

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(LABOUR DIVISION)**

**AT MBEYA**

**MISC. LABOUR APPLICATION NO. 8 OF 2022**

(Arising from the Labour Revision No. 3 of 2021)

**ZHANG ZAIGUO.....APPLICANT**

**VERSUS**

**EPOCH MINING (T) LIMITED.....1<sup>ST</sup> RESPONDENT**

**FENG YINGDANG.....2<sup>ND</sup> RESPONDENT**

**RULING**

Date of last order: 09.03/2023

Date of Ruling: 05/05/2023

**NDUNGURU, J.**

In this application, the applicant one, Zhang Zaiguo, is seeking number of prayers through chamber summons and notice of application and I find it necessary that the prayers should be quoted in full as hereunder;

(a) The Honourable Court be pleased to lift the corporate veil and order the 2<sup>nd</sup> respondent FING YANGDAN the managing director of the 1<sup>st</sup> Judgment Debtor/Respondent to personally be liable for satisfaction of decretal sum of USD \$ 600,000/=.

(b) Having granted prayer (a) above this Honourable Court be pleased to order for arrest and detention of the 2<sup>nd</sup> Respondent FING YANGDAN the managing director of the 1<sup>st</sup> Respondent/Judgment Debtor as a civil prisoner in satisfaction of decretal sum of USD \$ 600,000/=.

(c) In the alternative this Honourable Court be pleased to order the 2<sup>nd</sup> Respondent to pay from her own (personal) resources or resources from other companies that she owns or manages the sum decreed by this Court in Labour Revision No. 3 of 2021 in favour of the decree holder which is USD \$ 600,000/=.

(d) Costs of this application be provided for.

(e) Any other orders or reliefs as this Honourable Court shall deem fit to grant.

The application is predicated on the provisions of Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and Rule 55 (1) and (2) of the Labour Court Rules, 2007 G.N. No. 106 of 2007 and section 42 (c), 44 (1), and Order XXI Rule 28, 35 (1), (2) of the Civil Procedure Code (Cap 33 R.E. 2019).

The application is supported by an affidavit duly sworn by one, January Raphael Kambamwene, the applicant's counsel. Having being served with the application, the respondents filed counter affidavit to oppose the applicant's application and also raised the points of preliminary objection through the notice of opposition to the effect that;

(i) That, this application is res subjudice as the same application is pending before Hon. Dr. Mongella Judge which is Application for Execution No. 26 of 2021 where the relief sought are to lift corporate veil.

(ii) In alternatively this application is res judicata vide Application for Execution No. 74 of 2019 where the applicant filed application to lift corporate veil against the respondents and the same was dismissed and the applicant did not appeal.

(iii) That, this Honourable Court has no jurisdiction to determine this application as there is a pending appeal to the Court of Appeal of Tanzania by the 1<sup>st</sup> respondent against the applicant to challenge the judgment and decree of the High Court.

(iv) That, the application is for execution on USD 600 which is not contained in the decree and the attached decree is defective.

(v) That, the notice of application, notice of representation and affidavit of this application does not indicate the drawer.

(vi) That, the affidavit supporting the application is incompetent as it contravenes Rule 24 (3) (a), (c), (d) of the Labour Court Rules, 2007 GN No. 106 of 2007.

(vii) That, the notice of application is incompetent for contravening Rule 24 (2) (f) of the Labour Court Rules, 2007 GN No. 106 of 2007.

(viii) That, the affidavit supporting the application is defective for containing third party information hear say information.

In accordance with a well-established practice, once a preliminary point of objection is raised, the Court is duty bound to entertain it first and make a decision thereon before proceeding to hear the substantive matter. That is the practice of the Court founded upon prudence which I could not overlook.

When the application was placed before me for hearing of the preliminary objections, the applicant enjoyed the services of Mr. January Raphael Kambamwene, learned advocate whereas the respondents enjoyed the services of Mr. Baraka Mbwilo, learned advocate. Upon the parties request the Court allowed the preliminary points of objection be disposed orally.

In arguing the first limb of objection Mr. Mbwilo contended that, this application is res subjudice as there is another application for execution pending before Honourable Mongella, J. He added that, when the applicant was filed this application, the same applicant had already filed another application which is Misc. Application No. 26 of

2021 before Honourable Mongella, J. He also stated that, the central issue of the two applications are executing the award by arresting the Director or Feng Yingdang.

He continued to submit that, the Misc. Application No. 26 of 2021 was dismissed by Honourable Mongella, J. Again, Mr. Mbwilo contended that, it was not proper for the applicant to file the same application which was pending before another judge.

