

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 663 OF 2018

BETWEEN

DILIP MAJITHIA APPLICANT

VERSUS

MACHUMI J. NGEZE RESPONDENT

RULING

Date of Last Order: 18/05/2020

Date of Ruling: 26/06/2020

S.A.N. Wambura, J.

This ruling is in respect of a preliminary objection raised by the respondent **MACHUMI J. NGEZE** when filing his counter affidavit challenging the application filed by the applicant **DILIP MAJITHIA** who is seeking to revise the ruling of Hon. S.H. Simfukwe, Deputy Registrar in Miscellaneous Application No. 325 of 2017 on the following grounds:-

- i. That, this application is hopelessly time barred.*
- ii. That, application is bad in law as it is trying to revise an interlocutory order.*

The applicant was represented by Advocate Stephen Ndila Mboje while the respondent was represented by Advocate Arnold Arnold Luoga.

With leave of this Court the preliminary objection was argued by way of written submissions. I thank both parties for adhering to the schedule and their submissions hence this ruling.

On the 1st ground of preliminary objection the respondent's counsel submitted that, the application has been overtaken by events because Hon. Simfukwe, Deputy Registrar ordered the applicant to deposit a decretal sum within 14 days from the date of Order as a condition for stay of execution. The Order was issued on 15th August, 2018, that means the applicant was supposed to deposit the decretal sum on or before 30th August, 2018. That the applicant did not comply with the Courts Order. He filed the present application on 15th October, 2018, that is two (2) months after expiration of the fourteen (14) days issued by Court. That if the applicant had an intention of challenging the decision of Hon. Registrar then he ought to have done so on or before 30th August, 2018

On the 2nd ground it was submitted that it is settled law that interlocutory Orders are not appealable or revisable. The Order issued by Hon. Simfukwe was interlocutory in nature as it did not finalize the matter.

Rather an order to the applicant to temporarily deposit the decretal sum as a condition for stay of execution and not to pay the respondent. The respondent Counsel referred to Rule 50 of the Labour Court Rules, GN 106/2007 which provides that:-

"Rule 50 No appeal review, or revision shall lie on interlocutory or incidental decisions or orders, unless such decision has the effect of finality of determining the dispute."

He cited the case of **Managing Director Souza Motors Ltd v Riaz Gulamani & Another** (2001) TLR 405, Bwana J. (as he then was) which held that:-

"A decision or order of preliminary or interlocutory nature is not appealable."

He thus prayed for dismissal of the application with costs.

In response, the applicant's Counsel contended that the respondent misconceived the facts in the present case and those in the cited case of **Managing Director Souza Motors Ltd v Riaz Gulamani & Another** (supra). That in that case the respondents were aggrieved by the Order of

court which dismissed their application for attachment of the motor vehicle and furnishing of security pending determination of the main suit, the reasoning of that case was that:-

"The ruling of this court dated 22nd February, 2000 as referred to above, did not have the effect of finally determining the suit. What it did was to determine matters of a subsidiary /secondary nature. The main issue is yet to be determined by way of trial should mediation fail..."

That the position of the law in the above cited case is distinguished with the circumstances of this case because the ruling and Order of this Court in Miscellaneous Application No. 325 of 2017 does not determine matters of subsidiary/secondary nature but, it had the effect of finally determining Revision Application No. 460 of 2017 hence the Order is subject to appeal /revision.

In regard to the 2nd ground of revision, it was argued that the application was timely filed as the impugned decision was delivered on the 15th of August, 2018 and application was filed on 15th October, 2018 after receiving the ruling on the 3rd of September, 2018.

That the Rules are silence regarding time limit for filing applications of this nature. That due to the lacuna, he invoked the 60 days' time limit as prescribed in the cases of **Bank Of Tanzania v Said A. Marinda & 30 Others**, Civil Reference No. 3 of 2014 and **Suleiman Ally Nyamalegi & 2 Others v Mwanza Engineering Works Ltd**, Mwanza Civil Application No. 9 of 2002 CAT (unreported) when citing the case of **James Masanja Kasuka v George Humba**, Civil Application No. 2 of 1997, CAT (unreported).

