

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

MISC. LABOUR APPLICATION No. 124 of 2023

(C/f Labour Application No. CMA/ARS/ARS/40-1/21/16/22)

LODHIA STEEL INDUSTRIES APPLICANT

VERSUS

RAMADHANI HAJI MWENDA & THREE OTHERS RESPONDENT

RULING

3rd & 25th August, 2023

TIGANGA, J.

This is an application for stay of execution filed by the applicant against the respondents. The award whose execution is sought to be stayed is the one issued by the Commission for Mediation and Arbitration of Arusha (CMA) in Labour Dispute No. CMA/ARS/404/21/16/22 dated 28th October 2022 (Lyimo, J.C., Arbitrator).

The application is by the chamber summons filed under section 91 (3) of the **Employment and Labour Relations Act** No. 6 of 2004 R.E. 2019 (the ELRA) and Rules 24 (1), (2) (a) (b) (c) (d) (f), (3) (a) (b) (c) (d) and 24

(11) of the **Labour Court Rules, 2007**, GN. 106 of 2007 (Labour Court Rules).

The application is also supported by the affidavit sworn by Mr. Wilson Ezekiel, the learned Advocate for the applicant and the Notice of Application which also contained the notice of representation that appointed Mr. Wilbard John Masawe and Wilson Ezekiel, learned advocates to represent the applicant. From the affidavit and the record, the following facts can be deciphered. The respondents were employed by the applicant before their employment was terminated. Following that termination, they filed labour dispute No. CMA/ARS/404/21/16/22 in which they were jointly and together claiming that they were unfairly terminated by the applicant.

After filing necessary pleadings before the CMA, the matter was scheduled for hearing on which date the applicant herein defaulted appearance. Therefore, the matter proceeded *ex-parte* against her. According to the affidavit, the applicant deponed that, the matter proceeded without her knowledge as she only became aware when she was served with a copy of the Award.

The affidavit goes further that, immediately thereafter, the applicant lodged Application No. ARS/MISC.APP/24/22 praying to set aside the *ex-parte* Award on the ground that, she was not properly served with the summons to appear before the CMA and defend the matter against her. However, such an application was dismissed on 05th December 2022 for the applicant's non-appearance.

He said on the day of dismissal, the matter was scheduled for hearing at 10:00hrs and he arrived at the CMA on time but he was notified that the Arbitrator would arrive late. The applicant then decided to appear for another matter scheduled for mention on the same day at the District Land and Housing Tribunal of Arusha, only to return to the CMA and find her application already dismissed for want of prosecution. The applicant had therefore filed another application CMA/ARS/MISC.APP/26/22 praying for restoration of the dismissed application by the CMA which is still pending to date.

He deposed further that, despite the said application, the respondents have proceeded with the execution of the Award hence, the current application is to ask for an order to stay the execution of the award pending

the hearing and determination of the application for restoration before the CMA.

Opposing the application, the respondents filed a joint counter affidavit through their legal representative Mr. Herode Bilyamtwe who deponed that, on the day the matter was dismissed, the applicant's Advocate was at the CMA but decided to attend another case. He also stated that this application be dismissed with cost as there is no possibility of success in the application for restoration before the CMA.

During the hearing of the application which was by way of written submissions, the applicant was presented by Mr. Willson Ezekiel, the applicant's Advocate, whereas the respondents appeared in person and unrepresented.

Supporting the application, Mr. Ezekiel prayed that, his affidavit be adopted to form part of the submission and averred that, justice required this application to be granted because its denial would render the pending application before the CMA nugatory. He further submitted that the application for Execution No. 70 of 2023 filed in this Court before the Deputy Registrar originates from Labour Dispute No. CMA/ARS/404/21/16/22 which

the applicant has already challenged its Award to be executed through all available legal remedies and procedures, hence, proceeding with the execution will prejudice her. To cement his argument, he cited the decision of this Court between **HLH Mulbadaw Ltd vs. John Joseph Sanka**, Misc. Labour Application No. 17 of 2022, where it was observed that when there is a pending application at the CMA as the one at hand, logic and common sense demand that, execution should be stayed pending the application for setting aside the *ex-parte* Award.

He further submitted that another condition for an application of this nature is the fact that the applicant will suffer irreparable loss if the same is not granted and the fact that, the application has been filed without unreasonable delay increases the assurance that the applicant did not sleep on her right. He prayed for the application to be granted pending the final determination of the application filed at the CMA.

In reply, the respondents submitted that the applicant's application pending at the CMA is not generated from their application for execution No. 65 of 2022 which is pending before the Deputy Registrar, to the contrary the applicant prayed for a stay of execution of application No. 70 of 2022 instead

of Application for Execution No. 65 of 2023 which is pending for execution in this Court before the Deputy Registrar. Moreover, the proper parties are with names **Lodhia Steel Industries vs. Ramadhani Haji Mwenda and Three Others** but in her affidavit, the applicant cited the respondent's names differently as it appeared as **Lodhia Steel Industries vs. Haji Ramadhani Mwenda & Three Others**. In that regard, since the applicant challenges the wrong application, their application for execution remains unchallenged. He prayed that this Court dismiss the application and proceed with execution. There was no rejoinder.

