

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

MISCELLANEOUS APPLICATION NO. 95 OF 2021

BETWEEN

KUNAL JAGDISH VAGHELA.....APPLICANT

AND

SALEHE MUSHEHE KIBWANA 1ST RESPONDENT

KUNAL MAGANILAL 2ND RESPONDENT

RULING

Date of last order: 28/10/2021

Date of Ruling: 26/11 2021

B.E.K. Mganga, J

On 31st March 2021, Kunal Jagdish Vaghela, the Applicant, filed this application so that he can be relieved from execution proceedings No. 27 of 2020 pending in this Court against Kunal Maganlal. Brief facts leading to the said execution proceedings and this application are that, the herein respondent was employed by the said Kunal Maganlal as Daladala driver. It happens that their relationship turned sour as a result the respondent filed Labour dispute No. CMA/DSM/ILA/312/19/212 to the Commission for Mediation and Arbitration henceforth CMA. The said dispute was heard exparte and an exparte award was issued on 2nd January 2020 in favour of the respondent who was awarded TZS 2,200,000/=.

On 31st January 2020, Kunal Maganlal filed an application at CMA to set aside an ex parte award. The notice of application was supported by an affidavit of the said Kunal Maganlal. The application was opposed by the respondent who filed a counter affidavit and notice of preliminary objection that the applicant was out of time. On 30th November 2020, Mbeyale, R, arbitrator, dismissed the application by upholding the preliminary objection raised by the respondent. The respondent thereafter filed Execution No. 27 of 2020 to execute an ex parte award. Kunal Maganlal filed before this court Miscellaneous Application No. 417 of 2020. The said Miscellaneous application No. 417 of 2020 was withdrawn by the said Kunal Maganlal on 25th February 2021. As stated hereinabove, this application was filed before this court on 31st March 2021 by **Kunal Jagdish Vaghela**, the applicant, after withdrawal of the aforementioned Miscellaneous application. In the affidavit in support of the notice of this application, applicant deponed that arrest warrant was issued in execution No. 27 of 2020 against him while the dispute and execution application were against kunal Maganlal who is a different person.

The respondent filed a counter affidavit opposing the application. In the counter affidavit, respondent deponed that applicant filed an application to set aside ex parte award at CMA and that in the said application, applicant did not challenge correctness of his name.

Respondent attached the ruling dismissing application to set aside exparte award, the notice of application, chamber summons and an affidavit filed in support of the application to set aside the said exparte award by the applicant as annexure BSM1 and BSM2 collectively.

On hearing date, applicant was represented by Mr. Nehemia Munga, Personal Representative, whereas, the 1st Respondent was represented by Mr. Bernard Maguhwa and Beatrice Kahomba, Advocates. 2nd respondent neither filed a counter affidavit nor entered appearance before this court. More so, there is no proof that he was served with the application.

Arguing the application on behalf of the applicant, Mr. Nehemia submitted that applicant is praying execution No. 27 of 2020 be dismissed on ground that the name in that application for execution is not of the applicant. Munga submitted that, the name of the applicant is **Kunal Jagdish Vaghela** and that applicant failed to appear at CMA as he is not called **Kunal Maganlal** as a result CMA issued an exparte award. Mr. Munga prayed that the application be allowed by dismissing execution No 27 of 2020 and that if the respondent is still interested, he may file a fresh complaint to CMA using the proper name of Kunal Jagdish Vaghela. Mr. Munga conceded that Respondent was employed by the applicant as daladala driver.

Resisting the application, Mr. Bernard Maghuwa, counsel for the 1st respondent submitted that, the application was filed by the applicant who, incidentally, is the 2nd respondent. The applicant is the one who made application at CMA praying to set aside an ex parte award in the name of the 2nd respondent but the same was dismissed. Counsel for the 1st respondent submitted that in an application to set aside an ex parte award at CMA, applicant did not challenge the name of the parties. Counsel went on that, the application based on determination of the applicant's name has not been determined at the original jurisdiction, as such, this court has no jurisdiction as its powers are revisional. Counsel for 1st respondent argued further that, applicant raised the issue of name while making submissions to set aside ex parte award but the same was not in his affidavit. Mr. Maghuwa, counsel for the 1st respondent, was of the view that, the application by the applicant in which he has denounced his name, that he is not Kunal Maganlal, the 2nd respondent, is intended to delay execution No. 27 of 2020 which is pending before this Court. He thus prayed for dismissal of the application.

