

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

REVIEW APPLICATION NO. 13 OF 2023

(Arising from the decision of the High Court issued by Hon. Deputy Registrar in Misc. Application No. 511 of 2022 dated 30th day of March 2023)

SYLVESTER SAMSON MBOJE..... APPLICANT

VERSUS

CRDB BANK PLC..... RESPONDENT

RULING

Date of last order: 6th Sept. 2023

Date of ruling: 26th Sept. 2023

OPIYO, J.

The applicant filed the present application seeks a review of this Court's decision dated 30th March 2023 in Misc. Application No.511 of 2022. The ground for seeking a review as appears in the Memorandum of Review are as follows: -

- i. The Deputy Registrar made an apparent error on face of record by varying the decision of his predecessor on security/ bank guarantee issued on 22nd December 2022.
- ii. The Deputy Registrar illegally exercised his jurisdiction and made a mistake by claiming that the applicant/decreed holder

was not entitled to call on the guarantee upon the striking out Misc. Application No. 505 of 2022.

- iii. That the Deputy Registrar made an error on face of record and a mistake in exercising its jurisdiction by claiming that the execution should proceed as stipulated in the execution form while there is a bank guarantee issued in favour of the applicant by the order of his predecessor in Misc. Application No. 500 of 2022.
- iv. That the Deputy Registrar made an error apparent on the face of record and exercise the jurisdiction not vested in him by varying the terms of the Bank guarantee submitted in the Court.
- v. That the Deputy Registrar issued an order dismissing a prayer by the decree holder contrary to the pending application before it and contrary to the previous proceedings in Execution No. 511 of 2023.

The hearing of the application proceeded orally. The Applicant was represented by Mr. Roman Masumbuko, Advocate whereas the Respondent was represented by Mr. Alex Mianga, Advocate.

In his submission Mr. Masumbuko combined ground 1 and 5 and ground 2, 3 and 4 were also argued jointly. Starting with ground 1 and 5, Mr. Masumbuko submitted that the decision by the Deputy Registrar varied its predecessor's order of 22nd December 2022 issued by Hon. Fimbo, as per Annexure SSM 5 of the record of review. He stated that, the respondent had applied for stay of execution which was granted on the said 22nd December 2023 on condition that they deposit Bank guarantee as security. The said Bank guarantee was deposited.

He continued to submit that, in the disputed ruling it is well covered that stay of execution was granted pending determination of Misc. No. 505 of 2022. This order has never been varied. The Misc. Appl No. 505/2022 was struck out on 07th March 2023. According to him, by being struck out it has already being determined but still Hon. Ding'ohi, Deputy Registrar varied the order as per Annexure SSM 6 – Page 5 last paragraph by stating that a debt must be certified before execution can proceed and that they had to execute by attachment and sale not by calling bank guarantee. On such basis he is of the view that it was wrong to decide so as an order was already issued by Fimbo and the amount was already certified that is why bank

guarantee was issued. He believes that, the previous decision was varied By Hon. Ding'ohi in giving the judgement debtor the chance to show cause again. Supporting his position, he cited the case of **Unilever Tea Tanzania Ltd vs. Mathias Marandu**, Labour Revision No. 13 of 2021 it was held that once this court has issued a decision it becomes *functus officio*. Therefore this court was *functus officio* after Hon. Fimbo had already stayed the execution. On that basis, it was proper for her successor to proceed from where it ended as was held in the case of **Mohamed Enterprises (T) Ltd Vs. Masoud Mohamed Nasser**, Civil Appl. No. 33 of 2012, Court of Appeal Page 15 last paragraph and page 17 last paragraph.

On ground 2, 3, 4 as to whether the Deputy Registrar was right in his findings that demanding bank guarantee before completing court procedures is improper and premature. Mr. Masumbuko submitted that the decree that was sanctioned by this court as per Annexure SSM-5 was very specific that, once the application No. 505 of 2022 was determined, they receive payment from decree holder and the amount under the guarantee has to be paid. He argued that, after all, the guarantee is only valid upon to 14th February 2024, after which it

will dissolve. Thus, he is of the view that it does not require the court to certify anywhere as the amount was already certified.