Having gone through the parties' affidavits and submissions, the main issue for determination is whether the applicant's application has merit. It is a trite law that, for the application of a stay of execution of the decree or arbitral Award pending the determination of an appeal or application for revision to stand, any or more of the following factors have to be considered as held in the case of **Ignazio Messina & National Shipping Agencies vs. Willow Investment & Costa Shinganya**, Civil Reference No.8 of 1999 (unreported) that;

"It is now settled that,

i) The Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage;
ii) It is equally settled that, the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory;
iii) Again, the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so."

See also **Tanzania Railways Corporation vs. Mrs. Augusta Upendo Rweyemamu**, Civil Application No. 106 of 2004, where the Court of Appeal of Tanzania granted stay of execution on the ground that there was a serious triable issue in the intended appeal and the case of **Tanzania Electric Co. Ltd. & Two Others vs. Independent Power Tanzania Ltd.** Consolidated Civil Applications Nos. 17 and 27 of 1999, where the Court of Appeal added another principle when it held that it would grant a stay if demonstrated that, the intended appeal has *prima facie* likelihood of success.

Applying the above principles in the application at hand, the applicant must prove and demonstrate the existence of the above factors which will justify the grant of an order for stay of execution. In the affidavit supporting the application, the applicant stated that they had applied to set aside the

dismissal order and restore an application for setting aside the application for *ex parte* award after the initial application to set aside the *ex-parte* order by the CMA was dismissed for want of prosecution. He further deposed that, the execution of the CMA Award will render the pending application before CMA meaningless and nugatory. Further to that, the applicant will suffer irreparable damage if the execution is effected as they have the chance of success if the original CMA application is heard *interpartes*. The applicant also claimed that the main cause for the application to be heard *ex-parte* was that she was not served with the summons to appear before the CMA until the *ex-parte* Award was delivered.

Starting with the existence of a pending case at the CMA, whether the same will be nugatory if the application is not granted. It is an undisputed fact that the application for setting aside the dismissal order is yet to be determined by the CMA. Even though such a decision is discretionary, subject to the reasons which will be adduced by the applicant, denying this application will pre-empt the said application. As much as the main application was not heard *interpartes*, it is without doubt that, the contentious matters between the parties were only heard one-sided. More so, in the impugned *ex-parte* proceedings and consequential Award, the

applicant claimed that she was never served with the summons to appear and defend herself. This, in my view, is sufficient to prove that there is an arguable case to warrant the stay of execution.

On the degree of irreparable loss to be suffered by the applicant, the Court of Appeal in **Ignazio Messina (supra)** briefly defined the term “irreparable loss” as the kind of loss that cannot be atoned by an award of damages. In the application at hand, it is unfortunate that, neither in her affidavit nor submission, the applicant has explained the irreparable injury likely to be suffered or how the same could not be recovered. He just pointed out that, non-granting of the application will make her suffer irreparable loss without expounding further.

However, looking at annexure 5 of the applicant’s affidavit, the amount to be paid to the respondents in the execution is more than Twenty Million Tanzanian Shillings. In the case of **The General Manager Steel Structures and System Ltd. vs. Jamila Mtunzi and Others**, Civil Application No. 12 of 2004 (unreported), the Court of Appeal of Tanzania stayed execution pending appeal and observed that;

"The amount involved is quite substantial. It would be dangerous to allow such a substantial amount to be paid to such people of

unknown means of living with dubious residential contact. In the event the applicant succeeds in his appeal he can hardly recover his money whereas if the applicant's appeal fails, there is nothing indicating that he will not be able to pay the respondents."

I do not intend to and I do not mean that the respondents are people of the attributes of those referred to in the above case authority, however, the respondents have not assured this court that, should the application before the CMA succeed, they will be in the position to return the already paid money, unlike the applicant who by all standard will be able to satisfy the award.

Subscribing to and applying the above reasoning in the application at hand, it will be the applicant who will be likely to suffer irreparable loss if the application for stay of execution is not granted than the respondents if the application is granted. I hold so because, in the event the application to set aside the *ex-parte* Award fails, the respondents will still be paid their amounts in full.

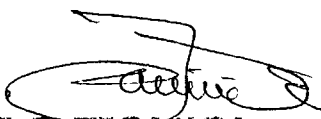
The same goes with the balance of convenience, as briefly elaborated above, it is in the interest of justice that, non-granting the application will prejudice the applicant more than the respondents. Lastly on the likelihood of success, as intimated briefly above, setting aside the *ex-parte* Award

depends on the discretion of the CMA to set aside the dismissal order first, the discretion which must be exercised judiciously guided by the principle of reasoning, and other existing principle of law applied in granting or refusing the application for setting aside the *ex-parte* order or award. Thus, it depends on the probability of whether or not the CMA will set aside both its dismissal order as well as the *ex-parte* Award. In light of the above, therefore, I find this application meritorious and proceed to grant it. the execution of the award issued by the CMA in Labour Disputes No. CMA/ARS/404/21/16/22 is stayed pending the determination of the application for setting aside the dismissal order by the CMA. This being a labour dispute, I give no orders as to costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 25th day of August 2023




J.C. TIGANGA
JUDGE