cited the case of **Amadeo Mnyenyelwa and Another V. Republic, Consolidated DC Criminal Appeal No. 45, 46 and 47 of 2021, High Court at Iringa.** With this submissions Ms. Kivuyo was of views that, as long as the Resident Magistrate's Court (RM's Court) went contrary to those principles on consolidation, then she was of considered opinion that, the ruling resulted thereafter is a nullity.

She pressed further that, as the consolidation is a nullity, it therefore follows that this court should nullify the proceedings, set aside the ruling and remit back the file to lower court to compose separate ruling for each case. She supported her argument with the case of **Alfred Sanga V. Evarist Njimba and 2 Others, Land Appeal No. 169 of 2020 HC, Land Division at Dar es Salaam.**

On the other hand, Ms. Kivuyo submitted that, consolidation of the two applications led to the denial of right to be heard of the parties in Misc. Civil Application No. 18 of 2019. With this, she stated that, since the ruling of consolidated Misc. Civil Application No. 18 and 19 of 2019 was reached after a denial of right to be heard, then she formed an opinion that, the same should be set aside and the matter be remitted back to the Resident Magistrates Court. Ms. Kivuyo pressed further that, remedy for breach of right to be heard is to nullify the whole of the decision not a party as prayed by the appellant. She insisted that, it is because failure to give right to be heard, the decision reached thereof should be nullified, no matter the same decision will be reached when the parties are given right to be heard.

Concerning ground number 14 of appeal Ms. Kivuyo stated that, they support this ground of appeal. She went further explaining that, it

was wrong for the Resident Magistrate's Court to treat the labour officers' calculations as being made by the Labour Conciliatory Board. She added that, there is no law giving powers to the Labour Officer to submit its calculations to the executing court. On that account she stated that, the submitted calculations by the Labour Officer do not bind the executing court as the same have no legal force.

It was Ms. Kivuyo's assertion that, as long as the Minister's decision has not stated the amount the appellant to be paid then, it follows that, it was the duty of the executing court but not the Labour Officer to compute. She cited the case of **Hasan Twaib Ngonyani v. Tazama Pipe Line Ltd (supra).** She added that, even when the Labour Officers' calculations have been approved by the qualified auditor and tax consultant, yet the same cannot bind the executing court. She thus prayed for this ground of appeal to be allowed, the ruling of the RM's court be set aside and it be ordered that the RM's court should determine the amount due to the appellant.

Concerning ground of appeal number 11 Ms. Kivuyo stated that, the same is misconceived. She gave the reason that, the concepts deemed date of repatriation and actual date of repatriation are not known in law. They have just been created by the appellant, they thus

have no legal effect. She added that, in Misc. Civil Application the appellant claimed subsistence allowance up to 24th November, 2018 basing on the calculations of Labour Officer. She was of considered opinion that, as that is what was claimed, then the appellant cannot blame the executing court for granting what he had claimed. She added that, the appellant's application for execution, was also in violation of Order XXI Rule 10 (2)(g) of Civil Procedure Code (CPC). This is due to the fact that, the appellant never mentioned the amount due from the alleged deemed date of repatriation to actual date of repatriation. She further told the court that, the appellant provided no facts on the alleged actual date of repatriation. To her the court would not be able to make speculations.

Further, Ms. Kivuyo stated that, without prejudice to her earlier submission, the appellant is not entitled to subsistence allowance based on per diem but monthly salaries. To bolster her assertion, she cited section 59 of the Employment Act [Cap 366 RE 2002] and cases of **AG V. Ahmad R. Yakuti and 2 Others, Civil Appeal No. 49 of 2004, CAT at DSM** and **Juma Akida Seuchago V. SBC (Tanzania) Limited, Civil Appeal No. 7 of 2019, CAT at Mbeya.**

In rejoinder Mr. Mhingo wanted the court to note that the respondent did not dispute anything on the historical background that the appellant endeavored to give in his written submissions.

He added that, the appellant firstly intended to appeal against the whole of the RM's Court decision. He added that, on reflection during submissions he abandoned three grounds of appeal, hence he no longer appeals against the whole of that decision but a part.

