

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 280 OF 2023**

*(Arising from Award issued on 19/12/ 2017 by Hon. Mwidunda, E., Arbitrator, in Labour Dispute No.  
CMA/DSM/KIN/R.547/14/183)*

**LUQMAN MALOTO ..... APPLICANT**

**VERSUS**

**GLOBAL PUBLISHERS & GENERAL ENTERPRISES LTD..... RESPONDENT**

**RULING**

*Date of Last Order: 28/11/2023  
Date of Ruling: 11/12/2023*

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

Applicant has filed this application seeking the court (i) to set aside the dismissal order in respect of Application for Execution No. 223 of 2018 delivered on 01<sup>st</sup> August 2018, (ii) to restore Application for Execution No. 223 of 2018 that was dismissed for want of prosecution on 01<sup>st</sup> August 2018.

Brief facts of this application are that, Luqman Maloto, the abovenamed applicant was an employee of the respondent. It is undisputed by the parties that, employment relationship between them turned bitter as a result, applicant filed CMA/DSM/KIN/R.547/14/183

before the Commission for Mediation and Arbitration (CMA). In the Referral Form(CMA F1) applicant indicated that respondent unfairly treated him by deducting 20% of April 2014 salary. Based on the said unfair treatment, applicant prayed to be paid TZS 180,300,000/= as compensation.

On 19<sup>th</sup> December 2017, Hon. E. Mwidunda, arbitrator, having heard evidence of the parties, issued an award in favour of the applicant. In the said award, the arbitrator awarded the applicant be paid (1) TZS 300,000/= being 20% of April 2014 salary that was deducted by the respondent and (ii) TZS 120,000,000/= being eight (8) months salaries for being punished by the respondent without being afforded right to be heard.

Respondent was aggrieved by the said award but being out of time, without success, she filed application for extension of time within which to file revision as a result the said award remained unchallenged. In 2021, applicant filed Execution No. 337 of 2021 so that he can be paid in accordance with the CMA Award. On 18<sup>th</sup> February 2022, Hon. S. B. Fimbo, the executing officer, dismissed the said execution because she found that she was *functus officio* because on 1<sup>st</sup> August 2018, Hon. S. H. Simfukwe, executing officer(as she then was) dismissed for want of prosecution execution No. 223 of 2018 that was allegedly filed by the

applicant. Based on the foregoing, applicant filed this application praying the court to set aside the sad dismissal order and restore the said execution application.

In support of the application, applicant filed his affidavit in which he stated *inter-alia* that, respondent was aggrieved by the said award as a result, on 4<sup>th</sup> June 2018, she filed Miscellaneous Application No. 237 of 2018 before this court seeking extension of time within which she can file an application for revision for the court to revise the said award. Applicant stated further that, on 4<sup>th</sup> October 2019, this court (Hon. S.A.N. Wambura, J, as she then was), dismissed for want of merit Miscellaneous Application No. 237 of 2018 that was filed by the respondent. It is further stated by the applicant that, on 16<sup>th</sup> October 2019, respondent filed Miscellaneous Application No. 621 of 2019 seeking the court to review its decision in Miscellaneous Application No. 237 of 2018 but on 21<sup>st</sup> April 2020, the said Miscellaneous Application No. 621 of 2019 was dismissed for want of prosecution by Hon. S.A.N. Wambura, J (as she then was). It was further deponed by the applicant that, on 11<sup>th</sup> May 2020, respondent filed Miscellaneous Application No. 168 of 2020 praying the court to re-enroll Miscellaneous Application No. 621 of 2019 but the said Miscellaneous Application No. 168 of 2020 was dismissed on 21<sup>st</sup> May 2021 by Hon. A.E. Mwipopo, J for want of merit.

Applicant also stated that on 19<sup>th</sup> August 2021, he filed Execution No. 337 of 2021 and that, after filing the said execution No. 337 of 2021, he appeared before Hon. S.B. Fimbo, Deputy Registrar. He deponed further that, it is at this time, he learnt that, previously execution No. 223 of 2018 was filed in court without his knowledge and that, the said execution No. 223 of 2018 was dismissed on 01<sup>st</sup> August 2018 by Hon. S.H. Simfukwe, Deputy Registrar(as she then was) for want of prosecution. Applicant stated further that, he became aware after the respondent has filed a preliminary objection that the matter was *res judicata* through the decision of Hon. Simfukwe DR(as she then was) and that, the said preliminary objection was sustained.

