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

REVISION NO. 417 OF 2020

BETWEEN

AKBAR HASSAN MOHAMED ..... APPLICANT

VERSUS

ZETAS ZEMIN TEKNOLOJIS A.S. ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The Revision before me is against the ruling of the Honorable Deputy Registrar in Execution Application No. 77/2018 whereby the applicant moved the Court to attach and retain the money of the Decree Debtor (respondent herein) retained by DAWASA as per award. The Honorable DR declined to issue the order on the ground that DAWASA was not a party to the dispute or the Award and further that the award did not order DAWASA to pay the applicant. Aggrieved by the decision, the applicant has lodged the current revision on the following grounds:

1. That the Deputy Registrar erred in law and in fact for failure to abide with the governing laws on the execution of Decree or Award as provided in Civil Procedure Code CAP 33 R.E 2019 as well as Labour Court Rules G.N No. 106 of 2007.
2. That the Deputy Registrar erred in law and in fact for failure to confined to Orders enshrined in the Award thus dwell on interpreting Orders of the Award which are very clear on how the Award can be satisfied to require unfound interpretation.

3. That the Deputy Registrar erred in law and in fact for failure to take note that DAWASA is in possession of Retention money as per Contract CB No. CW-W108 thus can be compelled to satisfy the Decree or Award as the procedures allows for third party in possession of movable properties belonging to Judgment Debtor to be compelled.
4. That the Deputy Registrar erred in law and in fact eroding and ousted the powers and jurisdiction of the Court on execution of the Award by categorically pronouncing that the Labour Court is not the proper forum for execution application at hand while it is a labour related matter.
5. That the Deputy Registrar erred in law and in fact to exercise powers of the Registrar turned to be advisory to the Applicant to seek unknown forum to file the execution.
6. That the Deputy Registrar erred in law and in fact on determining that he cannot attach the retention money payable to the Respondent in custody of DAWASA account despite the fact that the mode of execution was specifically on the retention money as per Award and the inventory of the same was evidenced by the Applicant as well as DAWASA itself.

This is an ex-parte judgment following efforts to serve the respondent proving futile. The Respondent was properly served through substituted service vide DHL, however, the records show that even at the stage of CMA, the respondent/Judgment Debtor has never entered appearance.

Before I venture into the merits or otherwise of the application, brief background of the matter is narrated. An employer-employee relationship existed between the applicant (employee) and the respondent (employer) from the 01st of September, 2012 at a base working station in Dar-es-salaam. The employer is a foreign country based in Dubai, United Arab

Emirates. The applicant was employed in a capacity of Representative of the respondent in Tanzania. So what was the respondent role in DAWASA? According to the submissions of the applicant and the records of this application, the respondent was a contractor who on 28th September, 2012 entered into contract with DAWASA to drill 8 Exploratory Boreholes on Kimbiji Aquifer. The contract was mostly performed but before the end of the contract, there were some disagreements between the parties and the respondent closed the project and left the country.

It was during of the employer-employee relationship between the applicant and the respondent that the dispute arose, after the applicant claims to have been under payed having performed extra duties than the ones assigned to him under the employment contract.

Vide Labor Dispute No. CMA/DSM/ILA/R.632/17 ("the Dispute"), the applicant lodged a complaint against the respondent claiming for a compensation of USD. 150,020/- as salary arrears, allowances and other entitlements. The dispute was heard ex-parte and in its award, the Commission for Mediation and Arbitration awarded the applicant a total sum of USD 164,933/- an amount higher than what was claimed by the applicant in CMA Form No. 1. The CMA further ordered that the amount declared in the award may increase if the employer delayed in handing over the contract. Subsequently, the applicant lodged before this court an Execution Application No. 77/2018. When the matter came for execution, the applicant herein who is also the decree holder, prayed for the following mode of execution:

> *"By attachment of retention money of decree debtor retained by DAWASA as per award"*

Upon hearing the application, the Honorable DR held in her ruling:

"Even the Award did not direct that money to be paid by DAWASA rather it advise that they have to liase with DAWASA to look how it can able to help that Decree Holder to get his right.

