

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**MBEYA SUB – REGISTRY**  
**AT MBEYA**

**MISC. LABOUR APPLICATION NO. 26252 OF 2023**

*(Arising from Labour Execution No. 40 of 2020)*

**MAJENGO ATHUMAN MOHAMED .....APPLICANT**

**VERSUS**

**OTTER MINING COMPANY LTD .....RESPONDENT**

**RULING**

*Date of hearing: 17/4/2024*

*Date of ruling: 29/5/2024*

**NONGWA, J.**

This is an application for re enrolment of Labour Execution No. 40 of 2020 which was dismissed for non-appearance of the parties. It is made under rule 36(1)(2) of the Labour Court Rules, 2007, G.N No. 106 of 2007 and supported by the affidavit of Faraja Msuya, counsel for the applicant. The application is opposed by the respondent who filed counter affidavit and raised points of preliminary objections that

1. That this honorable court has no jurisdiction to entertain this application for being time-bared;
2. That this application is bad in law for contravening the requirements of Rule 24(1) of the Labour Court Rules GN No. 106 of 2007; and

3. That this honorable court lacks jurisdiction to try this application as the honorable judge is barred from setting aside the orders of the Deputy Registrar.

From an established practice that once a preliminary objection is raised questioning the competence of a suit or any proceedings before a court of law, the court should hear the parties on the objection and determine the point before it deals with the other substantive aspects of the suit or proceedings. I ordered hearing of first preliminary objections. On the scheduled date Mr. Baraka Baraka, learned counsel appeared representing the respondent whereas Mr. Faraja Msuya also learned counsel represented the applicant.

Mr. Baraka was the first to take the ball rolling, he combined the first and second objections and the third was separately argued. In the combined objections, it was submitted that the application for restoration of the struck-out execution was time barred. He contended that although there is no express provision under the Labour court rules providing period to file application for enrolment of struck out application, sections 43 and 46 of the Law of Limitation Act [Cap. 89 R: E 2019] (the LLA), which apply where other laws have not provided for such limitation of period. He submitted that under item 21 of the schedule to the LLA, sixty days is provided for such application. To support the argument counsel cited the

case of **Barclays Bank Tanzania Limited vs Phylisia Hussein Mcheni**, Civil Appeal No. 19 of 2016 CAT DSM and **CHODAWU vs Board of Trustees of Tanzania National Park**, Revision No. 27/2022 HCT Arusha. Mr. Baraka submitted that Labour Execution No. 40 of 2020 was struck out in May, 2023 and the present application filed in November, 2023 quite beyond sixty days.

Concluding in the first and second objections, counsel for the respondent stated that the remedy for suit which is time barred is to dismiss under section 3 of the LLA.

In the third objection Mr. Baraka submitted that the application was not accompanied with notice of application as required by rule 24(1) of the Labour Court Rules.

In reply Mr. Msuya did not find substance in submission of Mr. Baraka in the first and second objections. He submitted that the application was not time barred. Explaining, he stated there was application for stay of execution in the Court of Appeal which was decided in December, 2023. That the current application was filed in November, 2023 before hearing of stay of execution in the Court of Appeal. According Mr. Msuya, time started to run after hearing of stay of execution interparty. Further arguments on this point were that the Deputy Registrar

erroneously struck the execution application while it was stayed pending determination of stay of execution.

Counsel for the applicant distinguished the two cases relied by the respondent's counsel on the ground that the case of Barclays, objection was raised in appeal whereas in the case of CHODOWU, it was in revision.

In respect of the third objection that there was not notice of representation, Mr. Msuya conceded, but was quick to pray for filing amended application for the labour court is the court of equity as provided under rule 55 of the Labor Court Rules and the holding in the case of **Felician Rutwaza vs Word Vision Tanzania**, Civil Appeal No. 213 of 2019 CAT, the step which will enable the parties and this court not to be overburdened by many applications.

In rejoinder Mr. Baraka stated that the argument that time started to run after hearing of stay of execution interparty was not reflected in the affidavit in support of the application. He added that the Deputy Registrar explained in details reason to strike the application and also the Court of Appeal had no knowledge of the pending execution in the high court.

I have considered the application documents and rival arguments for and against the preliminary objections. The only issue calling for my determination is whether the objections have merit.

Starting with the first objection on limitation of period to file application for enrolment of the strike out matter. It was submitted by Mr. Baraka that under labour laws there is no provision which provide period of time within which to file such application. Mr. Baraka referred to section 43 and 46 of the LLA to argue that limitation of period provided in this law apply in all matter. The argument was further fortified by the case of **Felcian Rwetaza** (supra). Having laid such found counsel, argued that the application was to be filed within sixty days. In response, Mr. Msuya submitted that time of limitation started to run after application for stay of execution in the Court of Appeal was determined, according to the counsel, this application was filed prior.