"...we accordingly set the time limit of sixty days in civil application as we have in criminal applications for review."

He thus prayed for the preliminary objection to be overruled for it is hopelessly unfounded.

A preliminary objection has been defined in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD** (1969) EA 696, to be in respect of points of law which have been pleaded or which arise by a clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.

In the case of **SELCOM GAMING LIMITED v GAMING MANAGEMENT (T) LIMITED & GAMING BOARD OF TANZANIA** Civil Application No. 175 of 2005,(unreported), the Court held that:-

*"A preliminary objection **is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds.** Any alleged irregularity, defect or default must be apparent on the face of the application."*

[Emphasis is mine].

Therefore a preliminary objection must raise a point of law based on ascertained facts and not on evidence, and if the objection is sustained it should dispose of the matter.

The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merit of an application because there is a point of law that will dispose of the matter summarily as it was held in the case of **Shahida Abdul Hassanali Kasam V. Mahed Mohamed Gulamali Kanji**, Civil Appl. No. 42 of 1999 (unreported).

Starting with the 2nd point of preliminary objection, it is apparent that the applicant has prayed to revise and set aside of the Order issued by

the Deputy Registrar dated 15th of August, 2018. I find it worth to reproduce the same:

"Hence, I hereby grant stay of execution on condition that the applicant should deposit in court the whole decretal sum as security within 14 days."

It was the respondent's contention that the Order was just interlocutory as it did not finalize the main application, hence cannot be appealed or revised. This was disputed by the applicant as he argued that, the Order is not interlocutory as it had effect of determining Revision Application No. 460/2017 to its finality.

It has been alleged that the applicant has not complied with the Order of the Court issued on 15/08/2018. This is not a very healthy situation because filing of an application for revision is not a bar to execution of the said Order. Applicant is warned on such a conduct which I believe will not be repeated.

Now, the Court has to decide whether the impugned Order is interlocutory? In the case of **VODACOM TANZANIA PUBLIC LIMITED COMPANY v PLANETEL COMMUNICATIONS LIMITED**, CIVIL APPEAL NO. 43 OF 2018, CAT, the Court adopted the test in the case of **BOZSON v ARTINCHAM**

URBAN DISTRICT COUNCIL (1903) 1 KB 547 wherein Lord Alverston stated that:-

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order; as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as final order; but if it does not, it is then, in my opinion, an interlocutory order."

In the light of the settled position of the law, it is clear that an interlocutory ruling or order is not appealable, save where it has the effect of finally determining the dispute.

In the circumstances of the matter at hand, it is apparent that the Order issued by Hon. Simfukwe granted an application for stay of execution of CMA's award on the condition that, the applicant has to deposit a decretal sum as security. The Order did not determine the main application. I therefore agree with the respondents Counsel that the application is incompetent in the eyes of the law. I thus sustain the 2nd point of the preliminary objection that the application has been filed being contrary to Rule 50 of the Labour Court Rules, GN 106/2007.

Since the 2nd objection has been sustained, I find no reason to determine the remaining ground. I thus strike out the application accordingly.

S.A.N. Wambura
JUDGE
26/06/2020

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DILIP MAJITHIA APPLICANT

VERSUS

MACHUMI J. NGEZE RESPONDENT

Date: 26/06/2020

Coram: Hon. W.S. Ng'humbu, Deputy Registrar

Applicant:

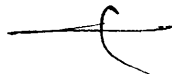
For Applicant: Mr. George Shayo - Advocate holding brief for Advocate
Arnold Luoga

Respondent: } Absent

For Respondent: }

CC: Lwiza

COURT: Ruling delivered on the 26th June, 2020 in the presence of Mr. George Shayo, Learned Counsel holding brief for Mr. Arnold Luoga, Learned Counsel for the Applicant and in the absence of the respondent is hereby certified true copy of the original.



W.S. Ng'humbu
DEPUTY REGISTRAR
26/06/2020