In his affidavit, applicant stated further that, after dismissal of Miscellaneous No. 337 of 2021 and perusal of the court record, he noted that, the signature of the decree holder in execution No. 223 of 2018 was forged by the respondent. It was further stated by the applicant that, he filed Miscellaneous Application No. 480 of 2022 for extension of time to set aside dismissal order in execution No. 223 of 2018 and that the prayer was granted on 21<sup>st</sup> December 2022 by Hon. Fimbo, Deputy Registrar. Applicant stated further that, he thereafter filed Miscellaneous Application No. 528 of 2022 that was assigned to Hon. S.R. Ding'ohi, Deputy Registrar(as he then was) but later, after the parties have filed

their respective submissions, the said application was struck out for want of jurisdiction hence this application.

On the other side, filed the counter affidavit affirmed by Abdallah Mrisho Salawi, her principal officer to oppose this application. In the said counter affidavit, the deponent deponed *inter-alia* that, applicant was aware of execution No. 223 of 2018 as he is the one who filed it but willfully failed to prosecute it. Salawi deponed further that, Execution No. 223 of 2018 was signed by applicant's person representative hence there is no forgery whatsoever and that allegations by the applicant are unfounded.

When the application was called on for hearing, Mr. Oscar Milanzi, learned advocate appeared and argued for and on behalf of the applicant while Ms. Melania Mashaguri, learned advocate appeared and argued for and on behalf of the respondent.

Arguing in support of the application, Mr. Milanzi submitted that, execution No. 223 of 2018 was filed on 25<sup>th</sup> April 2018 but the signature is different from that of the applicant. He went on that, the said execution No. 223 of 2018 was dismissed for want of prosecution, but only the respondent had knowledge and appeared. He added that, there is no proof of service to the applicant in relation to the said execution

No. 237 of 2018. Counsel for the applicant prayed the dismissal order by Hon. Simfukwe, DR (as she then was ) be set aside and execution No. 223 of 2018 be restored. In his submissions, learned counsel for the applicant conceded that applicant did not file an application to revise or review the decision by Hon. Fimbo DR.

Resisting the application, Ms. Mashaguri, learned counsel for the respondent submitted that, the signature in Execution No. 223 of 2018 is similar to the signature of Stephen Ally Mwakibolwa, advocate who was representing the applicant in revision No. 127 of 2017. Counsel for the respondent strongly submitted that, respondent did not forge the signature of the applicant. Learned counsel added that, Execution No. 223 of 2018 was filed by an advocate of the applicant. She went on that, Rule 10(2) of Order XXI of the Civil Procedure Code, give powers to an advocate of the decree holder to sign an application for execution. Ms. Mashaguri strongly argued that applicant was aware of presence of execution No. 223 of 2018 but negligently, himself and his advocate did not enter appearance. She concluded that, execution No. 223 of 2018 was properly dismissed on 01<sup>st</sup> August 2018 and that, the dismissal order barred applicant to file another application. When probed by the court as to the effect of the said dismissal order to the respondent, Ms.

Mashaguri submitted that, the dismissal order relieved the respondent from paying the applicant the amount awarded in the award. Being further probed by the court, counsel for the respondent conceded that, on 21<sup>st</sup> April 2020 respondent filed Miscellaneous Application No. 168 of 2020 praying for restoration of application No. 621 of 2019 that was filed on 16<sup>th</sup> October 2019 wherein respondent was praying the court to review its decision of dismissing Miscellaneous application No. 237 of 2018 for extension of time to file revision.

Apart from the foregoing, counsel for the respondent wondered as to why, applicant was awarded in 2017 but purport to have filed execution after four (4) years. Based on the foregoing, counsel for the respondent prayed the application be dismissed for want of merit.

I have considered both the affidavit of the applicant in support of the application and the counter affidavit filed by the respondent opposing the application and submissions made by both counsel. I should point out from the start that, this application will be decided based only on the affidavit and counter affidavit evidence of the parties.

It is undisputed by the parties that, applicant was awarded at CMA and that the said award has not been reversed on revision by this court or on appeal by the Court of Appeal. It is also undisputed that, applicant

has not enjoyed the fruits of the said award. It is alleged by the respondent that applicant filed execution application No. execution No. 223 of 2018 and that the same was dismissed on 01<sup>st</sup> August 2018 for want of prosecution because he did not enter appearance. On the other hand, it was alleged by the applicant that, he is not the one who filed the said execution application because his signature was forged and further that, he became aware of existence of the said execution No. 223 of 2018 at the time when respondent raised a preliminary objection in execution No. 337 of 2021 that it *is res judicata*. It is alleged by the respondent that the person who filed execution No. 223 of 2018 is Stephen Ally Mwakibolwa, the advocate who was representing the applicant.