Concerning the point of law raised by the respondent, that the appellant has been using different the names interchangeably referring the respondent without leave, the appellant's counsel named it as worthless. He added that, in punctuation, brackets and parenthesis are normally used to separate an extra piece of information from the rest of the text. With this, he went further contending that, the words in the bracket which are (Barrick Gold Tanzania-Bulyanhulu) are just giving the extra piece of information about Kahama Mining Corporation Ltd which is the proper name of the respondent. Mr. Mhingo formed an opinion that, the extra piece of information does not change the respondent's name and if omitted still does not affect the respondent altogether.

Mr. Mhingo went on insisting that, the same name with extra piece of information has been used in the Court of Appeal Civil in the

Application No. 172 of 2016 without any problem and the said court granted the said application for revision. To bolster his position, he referred this court to Exhibit F to the affidavit to show cause in Misc. Civil Application No. 19 of 2019.

To insist Mr. Mhingo stated that, after delivery of the said ruling of the Court of Appeal, the appellant instituted two applications in the Resident Magistrates' courts in the respondent's name with the extra piece of information. He added that, the same were ambushed with preliminary objections. In the ruling of those preliminary objections, *suo motto,* the court addressed the respondent's name without the extra piece of information.

He went on contending that, even when the respondent got aggrieved with the above rulings on preliminary objections, they appealed to the High Court citing themselves with the extra piece of information. He added that, even in the present rulings for the application for executions which are subject for this appeal, parties made their written submissions while citing the respondent with the extra piece of information only, the court *suo motto* omitted the extra piece of information. To him, no party is to be blamed for usage of the respondent's name interchangeably with and without the extra piece of

information. He added that, even the RM's court has been omitting the extra piece of information *suo motto* without initiation by parties. He added that, both parties were all fully satisfied throughout that the extra piece of information referred to the same was the respondent.

Alternatively, Mr. Mhingo stated that, if the extra piece of information was disturbing, the respondent was required to raise it at the earliest possible opportunity, preferably at the Court of Appeal or in the RM's Court. To him, raising this at appeal stage is deemed to have been waived as per Order 1, Rule 13 of the CPC. He added that, such misnomer in the extra piece of information is also a minor irregularity that can be cured by the courts order as per the case of **Christina Mrimi V. Coca Cola Kwanza Bottlers Ltd, Civil Application No. 113 of 2011, CAT at DSM.**

On the same stance, Mr. Mhingo stated that, the respondent's conduct in the Court of Appeal, RM's Court and in this court using her name with the extra piece of information, estops her from querying the Appellant in using the same. To him querying at this stage is against the overriding objective principle.

Concerning the extra independent order of the Board Mr. Mhingo stated that, it cannot be subjected to the decision of the Minister on a

further reference to him. He added that, as long as it was not appealed to the Minister, then it remains to be a separate proper order to be enforced as if it was a decree. He cemented his argument with the letter dated 18th July, 2008 authored by the Labour Commissioner at Dar es Salaam.

On another move Mr. Mhingo contended that, the extra independent order of the Conciliatory Board is not ambiguous. He said the same is contained in Attachment No. 7 to the Labour Officers report in Misc. Civil Application No. 18 of 2019. For easy of reference, he reproduced it all. For more clarification on the terms of the said decision he invited this court to make reference to Exhibit P11 to the counter affidavit in Misc. Civil Application No. 18 of 2019 and Attachment No. 9 to the Labour Officer's report in that application. Finally, he commented that, both parties were satisfied with that decision, hence did not appeal on it.

Concerning the Minister's decision Mr. Mhingo stated that, the same is not ambiguous as well. He said the same is contained in attachment No. 9 of the Labour Officer's report in Misc. Civil Application No. 19 of 2019. For easy of reference, he reproduced it.

On the foregoing, Mr. Mhingo stated that, the decision of the Minister says nothing concerning decision of the Board regarding treatment of the appellant's personal injuries. On that account, he commented that, there is nothing in common between the two decisions. To him, medical expenses which are involved in the decision of the Board are different from the terminal benefits involved in the decision of the Minister. As such he formed an opinion that, the two decisions deserve two separate executions.

Concerning the respondent's contention that, Supplement B to Form 5 should be disregarded, Mr. Mhingo stated that it is a misconception, as all opinion in that supplement are part and parcel to the decision of the Board. He added that, the Minister's decision referred to all appellant's terminal benefits and nothing else.

