

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

REVISION APPLICATION NO. 282 OF 2022

(Arising from the Ruling delivered by Hon. E.M. Kassian, Deputy Registrar on 28/7/2022 in Execution Application No. 75 of 2021 arising from CMA Award issued on 20/11/2020 by Hon. Mourice E. Sekabili, Arbitrator in Labour dispute No. CMA/DSM/251/20/187)

FRECO EQUIPMENT LIMITED APPLICANT

VERSUS

NEEMA OMARI MKILA RESPONDENT

JUDGMENT

Date of last Order: 17/10/2022
Date of judgment: 25/10/2022

B. E. K. Mganga, J.

On 31st March 2020, applicant terminated employment of the respondent, as a result, respondent filed the dispute before the Commission for Mediation and Arbitration claiming that she was unfairly terminated. On 20th November 2020, the arbitrator issued an award that termination of employment of the respondent was both substantively and procedurally unfair. The arbitrator ordered applicant (i) to pay the respondent TZS 13,500,000/= being salary compensation from 31st March 2020 namely, the date of termination to the date of the award and that the said amount will continue to accumulate up to the date of payment and (ii)

to reinstate the respondent and that, if applicant was unwilling to reinstate the respondent, then, she should pay twelve months' salary as compensation to the respondent. Respondent was served with a copy of the award on 1st December 2020 while applicant was served with the said award on 2nd December 2020.

Respondent felt that applicant is not ready to comply with CMA award as a result, she filed Execution Application No. 75 of 2021 to enforce the CMA award. On 28th July 2022, Hon. E.M. Kassian, Deputy Registrar, issued a ruling and an order of attachment and sale of Motor vehicle No. T.483 DJF V8 Nissan hardbody, T633 DMW Ford double cabin and T.138 DQZ Ford double cable so that respondent can be paid TZS 60,750,000/=.

Applicant was aggrieved with the said ruling hence this application for revision. The Notice of application is supported by an affidavit of Fred Malima. In support of the application, applicant raised two grounds namely:

- i). The Registrar erred to calculate the amount payable in the award.*
- ii). Registrar was not supposed to continue with execution after noting that the order of reinstatement cannot be executed.*

Respondent filed her counter affidavit resisting the application.

When the application was called on for hearing, Mr. Barnaba Luguwa, Advocate appeared for and on behalf of the applicant while Neema Omari Mkila, the respondent appeared in person.

Submitting on the 1st ground, Mr. Luguwa, learned counsel for the applicant argued that CMA issued an award that respondent's termination was unfair and ordered respondent be reinstated from the date of termination without loss of remuneration. He clarified further that, respondent was terminated on 31st March 2020 and that the award was issued on 20th November 2020 hence from date of termination to the date of the award, respondent was awarded to be paid TZS 13,500,000/= . He added that, in the award, the arbitrator ordered applicant to pay the respondent 12 months compensation salary if the former was unwilling to reinstate the respondent.

Mr. Luguwa, learned counsel for the applicant, submitted further that, on 10th March 2022, respondent notified the Deputy Registrar that she is not interested to be reinstated due to environments at work. He submitted further that, if an employee is unwilling to be reinstated, then, she is not entitled to be paid the right accruing on reinstatement. He was of a strong view that, upon refusal to be reinstated, respondent cannot benefit from the rights accruing from the order of reinstatement. He

Maintained that the Deputy Registrar erred to continue to enforce rights that are subjects of reinstatement. During his submissions, counsel for the applicant conceded that the order for reinstatement was issued on 20th November 2020 and that, in no time applicant wrote to the respondent requiring her to be reinstated and she later refused. Counsel further conceded that, it is only on 10th March 2022 when respondent stated while in court that she is not ready to be reinstated. He also conceded that, in the affidavit in support of the application, there is no even a single paragraph mentioning dates on which the parties discussed the issue of reinstatement of the respondent. He argued that, since respondent is unwilling to be reinstated, applicant cannot force her. He went on that, due to that, the Deputy Registrar formed an opinion that reinstatement is unenforceable. Counsel argued further that, due to unwillingness of the respondent to be reinstated, all rights based on reinstatement cannot be enforced. He submitted further that; respondent cannot be paid any amount including salary arrears accrued prior to the delivery of the award i.e., TZS 13,500,000/=.

Mr. Luguwa argued that, since respondent was unwilling to be reinstated, she was supposed to apply before CMA for the award to be reviewed. He submitted further that, from the date of the award to the

date of filing execution, is two months and it is one month after applicant was served with the award i.e., respondent filed execution one month after respondent was served with the award. But, after being referred to the copy of the award attached to the notice of application; Mr. Luguwa changed position and rightly conceded that, applicant was served with the award on 02nd December 2020 while respondent was served with the award on 01st December 2020 making a difference of a single day and that respondent filed Execution No. 75 of 2021 on 28th January 2021. He was quick to submit that, the Deputy Registrar erred to calculate entitlement of the respondent after he was informed on 10th March 2022 that respondent is not interested in reinstatement. He went on to submit that, the award did not consider possibility where the employee is unwilling to be reinstated due to environment at work and that the Court should find and direct how the award will be executed. Mr. Luguwa cited the case of ***George Mapunda & Another V. DAWASCO***, Misc. Rev. No. 1 of 2014, HC (unreported) to support his argument that the Deputy Registrar has no jurisdiction to calculate the quantum payable, rather, that is the duty of the Arbitrator and maintained his position that the Deputy Registrar erred to make calculations after respondent has declined reinstatement. He therefore prayed the Ruling of the Registrar be quashed and set aside.