On the second limb of objection, Mr. Mbwilo submitted that, the application was already decided that is Labour Execution No. 74 of 2019, which was decided by Honourable Mtarania, DR with the prayer of arresting the Director, the same issue was decided in Misc. Labour Application No. 26 of 2021, the reliefs sought being the same, and the parties being the same cannot be reinstituted. He also stated that, if the applicant was dissatisfied the remedy was to appeal.

Also, it was submitted by the counsel for the respondent that, the filing of this application is the abuse of Court process and is a forum shopping. He cited the case of **John Barnaba Machera vs North Mara Gold Mine Limited**, Civil Appeal No. 204 of 2019, CAT



and **Letshego Tanzania t/a Faidika Ltd vs Elisha Mboka Mwamengo**, Misc. Labour Application No. 40 of 2021, HC (Labour Division) at Dar es Salaam (both unreported) to cement his submission. Again, he stated that, since the application was dismissed before Mongella, J, the applicant cannot refile the same application.

As regards point number three of objection, Mr. Mbwilo prayed to consolidate with point number four of objection and submitted them together. He went on to submit that, the application for execution for USD 600 and the decree which the applicant intends to execute is not contained in the decree, thus the applicant has to ascertain on how he arrived at the figure. He added that, the Court will have to be dealing with the matter which is before the Court of Appeal of Tanzania. He further submitted that, the issue before the Court of Appeal of Tanzania is certainty of the figure in the decree of the High Court hence, this Court has no jurisdiction to entertain this application.

Coming to the 6<sup>th</sup> and 7<sup>th</sup> points of objection, the Court in this application is moved by notice of application, the same notice is in contravention with Rule 24 (3) (a), (c), (d) and 24 (2) (f) of the Labour Court Rules, 2007 GN No. 106 of 2007. He went on to submit that, the notice does not contain list of relevant documents. He also argued that, an affidavit does not state the names, description, and address of the parties and there is no legal issue that arise from the facts and relief sought.

He further submitted that, the notice of application on that basis is incompetent because Rule 24 (3) contains a mandatory expression by using the word "*SHALL*". He cited section 53 (1) of the Interpretation of Law Act (Cap 1 R.E. 2019) to the effect that when the word "*shall*" is used means it is mandatory.

In relation to the 5<sup>th</sup> limb of objection, Mr. Mbwilo submitted that, the notice of application and affidavit do not indicate the indicate the drawer. He argued that, it is shown to be drawn by Everlasting Legal Aid Foundation while it does not have hands to prepare pleadings and endorse. He cited section 43 (1) and 44 (1) of



the Advocates Act, the case of **TanESCO Co Ltd vs Benjamini Gasome John** (2015) LCCD 55, **William A. Salehe vs TanESCO Ltd** (2015) LCCD 95 and **John Mahinini vs Pangea Mineral Ltd** (2015) LCCD 104 to bolster his argument.

On the 8<sup>th</sup> limb of objection, Mr. Mbwilo contended that, when an affidavit mentions another person that person has to swear an affidavit to. He also argued that, in an affidavit which support applicant's application, the deponent at para 10 and 13 state that the information is received from the applicant but the applicant has not filed affidavit. Further, it was submitted by the counsel for the respondent that, the affidavit is in conformity with the rules of affidavit contain in Order IX Rule 1 of the Civil Procedure Code (Cap 33 R.E. 2019). To support his submission, Mr. Mbwilo referred this Court to the case of **Salima Vuai Fom vs Registrar Cooperative Societies** (1995) TLR 75.

In conclusion, he prayed for the Court that, the application be struck out with costs as the application is vexatious and frivolous, because the application in the same issue was filed in Dar es Salaam

Execution No. 74 of 2019, which was dismissed, but again the application shifted to Mbeya Registry and filed Misc. Labour Application No. 26 of 2021 which was dismissed and then this application. He added that, that is why he say it a vexatious and frivolous. He cited Rule 51 (2) of the Labour Court Rules, GN No. 106 of 2007.

In replying, Mr. Kambamwene argued that, the standard in Mukisa case is that the preliminary objection must be on point of law, must arise from the pleadings, does not need evidence and must be dispose the matter and should no leave the discretion to the Court. He went on to submit that, those being the standards the 1<sup>st</sup> point of objection does not dispose the case, the end result of res subjudice is to stay proceedings not to dispose. He further contended that, not found in the pleadings-affidavit and affidavit in reply.