Concerning the issue of consolidation Mr. Mhingo stated that, when there is a wrong consolidation there is no fixed principle that the whole of the decision be rendered a nullity. To him, each case should be decided on its own merits and circumstances. He went further stating that, for the case at hand, both parties agree that consolidation led to denial of right to be heard of parties in Misc. Civil Application No. 18 of 2019. To him, Misc. Civil Application No. 19 of 2019 was not affected.

He insisted that, the RM's court's ruling discussed only the Order of the Minister but not the order of the Board.

Concerning the reliability of the Labour Officer's calculations Mr. Mhingo stated that, the same are reliable and thus should not be disregarded as submitted by the respondent. He supported his assertion by the case of **Ali Abdalla Amour and Abdalla Ali Abdala V. Husein Sefudin (Safi Stores) [2004] TLR 313.** With that position he contended that, the Labour Officer has mandate to make report and calculations. He added that, in ground Number 14 only the appellant wanted to show that, the trial Magistrate was not careful to deal with the documents before her. To him, this was a minor error that cannot vitiate the whole of the decision.

Concerning the calculations of the subsistence allowance, unlike submissions by the respondent, Mr. Mhingo stated that, the same should be made on the basis of the prevailing law at the material time regarding repatriation costs as well as the available evidence on record. He referred to the cited authorities in his submission in chief. He condemned the respondent's advocate for being mute on those authorities instead he relied on his authorities on which the respondent

stated that the appellant is not entitled to subsistence allowance on per diem but on monthly salary.

On that note, Mr. Mhingo condemned the respondent for running away from the issue. To strengthen up his argument Mr. Mhingo stated that, the cases of **Ahmad R. Yakuti** (supra) and **Juma Akida** (supra) are not good laws, he gave the reason being that, they are contrary to the statutory provisions of section 59 of the Employment Act [Cap 366 RE 2002] which provided for per diem subsistence allowance.

Commenting on the cited case of **Paul Yustus Nchia** (supra), Mr. Mhingo stated that the Court of Appeal did not endorse payment of subsistence allowance on bases of monthly salary but per diem. He wondered the same was wrongly portrayed in the case of **Juma Akida**.

Mr. Mhingo cited the case of **Gasper Peter V. Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No 35 of 2017, CAT at Mtwara** and agreed that the Court of Appeal endorsed payment of subsistence allowance on basis of monthly salary. Yet he was quick to submit that, the same case together with the case of **Juma Akida** are distinguishable to our case for the reason that, they were filed and determined under the new labour law.

That was the end of both parties' submissions.

I have keenly gone through the entire pleadings, submissions and the authorities cited by both parties to the case. I have also taken into consideration the rival issues gathered from the parties. With all of that, I find it convenient to start with analyzing the point of law raised by the respondent's counsel.

Concerning the point of law raised by the respondent, the record is vivid that, when the dispute started the respondent's name was cited as **KAHAMA MINING CORPORATION LTD**. This fact is not disputed by the appellant. Also, the appellant does not dispute the fact that, he added ahead to that former respondent's name in brackets, the following words as I quote **"(Barrick Gold Tanzania-Bulyanhulu)".**

The appellant in his submission defended that, the words in the brackets are just an extra piece of information to the respondent's former name. To him, even if it is left or removed, it does not affect the respondent's name at all. But the respondent's views is that, the extra piece of information that has been added to the respondent's name, changes totally the respondent's name. To her, as such, without leave or order of the court, all cases with such added extra piece of information were incompetent and should be nullified.

It is undisputed fact that, the fatality of changing the names of parties to the case without leave or order of the court, is to protect the

parties' rights and hinder a stranger person to be joined in a case at a later stage, as it was stated in the case of **CRDB BANK PLC [FORMERY CRDB (1996) LTD] VS. GEORGE MATHEW KILINDU, CIVIL APPEAL NO. 110 OF 2017 CAT DAR ES SALAAM** as I hereunder quote; -

> *"We wish to emphasize that the issue of names of parties to the case is central for their identification. The right of appeal is for the parties who have been involved in the original suit and not any other person"*

Further, it is undisputed fact that, prohibition lies on the complete change to the names of parties. See, **CRDB BANK PLC [FORMERY CRDB (1996) LTD] (supra)** in which it was stated; -

> *".....the discrepancy pointed out is not on the misspelling of the name of a party to the suit* ***but a complete change of the name*** *of the appellant which was done without leave or an order of the court"* ***(emphasis is mine)***

The same case went on emphasizing the point that, prohibition is on the complete change of names to parties to the case.

