

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LABOUR DIVISION)  
AT ARUSHA**

**MISC. LABOUR APPLICATION NO. 37 OF 2023**

*(C/f from the High Court of the United Republic of Tanzania, Execution No. 74 of 2022, Revision Application No. 71 of 2022, Misc. Labour Application No. 3 of 2023, Originating from the Commission for Mediation and Arbitration for Arusha, Labour Dispute No. CMA/ARS/ARS/40/22/14/2022)*

**FRANSALIAN HEKIMA SEMINARY**

**SECONDARY SCHOOL ..... APPLICANT**

**Versus**

**PERUTH WILLIAM KAHABI ..... 1<sup>ST</sup> RESPONDENT**

**MR. MWANJALE FRED LUSENGA T/A**

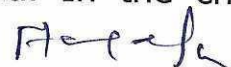
**SHASHI INVESTMENT LTD COURT BROKER..... 2<sup>ND</sup> RESPONDENT**

**RULING**

7<sup>th</sup> & 15<sup>th</sup> March 2024

**MWASEBA, J.**

Fransalian Hekima Seminary Secondary School, the applicant herein, has preferred this application under the provisions of **Order XXI Rule 24(1)(2) and (3) of the Civil Procedure Code**, Cap. 33 [R.E 2019] (hereinafter "the CPC"), beseeching the court to issue an order to stay Execution Application No. 74 of 2022 before the Deputy Registrar (DR), which originated from dispute No. CMA/ARS/ARS/40/22/14/2022 and Labour Revision No. 71 of 2022, pending determination of the appeal lodged in the Court of Appeal of Tanzania. In the chamber



application, the applicant indicated that the judgment debtor had deposited in the court the original card of motor vehicle No. T 584 BMN, Nissan Caravan to furnish security of this application in compliance with the law.

The application is supported by an affidavit of Mr. Lengai Sarunga Loitha, counsel for the applicant. The first respondent contested the application through a counter affidavit deposed by herself. The second respondent neither opposed the application nor supported it as he refrained from filing a counter affidavit.

Brief background facts of the dispute culminating this application as gleaned from the affidavits and annexes thereto go as follows: The 1<sup>st</sup> respondent was employed by the applicant as a commercial teacher on a fixed term contract that commenced on 01/01/2021 at a salary of TZS 620,000/=. He worked until 30/11/2021 when he was issued a notice of the contract's non-renewal. He had a legitimate expectation of renewal of contract as he was among the teachers included in the academic roster of 2022. He challenged his termination in the CMA via Labour dispute No. CMA/ARS/ARS/40/22/14/2022. The CMA resolved that the 1<sup>st</sup> respondent's contract was breached in contravention of the labour laws. The applicant was ordered to compensate her 12 months of



remuneration as the remaining contract period, a total of TZS 7,440,000/=.

The applicant's urge to challenge the CMA award in this court was fruitless. The applicant preferred in this court, Labour Revision No. 71 of 2022. This court (Bade, J.), in the judgment delivered on 22/09/2023, dismissed the revision for being bereft of merits. The CMA award was upheld. Still undaunted, the applicant has manifested its intention to appeal to the Court of Appeal of Tanzania through a Notice of Appeal lodged on 26/09/2023. The applicant also lodged in the Court of Appeal, Memorandum of Appeal and appeal record on 31/10/2023.

Prior to lodging revision in this court, the 1<sup>st</sup> respondent had instituted Execution Application No. 74 of 2022, which was pending before the Deputy Registrar. In the pendency of Labour Revision No. 71 of 2022 and Execution Application No. 74 of 2022, the applicant lodged a formal application vide Misc. Labour Application No. 3 of 2023, seeking an order to stay Execution proceedings before the DR. This court (Bade, J.) granted the applicant a stay of execution, pending determination of the Labour Revision No. 71 of 2022. The same was dismissed on 22/03/2023 then the 1<sup>st</sup> respondent resumed the execution proceedings before the DR. On 19/10/2023, the DR issued a warrant of attachment of the applicant's motor vehicle with registration No. T. 127 AER, make



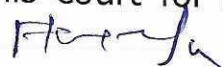
Toyota Land Cruiser. The 2<sup>nd</sup> respondent was ordered to execute the order. Invigorated by the appeal process initiated in the Court of Appeal, the applicant has preferred this application seeking to halt the execution proceedings pending before the DR.