As to the 2<sup>nd</sup> preliminary objection, Mr. Kambamwene argued that, counsel for the respondent has gone at length to state application on execution by arrest and detention, he has not submitted on the application for lifting the veil, it is only in this Court

and in this application. He also contended that, this application on lifting veil has not been adjudicated earlier.

In relation to the 3<sup>rd</sup> limb of objection, counsel for the applicant stated that, the appeal is not a bar the Court can proceed.

As regards 4<sup>th</sup> limb of objection, Mr. Kambamwene submitted that, the failure to give a correct figure does not oust the discretion of Court, the Court has jurisdiction to get the correct figure, thus is not a preliminary objection.

On 5<sup>th</sup> limb of objection, counsel for the applicant argued that, even if the drawer is not indicated that does not oust jurisdiction of this Court, thus is not preliminary objection.

As regards 6<sup>th</sup> and 7<sup>th</sup> limbs of objection, Mr. Kambamwene contended that, there are reliefs under labour laws and those out of labour laws. But when the reliefs seeking all out of labour laws like this of lifting veil the requirements of rule 24 all not necessary.

Turning to the 8<sup>th</sup> limb of objection, Mr. Kambamwene argued that, even if it was true the Court has jurisdiction to interfere it by

removing the offending paras and proceed with the others. He also argued that, there is objection to restrain the Court to proceed with hearing.

As regards costs, counsel for the applicant submitted that, the application is proper before this Court, and it seeks lifting the corporate veil the matter which has never been adjudicated before, thus the question of costs cannot arise here.

In his rejoinder, in the first place, Mr. Mbwilo submitted that, the points raised are pure points of law that is why he has supported with authorities. He added that, those points touch jurisdiction of the Court on the matter.

On the 1<sup>st</sup> point of objection, counsel for the respondent submitted that, yet the remedy is to stay but the same has already been determined, thus nothing to stay. He also stated that, all the applications mentioned are aimed of lifting the corporate veil, arresting the director must go with lifting the corporate veil. He went on to submit that, the issue is already decided.

He continued that, he agrees that the appeal does not bar execution, but that is done where the amount is certain. He added that, the appeal before Court of Appeal of Tanzania is on the certainty of the amount and the jurisdiction of the Court is on certain issue. He further submitted that, the Court cannot amend the amount at this stage where there is preliminary objection. Also, it was submitted by the counsel for the respondent that, the failure to indicate the drawer makes the application incompetent and the remedy is to strike out the application.

On the 8<sup>th</sup> limb of objection, Mr. Mbwilo argued that, the application is preferred by notice of application, failure to state the address of the parties is fatal. Again, Mr. Mbwilo contended that, the affidavit is incompetent, if the offensive paras are removed, then affidavit remains with paras which support the application to stand.

Regarding the costs, he insists that, being a vexatious and frivolous application the costs are to be provided as the applications mentioned are the same. Finally, he prayed for the Court that, this application be struck out with costs.



Having carefully gone through the long submission from the counsel for both sides and the Court record, I wish to point out that, the issue calling for determination is whether the points of the preliminary objection raised by the counsel for the respondent is hold water or not.

Starting with the first point of objection, in the first place, I wish to state that, the doctrine of res subjudice is predicated on the legal policy that is intended to avoid the possibility of two contradicting decision from the same Court or different Court on the same issue. Further, the doctrine of *res subjudice* is codified under section 8 of the Civil Procedure Code (Cap 33 R.E. 2019). For ease of reference, it is apt that the same be quoted, as hereunder;

*"No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where suit is*



*pending in the same or any other Court in Tanzania  
having jurisdiction to grant the relief claimed”.*

From the wording of the above cited provision of the law, it is well settled law and leading authorities are at one, that in order for the doctrine of *res subjudice* to successfully operate, the four ingredients must be proved namely; (i) the matter in issue in the second suit is also directly and substantially in issue in the first suit, (ii) the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title, (iii) the Court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit, (iv) the previously instituted suit is pending.

On that regards, my determination will be guided by the provision of the law cited above. In his submission, the counsel for the respondent clearly admitted that, the first suit or application which is Misc. Application No. 26 of 2021 before Honourable Mongella, J, is not pending before Court. In other words, the said Misc. Labour Application No. 26 of 2021 is already decided by

Honourable Mongella, J. Therefore, it is my considered view that, counsel for the respondent failed to establish all four ingredients of the doctrine of *res subjudice* hence, this point of objection is overruled.