"Similarly, the Christina Mrimi's case (supra) is distinguishable from the circumstances of this appeal, because even in that case ***there was no a complete change of a name of the party to the case*** *but only....."* ***(emphasis is mine)***

Having known that, the issue before us is whether the appellant completely changed the respondent's name by writing her former name of **KAHAMA MINING CORPORATION LIMITED** with the additional to it, in brackets, the extra piece of information "**(Barrick Gold Tanzania-Bulyanhulu)**"

The records show that, in the Civil Application No. 172 of 2007 when the Court of Appeal granted the appellant's application for revision, the respondent's name was cited to include such added words in brackets, that is **KAHAMA MINING CORPORATION LIMITED (Barrick Gold Tanzania-Bulyanhulu).** Therefore, even the Court of Appeal proceeded granting the said application with the said citation of the respondent's name, simply because, it had in mind that, the respondent's name has not been completely changed, but only some words were added in brackets to further talk of the respondent.

To me also, the changes in the respondent's name herein, is unlike in the cited case of **Inter consult limited** (supra) where such name

was cited instead of the name **International Engineering Consultancy Services Limited**. That is a completely change of a party's name. Likewise, in the cited case of **CRDB BANK PLC** (supra) where such name was cited instead of the name **CRDB (1996) LTD.** As it looks, it is a complete change of a party's name.

In the matter at hand, the records show that, there are some applications made at the Resident Magistrate's Court, where the respondent's name was cited with inclusion of the extra piece of information. Both parties attended those cases and defended their parties as well. This convinces that, the respondent is the same even when the extra piece of information has been added, that is why she has been able to act accordingly on the court's orders without being misled by her name with the extra piece of information.

In some of the applications made at the Resident Magistrates Court, the trial court, in their rulings, *suo moto* omitted the extra piece of information. Yet the parties to the case knew whom the ruling belonged to and acted upon those rulings on further court's actions.

This fact, goes with the appellant's proposition that, the extra piece of information just says something more on the same respondent and that, whether it is left or omitted, it does not affect anything.

Further, when passing through the records of appeal, I found out that, there are number of conversations between the appellant and the respondent. The correspondents show that, sometimes the respondent has been calling herself in the names found in the extra piece of information, Barrick Gold Corporation Tanzania and Bulyanhulu Gold Mine Limited.

In the attachments accompanying the Appellant's memorandum of appeal, there some of correspondences which verify such assertion, these are, **one,** settlement agreement between the appellant and respondent herein dated 23rd July, 2007 in which the respondent also called herself as **Barrick Gold Tanzania**, **two**, the document titled "**HATI YA MAKABIDHIANO NYARAKA ZA MATIBABU**" dated 27th July, 2007, in it the respondent has stamped it with **BULYANHULU GOLD MINE LTD** rubber stamp, and her human resource one, Gervasy Chapalwa, signed for **BARRICK GOLD (T) BULYANHULU**, **three,** the appellant's demand note of 5th May, 2008, the respondent received it with **BULYANHULU GOLD MINE LTD** rubber stamp, **four,** in the document purported to be "per diem policy for company business travel" the respondent cited herself as **BARRICK GOLD CORPORATION TANZANIA** and **BULYANHULU GOLD MINE LIMITED**, **fifth**, in check No. 000379-79-151502-0000001050-11 of NMB Mwanza Branch

which was for the appellant's payment of Tshs. 1,000,000/=, the respondent cited herself as **BULYANHULU GOLD MINE LIMITED.** This is just to mention a few.

This situation calls for conclusion that, if it were for blame, the respondent was the one to be blamed for initiating such changes of names that attracted the appellant too.

Further, as by doing so the respondent was just corresponding with the appellant's act of using the extra piece of information, there is no fatality. Further, had it prejudiced the respondent, she would have raised this point of law at the earliest stage.

On account of the all afore stated, with the availability of the overriding objective principle, I find that, the citing of the respondent's name with the extra piece of information without leave or order of the court, is a very minor discrepancy

The next issue to be determined is as to why the respondent had not initiated when corresponding with the appellant that her name was changed? Is it to say that the Appellant has changed her name?

