

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

REVISION APPLICATION NO. 374 OF 2022

(Arising from an order of Hon. E. J. Nyembele), Deputy Registrar dated 04/08/2022 in Execution No. 732 of 2019)

JAPHET MACHUMU..... APPLICANT

VERSUS

NMB PLC..... RESPONDENT

JUDGMENT

Date of last Order: 01/12/2022
Date of Judgment: 10/02/2023

B. E. K. Mganga, J.

Brief facts of this application are that, in September 1991, NMB PLC, the respondent employed Japhet Machumu, the applicant. The two enjoyed their employment relationship up to 16th July 2014 when the respondent terminated employment of the applicant. Aggrieved with termination of his employment, applicant filed the dispute before the Commission for Mediation and Arbitration henceforth CMA. At CMA, the arbitrator found that termination was unfair and ordered that applicant be reinstated without loss of remuneration and be paid TZS 100,000,000/= as compensation. Respondent was aggrieved with the

award, as a result, she filed Revision No. 710 of 2018 before this court. This court (Z.G. Muruke, J) found that compensation of TZS 100,000,000/= was on the higher side and reduced it to twelve months' salary.

Based on the judgment and decree of this court(Z.G. Muruke, J), applicant filed Execution No. 732 of 2019. In the said application, applicant made calculations as to the amount he believed he was entitled to be paid as TZS 384,527,342.88. According to the applicant, the said amount included inflation correction and other allowances. On the other hand, respondent was of the view that applicant was only entitled to be paid TZS 243,684,526.02 without including inflation correction. On 4th August 2022, Hon. E.J. Nyembele, Deputy Registrar, the executing officer, made an order that applicant is entitled to be paid TZS 247,964,659.12 being salary for 96 months', 24 months' compensation, outstanding leave payment, leave allowance and severance pay.

Applicant was aggrieved with calculations that were done by the executing officer hence this application for revision. In the affidavit in support of the application, applicant raised two issues namely:-

1. *Whether the Deputy Registrar was correct to ignore the laid down principles of the law regarding the terminal benefits of the Applicant in terms of section 40(1)(a), (b), (c) and 2 of the Employment and Labour Relations Act, Cap. 300 R.E. 2019 (sic) when she decided not to include inflation correction and other allowances of which the Applicant was entitled.*
2. *Whether the Deputy Registrar was correct when she decided not to include inflation correction and other allowances in the order of the Honourable Court dated 04/08/2022 as part and parcel of terminal benefits of the Decree Holder/ Applicant which are embedded in the NMB Human Resources Policies dated August 2021; collective Agreement on Terms and Conditions of Work and Fringe Benefits concluded between NMB Plc and FIBUCA dated 1st July 2011 and Memorandum of Understanding between NMB and FIBUCA dated 12.12.2014 all of which were made available to the Honourable Court and by the Decree Holder /Applicant on 4th July 2022 during hearing of Execution No. 732 of 2019 between parties for better determination of the said Execution proceedings in terms of the provisions of section 71(1),(2),(3),(4),(5), (6) and 7 of the Employment and Labour Relations Act, Cap. 300 R.E 2019(sic).*

In opposing the application, respondent filed the Notice of Opposition and the counter affidavit sworn by Herbert Clipa. In the counter affidavit, the deponent deposed *inter-alia* that on 4th August 2022, applicant amended Execution Form to show that he was claiming to be paid TZS 247,964,659.12 and the court issued the order that applicant should be paid that amount.

By consent of the parties, the application was disposed by way of written submissions.

