

**THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**  
**REVISION APPLICATION NO. 164 OF 2021**

**BETWEEN**

**BLUE PEARL HOTEL & APARTMENTS LTD..... APPLICANT**

**AND**

**HAMISI S. DAFFA AND 79 OTHERS ..... RESPONDENTS**

**JUDGMENT**

*Date of last Order: 29/03/2022*  
*Date of Judgment: 6/04/2022*

**B.E.K. Mganga,J**

Brief facts of this application are that, respondents were employees of the applicant. Respondents filed labour complaint No. CMA/DSM/ILALA/R.571/15 complaining that they were paid by the applicant salary that were below minimum wages. In their evidence at CMA, respondents testified that they were paid TZS 155,000/= per month instead of TZS 250,000/=. On 3<sup>rd</sup> August 2016, Hon. Alfred Massay, arbitrator issued an award ordering the applicant to pay them minimum salary of TZS 250,000/- and pay salary arrears being underpayment unlawfully withheld from 1<sup>st</sup> July 2013 the date the wage order came into force or such date the respondent commenced employment after the date the wage order came into force. Applicant

was aggrieved by the award as a result, she filed Revision application No. 366 of 2016 before this court. On 7<sup>th</sup> December 2016, Hon. A. C. Nyerere, J, (as she then was) dismissed the said application for want of prosecution and non-appearance. Applicant filed Miscellaneous application No. 09 of 2017 seeking to restore Revision application No. 366 of 2016 and set aside the dismissal order. On 5<sup>th</sup> July 2017, Hon. A. C. Nyerere, J, (as she then was) again dismissed Miscellaneous application No. 09 of 2017 for want of prosecution and no-appearance. Applicant further filed miscellaneous application No. 233 of 2017 seeking to set aside the dismissal order of Miscellaneous application No. 09 of 2017 issued on 5<sup>th</sup> July 2017. Respondents filed application for execution No. 204 of 2017 before this court to enforce the said award. Applicant filed Miscellaneous application No. 265 of 2017 praying stay of execution pending hearing and determination of Miscellaneous application No. 233 of 2017 before Hon. Nyerere, J (as she then was). On 12<sup>th</sup> September 2017 Hon. S.J. Kainda, Deputy Registrar, issued a ruling that the application by the applicant shall be granted on the condition that applicant shall furnish a bank guarantee or an amount of cash equal to the decretal sum awarded by CMA as security within Fourteen (14) days otherwise the application will stand to be dismissed. On 1<sup>st</sup> March 2018, Hon. Nyerere, J (as she then was) dismissed miscellaneous application

No. 233 of 2017 for want of prosecution and no-appearance. Applicant further filed Miscellaneous application No. 135 of 2018 seeking interpretation of wage Order for her to pay TZS 250,000/= per month to the respondents. The said application for interpretation was dismissed on 27<sup>th</sup> May 2019 by Hon. Muruke, J, for being time barred. When Execution application No. 204 of 2017 came for hearing before Hon. S.R. Ding'ohi, Deputy Registrar, Mr. Shalom Msaky, learned counsel for the herein applicant informed the court that the applicant/decree debtor is ready to pay the Decree holders (the herein respondents) upon quantification of the proper amount by the CMA and not the amount calculated by the respondents themselves. On 25<sup>th</sup> August 2020, the court remitted the CMA filed to CMA for computation /calculation of the exact amounts to be paid by the Decree debtor to the Decree holders. On 19<sup>th</sup> March 2021, through CMA/DSM/MISC.46 /2020, Hon. Mwakisopile, I.E, arbitrator made calculation and ordered that respondents are entitled to be paid Two Hundred Forty Eight Million Eight Hundred Ninety Eight Thousand Eight Hundred Tanzanian Shillings (TZS 248,898,800/=) only.

Applicant was aggrieved by the calculations made by Hon. Mwakisopile, arbitrator hence this application for revision. In the

affidavit in support of the application for revision, applicant advanced three issues namely:-

- 1. Whether the Commission for Mediation and Arbitration has power to entertain an application which was previously decided by the same Commission for being time barred.*
- 2. Whether the Commission for Mediation and Arbitration has the power to entertain an application which is out of time without an application for extension of time.*
- 3. Whether the Commission for Mediation and Arbitration correctly calculated the entitlements under the award.*

In resisting the application, respondents filed the counter affidavit affirmed by Jamal Ngowo, their personal representative from Tanzania Union of Industries and Commercial Workers (TUICO).

When the application was called for hearing, Mr. Shalom Msaky, learned counsel for the applicant submitted that CMA had no jurisdiction because calculations were supposed to be done within 14 days after the respondents became aware of the defects. Counsel relied on Rule 30(1) of the Labour Court Rules, GN. No. 106 of 2007 read together with section 90 of the Employment and Labour Relations Act [Cap. 366 R. E 2019]. Counsel for the applicant submitted that respondents filed the application for calculation at CMA after three years without condonation

hence CMA lacked jurisdiction. Counsel went on that the Deputy Registrar being the executing officer had no power to overrule the limitation period provided under the law and that has no power to entertain matters of law arising from execution. He argued that he was supposed to refer the matter to the judge in terms of Rule 1 of Order XLI of the Civil Procedure Code [ Cap. 33 R.E. 2019].

Counsel for the applicant submitted further that the award was procured with illegalities because the commission did not base calculation on evidence and that applicant was not heard on calculation at CMA. He argued that there was no hearing at all, but calculations were based on papers prepared and submitted by the respondent only. Counsel for the applicant cited the case of ***Mussa Chande Jape v. Moza Mohamed Salim, Civil Appeal No. 141 of 2018*** (unreported) and submitted that the award be set aside as there was violation of right to be heard. Counsel went on that due process be followed so that respondents can be paid their rights.