In relation to the second point of objection, at the outset, it is very crucial to state that, the doctrine of *res judicata* pleaded by the respondent is entrenched under section 9 of the Civil Procedure Code (Cap 33 R.E. 2019). For ease of reference I reproduce section 9 which provides that:

*"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court"*

In the line of the wording of section 9 cited above, I easily noted the above mentioned provision "bars" the Court to try a "suit" or "an issue" involving the same parties, which matter are directly and substantially the same like the ones which were tried in the former suit.

Also, the cited provision sets pre-conditions that, for the "suit" or "issue" to be barred from being twice "the suit" or issue" must have "been heard" and "finally decided in the previous suit by a Court of competent jurisdiction. It seems to me for better determination of whether or not the present application is *res judicata* one needs to examine parties and issues involved, in two applications and decided if are one and same, and if were finally decided.

Also, the doctrine of *res judicata* was defined in the Black's Law Dictionary, 8<sup>th</sup> Edition at page 1337 & 1338, to mean among other things: -

*"First, an issue that has been definitively settled by judicial decision. Second, an affirmative defense barring the same parties from litigating a second lawsuit on the*

*same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit”.*

Further, this doctrine also is well emphasized in the case of **Registered Trustees of Chama cha Mapinduzi vs Mohamed Ibrahim Versi and Sons and another**, Civil Appeal No. 16 of 2008, CAT (unreported) in which the Court stated that;

*"The object and public policy behind the doctrine of res judicata is to ensure finality in litigation. It is also meant to protect an individual from multiplicity of litigation”.*

Again, see the case of **Peniel Lotta vs Gabriel Tanaki & another** (2003) TLR 312 and **Umoja Garage vs National Bank of Commerce Holding Corporation**, Civil Appeal No. 3 of 2001, CAT (unreported)

Upon perusing the two applications, I find that, in Application for Execution No. 74 of 2019 the decree holder was Zhang Zaiguo whereas the decree debtor was Epoch Mining (T) Ltd. And in the present application the applicant is Zhang Zaiguo whereas the

respondents are Epoch Mining (T) Ltd and Feng Yingdang. Therefore, meaning that the parties in the two applications are the same though Feng Yingdang was not a party in the previously application, but still the applicant herein litigating under same title.

Regarding to the subject matter or issues in the two application, I find that in the previous application the applicant prayed for an order for an order to arrest and detained the director of the company as civil prison. This fact is evidenced at page 7 of the ruling of the Court in Application for Execution No. 74 of 2019. And in the present application the applicant is praying for an order for lifting of corporate veil and an order to arrest and detain the second respondent as managing director of the first respondent.

In relation to the issues or subject matters if were finally determined, upon close examination of the subject matters of the first application, I find out that, the subject matter was not finally determined. I hold so because the Court in Application for Execution No. 74 of 2019 rejected to issue an order for arrest and detained the director of the company as civil prison on the ground that there was



no formal application or oral application to prove that there are exceptional circumstances in execution of the award so as to lift the veil. Therefore, it is my considered view that, the present application is not *res judicata*, hence the same it is hereby overruled.

On the 3<sup>rd</sup> and 4<sup>th</sup> points of objection, my determination is that, the question of the decree having different figure from the figure in which the applicant intends to execute in this application for execution, it is much attract evidence to prove this allegation hence, it is not purely point of law. Also, I am in line with Mr. Kambamwene that, appeal does not operate as a bar to the execution. As far as there is no application for stay of the execution then there is nothing which bar the present application. This position is well provided under Order XXXIX Rule 5 (1) of the Civil Procedure Code (Cap 33 R.E. 2019) and Rule 11 (2):(b) of the Tanzania Court of Appeal Rules, 2009. Therefore, it is my considered view that, those points of object have no merit and it is hereby overruled.

Regarding to 5<sup>th</sup> limb of objection, in fact counsel for applicant do not dispute that the applicant's application does not indicate the



drawer rather he argued that the same does not oust jurisdiction of the Court. To be in good position, I see it is crucial to reproduce section 44 (1) of the Advocates Act (Cap 341 R.E. 2019). Section 44 (1) provides that;

*"(1) Every person who draws or prepares any instrument in contravention of section 43 shall endorse or cause to be endorsed or cause to be endorsed thereon his name and address; and any such person omitting so to do or falsely endorsing or causing to be endorsed any of the said requirements shall be liable on conviction to a fine not exceeding two hundred shillings."*

Whereas section 43 referred above provides thus:

*"43. (1) any unqualified person who, unless he proves that the act was not done for, or expectation of, any fee, gain or reward, either directly or indirectly, draws or prepares any instrument-*