On my party as rightly pointed by counsel for the respondent, the labour law is silence on period within which application for enrolment of matter struck for non-appearance should be filed. However, there is a presumption that when new law is enacted it is aware of the existence state of other laws. On this principle, **Vepa P. Sarathi** in a book titled Interpretation of Statutes. 5th Edition, Eastern Book Company, 2013. The learned author states at pages 236- 237;

*'The court must also assume that the legislature knew about existing enactments when passing a law...The court ought in general, in constructing an Act of Parliament to assume that the legislature knows the existing state of the law and did not intend*

*to overthrow a fundamental legal principle in the absence of clearly expressed contrary intention.'*

The above rule was applied in the case of **Barclays Bank Tanzania Limited vs Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016 [2021] TZCA 202 (17 May 2021), when the court stated that although the labour laws did not provide consequences of matters filed out of time, so long as there is in place the LLA those matters has to be dismissed. Though facts may not be the same but the principle on knowing state of existing law when propagating new law is relevant to this application.

Under the first schedule to the LLA item 21 of PART II provides that application under the Civil Procedure Code, the Magistrates' Courts Act or other written law for which no period of limitation is provided in this Act or any other written law period of limitation is sixty days. While Mr. Baraka submitted that application was time barred, Mr. Msuya did not buy such submission, he reckoned time from when stay of execution was determined in the Court of Appeal.

Mr. Msuya is not right on this aspect, time spent in the Court of Appeal would only be relevant in application for extension of time. This is also defeated by the fact that this application was filed even before hearing interparty of the stay of execution in the Court of Appeal, that is

December, 2023. This proves that the time is not reckoned on the date stay of execution was determined.

Labour execution was strike out on 22<sup>nd</sup> day of May 2023 and the present application for enrolment filed on 27<sup>th</sup> day of November, 2023, the application was filed lately for sixty-five days making it time barred as right submitted by Mr. Baraka. The consequences of time barred application is to dismiss it, however, I will not take that route for the reason to be apparent shortly. Upon a close perusal of the record as a whole, I have found that the order to strike out application for nonappearance of parties is fraught with illegality and impropriety.

For this reason, I am constrained not to strike out the application in order to retain the record for the purpose of correcting the illegality depicted. Otherwise, it would take a long time to start it all over which is not in the interest of justice. Therefore, the court *suo motu* has decided to invoke its powers of revision under the provisions of rule 28(1)(2) of the Labour Court Rules, 2007 G.N. No. 106 of 2007 to revise the proceedings dated 22<sup>nd</sup> May 2023 in Labour Execution No. 40 of 2020.

I have reservedly taken that course because the Court cannot justifiably close its eyes on a glaring illegality in any particular case because it has duty of ensuring proper application of the laws. There are a range of other cases in which instead of striking out the matter for being

incompetent, the court took the option of addressing the illegality, at the end of which it invoked its revisionary powers. See the case of **Tryphone Elias @ Ryphone Elias vs Majaliwa Daudi Mayaya**, Civil Appeal No. 186 of 2017 [2017] TZCA 200 (7 December 2017; TANZLII), **Tanzania Heart Institute vs The Board of Trustees of National Social Security Fund**, Civil Application No. 109 of 2008 [2008] TZCA 59 (15 August 2008; TANZLII) and **The Director of Public Prosecutions vs Elizabeth Michael Kimemeta @ Lulu**, Criminal Application No. 6 of 2012, [2012] TZCA 167 (10 October 2012; TANZLII) In the case of **Tryphone Elias @ Ryphone Elias** the court stated;

*'...because the obtaining circumstances in the instant case are such that we should intervene now, because the illegality pointed out goes to the jurisdiction of the court. That entails that at the end of it all; the decision of the High Court will not escape the wrath of being nullified. Consequently, to tackle the question of illegality at this early opportunity will vouch unnecessary further delays, and also save the parties from unnecessary potential and inescapable expenses.'*

My stance is further reinforced with the advent of the overriding principles under section 3A and 3B of the Civil Procedure Code which enjoin the court to promote an expeditious administration of justice and timely disposal of the proceedings at a cost affordable by the respective parties.