On her side, Ms. Mkila, the respondent, submitted that the award was issued on 20th November 2020 in her favour and that Six weeks passed without applicant complying with the CMA order. She went on that applicant was supposed to write a letter to reinstate her, but she did not. She stressed that, because of that, she filed an application for execution before this court and served applicant twice without appearing and that applicant appeared after the 3rd summons to show cause. She argued further that, applicant had no intention of complying with CMA award, because she could have done so soon after being served with summons.

Ms. Mkila, respondent submitted further that, it is only on 10th March 2022 when she informed the applicant that she is unwilling to be reinstated after falling sick. She strongly submitted that; applicant has not called her for negotiation after the award was issued. She further submitted that, she is entitled to be paid TZS 13,500,000/= because that covers salary arrears due to unfair termination and that applicant is supposed to pay her on monthly basis up to the date of reinstatement. She strongly submitted that applicant had no intention to comply with CMA order of reinstatement and that now applicant is using the statement she made on 10th March 2022 that she is not willing to be reinstated to deny her rights. She also submitted that; applicant have no evidence showing

that she is intending to comply with an order of reinstatement. She concluded her submissions by praying that the application be dismissed.

In rejoinder, Mr. Luguwa submitted that in paragraph 6 of the counter affidavit, respondent stated that applicant have not served her with a letter for reinstatement but there were communications that was accompanied with conditionalities that led discussions to be futile. When I probed by the court as to the nature of the conditions that led reinstatement to fail, Mr. Luguwa conceded that he is not aware of the said conditions that applicant gave the respondent in order to be reinstated.

I have examined the court record in Execution application No. 75 of 2021, the CMA award that is the subject of the said execution application and considered submissions of the parties in this application and find that it is undisputed that the CMA award was issued on 20th November 2020 and was served to the respondent on 1st December 2020 and to the applicant on 2nd December 2020. It is also undisputed that applicant has neither complied with the order of reinstatement of the respondent nor payment of TZS 13,500,000/=to the respondent being salary compensation from 31st March 2020 namely the date of termination to the date of award.

It was submitted by Mr. Luguwa, learned counsel for the applicant that respondent is unwilling to be reinstated hence she cannot be entitled

to enjoy the orders in the award. On the other hand, it was submitted by the respondent that applicant was not ready to comply with the order of reinstatement. I have examined the court record and find that it shows that on 11th March 2021, respondent filed Execution application No. 75 of 2021 namely four months' after the CMA award was issued. It is on court record also that on 9th September 2021 respondent appeared in person before Hon. F.S. Kiswaga, the Acting Deputy Registrar because Hon. W. Ng'umbi, Deputy Registrar was absent while Mr. Luguwa, advocate appeared for the applicant. Since Hon. Kiswaga had no jurisdiction, the matter was adjourned for mention on 22nd November 2021. On the later date, only respondent entered appearance, as a result, the matter was adjourned to 16th February 2022. Following transfer of Hon. Ng'umbi, Deputy Registrar, the matter was reassigned to Hon. E.M. Kassian, Deputy Registrar. When the matter was called on 16th February 2022, respondent informed the court that applicant asked her so that they can discuss. Mr. Luguwa, advocate who appeared for the applicant informed the court that, that was the position. Based on submissions of the parties, the Deputy Registrar adjourned the matter to 10th March 2022 ordering the parties to bring feedback on their discussions. On 10th March 2022 respondent is recorded stating:-

"I am not interested to be reinstated as the environment of work is causing me to be affected with Mascus spasm. I pray to be paid as per item No. (ii) of the CMA award."

On the other hand, Mr. Luguwa advocate is recorded saying: -

"...employment contract is a voluntary agreement between the employee and the employer, no one is in a position to force... Even if CMA award have ordered the decree debtor to reinstate the decree holder, however... the decree holder is unwilling to be reinstated. On that basis I pray...to mark the order for reinstatement is not enforceable.

So, I pray for a short adjournment so that I talk to my client about payment to decree holder as per item (ii) of the CMA award."