*(a) relating to movable or immovable property or any legal proceeding;*

(b) N/A

(c) N/A

*Shall be liable on conviction to a fine not exceeding one million shillings or twelve months' imprisonment or both and shall be incapable of maintaining any action for any costs in respect of the drawing or preparation of such instrument or any matter connected therewith."*

I have dispassionately read the provisions of section 44 (1) in the light of the arguments of the learned counsel for both parties. On that regards, it is my understanding that, it to be referring to unqualified persons drawing documents for gain, fee or reward as mentioned under section 43 (1) thereof. My stand is supported by the decision of the Court of Appeal of Tanzania in the case of **George Humba vs James M. Kasuka**, Civil Application No. 1 of 2005 (unreported) where the Court inter alia stated that;

*"Assuming that section 44 (1) in the Advocates Ordinance, Cap 341 of the Revised Laws is the correct*

*version and it refers to instruments as mentioned in s. 43, we would then say that the section deals with unqualified person who prepare those documents for gain, fee or reward. Surely, Mr. Kayaga could not be an unqualified person for purposes of preparing the Notice of Motion and the accompanying affidavit for filing in Court."*

The similar position is well elaborated in the case of **Beatrice Mbilinyi vs Ahmed Mabkhut Shabiby**, Civil Application No. 475/01/2020, CAT at Dar es Salam (unreported) where the Court of Appeal of Tanzania observed that;

*".....the provisions of section 44 (1) in the light of the arguments of the learned advocates for both parties. Having so done, we have understood it to be referring to unqualified persons drawing documents for gain, fee or reward as mentioned under section 43 (1) thereof."*

From the wording of the authorities cited above, the present application which was drawn by a foundation by the name Everlasting Legal Aid Foundation cannot be said that it was drawn by

an unqualified person. Further, Mr. Mbwilo did not say anything if the documents were drawn by an unqualified person as envisaged under section 43 and 44 of the Advocates Act. Therefore, this limb of objection is overruled.

As to the 6<sup>th</sup> and 7<sup>th</sup> points of objection, for easy reference I see it is very important to reproduce the Rule 24 (2) and (3) of the Labour Court Rules, G.N No. 106 of 2007 which provides that;

*"(2) The notice of application shall substantially comply with Form No. 4 in the Schedule to these Rules, signed by the party bringing the application and filed and shall contain the following information-*

- (a) the title of the matter;*
- (b) the case number assigned to the matter by the Registrar;*
- (c) the relief sought;*
- (d) an address of which that party will accept notices and service of all documents in the proceedings;*

- (e) a notice advising the other party that if he intends to oppose the matter, that party shall deliver a counter affidavit within fifteen days after the application has been served, failure of which the matter may proceed ex-parte; and*
- (f) a list and attachment of the documents that are material and relevant to the application.*

*"(3) The application shall be supported by an affidavit, which shall clearly and concisely set out-*

- (a) the names, description and addresses of the parties;*
- (b) a statement of the material facts in a chronological order, on which the application is based;*
- (c) a statement of the legal issue that arise from the material facts; and*
- (d) the relief sought.*

Upon perusal of the applicant's application filed before this Court, I found out that the notice of application does not contain the list of relevant document. Also, the affidavit in support of the application does not contain names, description and address of the parties. Further, the affidavit in support of the application also does not contain the relief sought and the legal issue from the facts. The law does not demand only the Notice of the Application to contain the prayer even the affidavit in support of the application.

Furthermore, I am aware with the principle of the overriding objective but the said principle of overriding objective cannot be invoked blindly in disregard of the rules of procedure couched in mandatory term. This position is well stipulated in the case of **Sgs Societe General De Surveillance SA & another Versus VIP Engineering & Marketing Limited and another**, Civil Appeal No. 124 of 2017, CAT (unreported) where the Court stated that:

*"We also find that the overriding objective principle does not and cannot apply in the circumstances of this case since its introduction in the Written Laws (Miscellaneous*



*Amendments) (No.3) Act, 2017 (Act No. 8 of 2017) was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."*

From the discussion and observation above, I find out this limb of objection has merit and the same is sustained. Therefore, I find needless to belaboring to the rest of the point of objection in the present application since this limb of objection is capable to dispose of the present application.

In the upshot, I hereby find out that the present application is incompetent before this Court for the reason that not complied with requirements of the Rule 24 (2) (f) and (3) (a), (c), and (d) of the Labour Court Rules, G.N No. 106 of 2007. No order as to costs on the reason that, the present application is not vexatious and frivolous.

It is so ordered.



  
**D.B. NDUNGURU**  
**JUDGE**

**05/05/2023**