IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 433 OF 2021

(Originating from the Ruling and Order of the Deputy Registrar of the High Court (Hon. W.S. Ng'humbu, dated 20th September 2021 in Execution Application No. 437 of 2020)

BETWEEN

UAP INSURANCE (T) LIMITED ..... APPLICANT

AND

YUDA SHAYO & 6 OTHERS ..... RESPONDENTS

JUDGMENT

Date of last Order: 11/05/2022
Date of Judgment: 20/05/2022

B. E. K. Mganga, J.

This decision is in respect of an application for Revision filed by UAP Insurance (T) Limited, the applicant, against the ruling of the Deputy Registrar in Labour Execution No. 437 of 2020 dated 20th September 2021 that was filed by Yuda Shayo & 6 Others, the herein respondents. It its undisputed facts that respondents were employee of the applicant and that their employment contracts commenced on

different dates and at different capacities. It is also undisputed that their employment relationship came to an end on 24th May 2018 when applicant retrenched the respondents on ground of operational requirement. The respondents were aggrieved with termination of their employment as a result they filed the dispute before the Commission of Mediation and Arbitration (CMA) claiming to have been unfairly terminated. At CMA, the arbitrator decided in favour of the respondents as the arbitrator found that respondents were both substantively and procedurally unfairly terminated. The arbitrator ordered the respondents be reinstated without loss of remuneration from the date of termination to the date they resume their service and be paid TZS. 50,000,000/= as general damages each.

Respondents filed an application for execution of the award in Execution No. 437 of 2020, specifying the award sum to which he/she applied for its enforcement including accrued salaries from the date of termination, 12 months' salaries in lieu of reinstatement, untaken leave allowance, salary arrears and general damages. In the said execution application, respondents were seeking the court to garnishing money held in the account of the applicant. Before the executing officer, counsel for the applicant submitted that she deposited TZS 153,873,932 in court in compliance with the order of reinstatement and prayed that

the said amount be certified as partial satisfaction of the award. On the other hand, it was submitted by counsel for the respondent that neither the court nor the applicant had power to turn an order of reinstatement into an order of compensation. Having considered submissions of both sides, on 20th September 2021, the executing officer found that it was undisputed that the award was for reinstatement. The executing officer found that the employer had an option of paying compensation instead of reinstatement and further that the said compensation must be made in terms of section 40(3) of the Employment and Labour Relations Act [Cap. 366 R.E 2019]. The executing officer held that the law does not state as to whether the wage to be used in calculating compensation is the basic or net salary of the employee and that for calculation to be properly done, the award should clearly state as to whether the base is basic or net. The executing officer held further that payment of a quantum which is different from the actual quantum of the award or decree does not amount to payment of money under a decree provided for under Order XXI, Rule 1 of the Civil Procedure Code [Cap.33 R.E 2019] unless the quantum is not disputed by the parties. The executing officer concluded that there was no quantum of compensation in lieu of reinstatement which was subject of the alleged payments made into court in satisfaction of the award and that there was no sum of TZS

100,068,219/= which was capable of being executed by the court. Based on the foregoing, the executing officer struct out the application for execution filed by the respondents.

Aggrieved by the ruling of the executing officer that struck out the application for execution filed by the respondents, applicant filed this application seeking the court to revise that ruling. In the support of the notice of application, applicant filed an affidavit of Venance Minja the applicant's Principal officer. In the said affidavit, the deponent raised 6 issues namely: -

1. *Whether the Deputy Registrar was correct in finding that the ELRA does not provide for the basis for computation of compensation in lieu of reinstatement.*
2. *Whether the basis of /factor for computation of compensation in lieu of reinstatement under section 40(3) of the ELRA must be set in the award/decree.*
3. *Whether the quantum of compensation in lieu of reinstatement under section 40(3) of the ELRA must be determined by the Tribunal/Court issuing the award/decree.*
4. ***Whether the payment of TZS 153,873,932/= into Court made by the Applicant in partial satisfaction of the Award*** *was payment in terms of Order XXI Rule 1(1)(a) of the Civil Procedure Code, Cap. 33 R.E 2019.*
5. *Whether the payment of TZS 153,873,932/= into Court by the Applicant was in compliance and satisfaction of an award of reinstatement made by the CMA.*

6. *Whether it was correct for the Deputy Registrar to fault the basis of computation of TZS 153,873,932/= made by the Applicant, while there was no dispute on the basis of computation of the said amount.*

It is worth to point out at this point that, respondents did not file their counter affidavit.

When the application was called for hearing, applicant was represented by Ms. Miriam Bachuba, learned counsel while respondents were represented by Mr. Benedict Bahati Bagiliye, learned counsel.