The court record shows further that, the matter was adjourned to 21st March 2022 at 14:00hrs but applicant did not enter appearance, as a result, it was adjourned to 5th April 2022. On the later date, Mr. Luguwa advocate informed the court that applicant is not able to dictate the amount she should pay the decree holder(respondent) and prayed the matter be fixed for hearing. When the matter was called on for hearing before the Deputy Registrar, respondent informed the court that on 20th November 2020 she was awarded to be paid TZS 13,500,000/= and that an order of reinstatement in her favour was issued. She further submitted that, her monthly salary was TZS 1,500,000/= and that at the time of filing application for execution on 28th January 2021, two months' had elapsed hence, in addition to the aforementioned amount, she was entitled to be

paid TZS 3,000,000/= for two months' making a total of TZS 16,500,000/= as of the date of filing execution application. She submitted further that, as of 16th June 2022, she was entitled to be paid TZS 42,750,000/=. On the other hand, Mr. Luguwa learned advocate submitted that the decree holder(respondent) is unwilling to be reinstated hence the award cannot be executed and that she is not entitled to be paid TZS 42,750,000/=. In rejoinder, respondent submitted that she was entitled to that amount and that applicant was reluctant to comply with the CMA award.

It was submitted by the applicant before the Deputy Registrar and before this court that respondent is unwilling to be reinstated. With due respect to counsel for the applicant, that submission is not correct. I am of that view because the statement made by the respondent on 10th March 2022 that she is not ready to be reinstated cannot, by itself, be regarded that respondent refused to be reinstated without proof that applicant made all efforts to reinstate the respondent. From where I am standing, there is no evidence that was adduced before the Deputy Registrar or this court showing that applicant invited the respondent to be reinstated and the latter refused. It is undisputed that parties informed the Deputy Registrar that they needed to discuss out of court and the Deputy Registrar gave

them that chance. It is only after that discussion that has remained a secret between the parties, respondent informed the Deputy Registrar that she is not ready to be reinstated. Mr. Luguwa learned counsel for the applicant conceded during his submissions that he is not aware of the conditions that made discussions for reinstatement to be futile. This court cannot assume, without evidence from the parties, as to what led that discussion to be fruitless. The least I can say is that, on 10th March 2022 respondent reported what she found as unrealistic environment for reinstatement. This does not mean that, from the beginning respondent was unwilling to be reinstated. Had applicant being ready to comply with the CMA award, she could have proved by evidence including but not limited to, payment of TZS 13,500,000/= that is salary from the date of termination to the date of the award and serving the respondent with a letter for reinstatement. Neither of the two were done by the applicant. In my view, it is illogical for the applicant to argue that respondent is unwilling to be reinstated and that the award is not executable. In my view, the award is executable in the sense that she is entitled to be paid the amount that was calculated by the Deputy registrar. Applicant was ordered to pay respondent Twelve months' salary in case she (applicant) was unwilling to reinstate the respondent. Since applicant has not

reinstated the respondent, then, the Deputy Registrar was justified to include that amount in his order to make the total amount payable to the respondent to be TZS 60,750,000/=.

It was submitted by Mr. Luguwa learned counsel for the applicant that the Deputy Registrar has no jurisdiction to calculate the quantum payable, rather, that is the duty of the Arbitrator and maintained his position that the Deputy Registrar erred to make calculations after respondent has declined reinstatement. With due respect to counsel for the applicant, that position is not correct. The deputy Registrar, has powers, in terms of sections 87(4) and 89(2) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] and Rule 48(3) and (4) of the Labour Court Rules, GN. No. 106 of 2007, to execute CMA awards as if they were decrees of the Labour Court. It was held by the Court of Appeal in the case of [Hassan Twaib Ngonyani vs TAZAMA Pipe Line Limited](#), Civil Appeal No. 2011 of 2018 [2022] TZCA 88 it was held that the executing officer has jurisdiction. In **Ngonyani's** case (supra), the Court of Appeal in allowing the appeal held *inter-alia*:-

"...the executing officer enjoys exclusive jurisdiction to deal with any question relating to execution, discharge and satisfaction of the decree. Where the resolution of any of the questions requires ascertainment of controversial factual issues, 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 long 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"

In Ngonyani's case (supra) the Court of Appeal also quoted its earlier decision in the case of ***Karata Ernest and Others V. The Attorney General***, Civil Revision No. 10 of 2010 (unreported), wherein it held:-

"Although ordinarily the trial court has a duty to determine the quantum which the judgment debtor is bound to pay under the decree, where it has left out that question open for consideration subsequently, the executing court has jurisdiction to determine the quantum under this section on the issue."

It is my view, therefore, that since the Deputy Registrar is the executing officer of CMA awards and since applicant has not complied with the said award which is enforced as if it is a decree of this court, the Deputy Registrar cannot be faulted by giving effect the terms of the decree. It is my further view, from the occurrence of events as was submitted by the parties before the executing officer and before me, that applicant is trying all possible ways to ensure that the CMA award becomes an egg that cannot give life. That should not be allowed. It is my further view that, whatever applicant is doing, must remember that the award remains unchallenged and that its wordings are clear and unambiguous.

That said and being guided by the above Court of Appeal decision, I hold that the Deputy Registrar had jurisdiction. I therefore dismiss this application for being devoid of merits.

Dated at Dar es Salaam this 25th October 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 25th October 2022 in chambers in the presence of Barnaba Luguwa, Advocate for the applicant and Neema Omari Mkila, the respondent.



B. E. K. Mganga
JUDGE