In his written submissions, applicant submitted that on 4th August 2022, without justifiable cause or reasons, the Deputy Registrar(Hon. Nyembele) ordered the applicant to amend Form CC 10 regarding the amount he was claiming to be TZS 247,964,659.12 that does not tally with the calculations made by the parties and no reason was assigned. He submitted further that the executing officer did not consider and or determine inflation correction and that because of that failure, he is claiming to be paid TZS 136,562,684.23 as balance. He argued further that inflation correction and other allowances are provided for in (i) NMB Human Resources policies dated August 2021 and (ii) Collective Agreement between NMB Plc and FIBUCA dated 12th December 2014 that are binding the parties. In short, applicant criticized the executing officer for not considering the Collective Agreement and the Human Resources policies at the time of making her order. It was strongly submitted by the Applicant that the omission by the executing officer to consider inflation correction occasioned injustice on his part.

Resisting the application, Kelvin Paul Ngeleja, advocate for the respondent submitted in his written submissions that on 4th August 2022

applicant amended Execution Form to show that he was claiming to be paid TZS 247,964,659.12 and that on the same date counsel for the respondent informed the court that he was not disputing that amount as a result, the executing officer allowed the application. Counsel for the respondent submitted that this application is frivolous and wastage of time of the court because issues relating to collective Bargain and Human resources policies are misplaced. He added that issues of inflation rate and allowances cannot be introduced during execution. Counsel for the respondent prayed the application be dismissed with costs.

In rejoinder submissions, applicant submitted that the executing officer did not comply with the provisions of section 40(1)(a) and (c), (2) and (3) and section 71(1),(2),(3) (4) and (5) both of the Employment and Labour Relations Act[Cap.366 R.E. 2019] and reiterated his submissions relating to inflation correction in relation to the NMB Human Resources Policies and the Collective Bargain Agreement and prayed the court to determine the issue of inflation correction and other allowances.

When the application was called on for orders and after carefully perusing the Court Record and the impugned order, I asked the parties

to address the court whether this application was filed within prescribed period or not.

Responding to the issue raised by the court, applicant submitted that the order complained of was issued on 04th August 2022 in his presence. He went on that after issuing the said order, the executing officer ordered hearing to proceed on 07th September 2022. He added that on the later date, the executing officer was not present, as a result, the matter was closed on 29th September 2022 by S.B. Fimbo, Deputy Registrar. Applicant submitted further that he was advised by his undisclosed lawyers that revision should be filed within 45 days.

During his submissions, applicant categorically and as indicated in the notice of application, submitted that he filed this revision application on 07th November 2022 challenging the order issued by Hon. Nyembele, DR dated 04th August 2022. In fact, he conceded that he filed this application 95 days from the date of the impugned order. Applicant tried to rely on the order issued by Hon. S.B. Fimbo, DR dated 29th September 2022 arguing that the order by Hon. Nyembele, DR did not finalize the process because the matter was marked closed on 29th September 2022 by the order of Hon. S.B. Fimbo, DR. When probed by the court he conceded that he filed this application 46 days after the

matter was closed by S.B. Fimbo, Deputy Registrar. In short, applicant conceded that the matter was filed out of time. He also submitted that he was paid compensation for 12 months as ordered by this Court and 96 months salaries from the date of termination to the date of payment.

On the other hand, responding to the issue raised by the court, Mohamed Muya, learned counsel for the respondent, submitted that the application is time barred. Counsel submitted further that Applicant was supposed to file this revision within 42 days after issuance of the impugned order on 4th August 2022 by Hon. Nyembele, DR but he filed it 53 days out of time. He added that, in the notice of application, applicant is not challenging the decision of Hon. S.B. Fimbo, DR dated 29th September 2022.

In disposing this application, I will start with the issue raised by the applicant that the executing officer did not consider inflation correction as provided for under the NMB Human Resources Policy and the Collective Bargain Agreement between NMB and FIBUCA.