Further challenging the decision, Mr. Masumbuko argued that the applicant complied with all the conditions for the amount as per Annexure SSM-8. However, the registrar held that the same has to be certified by the Court which is not a term in the said guarantee. Regarding the guarantee, Mr. Masumbuko argued that once it has been issued as a security, then payment should be honoured upon the terms of the guarantee. He stated that the court should not stop the decree holder from enjoying the fruits of the guarantee after being determined in his or her favour. In bolstering his position, he referred the Court to the case of Ms. **Farhia Abdullah Nur Vs. Advantech Office Supplies Ltd another**, Civil Appl No. 182/2016 Court Appeal, Dar es Salaam, Page 8 last two paragraphs where he said it was held that, the essence of security is to provide protection to decree holders from difficulties or impossibilities of realizing the decree in case the intended appeal fails. According to him that is a corner stone for the requirement for security, and it was an error for the Deputy Registrar to stop the decree holder from realizing the bank guarantee. By directing the applicant to sell the motor vehicle and leave the guarantee.

In such circumstances, he is of the view that, the applicant undergone hardship in realizing the decree contrary to terms of security. He thus, prayed for this Court to review the record and decision of Deputy Registrar and set it aside.

In reply to the application, Mr. Mianga submitted that, the application is non meritorious as he has failed to pinpoint the alleged errors on the face of record which led to miscarriage of justice. The case of **NBC v. Nurbano Abdallah Mulla**, Civil Appeal No. 207/120 of 2020 Court of Appeal at Tanga at Page 8 it cited written approval various cases described an error apparent on the face of record and must be on face of record and led to Miscarriage of justice.

Mr. Mianga alluded to the Court that the core of misunderstanding is the denial of the applicant to call the amount in the bank guarantee contrary to the procedure. He agreed that, it is undisputed that on the 22nd December, 2022, this Court in an application for stay of execution required the judgement debtor to deposit the security or execute the bank guarantee of the amount to the tune of TZS. 80,000,000/= was fully complied by the respondent. Since the application was granted the determination for an application for

extension of time that was later struck out for technicalities without being determined on merits.

Mr. Mianga submitted that following the struck out of respective application, parties appeared before execution Court where the Counsel for Decree holder deployed the court to issue an order to call the amount in the bank guarantee on the pretext that the application for extension of time have been determined. The execution court heard the rival arguments of both parties and scheduled the 30th March 2023 for delivery of its decision. But while they were waiting for the ruling of the court the applicant initiated a move to call for the amount in the bank guarantee as it is stipulated in their letter. he wrote a letter to NBC Bank to demand for payment, but the movement never materialized. He stated that, it is not true that Hon. Ding'ohi varied the term of guarantee or the order of his predecessor Deputy Registrar which required deposit of guarantee in performance of CMA award.

Mr. Mianga argued that the mode that was sought by decree holder requiring courts assistance was attachment of Debtor properties as listed therein, but in very un-unprecedented move the applicant jumped to calling for the court to call for the amount in the

guarantee. The guarantee was issued as a security to ensure that in case the judgement debtor fails to honour the amount as awarded by CMA then the decree holder would recourse to the guarantee. It was clear that the application for extension of time No. 505/2022 was never determine on merit. Thus it did not deny the respondent the right to pursue the application for extension of time to file a revision to challenge the CMA award.

The counsel said that immediately after the Misc. Appl No. 505 of 2022 was struck out, they filed another Appl. No. 66 of 2023 and during the time this matter was in process of assignment, the process of calling guarantee was going on.

On variation of decision Mr. Mianga submitted that, Hon. Ding'ohi, DR (as he then was) did not vary the former order of the court. He narrated that, the previous order only required the filing of security that was deposited to create assurance that respondent is capable of settling the amount in case she fails to pursue extension of time so as to file revision, while in current one it was founded that an attempt to call for amount in the guarantee at that time was wrong. Supporting he made reference to the case of **Mohamed Enterprises (T) Ltd v Mussa Shabani Chekechea** Civil Appl No. 394/11 of 2018, at Page

43 where it was held that the security deposited can be used in more than one application for stay of execution. He added that, it would be unprecedented to allow the calling for the amount in the Bank guarantee while the same stand as security and could be used in further application for stay of execution.

On the cases referred by the applicants counsel, Mr. Miangi argued that they are distinguishable because the Deputy Registrar did not vary the previous order or terms of guarantee. He only dismissed prayer by applicant to call for Bank guarantee contrary to the mode of assistance prayed for in the application for execution.

