

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 27 OF 2019

BETWEEN

CHUI SECURITY CO. LIMITED.....APPLICANT

AND

THOMAS BANGU.....RESPONDENT

JUDGMENT

Date of Last Order: 21/07/2020

Date of Judgment: 25/09/2020

A. E. MWIPOPO, J

Chui Security Company Limited have lodged the present application for revision against the Orders issued by Hon. S. H. Simfukwe, Deputy Registrar, dated 3rd November, 2018, in Execution No. 637 of 2018. The applicant is seeking revision for the following orders:-

1. That, this Honourable Court be pleased to call for the record, revise and set aside the Honourable Deputy Registrar order dated 18th December, 2018 by Hon. S.H. Simfukwe, made in Application for stay

of execution No. 637 of 2018 and subsequent orders thereto on grounds set forth in the annexed affidavit and on such other grounds which may be adduced on hearing date.

2. That this Honourable Court be pleased to determine the matter in the manner it consider appropriate and give any other relief it considers just to grant.

The background of the dispute in brief is that the Respondent namely Thomas Bangu was employed by the applicant as Operation Manager on 1st June, 2015. The respondent was terminated from employment by the applicant on 30th June, 2015. The respondent was not satisfied with the employer's decision and he referred the dispute to the Commission for Mediation and Arbitration (CMA) which delivered its Award in his favour. The applicant was aggrieved by the Commission Award and he filed revision No. 261 of 2016 before this Court which delivered its Judgment on 5th December, 2017, in favour of the respondent. The applicant was not happy with this Court decision and he decided to appeal to the Court of Appeal by filing a Notice of Intention to Appeal on 15th December, 2017, and the same was served to the respondent. The applicant also applied for copies of proceedings, judgment and decree of revision no. 261 of 2016, for purposes

of appeal. The respondent herein filed Execution Application No. 637 of 2018, which was heard and determined by Hon. Registrar on 18th December, 2018, where the applicant was ordered to deposit to Court account the decree amount which is shillings 50,000,000. Aggrieved by the Registrar decision in the Execution Application the Applicant filed the present application for revision.

The Notice of application is supported by the affidavit of Evoid Paul Mushi, Advocate of the applicant. The reasons for the revision are contained in paragraph 9 of the affidavit in support of the application. The reasons are as follows:-

1. That the Hon. Registrar erred in law and facts by opting to proceed to determine the respondent application for execution despite the fact that she was aware that there is a notice of appeal by the Applicant.
2. That the Hon. Registrar erred in law and facts by ignoring the Applicant's request that the Respondent is yet to be served with a copy of the Court proceedings, judgment and decree as requested and the request that the Respondent should serve the Applicant with Execution form for the Applicant to comply to Rule 11 (7) of

the Court of Appeal Rules, 2009, as amended by G.N. No. 362 of 2007 which require the Applicant in her application to stay the Execution at the Court of Appeal among other things to attach a copy of a notice of the intended execution.

3. That the Hon. Registrar erred in law and facts by denying the applicant right to be heard in his intended Appeal to Court of Appeal and application for stay of execution to the Court of Appeal.

Both parties to the application were represented where Mr. Godfrey Ngassa Advocate represented the Applicant and Mr. Paschal Temba, Personal Representative represented the Respondent. Hearing of the application proceeded by way of written submissions.

The applicant submitted on each ground of revision as contained in the affidavit. On the first ground the applicant argued that the Hon. Registrar erred to proceed to determine the respondent application for execution despite the fact that she was aware that there is a notice of appeal by the Applicant. The applicant filed a notice of intention to appeal to the Court of Appeal after he was aggrieved by the decision of the High Court in Revision No. 261 of 2016, as a result the High Court become *functus officio* as the matter is already before the Court of Appeal.