Otherwise it is my advise for Decree Holder to look on the way or how he can approach the Court with the jurisdiction to determine that issue.

For the matter in hand I cannot issue an order for attachment of the account of DAWASA who was not a party to the suit, or Award and whose the Award did not order them to pay.

But further I have no jurisdiction to inquire or scrutinize the contract entered between Decree Debtor and DAWASA on performance of their work where the Decree Debtor was doing.

Due to such circumstance with respect I decline to issue an order for attaching DAWASA Account. It is further advised for Decree Holder to follow the advise given in their Award. For that reason the application is hereby struck out.."

Aggrieved by the decision of the DR, the current revision was lodged on the aforementioned grounds. Having gone through the lengthy six grounds of appeal, I find that they all narrow down to two issues, one is whether the holding of the CMA on the retention money amounted to an order to warrant attachment of the money of decree debtor allegedly retained by DAWASA and two is whether the retention money payable to the Respondent in custody of DAWASA account as per Contract CB No. CW-W108 can be compelled to satisfy the Decree or Award (to be categorized as third party in possession of movable properties belonging to Judgment Debtor).

I will start with the second issue, whether the retention money payable to the Respondent in custody of DAWASA account as per Contract CB No. CW-W108 can be compelled to satisfy the Decree or Award. It seems to me that

what the decree holder is stretching his hands to, is the money that is retained by DAWASA account as per Contract CB No. CW-W108. He must have been privileged the knowledge of the existence of the amount from the position he held in the respondent company. The question is whether this money, can be used in any other way other than what is in the terms of the contract. Fortunately, the applicant has attached the contract between DAWASA and the respondent as annexure AHM-1 to his affidavit so I took time to peruse the said agreement to see whether what the applicant claims to be, actually exists. Para 4 of the agreement reads:

> *"The Employer hereby covenants* ***to pay the Contractor in consideration of the execution and completion of the Works and the remedying of defects therein,*** *the Contractor Price of such other sum as may become payable under the provision of the Contract at the times and in the manner prescribed by the Contract."*

According to that contract, I have not seen anywhere that DAWASA has committed to pay any administration costs or have anything to do with the administration of the respondent including labor issues arising in due course. In the contract, the respondent was a contractor to DAWASA who was the employer/client. This took me to annexure AHM-2 to the affidavit, the contract of employment between the applicant and the respondent. Even in that document, there is no place where the applicant is connected to DAWASA or informed that he has or will have anything to claim against DAWASA.

The only commitment of money that DAWASA had with the respondent is to pay the Contractor in consideration of the execution and completion of the Works and remedying of defects therein. Therefore shifting a financial liability that is related to an employment contract to DAWASA for a mere reason that he was the client/employer of the respondent on terms of

business other than employment is by all means absurd. If the applicant wishes to move DAWASA to pay any amount due by the respondent to the applicant, it should not be through a labour dispute.

I have noted that in his submissions to support the application, Mr. Josephat submitted that the failure to pay salaries was reported to respective stakeholders that is DAWASA and the Project Consultant (CDM Smith). Prior to the contract coming to an end, the Respondent abandoned the site whereas the entire Project was left to the hands of the Applicant. That to avoid the frustration of the Contract the Applicant was urged by DAWASA and CDM Smith to continue with the final implementation to an end of the Project as he is Tanzanian and the Project itself is vital for the country and he was further assured that at the end, the issue of outstanding salary and wages can be sorted out at DAWASA as an Employer of the Respondent have money retained under its custody. Further that the relationship between DAWASA and the Applicant was good and it was DAWASA who advised the Applicant to seek legal redress as the same can be used by DAWASA as a basis and justification for payment by deducting from the final certificate once raised.

I must admit that I do not understand why Mr. Josephat took his time to make such irrelevant submissions at this stage. He should have directed himself as to the value of this submission at this stage of Revision against Execution of the decree because all these are words from the bar which can not be substantiated at this stage. Even if they were to be so substantiated, then they would have no value addition at this stage. The question which remains a puzzle, is why all these facts were not tabled before the CMA during hearing of the substance of the claim. The other question is if the applicant knew all these facts and assurances about DAWASA, why didn't he make DAWASA part of the proceedings at the CMA? If he had claims against

DAWASA, why was he then attacking someone whom he knew was out of the country and could not be found and now wants to come and drag another party and make him liable for something which he was not a part of? All these unanswered questions leave a lot to be desired and there is only one conclusion, there is no any proof that the money was to be used to pay the applicant from a decree arising from a labor dispute.