On 04/03/2024, when the 1<sup>st</sup> respondent filed her counter affidavit, it was coupled with a notice of two points of preliminary objections couched in the following terms:

- a) This application is res-judicata and the same fits to be dismissed with costs; and*
- b) This Honourable Court lacks jurisdiction to entertain the application which has a pending appeal in the Court of Appeal of Tanzania.*

When the matter came for a hearing of the preliminary objections on 07/03/2024, the applicant was represented by Mr. Lengai Loitha, a learned advocate, while the first respondent was represented by Mr. Kenneth Ochina, a learned advocate. The third respondent appeared in person unrepresented. Hearing of the preliminary objections proceeded *viva voce*.

Submitting in support of the 1<sup>st</sup> limb of the preliminary objection, Mr. Ochina contended that this application is a *replica* of Misc. Labour Application No. 3 of 2023, which was preferred in this court for stay



Execution of Application No. 74 of 2022. He averred that Misc. Labour Application No. 3 of 2023 was determined to its finality, and its ruling was rendered on 22/03/2022. In that application, the applicant was granted an order to stay Execution Application No. 74 of 2022. Making reference to **Section 9 of the CPC**, Mr. Ochina highlighted five conditions which, when co-exist, the matter is considered res-judicata. In the **first** condition, he accounted that the matter must directly and substantially be the same as the one in the former suit. He insisted that the application under consideration is directly and substantially the same as Misc. labour Application No. 3 of 2023.


The **second** condition is that the instant application is res judicata as it involved the same parties as those in Misc. Labour Application No. 3 of 2023. **Third**, he submitted that in Misc. Labour Application No. 3 of 2023 and the instant application, parties herein litigated under the same title, which is a stay of execution. **Fourth**, the former application was determined by this court as being the competent court to entertain the matter, and **fifth**, the matter in issue in this application was heard and finally determined in Misc. Labour Application No. 3 of 2023.

According to counsel for the 1<sup>st</sup> respondent, the above conditions must co-exist to find a suit res judicata as stressed by the Court of Appeal in **Pravin Girthar Chavda v. Yasmin Nurdin Yusufali**, Civil

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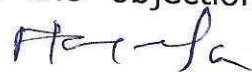
Appeal No. 165 of 2019 (unreported). Mr. Ochina was of the view that the doctrine of res-judicata undertakes to ensure that litigations come to an end. To drive his point home, he referred to the Court of Appeal decision in **Quality Group Limited v. Tanzania Building Agency**, Civil Application No. 182 of 2016 (unreported).

Adverting to the second limb of the preliminary objection, Mr. Ochina amplified that this court lacks jurisdiction to entertain the matter since an appeal has already been lodged in the Court of Appeal. He referred annexure "G" to the affidavit in support of the application, which is an appeal document that was filed in the Court of Appeal. In his view, once the appeal process is initiated in the Court of Appeal, this court ceases to have jurisdiction over the matter. To buttress his argument, the learned counsel relied on this court's decision in **Prosper Petro Munisi (Legal Administrator of Peter Munisi) v. Yunus Bakari Mshana**, Misc. Civil Application No. 151 of 2019. He also made reference to the Court of Appeal decision in the case of **Serenity on the Lake Ltd v. Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019 (unreported). He insisted that the proper forum this application would be preferred is the Court of Appeal. He prayed that the preliminary objections be found meritorious and the application be dismissed with costs.