When asked by the court whether; the applicant raised jurisdictional issue at CMA he readily conceded that she didn't. Counsel further conceded that there is no evidence showing that she prayed to file documents at CMA to as base of applicant's calculations.

Mr. Ngowo, the personal representative of the respondents from TUICo, submitted that there was no order for calculation made by Kainda, Deputy Registrar. He went on that, initially respondents filed application to CMA for calculation, but applicant raised objection that it was incompetent as a result it was struck out. That, applicant thereafter filed an application for execution without stating the amount as a result when both parties appeared before Hon. Ding'ohi, Deputy Registrar, Mr. Masaki, counsel for the applicant informed the court that applicant is ready to pay the respondents upon calculations being made. That, the deputy Registrar remitted the file to CMA for calculations to be made, but on several dates, applicant did not enter appearance for hearing of calculation to be done. Mr. Ngowo submitted further that there are no illegalities in the award. He also submitted that applicant did not file the amount each respondent was entitled to as a result, applicants made calculations. Ngowo went on that applicant is playing delay tactics which is why, she filed several applications before this court and claiming that she is ready to pay while she doesn't.

I have considered the rival submissions and carefully examined court record relating to all applications mentioned hereinabove and I should say from the word go that applicant is abusing court process.

It was submitted by Mr. Msaky counsel for the applicant that calculations were supposed to be done within 14 days after the respondents became aware of the defects. In so submitting, he relied on Rule 30(1) of the Labour Court Rules, GN. No. 106 of 2007 read together with section 90 of the Employment and Labour Relations Act [Cap. 366 R. E. 2019]. Based on these two provisions, counsel for the applicant submitted that CMA had no jurisdiction because application for calculations was filed and heard out of time without condonation. With due respect to counsel for the applicant. I have read Rule 30(1) of the Labour Court Rules (supra) and find that it has nothing to do with this application. The said Rule relates to notice of appeal hence not applicable to the circumstances of the application at hand. Not only that but also, section 90 of Cap. 366 R.E. 2019 (supra) is not applicable. The said section provides:-

*"90. An arbitrator who has made an award under section 88(10) may, on application, correct in the award any clerical mistake or error arising from any incidental slip or omission".*

From the above quoted section, there is no requirement that respondents were supposed to make application for calculations within 14 days as argued by counsel for the applicant. In my view, the submissions by the applicant that respondents were time barred lacks merit. It was further submitted by counsel for the applicant that the

deputy Registrar had no power to order calculations to be made and that the deputy Registrar was supposed to refer the matter before the judge. Counsel for the applicant relied on Rule 1 of Order XLI of the Civil Procedure Code (supra). It is my view that this submission lacks merit for two reasons (i) it is the same counsel for the applicant who moved the court that applicant is ready to pay the respondents upon calculations being made by the CMA. Therefore, in no way, CMA could have made calculations without the court remitting the file to it for calculations, and (ii) the deputy registrar being the executing officer has mandate to make findings on issues of law that arise during execution as it was held by the Court of Appeal in the case of ***Hassan Twalib Ngonyani v. TAZAMA Pipeline Limited, Civil Appeal No. 201 of 2018***, (unreported) wherein it held:-

*"... under section 38(1) of the CPC..., the executing court enjoys exclusive jurisdiction to deal with any questions relating to execution, discharge and satisfaction of the decree. Where the resolution of any of the questions requires ascertainment of controversial factual issue, the executing court is entitled, under section 38(2) of the CPC even to convert execution proceedings into a suit. In our view, therefore, in so doing as the claim is captured by the decree, whether expressly or constructively, it is within the power of the executing court to compute the same."*

It is my view, that it was proper for the Deputy registrar to require the arbitrator to make calculations. More so, the order was solicited by counsel for the applicant who, now is challenging that CMA had no



jurisdiction. It is my view, as pointed above, applicant have been filing several applications including this one in the abuse of court process to ensure that execution application filed by the respondents will be frustrated and that the award remains an empty paper that cannot be enforced.

It was submitted by counsel for the applicant that the award is tainted with illegalities because she was not afforded right to be heard. Mr. Jamal for the respondent submitted that applicant was served but did not enter appearance during hearing of the calculations. I have examined the CMA record and find that applicant was duly served. The CMA record show that in one instance, Mr. Michael Mashauri, the HR of the applicant appeared at CMA and promised to file documents that are base of calculations by the applicant and the matter was adjourned to 27<sup>th</sup> November 2020. The CMA record further shows that Shalom Msaky, advocate, also entered appearance but later he did not. The documents that were supposed to be the base of calculations on behalf of the applicant were not filed. That being the position, applicant cannot complain that she was denied right to be heard. From where I am standing, she was afforded right to be heard, but she did not utilize it. It is my view that, failure by the party to utilize the right to be heard afforded, cannot at later stage, be a base of complaint by the said party

that s/he was denied right to be heard. In fact, the law helps those who are vigilant and not those who sleep on their rights. From the facts of this application, I am of the settled opinion that applicant has been making several applications as a delay tactic as submitted by Mr. Ngowo for the respondents. I further hold that applicant has been abusing the court process. I therefore direct that he should stop forth with from now otherwise he will be ordered to pay costs to the parties.

For the foregoing I hereby dismiss this application for want of merit.

Dated at Dar es Salaam this 6<sup>th</sup> April 2022.



B.E.K. Mganga

**JUDGE**

Judgment delivered in chambers on this 6<sup>th</sup> April 2022 in the presence of Dismas Mwendwaraha, George Richard Chamlilo and Mohamed Juma Mwagiro, on behalf of the respondents but I absence of the applicant.



B.E.K. Mganga

**JUDGE**