I have examined court record in Execution No. 732 of 2019 and find that on 4th August 2022 Applicant filed execution Form No. CC.10 claiming to be paid TZS 247,964,659.12. The record shows that applicant appeared in person while Sabas Shayo, Advocate appeared on

behalf of the respondent. On the same date, the court recorded as hereunder:-

"Court: Following the computation done in assistance of the parties as a substitute of reinstatement ordered by CMA on 23rd February 2017, it is hereby ordered that the decree holder be paid Tsh 247,964,659.12 the same being terminal benefits for unfair termination as per s. 40(3) of the Employment and Labour Relations Act Cap 300 RE 2019(sic). It is hereby ordered that terminal benefits so ordered hereinabove include the following; 96 months' wages, 24 months' wages as compensation, outstanding leave payment, leave allowance and severance payment. It's also ordered that payment shall be done to the decree holder after assessment of tax by the government, and deduction of pension contribution by the employer 15% out of the 96 wages payment..."
(Emphasis is mine)

It is my view, as the quoted paragraph shows, computation was done with the help of the parties namely applicant and the respondent. I see no logic of criticizing the executing officer that she made wrong computation.

Things did not end there because the court record shows further that, on 29th September 2022, both the applicant and Sabas Shayo, advocate for the respondent, appeared before Hon. S.B. Fimbo, Deputy Registrar after Hon. Nyembele was transferred to another duty station. On this date, applicant informed the court that respondent has paid him the whole amount. In his own words, applicant is recorded stating:-

"Decree holder: I have already been paid the decretal sum in which they deposited a total of Tsh 156,035,232/=(sic) as wages for 96 months', Tshs 19,504,404/= (sic) as 12 months' wages compensation, Tshs 12,136,073 as annual leave, Tshs 13,002,936 (sic) as leave allowance, Tshs 4,376,324.72 as severance pay, Tshs 23,405,284.80(sic) as PPF, Tshs 78,801,761.60 as employee's contribution to PPF..."(Emphasis is mine).

On the other hand, Sabas Shayo informed the executing officer that applicant was also paid TZS 23,405,284 as pension. Based on submissions by the parties, the executing officer recorded that the decretal sum of TZS 247,964,659.12 as computed by the parties has been satisfied and closed the matter.

From the foregoing, it is my view, as was correctly submitted by counsel for the respondent, that this application is frivolous. In the application at hand, applicant is complaining that the executing officer did not consider inflation correction as provided for in the NMB Human Resources policy and the Collective Bargain Agreement between NMB and FIBUCA. With due respect to the applicant, I have examined the court record and find that all claims relating to inflation correction covered in the NMB Human Resources Policy and the Collective Bargain Agreement were not raised before the court. Even if assuming that the said claim was raised, in my view, the executing officer have no jurisdiction to determine that issues, because (i) that issue was never

raised and decided at CMA and before this Court at the time of hearing Revision Application No. 710 of 2018 and (ii) in terms of section 74 of the Employment and Labour Relations Act[Cap.366 R.E. 2019], powers relating to interpretation and or implementation of the collective bargain Agreement is exclusively reserved to the Court and not the executing officer or CMA. Therefore, the complaint that the executing officer did not consider inflation correction provided for, in the Collective Bargain Agreement between the Respondent and FIBUCA at the time of making her order is unfounded and cannot be entertained.

Now turning to the issue of limitation of time raised by the court. It is not disputed that applicant filed this application through e-filing system on 3rd November 2022, the date he sworn his affidavit supporting this application challenging an order of Hon. Nyembele, DR, the executing officer dated 4th August 2022. The record shows that the said order was issued in presence of the applicant. It is clear from the record that Applicant filed this application after 87 days while the period that was available for him to file this revision application is 42 days. In his submissions before this court, applicant correctly conceded that the application is time barred as was also submitted by counsel for the respondent. Since the application was time barred, the only remedy

available is to dismissed it as it was held by the Court of Appeal in the case of **Barclays Bank Tanzania Limited vs Phylisiah Hussein Mcheni** Civil Appeal No. 19 of 2016 [2021] TZCA 202.

For the foregoing, I dismiss this application for being time barred.

Dated in Dar es Salaam on this 10th February 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on this 10th February 2023 in chambers in the presence of Japhet Machumu, Applicant and Mohamed Muya, Advocate for the Respondent.



B. E. K. Mganga
JUDGE