The next issue is what I termed as the first issue, whether the holding of the CMA about the retention money amounted to an order to warrant attachment of the money from DAWASA. In the case of **Millicom Tanzania NV vs James Alan Russels Bell & 5 Others (Civil Revision No.3 of 2017) [2018] TZCA 355; ; (26 July 2018)** while dealing with an issue whereby the property of a party who was not a party to the suit was sold in execution, the Court of Appeal of Tanzania had this to say while citing the provisions of Section 38 of the CPC :

> *"Section 38 (1) of the CPC which provides:*
>
> *"All questions arising between the parties to the su it in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit"*
>
> *In the light of bolded expression, the scope of questions to be determined by the executing court* ***is limited to those arising between the parties to the suit in which the decree was passed."***

On the above principle, the first thing is to see whether the said DAWASA was a party to the suit (the dispute) and further see what the CMA order entailed against DAWASA. It is apparent on the record and undisputed by the applicant that the said DAWASA was not a party to the dispute at the

CMA. Further to that, looking at what the CMA order in its award concerning DAWASA, which is found on page 9 at para 6 of the reliefs, it reads:

> *"kukamilika malipo ya madai mlalamikaji, atafute njia ya kuwasiliana na mlalamikiwa ambaye kwa sasa hayupo nchini. Pia awasiliane na DAWASA ambao ndio waajiri wa Mlalamikiwa pamoja na Mshauri Mwelekezi CDM Smit ili kulinda haki ya mlalamikaji isipotee na kuweza kuhitimisha madai yake kwa kuangalia uwezekano stahiki za mlalamikaji zitoke kwenye malipo ya fedha ambazo zimeshikiriwa kama retention money".*

Reading through the lines of the CMA order, it is not a subject of execution; rather it is a subject of intervention with DAWASA. The order reads "*kuweza kuhitimisha madai yake kwa kuangalia uwezekano stahiki za mlalamikaji zitoke kwenye malipo ya fedha ambazo zimeshikiriwa kama retention money*". The CMA said *kuangalia uwezekano* meaning "to see the possibility that the amount of compensation comes from retention money". This is in no way an executable order of the CMA. I can see the logic why the CMA did not directly order DAWASA to pay the applicant, it is because she was not party of the dispute at the CMA hence there is no way that the CMA could intend to make such an order.

Therefore if we are to proceed and order that the execution proceed against DAWASA, we would first have to ask ourselves if she was afforded a right to be heard before such an order was passed against him. A right to be heard is fundamental and cannot be overlooked easily. In the case of **Halima Hassan Marealle Vs Parastatal Sector Reform Commission, Civil Application No. 84 of 1999** (unreported), while dealing with the omission of a right to be heard before an order is passed against the party, the Court of Appeal of Tanzania had this to say:

"... It is no argument that there were no grounds before the learned judge on which the order could be made. Rather the concern is whether the applicant whose rights and interests are affected is afforded the opportunity of being heard before the order is made. The applicant must be afforded such opportunity even if it appears that he or she would have nothing to say, or what he or she might say would have no substance."

As for the case at hand, the said DAWASA was not afforded any opportunity to be heard before her property was applied to be attached in execution, neither does the order of the CMA indicate that there was anything executable against the property of DAWASA. It was rather an advise that the applicant should seek intervention there in order to see how best she can be sorted out. That cannot be interpreted in any way that DAWASA is part of the judgment debtor. Therefore the DR was right in refusing to attach the property of DAWASA in fulfillment of the decree which she was not a party.

On those findings, I see no reason to fault the ruling of the Honorable DR in execution No. 77/2018. This application is therefore dismissed in its entirety.

Dated at Dar-es-salaam this 30th day of September, 2021

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

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S.M. MAGHIMBI

JUDGE