The Applicant submitted on the second ground of revision that the applicant was yet to be served with Court proceedings, judgment and decree. Also, the applicant was not served with copy of execution form in accordance with rule 11 (7) of the Court of Appeal Rules, 2009, as amended by G.N. No. 362 of 2017. The rules require the applicant to attach a copy of a notice of the intended execution in the application for stay of execution. The Hon. Registrar failed to understand the requirement of the law demanding the Applicant to have a copy of the execution form in order to successfully file application for stay of execution at the Court of Appeal.

The applicant's third ground of the revision is that the Hon. Registrar erred in law and facts by denying the applicant right to be heard in his intended Appeal to Court of Appeal and application for stay of execution to the Court of Appeal. The applicant submitted on the ground that the act of Hon. Registrar to order the Applicant to deposit 50 million shillings as security is denying the Applicant right to be heard as the order has pre emptied the intention of the Applicant to file application for stay of execution.

The applicant prays for the Court be pleased to set aside the order of Hon. Registrar for the applicant to deposit 50 million shillings as the power of execution was vested to the Court of Appeal.

In reply, the respondent briefly submitted on each ground of revision as submitted by the applicant. On the first ground of revision the respondent argued that it is trite law that Appeal, Revision or Review does not bar execution of a decree. The applicant was supposed to serve the respondent within 14 days with the purported Notice of Appeal and to file within sixty days the application for stay of execution. As of today the respondent is neither served with Notice of Appeal nor submission of appeal.

Regarding the second ground of revision, the Respondent submitted that the applicant faulted in his submission for the Deputy Registrar decision to order execution to proceed. However, there is no document presented to Hon. Registrar to prove that there is an appeal or stay of execution when the case came for hearing. The Hon. Registrar rightly decided the execution application according to the evidence presented before her. The applicant complained that he was not served with necessary documents to enable him to file stay of execution and proceed with other steps of appeal, but he failed to prove that he requested for them. There is no letter addressed to the Registrar asking to be supplied with the respective documents which was provided. The Respondent is of the view that this is an afterthought aiming to delay the execution.

The respondent submitted on the third ground of revision that the applicant's allegation that he was denied right to be heard in the appeal to the Court of Appeal and in his application for stay of execution are not true as the record shows that stay of execution was granted with condition to deposit 50 million shillings as security. The applicant still has right to proceed with appeal process and stay of execution application.

The respondent is of the view that the applicant is contradicting himself on the gist of application as it is not clear if he is challenging the power of the High Court to order security deposit or the power of the High Court to proceed with execution. The respondent is praying for the application to be dismissed for lack of merits.

The applicant did not file any rejoinder submission.

Having considered the above contending submissions, the content of notice of application, its supporting affidavit and the reply thereto, I find it relevant to commence the determination of this application by revisiting Notice of Application, its supporting affidavit, record of Execution No. 637 of 2018 and submission by the parties. The applicant is praying for the Court to revise the order of Hon. Deputy Registrar dated 18th December, 2018,

who ordered the applicant to deposit 50 million shillings to the Court Account as decree amount. The applicant asserted that despite the Registrar being aware that the Notice of Intention to Appeal was filed, she proceeded to determine the Application for Execution No. 637 of 2018. In contention, the respondent submitted that the Registrar was not aware of the presence of Notice of Intention to Appeal.

The respondent have submitted that an appeal does not automatically stay the execution of decree. I agree with the respondent that according to rule Order XXXIX Rule 5 of the Civil Procedure Code Act, Cap. 33, an appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the Court may order. The Rule 5 (1) of the Order XXXIX of the Civil Procedure Code Act, Cap. 33, provides that:

5.-(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree.

The position was reiterated in the case of **Princess Shabaha Company Limited vs. NIC Bank Tanzania Limited**, Commercial Case No 94 of 2015, High Court, Commercial Division at Dar Es Salaam, (Unreported), where the Court held that, I quote:-

"The pendency of an application in the Court of Appeal or / even before the trial court can only act as a caution to the officer who carries out the execution of the decree (normally the Deputy Registrar) not to carry out the execution to the extent that may interfere and prejudice the proceedings pending in the higher court or in the same court but for sure the Decree Holder (just like the Judgment debtor who has the right of appeal etc), has the right to commence the execution proceedings for instance to identify the properties of the Judgment Debtor which are liable for attachment and sale and probably the court broker who will carry out the order."

