

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA

MISC. APPLICATION NO. 14 OF 2020

(Arising from Labour Execution No. 13 of 2020)

BAYPORT FINANCIAL SERVICES (T) LTD.....APPLICANT

VERSUS

HERIETH NASHON.....RESPONDENT

RULING

Date of Hearing : 08/10/2020

Date of Judgment: 30/10/2020

MONGELLA, J.

In this application, the applicant is moving this Court for orders to lift the garnishee order nisi issued in Execution No. 13 of 2020 in respect of the applicant's bank account number 23910000466 at National Microfinance Bank PLC (NMB) at Dar es Salaam, pending the determination of the applicant's application for extension of time and stay of execution pending in this Court. The application is made under Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d), (11) (b); and Rule 55 (1) (2) of the Labour Court Rules, 2007. It is supported by the affidavit of one Hassan Mussa, the chief legal officer of the applicant, which was adopted to form part of the applicant's submission.



The events leading to this application are briefly as follows: the applicant underwent a retrenchment whereby the respondent together with other 101 employees were retrenched. The respondent filed a claim in the Commission for Mediation and Arbitration (CMA) in Mbeya claiming for unfair termination. The matter was decided in her favour. Dissatisfied with the CMA award, the applicant filed for revision in this Court, that is, Revision No. 06 of 2019, which was struck out on technical grounds, with leave to re-file in two days. The applicant however, failed to comply with the two days' time limit issued by the court and thus filed an application for extension of time. Along with this application, the applicant filed another application for stay of execution. While both applications were pending in court a garnishee order nisi was issued on 10th August 2020 against the applicant's account number 23910000466 operated by NMB Bank PLC.

Both parties were represented whereby the applicant was represented by Mr. Kassim Masimbo and the respondent was represented by Mr. Imani Mbwiga, both learned advocates. The application was argued orally.

In his submission, Mr. Masimbo challenged the order issued by the Deputy Registrar on the ground that it was illegal. He argued so saying that the applicant already had two applications in this Court to wit, Misc. Application No. 8 of 2020 on extension of time, and Misc. Application No. 13 of 2020 on stay of execution. He said that both applications were filed in this Court in July 2020 and parties were scheduled to appear before the presiding judge on 2nd September 2020. Given the situation, Mr. Masimbo was of the stance that the issuance of the garnishee order nisi by the Hon.



DR was contrary to section 91 (3) of the Employment and Labour Relations Act, 2004 (ELRA). To bolster his point he referred the Court to the case of ***Serenity on the Lake Ltd. v. Dorcus Martin Nyanda***, Civil Revision No. 1 of 2019 in which the Court of Appeal (CAT) insisted that where there is an appeal filed in court and is still pending, the DR cannot take any action on execution.

Relying on the above submission, Mr. Masimbo prayed for the garnishee order nisi to be vacated until the two pending applications are determined in this Court. He argued that the said order is affecting the applicant in performing its duties in effecting various payments. He said that the said account is used by the applicant as a collection account in its businesses and until the date of the order it had more than one Billion Tanzanian Shillings.

Mr. Mbwiga also started his reply submission by adopting the counter affidavit sworn by him. He proceeded to argue that the question to be asked at this point is whether the two applications by the applicant in this Court can warrant the court to uplift the garnishee order nisi. He contended that, as per the court records in Execution Application which is pending to date; the applicant never entered appearance, something which led the Hon. DR to proceed ex parte. Further, referring to the case of ***Step in Ltd. v. Dar es Salaam Institute of Technology (DIT)***, Misc. Commercial Cause No. 328 of 2015, he argued that for garnishee order nisi to be uplifted, the applicant must prove before the court that there were irregularities or the decree had irregularities. He said that this was not proved by the applicant nor stated in the affidavit.



Mr. Mbwiga distinguished the case of **Serenity on the Lake Ltd.** (supra) arguing that the circumstances in this case differ from the one at hand as in the said case the Court was dealing with an appeal. He added that, the Hon. DR however, on noting the pending applications decided not to issue further orders, being garnishee order absolute. He further raised his concerns on the likely loss to be suffered by the respondent given the fact that the applicant had stated in his affidavit in support of the application that he underwent retrenchment of the workers due to bad financial condition. He added that the applicant as we stand has already closed all his regional branches and remained with only the headquarters in Dar es Salaam. He contended that if the garnishee order nisi is lifted, then it is the respondent who stands to suffer irreparable loss by having an empty decree to execute.

In rejoinder, Mr. Masimbo reiterated his position with insistence that under section 91 (3) of the ELRA, the execution ought to be stayed as there were other applications pending in court.

After considering the arguments of both counsels I proceed to observe as follows:

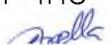
Basically, Mr. Masimbo is seeking to impugn the order of the Hon. DR in issuing garnishee order nisi under the provisions of section 91 (3) of the ELRA. The section provides that "**the Labour Court may stay the enforcement of the award pending its decision.**" First of all this provision does not make it mandatory for the Labour Court to stay the enforcement of the award. It is discretionary upon the court, which in my view, is to be



exercised considering the circumstances of each case. In my settled view also, section 91 (3) is not to be construed in isolation of the rest of the provisions under the same section. In essence, the decision referred to under section 91 (3) is with respect to the defects in the arbitration award and or arbitration proceedings thereby affecting the award. It does not cover each and every decision of the court as claimed by Mr. Masimbo. It has to be on the merits of the impugned award.

In the affidavit in support of the application, as well as in the submission by Mr. Masimbo, it is averred that the applicant has two pending applications in this court being: Misc. Application No. 8 of 2020 on extension of time, and Misc. Application No. 13 of 2020 on stay of execution. Mr. Masimbo referred the court to the case of **Serenity on the Lake Ltd** (supra) which requires the court not the effect execution where there is an appeal pending. As much as I agree with the position settled in this case, I find the same inapplicable in the matter at hand. In my settled view, an application for extension of time to file an appeal or revision, is not in itself an appeal or revision. While such an application is pending in court, the status stands to the effect that there is no appeal or revision filed in court. Under the circumstances, the application for extension of time therefore, cannot operate as a bar to execution. See: **TAFISA General Enterprises Limited v. Tanzania National Roads Agency (TANROADS)**, Arbitration Cause No. 01 of 2017 (HC at Mbeya, unreported).

Mr. Masimbo also argued that the applicant shall suffer irreparable loss as the affected bank account is used as a collection account for the



applicant's business. He also submitted that at the time the garnishee order nisi was issued the said account had more than one Billion Tanzanian Shillings. I have in fact gone through the order given by the Hon. Arbitrator. In fact, the said order has not attached the whole amount in account number 23910000466. It has in fact restricted only T.shs. 17,150,640/- connected to the decree issued in favour of the respondent. Under the circumstances, I find that the applicant has failed to substantiate how he shall suffer irreparable loss compared to the respondent. However, taking into consideration that there is an application for stay of execution pending in this Court, I order that no further orders, that is, garnishee order absolute, shall be issued in respect of Account Number 23910000466, NMB Bank PLC until the determination of the said application which in my view shall also have an impact on the garnishee order nisi issued by the Hon. DR.

The application is therefore dismissed. No orders as to costs.

Dated at Mbeya on this 30th day of October 2020.


L. M. MONGELLA
JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 30th day of October 2020 in the presence of the respondent and his advocate Mr. Imani Mbwiga, also holding brief for Mr. Kassim Masimbo for the applicant.




L. M. MONGELLA
JUDGE