On the prevailing situation and on the dictates of Order 1 Rule 10-(2) of the CPC, I *suo motto* grant leave for that change of the respondent's name. On that note, the respondent's name may be cited in her former name of **KAHAMA MINING CORPORATION LIMITED,**

or that former name together with the added extra piece of information of **(Barrick Gold Tanzania-Bulyanhulu).** In the same line, the respondent may also be cited in those names she calls herself when corresponding with the appellant of **Barrick Gold Corporation Tanzania** and **Bulyanhulu Gold Mine Limited**. It is because all those names represent the same person, the respondent herein. This objection on point of law raised by the respondent is unmeritorious, hence overruled.

The first grounds of appeal calls for determination as to whether the decision of the Labour Conciliatory Board is enforceable on its own as if it was a decree or not. It is not in dispute that, both parties made reference to section 43 of the Security of Employment Act Cap 387 which was the law in force by the time. For easy of reference, I find it proper to reproduce it hereunder; -

> *"43. The decision of the Minister on a reference to him under section 41 or section 42 and, subject to any decision on a further reference to the Minister therefrom, the decision of a Board under section 40 shall be final and conclusive and shall be binding on the parties to the reference, and, subject as aforesaid,*

such decision may be enforced in any court of competent jurisdiction as if it were a decree"

Translating that section 43, the Appellant was of firm views that, the decision of the Labour Conciliatory Board in itself can be enforced in any court of a competent jurisdiction as if it was a decree.

To the contrary, the respondent's counsel translated that provision of the law otherwise. Her opinion was that, the decision of the Board may only be enforced as if it was a decree after it has been made a reference to the Minister. With that version, the respondent meant that, the decision of the Board cannot be enforced until a reference of it is made to the Minister. The respondent held that view while relying on one line from the quoted provision which reads "*subject to any decision on a further reference to the Minister therefrom."* For easy of reference I re-quote the provision;

> *"43. The decision of the Minister on a reference to him under section 41 or section 42 and,* ***subject to any decision on a further reference to the Minister therefrom,*** *the decision of a Board under section 40 shall be final and conclusive and shall be binding on the parties to the reference, and, subject*

as aforesaid, such decision may be enforced in any court of competent jurisdiction as if it were a decree".

The question is, does the line "*subject to any decision on a further reference to the Minister therefrom"* in section 43 of the Security of Employment Act meant to subject the decisions of the Board for further reference to the Minister before they become ripe to be enforceable as decrees?

To answer that question, we have to deal first with finding out what the line in question is saving in the position it is. To easily find out as to what that line it is saving in the position it is, I find it proper to reproduce section 42(5) of the Security of Employment Act which is found immediately before the line in question in section 43 of the Act.

"42(5) Where a re-instatement or reengagement has been ordered under this section and the employer refuses or fails to comply with the order-

(a) ***in the case of an order made by a Board against which no reference has been made to the Minister, within twenty-eight days of the order being made; or***

(b) ***in the case of an order made by the Minister on a further reference to him,*** *within fourteen days of the order being made by the Minister,*

the employer shall be liable to pay the employee compensation of an amount equal to the aggregate of-

(i).....N/A.....

(ii).....N/A.....”

(Emphasis is mine)

Upon making a simple translation of section 42(5)(b) particularly on the highlighted words, I have noted that, there are decisions of the Minister that are subjected for a further or second reference on them to the same Minister. See the case of **Ally Mbelwa Abdallah vs. Twiga Chemicals Industries, Civil Appeal No. 50 of 2012** (unreported). Commenting on it, Juma, J. (as he then was) held that; -

"My reading of the above-cited provisions, specifically section 42(5)(b) of Security of Employment Act, leaves me in no doubt that if the respondent as an employer was not satisfied with the decision of the Minister to reinstate the appellant, he should have

first resorted to a ***further reference back to the same Minister within fourteen days*** *of the order of reinstatement having been made by the Minister. It is only after the Minister has decided on that further reference from the employer and the employer still refused to reinstate the employee when the employer shall be liable to pay the employee the statutory compensation"* ***(emphasis is mine)***

With that stance, our line in question found in section 43 of the Security of Employment Act, becomes easy to translate now. The words "*subject to any decision on a further reference to the Minister therefrom"* shows nothing but refers to the decisions of the Minister after a second or further reference to that same Minister.