In arguing the application on behalf of the applicant Ms. Bachuba, learned counsel narrowed the aforementioned grounds of revision into two namely (i) whether the Deputy Registrar correctly interpreted the provision of section 40(3) of the Employment and labour Relations Act [Cap. 366 R.E. 2019] and (ii) whether the executing officer was justified in disregarding payment of TZS 153,873,932/=.

Arguing the issue whether the Deputy Registrar correctly interpreted the provision of Section 40(3) of Cap. 366 R.E. 2019 (supra), counsel for the applicant submitted that in the award, applicant was ordered to reinstate the respondents as a result she made calculation in terms of Section 40(3) of Cap. 366(supra). Counsel for the applicant submitted that the Deputy Registrar was supposed to determine whether Section 40(3) was complied with or not, instead the Deputy

Registrar held that Section 40(3) is not a base of computation, and that the basis of computation must be stated in the Award, or the quantum of compensation must be determined by the arbitrator. Counsel for the applicant submitted further that, that was an error on part of the executing officer because the determining factor is the monthly salary of each employee. During submissions, Ms. Bachuba conceded that it was not stated in the award how much each respondent was entitled to be paid as monthly salary. She went on that, there was no dispute relating to the amount of salary each was paid monthly. She however conceded that respondents refused payment pending determination of revision application that was filed before this Court by the applicant. she relied on annexture UAP2 to the affidavit in support of this application arguing that the same shows monthly salary for each respondent and how computation was made.

Counsel for the applicant submitted further that executing officer held that when applicant (employer) decided not to reinstate the employee, parties were supposed to go back to CMA to calculate the basis of compensation which is not the requirement under Section 40(3) of Cap. 366 R.E. 2019(supra). Counsel added that, the executing officer held further that the law is not clear as whether computation is based on net or gross salary. She was of the view that calculations

must be based on gross salary subject to taxation as per Section 7(2)(e) of the income tax Act. She concluded that it was not proper for the Executing Officer to direct parties to go back to CMA.

In the 2nd issue namely, whether the executing Officer was justified in disregarding payment of TZS 153,873,932/= made by applicant in partial satisfaction of the award, Ms. Bachuba submitted that, the Executing Officer held that this amount was not in satisfaction of the award. Counsel for the applicant relied on annexture UAP3 to the affidavit in support of this application and submit that the same shows that the said amount satisfied the award. Ms. Bachuba, counsel for the applicant submitted that the award was issued on 5th August 2019 and that the said money was deposited in court on 6th December 2019. During submissions, counsel for the applicant conceded that there are no dates showing as to when respondents were called to be paid their salaries instead of reinstatement. She submitted further that, respondents were terminated on 24th May 2018 hence their benefits were supposed to be calculated from that date to 6th December 2019 when payment was made i.e., 18 months and 12 days. She argued further that computation was not challenged by the respondents and that the Executing Officer was supposed to ascertain whether payment

was in accordance with the law and not direct parties to go to CMA for calculations.

Further to that, Ms. Bachuba, counsel for the applicant submitted that Arbitrator wrongly interpreted the provisions of Order XXI, Rule 1 of Civil Procedure Code [Cap.33 R.E 2019] when he stated that the amount was uncertain. She submitted further that, the law allows payment to made to the Court, decree holder or otherwise as the Court may direct. She candidly submitted that there is no requirement that judgment debtor should notify the decree holder prior payment, and that the Executing Officer erred in disregarding the payment.

On his part, Mr. Bagiliye, learned counsel for the respondents, submitted that, they support the finding and decision of the Executing Officer because he was not ready to be dragged away by the parties. He went on that what was before the Executing Officer was an application for execution filed by the respondents but was struck out on ground that the Executing Officer was invited to execute what was not in the award because respondents were intending to execute TZS 100,068,219/= which was not in the award. He submitted further that in the award, applicant was only ordered to reinstate the respondents. In that circumstance, in the application for execution, respondents were

supposed to seek an order of reinstatement and not payment of TZS 100,068,219 as they did. To bolster his submissions, Mr. Bagiliye referred the court to the case of ***George Mapunda and Wema Abdalla V. DAWASCO***, [2014] LCCD 89 at page 363 where it was held that the award is executed as it was stated and that there is no room for the parties to create a new award. He therefore submitted that in the application for execution that was filed by the respondents that is the subject of this revision, respondents created their own award instead of the order of reinstatement.

Mr. Bagiliye, counsel for the respondents submitted further that, applicant filed application for Revision No. 740 of 2019 that was before Hon. Aboud, J. but was struck out. Later, applicant filed Revision application No. 16 of 2021 that was decided on 11th February 2022. He argued that it is not true that applicant opted for payment instead of reinstatement because she made several attempts including Miscellaneous Application No. 591 of 2019 in which she was praying for stay of execution.