Having considered parties submissions, the rival issue is whether Kunal Jagdish Vaghela, the applicant is the same person as Kunal Maganlal, the 2nd respondent, and whether; the prayer to dismiss execution No. 27 of 2020 is tenable in law.

In responding to the first issue relating to names, I have passionately examined the affidavit in support of the application with its annexures and the counter affidavit together with its annexures and submissions made by the parties before me and find that the ruling dismissing application to set aside an ex parte application shone light to this issue. The said ruling annexure BSM 1 to the counter affidavit shows that the application to set aside an ex parte award was made by Kunal Maganlal but in the course of argument the said Kunal Maganlal argued that his name is Kunal Jagdish Vaghela, the herein applicant. The name "***Kunal Jagdish Vaghela***" came out during submission as correctly submitted by counsel for the 1st respondent. It was not in the application filed to set aside an ex parte award. This, in my view, was an afterthought and an abuse of court process. The evidence for this conclusion is abundant. I have examined the notice of application, chamber summons and an affidavit filed at CMA by Kunal Maganlal and find that they do not suggest that the said ***Kunal Maganlal*** was not a proper person in the award and that the proper name was Kunal Jagdish Vaghela. Therefore, in my view, raising the discrepancy of the name in submission, was intended to mislead the arbitrator. In the application at hand, applicant has used the name of Kunal Jagdish Vaghela but praying dismissal of execution No. 27 of 2020 that was filed against Kunal Maganlal which he has denounced. If applicant is not the same

person as Kunal Maganlal, why should he be bothered by the execution application filed against a different person. It is illogical that pains are being felt by a different person who has not been caned. In connection to that, it is apparent that, while at CMA in application to set aside an exparte award applicant made an application by using Kunal Maganlal but when he found himself in hot soup, he came up with a new name namely, Kunal Jagdish Vaghela. In no doubt, applicant was and is aware that he is a decree debtor arising from the exparte award filed by the 1st respondent.

In addressing correctness of names of the parties, courts have been using the Doctrine of finger litigation or misnomer. The said doctrine was used by the court of Appeal in the case of ***Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd***, Civil Application No. 113 of 2011, CAT (unreported) wherein the Court of Appeal endorsed the holding in the case of ***Evans Construction Co. Ltd. versus Charrington & Co. Ltd. and Another*** (1983) I All E R 310 where it was held:-

"...As the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holdings Ltd., and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued...it would be just to correct the name of the respondent"

Applying the same doctrine, the Court of Appeal in ***Christina's case***, supra, the Court of Appeal held:-

"We are satisfied that it is just to correct the name of the Respondent from Coca Cola Kwanza Bottlers Ltd. to Coca Cola Kwanza Ltd".

In the matter at hand, it is undisputed that respondent pointed the correct judgement debtor in Execution No. 27 of 2020 but what is disputed is correctness of the name of the applicant instead of being named Kunal Jagdish Vaghela he was named Kunal Maganlal. It is established principle that the correctness of the name would not affect the suit if the course of action is between the parties. I therefore hereby apply the same principal in this application.

It was submitted by counsel for the applicant that execution application No. 27 of 2020 be dismissed and that if the 1st respondent is interested, he can refer a fresh dispute to CMA against the applicant using the alleged name "Kunal Jagdish Vaghela". With this submission from applicant's personal representative, there is no dispute that, applicant is aware that he was the employer of the 1st respondent and that, he terminated him and further that, there is an award in favour of the 1st respondent. It is my view that, there is no need of respondent to refer a fresh application at CMA as that will amount to multiplicity of proceedings on the same parties but using different names. I will therefore correct the names of the parties in the exparte award and execution application to avoid going back to CMA to be heard afresh. The position I am taking

regarding the advantage of correcting the name was discussed in Ugandan case of **Buffalo Youngster Inc. v. SGS Uganda Ltd**, HCMA, No. 6 of 2012 as was cited by this court in the case of **Rev. John Mathiasi Chambi & 548 Others v. Registration Insolvency and Trusteeship & 5 Others**, Miscellaneous Cause No.21 of 2020S, where this Court (Mlyambina, J) stated that:

"Multiplicity of proceedings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed."

For the foregoing, I do hereby apply the doctrine of *finger litigation* or *Misnomer* in the application. I therefore dismiss this application and order that the name of the respondent in the exparte award should read Kunal Maganlal @ Kunal Jagdish Vaghela and that the application for execution No. 27 of 2020 should continue in the name of Kunal Maganlal @ Kunal Jagdish Vaghela as the decree debtor as he is the same person and the 1st respondent as decree holder.

It is so ordered.



B.E.K. Mganga

JUDGE

26/11/2021