Thus, it is my settled view that, section 43 of the Security of Employment Act wanted to show that, all the decisions of the Minister after a reference to him has been made for the first time, and the decisions after a second or further reference to the Minister, together with the decisions of the Labour Conciliatory Board, can be enforced as if they are decrees.

To buttress that holding, see the gist found in section 42(5)(a) of the said Security of Employment Act. This section recognizes that, it is

not a must for all decisions of the Board to be referred to the Minister for them to have force of being executed. The same section puts the Employer into a liability to pay sum of moneys if that employer did not challenge the decision of the Board within 21 days.

Further, I have passed through the whole of the Minister's decision, the same shows that reference to him was made by the respondent, but only on the issue of termination of the appellant. The Minister's decision did not deal with the unfair treatment of personal injuries of the Appellant as per Exhibit P25, the Labour Commissioner's letter. No wonder even the respondent knows this position, that is why they made payment to the appellant on the same and their vice president wrote a letter acknowledging the same as per Exhibits P21 and P34 respectively.

On the second group of grounds of appeal, it calls to determine whether the consolidation done by the Resident Magistrate's Court in Misc. Civil Applications No. 18 and 19 of 2019 was lawful. The appellant stated that, the same consolidation was unlawful. He gave the reason among others being that, it was done after hearing of the applications and that it denied right to be heard on Misc. Civil Application No. 18 of 2019 as the same was not given full consideration contrary to the rules

that guide ingredients of a proper judgment. In the same spirit, the respondent agreed with this appellant's ground of appeal.

Having perused the records, I have found myself forced to concur on this issue with both parties to the case, that the consolidation done by the trial Magistrate at the RM's Court was unlawful. It was done after hearing of the two applications separately. Further, there were no reasons given for consolidation. I thus agree that, it was contrary to the dictates of the case of **Dr. Reginald Mengi** (supra).

However, what the parties differ on this issue is, the way forward after knowing that the consolidation was done unlawfully. The respondent suggests that, the whole of the proceedings and ruling thereof, should be nullified and set aside, then the matter be remitted back to the RM's Court for proper composition of separate judgments. Meanwhile, the appellant suggests that, the Misc. Civil Application No. 18 of 2019 that has been affected by the unlawful consolidation should only be remitted back for a separate proper determination and the available ruling should be termed to represent only Misc. Civil Application No. 19 of 2019.

Whether to take the respondent's or appellant's way, it depends on the look like of the contents in of the available record. I have gone through the entire ruling of the RM's Court on the issue in question. My

perusal has found that, the whole of the 11 pages' ruling of the RM's Court has discussed Misc. Civil Application No. 19 of 2019 from the beginning to the end. In it, the Misc. Civil Application No. 18 of 2019 was talked in just three lines. Right to be heard on this application was actually suppressed. As both parties have observed, I entirely agree with them that, the said consolidation has caused injustice to the Misc. Civil Application No. 18 of 2019.

The act of writing three lines purporting to represent judgment of an application for execution No. 18 of 2019 leaves a lot of questions, whether the trial Magistrate had in mind that her ruling represents two consolidated applications or only one. I understand, the cited cases of **Amadeo** (supra) and **Alfred Sanga** (supra) both are to the effect that, when they found consolidation was not proper they proceeded to nullify the whole of the decision and an order for composition of separate decisions.

I must put it clear that, both cases cited above are of the High Court, thus, they don't bind this court. Now, taking into consideration the undisputed historical background of this matter that it has been adjudicated since 2003, plus acts of the respondent to reproduce Minister's decision tending to be against the appellant's rights while not, and that once stopped, the execution and seeking of the prerogative

orders without joining the appellant which was wrong followed thereafter, also the non-continuing with the prerogative orders application after court of appeal has ordered the appellant to be joined therein; with all these I hesitate to get into the trap of being used to delay the appellant's rights, if any. For that stance, I will not nullify the whole of the RM's Court ruling, rather to order that, the whole of the RM's Court's decision represents only Misc. Civil Application No. 19 of 2019.