That, also the case of ***Ms. Farhia(Supra)*** is distinguishable as the respondent has never lost her right to pursue the matter and she has never agreed that she is ready to pay and failed to pay to allow Bank guarantee to be called. In that case the security was right to be called as the debtor had lost the appeal and was creating difficulties for the decree holder to enjoy the benefits of Decree.

He concluded by stating that the applicant has failed to show any error on face of record and how the matter of *functus officio* is applicable in this matter.

In response to 2nd, 3rd and 4th grounds Mr. Miangi submitted that, the life span of the bank guarantee issued by the respondent for due performance of decretal sum of CMA award, goes to the year 2024 February. According to him, it can stand as a security throughout the period. He challenged the applicant in calling for bank guarantee on the reason that the same could have legal effects in the event the respondent loses her right to pursue the remedy to file revision out of time or in application for revision.

It was argued that since the respondent is still pursuing the application for extension of time to file revision of the award court to be executed, bank guarantee can stand as a security in another application. He argued that, the bank guarantee is still valid to exist as a security as it assures the applicant that he will be paid if respondent fails to pursue remedies in challenging the CMA award.

He further distinguishes the case of ***Laem Thongs case (supra)***, according to him the circumstance are different and Registrar have

never changed the mode of execution, but rather prevented the applicant from calling the amount in the Bank guarantee that stand as security contrary to the mode of assistance applied for before this Court in a form of attaching respondent properties.

Lastly, it was submitted that, the Hon. Deputy Registrar properly decided by dismissing applicant's prayer, as the move would defeat the purpose of the security. He added that, since there was no formal application showing the mode of execution applied for and no certification of Hon. Deputy Registrar that respondent has failed to honour the award justifying calling for guarantee, decision of the DR was right that the application was premature. Thus, he prayed for the application to be dismissed.

In rejoinder Mr. Masumbuko reiterated his submission in chief, but challenged some of the cases including ***NBC's case (supra)*** and ***Mohamed's case (Supra)***. Starting with NBC's case, Mr. Masumbuko submitted that this case based on rule 66 of Court of Appeal Rules on review of Court of Appeal own judgement, but the case at hand is based on rule 27 of Labour Court Rules which is a review of the District Registrar's by the Judge of this court. According

to him, it is a unique application it cannot be compared by the Court of Appeal Rules in application for review. He added that, what they challenge is not only an error apparent on face of record, but also on illegally, mistake, failure to exercise jurisdiction properly and similar issues, which to him is justified as grounds for review in the circumstances.

In Mohamed's Case, Mr. Masumbuko submitted that it is distinguishable as there was no another application to hold back the bank guarantee before the Deputy Registrar. He added that the bank guarantee was only specific to Misc. Application No. 505 of 2022 and Hon. Fimbo's decision was specific on that it was not for any other application, including Appl No. 66 of 2023 that was filed later after previous being struck out. On that basis, he is of the view that the Deputy Registrar had no mandate to change that specific order in respect of guarantee.

Having measured parties' submissions and Court records, I am persuaded to address all the grounds of application focusing on two major points forming the centre of debate between the parties on the alleged mistakes, errors and illegality in the impugned decision. First is whether the court was *functus officio* in reaching a decision in the

impugned ruling, i.e. whether Hon. Ding'ohi, DR (as he then was) varied its predecessor's order of 22nd December 2022 issued by Hon. Fimbo, DR. Second; whether the Deputy Registrar was right in his findings that demanding bank guarantee deposited as security before completing court procedures is improper and premature after striking out of Misc. Application No. 505 of 2022.

Starting with the first issue as to whether the matter was *functus officio* or whether the Hon. Ding'ohi varied decision of his predecessor? The well-known plain meaning of the word '*functus officio*' means having discharged his/her duty, thus in matters of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating Tribunal/Court thereby becomes *functus officio*. In regard to our application, in establishing as to whether the decision was already made, the record available including Misc. Application No. 500 of 2022 which shows that at some point there was application for stay pending determination of Misc. Application No. 505 of 2022 which was for extension of time to file revision by the respondent herein. That means when the decision of depositing bank guarantee in the Misc. application no 500 of 2022 was reached the application for extension of time was still pending.

So, the decision for the stay of execution was conditional in that the respondent was required to deposit bank guarantee as security for the due performance of CMA award by 22/2/2023 pending determination of the matters that were still pending in court. The same was issued by respondent's banker on 21/2/2023.