In rebuttal, Mr. Loitha, in respect of the first limb, submitted that the objection that the application is res-judicata was pre-maturely raised because res-judicata is not a pure point of law. It needs evidence to ascertain, relying on the case of **Mukisa Biscuits Manufacturing Co. LTD v. West End Distributors LTD (1969) EA 696**. Counsel for the applicant blamed the respondent for referring to the annexures, which, in his view, are nothing but evidence. He insisted that consistent with the authority in **Mukisa Biscuits** (Supra), a preliminary objection cannot be based on facts but on purely point of law. According to Mr. Loitha, this application is not res judicata because in Misc. Labour Application No. 3 of 2023, the applicant sought and was granted an order to stay execution in Labour Revision No. 71 of 2022, while in this application, the applicant seeks to stay execution of the award of the CMA pending the determination of the appeal lodged in the Court of Appeal. He maintained that the subject matter and even the case number are quite different. He prayed that the first limb of the preliminary objection be overruled with costs.

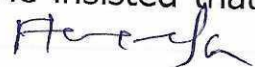
Responding to the second limb, the applicant's counsel asserted that the jurisdiction of this court to entertain the matter is hard to determine unless the application is heard. Like in the first limb, Mr. Loitha made it again in this second limb that the objection was



prematurely raised because it needs evidence to ascertain whether this court has jurisdiction or not. He also discounted the respondent's submission for relying on annexure "G", attached to the affidavit, which connotes evidence. He stressed that the application has been preferred under **Order XXI Rule 24(1)(2) and (3) of the CPC** which confer jurisdiction on this court to stay the execution of an award of the CMA.

He relied on the case of **Serenity on the Lake** (supra) referred by the respondent's counsel to substantiate that the Labour Court has jurisdiction to stay the award pending its decision. He referred page 7 of the cited decision which in his view indicates that this court has jurisdiction to determine the matter regardless of the fact that there is a notice lodged at the Court of Appeal. Mr. Loitha was of the firm view that what is sought to be stayed is not this court's decree, rather the CMA award. He further relied on **Section 91(3) of the Employment and Labour Relations Act**, Cap. 366 [R.E 2019] which confers jurisdiction on this court to stay execution. On the strength of his submission, Mr. Loitha urged this court to find the preliminary objections misplaced and dismiss them since they are not based on legal points but purely matters of fact.

The rejoinder submission by Mr. Ochina was earnestly reiteration of what he submitted in the submission in chief. He insisted that, both



preliminary objections are predicated on pure points of law. He reiterated prayers made in the submission in chief.

I have duly examined the preliminary objections raised by counsel for the 1<sup>st</sup> respondent, affidavits for and against the submission as well as the rival submissions by counsel for both parties. For reasons to be apparent in the due course, I shall begin with determination of the second limb of the preliminary objection.

At the outset, I need not overemphasize that jurisdiction is the bedrock on which the court's authority and competence to entertain and decide matters rest. The essence of court's jurisdiction was discussed *extenso* by the Court of Appeal in the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (unreported), when the Court had this to say:

***"Jurisdiction" is defined in Halsbury's Laws of England Vol. 10 para. 314 to mean:***

***"The authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim, or as to the area which***



***jurisdiction extended, or it may partake of both these characteristics."***

***Principally, objection to jurisdiction of a court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to serve time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained."*** (Emphasis added)

Owing to the peculiar nature and seriousness of ascertaining the jurisdiction of a court before entertaining any matter, I have deliberately decided to begin the determination of the preliminary objections with the second limb. My curiosity is precipitated by the fact that in the event it is resolved that this court lacks jurisdiction to entertain the application, the first limb dies a natural death. According to the 1<sup>st</sup> respondent's counsel, once appeal process is initiated in the Court of Appeal, the High Court ceases to have jurisdiction to entertain such matter.