In the present application the Applicant filed a notice of intention to appeal on 15th December, 2017, and applied for a copy of Judgment, Decree and proceedings on 1st of January, 2018. There is nothing which shows that the Registrar was aware that the applicant (Judgment debtor in the Application for Execution) have filed Notice of intention to appeal. As provided by the law above, the filing of the notice of intention to appeal does not automatically stay the execution of the decree. The Registrar in the

application for execution ordered the applicant to deposit in the Court Account a decree amount.

The record of Execution No. 637 of 2018 shows that both parties appeared before the Registrar on 18th December, 2018, where the applicant (Judgment Debtor in Execution Application) informed the Registrar that they have not been supplied with proceedings of Revision case. The Registrar did find that there is no stay for execution nor application for stay of execution which is pending and she ordered the applicant to deposit the security in the Court account. This means that the Registrar considered the applicant allegation that he intends to appeal against the decision of the High Court in Revision Application No. 261 of 2016 and that he was not supplied with copies of Judgment, Decree and proceedings of the respective revision.

The applicant alleged that he failed to proceed with appeal process and application for stay of execution for the reason that he was not furnished with the copies of judgment, decree and proceedings of the Court and the execution order that may allow him to file stay of execution application in the Court of Appeal. It is in record that the applicant requested to be supplied with the copy of the judgment, decree and proceedings of the Court in Revision Application where the respective letter was received by the Hon.

Registrar on 1st February, 2018. The said letter did not disclose the reason for the request. Also, there is nothing in the record to show that the applicant did make any effort to make a follow up after the requested documents were not supplied in time.

The applicant submitted that under rule 11 (7) of the Court of Appeal Rules, 2009 as amended requires the application for stay of execution to be accompanied by copies of the notice of appeal; decree or order appealed from; judgment or ruling appealed from; and notice of the intended execution if any. It is true that the above mentioned documents are supposed to be annexed in the application for stay of execution before the Court of Appeal. However, the evidence available in this application does not show that the applicant applied to be supplied with notice of intended execution. Therefore, from the evidence available it is clear that the applicant who is blaming the Registrar for his failure of filing of the stay of execution did not request for the notice of the intended execution or make a follow up to the Court to be furnished with the other respective documents required in filing an application for stay of execution. Therefore, I'm of the opinion that the applicant have himself to blame for his failure to make a follow up to his request to be furnished with the judgment, decree and proceedings of

the Court for more than one year and there is nothing in the record which shows that he applied for notice of the intended execution. Consequently this ground is found to have no merits at all.

The applicant in the third ground of the revision is of the view that the Hon. Registrar denied him the right to be heard in his intended Appeal to the Court of Appeal and application for stay of execution to the Court of Appeal. The act of Hon. Registrar to order the Applicant to deposit 50 million shillings as security is denying the Applicant right to be heard as the order has pre-empted the intention of the Applicant to file application for stay of execution. The respondent vehemently contended this submission by the applicant. The respondent is of the opinion that the stay of execution was granted with condition to deposit 50 million shillings as security.

The record of execution application shows that the Court decided to proceed with execution as there was no stay of execution or application for stay of execution filed by the applicant. The record further shows that the applicant was availed with the right to be heard before Hon. Deputy Registrar and I'm of the opinion that he still has right to proceed with appeal process and stay of execution application where he will be heard. The applicant in his submission before the Hon. Deputy Registrar did not show how he is

going to be affected by the execution order and also the applicant did not give any security for the due performance of such decree. There was nothing to pursue the Hon. Registrar to carry out the execution with caution not to interfere and prejudice the proceedings pending in the higher court. Thus, the Registrar order for the applicant to deposit in the Court account the decree amount was according to the law.

Therefore, I find this revision application in its totality to have no merits and the same is hereby dismissed. This being a labour matter, there is no order as to cost.



A. E. MWIPOPO

JUDGE

25/09/2020