Counsel for the respondents submitted further that in the aforementioned revision applications, applicant was challenging *inter-alia* salary arrears that was affecting the salaries of decree holders. In short,

in revision application No. 16 of 2021, applicant was challenging the whole award. Therefore, it cannot be said that she paid the money in satisfaction of the award. Mr. Bagiliye went on that the award and this application have been overtaken by this court's judgment in revision application No. 16 of 2021. After delivery of judgment of this Court, what must be executed is the decree of this Court and not CMA's award. Counsel for the respondents prayed the application be dismissed as it has been overtaken by the judgment of this Court in Revision Application No. 16 of 2021 between **UAP Insurance (T) Ltd V. Yuda Shayo & 6 Others** dated 11th February 2022 since what is supposed to be executed is the decree of this Court and not CMA award.

Moreover, Mr. Bagiliye submitted that Section 40(3) of Cap. 366 R.E 2019 (supra), provides that wages and other benefits that accrue to the employee must be paid when the employer opt for not reinstating an employee hence there was a need for the parties to go back to CMA.

In rejoinder, Ms. Bachuba submitted that, the judgment of this Court has not overtaken the award because in the judgment the award was upheld. She however conceded that the judgment made alterations in the award. Counsel insisted that, the award can be executed despite that it has been altered by the decree of the court. She maintained that

the fact that applicant filed revision application did not bar applicant to pay the respondents instead of reinstatement. She also conceded that applicant was pursuing two procedures in different forum. She conceded further that TZS 153,873,932/= that was deposited in the Court's account by the applicant is not reflected in the award and that was deposited on 6th December 2019 after filing revision application in 2019. Counsel for the applicant submitted further that the case of ***George Mapunda*** (supra) is not applicable in the circumstances of this application.

I have carefully considered affidavit in support of the application, the counter affidavit opposing the application and submission of both counsels in this application, and I wish to point out from the outset that in the CMA award, applicant was ordered to reinstate the respondents. It is undisputed by the parties that applicant filed several applications including revision application No.16 of 2021 challenging the said award. It is further undisputed that on 11th February 2022, this court delivered its judgment in Revision application No. 16 of 2021 by slightly altering the award. In other words, the award has been overtaken by event and what can be executed is the decree of this court and not the CMA award. It is further undisputed that respondents filed Execution Application No. 437 of 2020 the subject of this application seeking to

execute the CMA award. It is also undisputed that the said Execution Application No.437 of 2020 filled by the respondents was struck out by the Executing Officer on 20th September 2021. This application emanates from the ruling of the Executing Officer striking out the said Execution Application filed by the respondents and not by the applicant. In other words, Execution application No. 437 of 2020 was not decided on merit. From where I am standing, three things are clear in my mind namely (i) the applicant is not the one who file Execution Application No. 437 of 2020, (ii) the said Execution application was struck out and not dismissed, and (iii) applicant cannot be aggrieved by the decision striking out an application that was not filed by herself. This takes me to the is whether this revision application filed by the applicant against an order striking execution application filed by the respondents is competent before this court. It has been held several times by both this court and the Court of Appeal that a party who files a matter in court and the same being struck out, the person who filed the matter that has been struck out has an option to refile it. For example, in the case of ***Masolwa D. Masalu v. the Attorney General and Another,*** Civil Appeal No. 21 of 2017 (unreported), the Court of Appeal quoted its earlier decision in the case of ***Joseph Mahona @ Joseph Mbije @***

Maghembe Mboje and Another v. The Republic, Criminal Appeal No. 2015 of 2008 (unreported) held that: -

> *"In the instance case, the matter before the High Court was not dismissed but struck out. That implies according to* ***Ngoni Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman*** *[1959]1. E.A. 577 the matter was incompetent which means there was no proper application capable of being disposed of.* ***The established principle is that the applicant in an application which has been struck out is at liberty to file another competent application before the same court before opting to appeal as it has appeared in this appeal"****.*

As pointed out herein above, Execution application No. 437 of 2020 was filed by the respondents and was struck out. It was therefore open to the respondents to file another competent execution application. In my view, applicant cannot be aggrieved by the decision of the executing officer to strike out an execution application filed by the respondents. In line with the decision of the Court of Appeal quoted hereinabove, the matter that was strike out is not subject to an appeal or revision. I am of the considered view therefore that, this revision application filed by the applicant against an order striking execution application filed by the respondents is incompetent liable to be struck out. Since the order of the Executing Officer struck out the application by the respondents and did not finalize the application between the parties, I see no need to venture on discussing grounds and arguments

raised the parties in this application. The reason behind that stance is that respondents are at liberty to file a proper application for execution and all arguments raised in this application can be determined at that time. More so, I see no logic for the applicant to be aggrieved by an order striking out the application that was not filed by herself.

For the foregoing, I hereby strike out this application for being incompetent.

Dated at Dar es Salaam this 20th May 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 20th May 2022 in the presence of Yuda Shayo, respondent but in the absence of the applicant.

B. E. K. Mganga
JUDGE