Unwaveringly, it is settled that in matters relating to stay of execution, once a Notice of Appeal is lodged, then the Court of Appeal is seized of the matter to the exclusion of the High Court. The above general rule can be defeated with only two exceptions, which are none other than applications for certificate on a point of law or leave to appeal. That position was closely examined by the Court of Appeal in the case of **Matsushita Electric Co. Ltd v. Charles George t/a CG**



**Travers**, Civil Application No. 71 of 2001 (unreported), where it was observed:

*"Once a Notice of Appeal is filed under Rule 76 then this Court is seized of the matter **in exclusion of the High Court except for applications specifically provided for, such as leave to appeal or provision of a certificate of law.**"* (Emphasis added)

That position has been subject of recurrence in numerous decisions including: **CRDB Bank PLC v. Finn W. Petersen and 3 Others**, Civil Application No. 367/17 of 2017, **Awiniei Mtui and 3 Others v. Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimamo)**, Civil Application No. 19 of 2014 (reported TanzLii) and **Serenity on the Lake Ltd** (supra), to mention but a few.

In the application under scrutiny, the applicant deposed under paragraph 6 of the affidavit in support of the application that being aggrieved by the decision of this court in Labour Revision No. 71 of 2022, on 26/09/2023 it lodged Notice of Appeal to the Court of Appeal of Tanzania. The said notice was attached in the affidavit as annexure "E". Additionally, under paragraph 9 of the affidavit in support of the application, the applicant pleaded that on 31/10/2023, it filed a memorandum of appeal as well as a record of appeal in the Court of



Appeal, and the record, as well as the memorandum, was served on the respondents on 06/11/2023.

From the above averments, it is imperative to note that the appeal has been initiated by the applicant in the Court of Appeal. That is apparent from the submission by counsel for the applicant as well as the affidavit in support of the application and the annexes. In my considered view, there are no other miracles needed to demonstrate that appeal was initiated in the Court of Appeal.

I hasten to remark that by making reference to the annexures, the respondent's counsel did not adduce evidence as the applicant's counsel wants this court to believe. It is an undisputed fact that affidavits are evidence. At the same time in order for a party to ascertain whether the court has jurisdiction to entertain any matter, recourse is taken to the pleadings. On authority, the Court of Appeal in the case of **Salim M. Kabora v. TANESCO Ltd and 2 Others**, Civil Appeal No. 55 of 2014 (reported TanzLii), accentuated the position. Among other things, the Court observed:

*"The above excerpt tells it all that before a court dwell into the determination of any matter brought before it, it is elementary that it should, in the first place, satisfy itself that it has the requisite mandate to determine the matter. Since the appellant, in his plaint, disputed the respondent's claim*

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*for the outstanding debt and had instituted a suit in the High Court to challenge it, **then the issue of jurisdiction arose by clear implication out of the pleadings** and in the authority of **Karata Ernest and Others V. The Attorney General** (supra), the issue raised was therefore a point of law.”(Emphasis added)*

Contention by Mr. Loitha that the preliminary objections are not based on pure points of law since the respondent's counsel made reference to annextures, is highly misconceived. Strengthened by the above deliberations, I am constrained to agree with Mr. Ochina that since the appeal process was initiated by the applicant in the Court of Appeal after Notice of Appeal and the appeal record were filed and served on the respondents, this court is ceased to have jurisdiction to entertain the application because it marked that there is pending appeal in the Court of Appeal. The appropriate forum where this application could be entertained as submitted correctly by respondent's counsel, is in the Court of Appeal. I therefore find merits in the second limb of the preliminary objection and sustain it.

Having resolved that the jurisdiction of this court to deal with the matter has been ousted, I refrain from determining the first limb of the preliminary objection because the second limb sufficiently disposes of



the application. Practically, any proceedings entertained by court without requisite jurisdiction, is guaranteed to be nullified.

Fortified by the above analysis, I am in agreement with the 1<sup>st</sup> respondent's counsel that this court has no jurisdiction to determine the application. The second limb of the preliminary objection is sustained. The application being preferred in a court without jurisdiction to entertain the same cannot be salvaged. It is liable to suffer the wrath of dismissal, as I hereby do. Considering the fact that this application emanated from a labour dispute, each party shall bear their own costs.

Order accordingly,

**DATED at ARUSHA** this 15<sup>th</sup> March 2024



  
**N. R. MWASEBA**

**JUDGE**