The order of the RM's Court that, Misc. Civil Application No. 18 of 2019 cannot be granted as it does not emanate from the Minister. It is hereby nullified as I have endeavored to demonstrate in the first and this second grounds of appeal. On that note, a separate ruling is hereby ordered to be composed on Misc. Civil Application No. 18 of 2019.

Concerning ground of appeal number 14, whether the trial Magistrate erred when she held that the amount representing the appellant's right in the order of the Minister was calculated by the Conciliation Board of Kahama. In fact, both of the parties to the case are not in dispute to this ground of appeal.

What the parties differ is only on the suggests of the respondent's Counsel that, there is no law giving power to the Labour Officer to present calculations to the executing court. To him, the presented

calculations have no legal force hence they should have not been acted upon. The executing court should have made calculations of its own. On his part, the appellant's Counsel pressed that, the Labour Officer has mandate to make report and calculations in questions.

This issue should not detain us much. In the cited case of **Ali Abdallah Amour and Abdalla Ali Abdalla** (supra), the Court of Appeal held those calculations of the Labour Officer to be of sufficient reliable, thus can be used by the executing court. With the availability of this holding in the cited case, I find that the Labour Officers report and calculations have legal force and capable of being used by the executing court as it did in the Misc. Civil Application No. 19 of 2019.

Concerning the eleventh ground of appeal, the appellant complains that the trial Magistrate omitted to calculate and add the amount of subsistence allowance for the period from the deemed date of repatriation which is 24th November, 2018 to the actual date of repatriation, 3rd December, 2021 in Misc. Civil Application No. 19 of 2019. The appellant claims this, in accordance with the Minister's decree dated 25th November, 2006.

As we have seen above while discussing the other grounds of appeal, the Labour Officer made a report and calculations on the quantum of money that the appellant deserves to be paid. In it, the

Labour Officer calculated up to the deemed date of repatriation only and left the remaining portion because the actual date of repatriation was not yet known.

The records show, that, this fact is well known by the trial Magistrate. See at pages 1 - 2 of the typed judgment of the trial court. Further, as the trial Magistrate when executing Misc. Civil Application No. 19 of 2019 relied on the Labour Officer's report, then she ought to have complied to the same in its entirety, and not to choose which portion to execute and leave the other portion unattended. Failure to make execution on the portion of a decree, was actually wrong as the employer is required to pay even the delayed days of repatriation as per **Zaid Sossy Mzoba** (supra).

To make it easy, this court hereby orders that, as the actual date of repatriation is known, then the Labour Officer should accomplish his work by making a report and calculations on the appellant's entitlements on the remaining portion of the decree, which is from the deemed date of repatriation to the actual date of repatriation. The appellant then should make a separate execution on that part which has not been executed after the Labour Officer has accomplished his report.

However, such calculations by the Labour Officer should base on the prevailing law at the material time (old labour laws), simply because,

the dispute among the parties arose by the time such laws were in operation.

All said and done, I find the appeal meritorious to that extent as discussed. Consequently, this court makes the following orders: -

a) The appeal is allowed to the discussed extent.

b) The citing of the respondent's name with the added extra piece of information, Barrick Gold Tanzania and Bulyanhulu Gold Mine Ltd. is not fatal and this court *suo motto* grants leave of that change of respondent's name.

c) The purported consolidation of the two appellant's applications for execution at the RM's Court is nullified.

d) The resultant ruling which is complained in this appeal is taken to be valid ruling and represents only Misc. Civil Application No. 19 of 2019 to the tune of Tshs. 3,120,091,692/=.

e) The complained ruling and order of the RM's Court made therein refusing execution of the Decree of the Labour Conciliatory Board of Kahama District dated 13th October, 2003 in Misc. Civil Application No. 18 of 2019 is hereby quashed and set aside.

f) The execution for Misc. Civil Application No. 18 of 2019 should expeditiously proceed upon the composition of its separately

judgment by another Magistrate with competent jurisdiction using the parties' submissions which were made therein.

g) The Labour Officer to make a report and calculations of the appellant's entitlement from the deemed date of repatriation to the actual date of repatriation thereby giving chance for the appellant to apply for execution on such portion of entitlement.

It is so ordered.

S.M. KULITA
JUDGE
24/11/2022

DATED at **SHINYANGA** this 24th day of November, 2022.

S.M. KULITA
JUDGE
24/11/2022