As a starting point, the issue is whether there is proof that execution No. 223 of 2018 was filed with the consent or knowledge of the applicant and whether, it was filed by the said Stephen Ally Mwakibolwa, advocate. The follow up issue is whether, applicant was aware of the date the said execution No. 223 of 2018 was fixed for hearing and failed to enter appearance.

I have read a copy of the proceedings in execution No. 223 of 2018 attached to the affidavit of the applicant and find that, the said



execution was dismissed on 1<sup>st</sup> August 2018 for want of prosecution. The said record shows that, on the said date, the decree holder was absent, but the decree debtor was present. Though the record shows that decree debtor was present, the said record does not show the name of the person who appeared on behalf of the decree debtor. I have examined the counter affidavit filed by the respondent and find that, there is nothing disapproving the content of the said court proceedings. In short, there is no evidence showing that, prior to 1<sup>st</sup> August 2018, the said execution was called on be it for mention or hearing and that the parties appeared before the executing officer. In absence of that evidence, the issue is how did the unnamed person who appeared in court on behalf of the respondent got information. From where I am standing, there is no proof that applicant was aware of existence of the said execution application. I am of that view because, nothing was stated by the respondent in her counter affidavit proving that applicant was aware and on certain days he or his advocate or personal representative, attended in court.

Respondent in an attempt to prove that applicant was aware, attached to the counter affidavit, Form No. CC10 dated 25<sup>th</sup> April 2018 showing that the decree holder was praying the court to attach Motor vehicle with Registration No. T918 BTL, make Range Rover to satisfy

the award of TZS 12,300,000/=. Respondent further attached the Notice of Application of Revision No. 125 of 2017 dated 13<sup>th</sup> March 2017 and the affidavit of Stephen Ally Mwakibolwa, advocate sworn on 13<sup>th</sup> March 2017 before William Waziri, Advocate to show that, those signatures are similar. I have carefully examined Form No. CC10 and find that there are similarities in signatures between the said Form No. CC10 on one hand, and the signatures on the notice of application and the affidavit of Stephen Ally Mwakibolwa on the other hand. In my scrutiny, I have noted that, the person who signed Form No. CC10 identified himself as the decree hold but the signature, as I have pointed hereinabove, and as it was deponed in the counter affidavit and further submitted by counsel for the respondent, belongs to Stephen Ally Mwakibolwa, advocate, who was initially representing the applicant. I have examined the said Form No. CC10 and find that the said form does not show that it was signed on behalf of the decree holder. The said Form No. CC10 purports to show that it was signed by the decree holder. It is my view that, the allegation that Form No. CC10 or that execution No. 223 of 2018 was signed by Stephen Ally Mwakibolwa, advocate on behalf of the applicant cannot be valid. Had the said advocate signed and filed the said execution No. 223 of 2018 on behalf of the applicant, he could have

shown in the said Form No. CC10 that he signed and filed it on behalf of the applicant.

It was submitted on behalf of the respondent that, the said Stephen Ally Mwakibolwa, advocate had power and signed the said Form No. CC10 on behalf of the applicant in terms of Rule 10(2) of Order XX1 of the Civil Procedure Code [Cap.33 R.E 2019]. I have no problem with the powers of the advocate to sign or file execution application in terms of the said Rule if proved to the court that the said advocate was acquainted with the facts of the case and complied with all what is provided under the said Rule. The issue that was not answered by the counter affidavit by the respondent is whether, the said Form CC10 that initiated execution No. 223 of 2018 was signed by the said Stephen Ally Mwakibolwa with the consent and knowledge of the applicant. In paragraph 4 of the counter affidavit, the deponent stated that the said execution No. 223 of 2018 was filed by Stephen Ally Mwakibolwa, the previous representative of the applicant. It is my view that, respondent had a duty to prove that the said execution was filed by Stephen Ally Mwakibolwa. In my view, respondent was supposed to attach the affidavit of the said Stephen Ally Mwakibolwa to confirm or distance himself from that allegation. I am of that considered view because, an affidavit mentioning another person, that other person must also swear

or affirm his or her affidavit in support thereof. See the case of *Sabena Technics Dar Limited v. Michael J. Luwunzu*, (Civil Application No. 451 of 2020)[2021] TZCA 108, *Franconia Investments Ltd v. TIB Development Bank Ltd*, (Civil Application No. 270 of 2020 [2021] TZCA 563, *Benedict Kimwaga v. Principal Secretary Ministry of Health*, Civil Application No. 31 of 200, CAT(unreported), *NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd*, Civil Application No. 13 of 2002, CAT(unreported), *Elly Matiku & Another vs Mediterranean Shipping Company T. Ltd* (Civil Appeal No.454 of 2020) [2023] TZCA 17461 (28 July 2023), *Frady Tajiri Chawe vs Tanesco* (Civil Application No. 505 of 2019) [2023] TZCA 88 (6 March 2023) to mention but a few.