Having laid such foundation, I feel now comfortable to look on what transpired in court, proceedings are clear that on 22<sup>nd</sup> day of May, 2023 when the Deputy Registrar struck Labour Execution No. 40 of 2022 for non appearance of parties was aware of stay of execution order of the Court of Appeal. To appreciate what transpired I will let the record speak itself;

*'Date: 22/5/2023*

*Coram: P.R. Kahyoza -DR*

*D/Holder: absent*

*For D/Holder: absent*

*J/Holder: absent*

*For J/Holder: absent*

*B/C: Saanane*

*Court: Parties are once again absent. The record shows that on 29<sup>th</sup> September when this matter was called on for necessary orders, the court was informed by **Mr. Isaya Mwanri, counsel for the Judgment Debtor that the Court of Appeal had issued an order staying these execution proceedings. The order was issued on 5<sup>th</sup> September, 2022.***

*The matter was then adjourned for further necessary orders. However, parties have to date not appeared in court to update the court on the status of the pending appeal. It should be borne*

*in mind that stay orders are not permanent orders. I am in the circumstances made to believe that there have been laxity on the part of the parties. This in my view, calls for deserving order. This application is struck out for non appearance of parties.'*  
[Emphasize supplied].

From the above quotation, two important thing emerges, one, presence of stay order of the Court of Appeal and two, failure of parties to update the court progress of the case. I agree with the Deputy Registrar that parties to the case are not required to sit back not playing their part to follow up the matter militantly to ensure it progress or updating the court of the impending proceedings. However, that is not a guarantee that the Deputy Registrar was right in striking the application. It is the law that when there is order of stay of execution nothing can be done in respect of such execution proceedings. That is to say as acknowledged by the Deputy Registrar that the Court of Appeal had stayed the execution proceedings before him, his hands in such proceedings was therefore tied and could not issue any order unless the order of stay order was lifted. My own research discovered the *ex-parte* stay order by Hon. **Kente, J.A** of 5<sup>th</sup> September 2022, which stayed proceedings in Labour execution No. 40 of 2020 pending determination of the hearing inter partes and determination of the application for stay of execution.

As submitted by partys' determination of inter party stay of execution was conducted on 23<sup>rd</sup> December 2023 while the Labour Execution No. 40 of 2020 was struck out on 22<sup>nd</sup> May 2023. The above chronological events reveal one, *ex-parte* stay order stayed the execution proceedings until finalisation of inter party and determination of application for stay of execution, in this case it was 23<sup>rd</sup> December 2023. On 22<sup>nd</sup> May 2023 when the Deputy Registrar reopened the execution proceedings, there was in force *ex-parte* stay order of the Court of Appeal, in other words the Deputy Registrar had no power to lay his hand and give any valid order in respect of the stayed proceedings. The act was a transgression of the stay order issue by the Court of Appeal which ordered the execution proceeding to be stayed. The order to struck out the application was therefore prematurely made.

While the Deputy Registrar might have been eagle to combat the behaviour of the litigants who upon obtaining stay order remain home and dry, thus impeding the timely delivery of justice and enjoyment of decree in the country. However, that must only be done in accordance with the law and principles laid. In the case of **Independent Power Tanzania Limited vs Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009, CAT at Dar es Salaam (TANZLII) when the court held;

*'It is important always to remember that speed in itself, as courageously commended by Ms. Karume, is not of the essence in the delivery of justice if it does not lead to justice itself. Our conviction is that in the administration of justice, speed is good, but JUSTICE IS BEST...'*

In the circumstance of this case, the Deputy Registrar was aware of the stay of proceedings before him issued by the Court of Appeal. Best practice would have been to summon the parties and probe them on the progress of the stay of execution in the Court of Appeal or himself to make personal effort to get progress of the proceeding from the responsible personnel of the Court of Appeal. This all was not done as the result the order to struck out the application was to overstep the stay order of the Court of Appeal which was an error and cannot be left to stand.

In the event, the order to strike out the application for nonappearance of parties was improperly issued and cannot be left to stand. In view of the powers conferred upon this court under Rule 28(1) of the Labour Court Rule G.N. No. 106 of 2007, I hereby *suo moto* revise and quash the proceedings dated 22<sup>nd</sup> May 2023 and set aside the order to struck out the application. It is directed that the hearing of the application to proceeded from the stage reached before according to the law subject to conditions of stay order of the Court of Appeal in Civil

Application No. 499/06 of 2022 dated 23<sup>rd</sup> December 2023. No order for costs.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA**

**JUDGE**

**29/5/2024**

Dated and Delivered at Mbeya this 29/5/2024 in presence of Mr. Faraja Msuya advocate for the Applicant and Mr. Ipyana Mwantoto Advocate for the Respondent.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA**

**JUDGE**