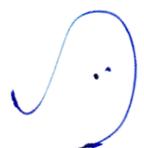


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**THE SUB - REGISTRY OF MWANZA****AT MWANZA****CIVIL REVIEW NO. 02 OF 2023****NKWABI SHING'OMA LUME-----APPELLANT****VERSUS****SECRETARY GENERAL, CHAMA****CHA MAPINDUZI-----RESPONDENT****RULING***May 2nd & 29th, 2023***Morris, J**

This court is being moved by the application to review its decision in Civil Appeal No. 59 of 2022 dated February 22nd, 2023. On the stated date, the appellant (now applicant) through his advocate prayed to withdraw his appeal for the reason that it had cropped from execution proceedings which are only challengeable by way of revision not appeal.

In his memorandum of review, the applicant alleges to had discovered a new and important matter which he and his advocate had no knowledge of when the foregoing withdrawal was requested. That is, with all necessary diligence, they were not aware of the principle that a



decision of Resident Magistrates' Court in execution proceedings is, in certain circumstances, appealable. Hence, he prays for the withdrawn appeal to be readmitted and pursued to finality.

I will start by giving a brief background of this matter. The applicant was the respondent's employee. His employment was later terminated. He successfully challenged the termination before the Conciliation Board of Nyamagana District. The respondent was ordered to reinstate and pay him salaries from termination to the reinstatement date. The aggrieved respondent appealed to the minister responsible for labour matters. He failed. Still strong-minded, the respondent further challenged the said decision by way of judicial review before this court. Once again, he did not make it a success.

Consequently, the applicant applied for execution under section 28(1) (c) of ***the Security of Employment Act***, Cap 387 R.E 2002 (hereinafter, 'the Act'). The executing court ordered his immediate reinstatement and payment of Tshs. 11,567,647/50 being arrears of salary from termination to March 31st, 2009. The order was not honoured. Later, the same court ordered that the respondent was at liberty to reinstate or pay him compensation pursuant to section 42 (5) (d) (ii) of **the Act** in lieu thereof.



The applicant appealed to both this Court and subsequently to the Court of Appeal against the foregoing decision. The Court of Appeal which nullified the order of the executing court for want of jurisdiction. Consequently, execution proceedings were ordered to proceed. When the matter was remitted for execution, the applicant amended his application. This time, he applied for reinstatement and payment of Tshs. 84,027.943.23/- as wages from December 2003 to November 2020. The Resident Magistrates' Court, on May 25th, 2021; granted the subject application for execution as prayed. However, once again, the respondent did not comply with the order.

Accordingly, on July 15th, 2021 the same court issued a certificate to the respondent for payment of Tshs. 84,027.943.23/- under section 16 of *the Government Proceedings Act*, Cap. 5 R.E. 2002. Further, on August 19th, 2021 the applicant applied for *garnishee nisi* against the respondent's CRDB Bank Account No. 01J1005069303. Upon hearing of the said application, the executing court vacated its previous ruling of May 25th, 2021 on the ground that, there was no decision which awarded the applicant the amount of Tshs. 84,027.943.23/-. Further, it struck out the application for execution altogether. This decision aggrieved the applicant culminating into the filing of Civil Appeal No. 59 of 2022 before

this Court. The subject appeal gave rise to this review (after having allegedly been withdrawn wrongly).

The present application was argued through written submissions. The applicant was represented by advocate Hamza Abdeleman Twaha while the respondent enjoyed services of advocate Rhoda Godbless Maruma. For the applicant, it was submitted that the ruling of the trial court emanated from execution proceedings under section 38 (1) of the **Civil Procedure Code**, Cap. 33. R.E. 2019 (hereinafter, the CPC). It was argued that the said provision is *parimateria* to section 47 of **the Indian Code of Civil Procedure**. To the applicant, the executed order from the Conciliation Board is a decree appealable under section 70 (1) of **the CPC**.

Further reference was made to Chitale and Rao on **the Indian Code of Civil Procedure** (2nd edition), Vol 1, and the cases of **Paul Solomon Mwaipyana v NBC Holding Corporation** [2004] TLR 288; **Tanganyika Motors Limited v Transcontinental Forwarders Ltd**, Civil Appeal No. 44 of 1995; **Nkwabi Shing'oma Lume v Secretary General, Chama Cha Mapinduzi**, Civil Appeal No. 234 of 2017; **Tanzania Breweries Ltd v Dotto Chagula**, Misc. Civil Application No 25 of 1999; **Agricultural Inputs Trust Fund v Stephano Simon Mwampashi**, Civil Appel No. 09 of 2018; and **Petrobert Ishengoma v**

Kahama Mining Corporation Limited, Civil Appeal No. 25 of 2021 (all unreported).

On the part of the respondent, with respect, nothing was submitted in respect of an application for review. Instead, her submissions covered historical background of the matter and the appropriateness of the Resident Magistrates Court's decision. This respondent's misdirection was considered by the applicant, in the rejoinder submissions, as admission by the former to the application for review.

I have keenly considered all the submissions. The question to be answered is whether or not the decision of Resident Magistrates Court in execution proceedings herein is appealable. According to the applicant, it is. To him, the decision made under section 38 of ***the CPC*** is a decree in terms of section 3 of the same law. Hence, the said decree is appealable under section 70 (1) of the same ***Act***. Reading the impugned decision, the Resident Magistrates Court ordered that the applicant is not entitled to Tshs. 84,027.943.23/- because neither the order of Conciliation Board of Nyamagana District nor that of the minister ordered for payment of such amount.

In my view such decision not only finally determined the right of the parties (the decree holder); therefore, sufficing to be a decree but also it



purported to modify the decree being executed. In other words, the decision given by the executing court in interpreting the decree issued by the Conciliation Board, is a completely new order/decre. The definition provided by section 3 of *the CPC*, is to the effect that a decision in determination of any question within its section 38 amounts to a decree. This was also held in *Peter Ng'omango v Attorney General*; and *Petrobert Ishengoma vs Kahama Mining Corporation Ltd (supra)*.

Nevertheless, I am inclined to determine it an auxiliary question of whether or not, the present matter, involving the decision of the subordinate court arising from interpretation of decree in its execution proceedings is appealable. I have taken such task because, I think, this case bears its own peculiarity.

As pointed out above, the Resident Magistrate Court previously allowed the applicant to be paid Tshs. 84,027,943.23/-. Subsequently, it ruled denying him the awarded amount. It actually struck out the whole application for execution. By doing so, I observe that, the Resident Magistrates Court modified or corrected or vacated its previous order. This, was a new decision altogether. Further, parties were not heard on such matter. The right of being heard is fundamentally inherent to rules

of natural justice. The subsequent order, is therefore, pursuant to section 74 (1) (c) of *the CPC* appealable.

For the reasons and analysis given above, I grant this application under Order XLII (1) (b) of *the CPC*. I, subsequently, hereby vacate this Court's order allowing withdrawal of Civil Appeal No. 59 of 2022. The same is readmitted for subsequent hearing. Each party will shoulder own costs. It is so ordered.



C.K.K. Morris
Judge
May 29th, 2023

Ruling is delivered this 29th day of May 2023 in the presence of Mr. Nkwabi S. Lume, the applicant and Mr. Anthony Kanyama, Advocate for the Respondent.

C.K.K. Morris
Judge
May 29th, 2023