It is my view that, it was only Stephen Ally Mwakibolwa who was supposed to confirm that he signed the said Form No. CC10 on 26<sup>th</sup> April 2018 on behalf of the applicant or that applicant consented for him to sign and file the said execution application. In my view, that could have proved that applicant was aware of existence of execution No. 223 of 2018. Respondent was supposed also to prove, by the counter affidavit evidence, that, applicant or his advocate or personal representative was aware of the date the said execution application No.223 of 2018 was scheduled for hearing but defaulted to enter appearance. For the

foregoing, it is my considered view that, the provisions of Rule 10(2) of Order XXI of Cap. 33 R.E. 2019(supra) relied upon by counsel for the respondent is inapplicable in the circumstances of this application.

I have taken the above stance after scrutinizing the affidavit and the counter affidavit including annexures thereto. As pointed out hereinabove, the name of the person who attended in court on 1<sup>st</sup> August 2018, the date execution No. 223 of 2018 was dismissed is not disclosed. In fact, there is no evidence as to how respondent became aware of presence of the said execution or how she was notified to attend hearing on 1<sup>st</sup> August 2018. This has left many unanswered questions.

It was submitted by counsel for the respondent that the dismissal of the said execution No. 223 of 2018 had the effect of relieving the respondent from satisfying the award. Whether that is correct or not, the disturbing issue is, if that is the correct position, why respondent took trouble on 16<sup>th</sup> October 2019 to file Miscellaneous application No. 621 of 2019 seeking the court to review its decision of dismissing in Miscellaneous application No. 237 of 2018 for want of merit. It can be recalled that in Miscellaneous application No 237 of 2018, applicant was applying for extension of time to file revision to challenge the CMA award. I should also point out that, Miscellaneous application No. 621 of

2019 was dismissed on 21<sup>st</sup> April 2020 for want of prosecution. Again, if submissions by counsel for the respondent is correct, why on 11<sup>th</sup> May 2020 respondent filed application No. 168 of 2020 praying for restoration of application No. 621 of 2019. It is worth to note that, Miscellaneous application No. 621 of 2019 was dismissed on 21<sup>st</sup> May 2021. It can be recalled that, execution No. 223 of 2018 was dismissed for want of prosecution on 1<sup>st</sup> August 2018 and on 18<sup>th</sup> February 2022, Hon. S.B. Fimbo, Deputy Registrar dismissed execution No. 337 of 2021 filed by the applicant for want of jurisdiction as she found that in presence of dismissal order in execution No. 223 of 2018, she was *functus officio*. I agree with her reasoning because, she had no power to rehear the parties on execution application without first vacating the dismissal order that was issued by Hon. S. H. Simfukwe, Deputy Registrar(as she then was) on 1<sup>st</sup> August 2018.

From what I have discussed hereinabove, I find this application merited because there is no proof that execution No. 223 of 2018 was filed by the applicant or his advocate with the consent and knowledge of the applicant. I have further found that there is no proof that applicant was aware of the date the said execution No. 223 of 2018 was scheduled for hearing. For all what I have discussed hereinabove, hereby allow this application, and set aside an order that dismissed

execution Application No. 223 of 2018 for want of prosecution. Since there is no proof that the said execution application was filed by the applicant, I hereby reject the order of restoration of the said execution No. 223 of 2018. The order to restore execution No. 223 of 2018 could have been valid only upon proof that it was filed by the applicant. This court cannot restore an application that was not filed by the parties. That being the position, applicant is at liberty to file a new application for execution of the CMA award that was issued on 19<sup>th</sup> December 2017 because she is still within the prescribed time.

Dated at Dar es Salaam on this 11<sup>th</sup> December, 2023.



B. E. K. Mganga  
**JUDGE**

Ruling delivered on this 11<sup>th</sup> December 2023 in chambers in the presence of Oscar Milanzi, Advocate for the Applicant and Melania Mashaguri, Advocate for the Respondent.



B. E. K. Mganga  
**JUDGE**