Subsequently, the Misc. application that was pending was struck out on 7/3/2023, before Mlyambina J. The application no 511 of 2022 before Hon. Ding'ohi DR (as he then was) was for execution of CMA award by way of sale of judgement debtors landed properties and motor vehicles. But upon striking of application no 505 of 2022 by Mlyambina J, the counsel for the applicant demanded execution to proceed by way of payment of the guarantee money from the guarantor's Bank to the decree holder. The DR refused the application holding that it was improper and prematurely made as it was made before the completing relevant court procedures. By the look of it this was not the same decision previously made by this court to be *functus officio*. It is true it was related to bank guarantee that was previously dealt with in application no 500/2022, but in a different context. The previous decision was on the need to deposit bank guarantee as security pending completion of the application that

was pending before court (Misc. no 505/2022) and in the impugned ruling the issue was whether the said bank guarantee could be brought forward to settle the decree upon striking out Misc. Application no 505/2022. Mr. Masumbuko interpreted the struck out of application No. 505/2022 as completion of court procedures automatically bringing guarantee to the full swing in settling the debt. That is what was blocked by the subsequent court decision as there were still other court procedures to be complied with to make calling for the said guarantee viable. In such circumstances the doctrine of '*functus officio*' is not applicable as no decision of this court was varied by its subsequent decision as claimed by Mr. Masumbuko. Therefore, the applicant's allegation regarding *functus officio* lacks merits.

Regarding rejection of calling money deposited as the security, it is on record that the bank guarantee was deposited as a security, after execution process being stayed in Misc. Application No. 500 of 2021, pending determination of the Misc. Appl. 505 of 2022. In my view, as correctly argued by Mr. Mianga, since it is undisputed that Misc. Application No. 505/2022 for extension of time so as to file revision was struck out for being incompetent, that's means the rights of the

parties were not finally defined as its application was not determined on merits.

Determination by striking out the application did not therefore deny the respondent the right to pursue further application for extension of time to file a revision to challenge the CMA award. That is the reason immediately after the Misc. Appl. No. 505/2022 was struck out, the herein filed another application No. 66 of 2023 for the same prayer. And as the life span of the security was yet to expire, the same security could be used for the subsequent application in terms of the holding in **Mohamed Enterprises (T) Ltd v Mussa Shabani Chekechea** (Supra) cited by Mr. Mianga.

The calling for security is geared on finality of the court proceeding. Therefore, it would indeed be unprecedented to allow the calling for the amount in the Bank guarantee standing as security before conclusion of court procedures relating to the matter. On that basis the allegation that the Misc. Application No. 505 of 2022 was determined lacks legal standpoint, on the reason that the Decree Debtor, the respondent herein still had a chance to challenge the award sought to be executed, after being afforded with an opportunity of re-filing the same application. As a result Misc.

Application No. 66 of 2023 was filed and still pending in attempt to challenge the same award. All these circumstances justify decision issued by Deputy Registrar in rejecting calling for money as a security. In premise I agree with respondent's Counsel by citing **Mohamed's case (Supra)**, in the holding that security could be used in another application. And even the case of **Ms. Farhia (Supra)** cited by Mr. Masumbuko that security is called upon the decree debtor losing the right to pursue the matter and refuses or bringing difficulties in settling the decree otherwise. In that case the security was right to be called as the debtor had lost the appeal at the highest court and was creating difficulties for the decree holder to enjoy the benefits of decree, but in our case the debtor's chance to pursue challenge to the decree in question is yet to be closed and she is indeed still in court for the same.

Apart from that as per **annexture SSM-1** it is shown that the properties asked to be attached in intended execution were motor vehicles, and landed properties and no evidence that the respondent defaulted to pay or disposed of the properties to be attached. This validate Deputy Registrar's findings that the prayer of calling money deposited as security is premature, on the reason that it is the last

resort to be opted in execution process. Therefore, in my view, all circumstances of this matter defeated applicant's allegation regarding illegality, error, or mistakes for this Court to exercise its power under **Rule 27 (2) (b) and (c) of the Labour Court Rules, G.N No. 106 of 2007**, in reviewing Misc. Application No. 511 of 2022. No apparent errors on face of the record to justify review. The application could not therefore stand. Based on the above reasoning, I hereby dismiss this application for review for lacking merit. I give no order as to the cost.

It is so ordered.



A handwritten signature in blue ink, appearing to read "M. P. Opiyo".

M. P. OPIYO,

JUDGE

26/9/2023