

TANZANIA / JUDGMENT

ANTHONY RAPHAEL MKUDE V

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 25917 OF 2024 ANTHONY RAPHAEL
MKUDE APPLICANT VERSUS LUMUMBA
GRIL RESPONDENT

JUDGMENT

Date of Last Order: 02/12/2024 Date of Judgment: 12/12/2024 B. E. K. Mganga, J. Brief facts of this application are that, Anthony Raphael Mkude, the abovenamed applicant, was employed by Lumumba Gril, the above- named respondent, for a fixed period contract of employment. It happened that respondent terminated employment of the applicant, as a result, on 31st July 2023 applicant filed a labour dispute before the Commission for Mediation and Arbitration (CMA) complaining that respondent breached his employment contract. When the dispute was called on for mediation on 23rd August 2023 before Ho. Mvungi, H.A, mediator, the parties settled their grievances as a result, a certificate of settlement of the dispute (CMA F6) was signed by the applicant and Farys Abdulah, on behalf of the respondent. The said settlement (CMA F6) was also signed by Hon. Mvungi, H.A, Mediator. In the said CMA F6 the parties agreed that, applicant shall be reinstated and that, he shall 1 sign a new contract on 1st September 2023. It was further agreed that, applicant shall have no any further claim against the respondent. It is alleged by the applicant that, after the said settlement on the same date, respondent reported him to police alleging that he stole respondent's property. It is said that, based on the said allegation, applicant was arrested by police but was bailed out on the same day. It is also said that, respondent did not honour the terms of settlement in CMA F6 as a result, applicant filed Execution No. 3595 of 2024 before this court praying to attach and sell different items/property of the respondent to satisfy the award of TZS 2,640,000/= to enforce the settlement agreement. On 28th March 2024, Hon. R.G. Tarimo, the Executing officer, delivered a ruling stating that the application for execution is inconsistent with the award because, the award was that applicant should be reinstated and there was no any alternative stated. The Executing officer held further that, if going back to the office by the applicant is impracticable, that should be tabled before the CMA to give orders that may be executable or pray for revision before the High Court. Based on the foregoing, on 1st June 2024, applicant wrote a letter to the CMA in-charge Dar es salaam and filed CMA/DS/Ila/MISC/20/2024 praying CMA to make calculations of the amount of money he is entitled 2 to be paid. The said letter was received at CMA on 24th June 2024. It is undisputed that, initially the said matter was

assigned to Hon. Igogo, Arbitrator, but was later assigned to Hon. Mvungi, H.A, Mediator. On 2nd September 2024, the parties appeared before Hon. Mvungi H. A, Mediator, as a result, applicant stated that, he is not ready to be reinstated because respondent reported him to police and the latter effected arrest. In his submissions before the aforementioned mediator, applicant admitted that he did not have evidence to show that he reported back to work or that he was arrested by police officers. On his party, Mr. Farys Abdullah, the director of the respondent submitted that, after signing the settlement certificate (CMA F6), applicant did not go back to work. He also submitted that, he is ready to reinstate applicant by signing a new contract of employment as they agreed in CMA F6. He added that, if applicant is unwilling, it shall be regarded that he has terminated his employment contract. Based on the foregoing submissions, the arbitrator issued an order that she cannot make calculations because, from 23rd August 2023, the date parties signed settlement certificate (CMA F6) applicant did not go back to work and there is no contract that was signed by the parties to show the nature of contract and payment thereof. In conclusion, the 3 mediator issued an order that applicant should sign a new contract and be reinstated as agreed in the certificate of settlement (CMA F6). Applicant was aggrieved with the said order hence this application for revision. In the affidavit in support of the Notice of Application, applicant raised two grounds namely:-

1. That, the same mediator who issued the first order of reinstatement that was not honoured by the respondent after the latter has reported to police and applicant being arrested issued the second order requiring applicant to be reinstated.
2. That, the Hon. Arbitrator erred both in law and facts by reassigning the said application to the mediator unprocedurally because it was the in charge who was supposed to make the said assignment. In opposing the application, respondent filed both the Notice of Opposition and the counter affidavit affirmed by Farys Abdullah Lardhy, the director of the respondent. When the application was called on for hearing, Mr. Mhindi Said, personal representative, appeared and argued the application on behalf of the applicant while Mr. Denis Mwamkwala, personal representative, appeared and argued the application on behalf of the respondent. Arguing in support of the application, Mr. Said submitted that, after signing the settlement certificate (CMA F6) applicant was arrested by police based on the report that was made by the respondent that applicant stole respondent's property. He also submitted that, on 1st 4 September 2023, applicant reported at work as agreed in settlement agreement, but he was prevented from entering into office. He further submitted that, applicant thereafter filed execution No. 3595 of 2024 as a result, on 28th March 2024, a ruling was issued ordering the parties to go back to CMA or file revision before this court. He added that, on 24th June 2024 applicant opted to go back to CMA praying CMA to make calculations of the amount he is entitled to be paid after refusal of the respondent to reinstate the applicant. He also submitted that; applicant simply wrote a letter to the CMA in charge praying calculations to be done. Upon being probed by the court, the personal representative of the applicant conceded that, in terms of Rule 29 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 67 of 2007, there was no application at CMA. He went on that, at CMA, the dispute was assigned to Hon. Igogo Arbitrator, but it was

thereafter reassigned to Hon. Mvungi, Mediator. In his submissions, Mr. Said conceded that, after issuing CMA F6, CMA had no jurisdiction to entertain the matter. He also conceded and submitted that, it was not proper for the mediator, through judicial process to determine the matter that was filed administratively and in absence of a proper application thereof. Despite the foregoing, Mr. Said implored the court to allow the application and issue an order that applicant be paid 12 months salaries. 5 To support his submissions, he cited the case of K.K. Security Co. Ltd

- v. Majariwa Musa Kagoma, Revision No. 822 of 2019, HC (unreported) wherein this court held that, relationship between the parties has broken irreparably and ordered the employee to be compensated 12 months salaries. In his submissions, the personal representative of the applicant conceded that, in Kagoma's case (supra), the application was not filed through administrative letter like the application at hand. With those submissions, the personal representative prayed that the application be allowed, and that applicant be compensated 12 months salaries. Resisting the application on behalf of the respondent, Mr. Mwamkwala, the personal representative of the respondent, submitted that, on 23rd August 2023, the parties entered settlement agreement in presence of Mvungi, Mediator. He submitted further that, in terms of section 87(4) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], the said settlement is a decree or an award subject to revision. He also submitted that, in Execution Application No. 3595 of 2024, applicant was advised to file revision, but he did not file revision against the settlement order, instead, he only wrote an administrative letter to CMA. He added that, the said letter is not in judicial form and was not filed as a formal application in terms of rule 29 of GN. No. 67 of 6 2007(supra). Based on that, Mr. Mwamkwala submitted that, there is no proceedings that this court can act upon or revised. He further submitted that, the court can, under Rule 28 of GN. No. 106 of 2007(supra), only call proceedings but, since there is no proceedings, there is nothing to be revised or grant prayers prayed by the applicant. Mr. Mwamkwala further submitted that, Kagoma's case(supra) is distinguishable because, in the said case, there were CMA proceedings unlike to the application at hand. With those submissions, he prayed that the application be dismissed for want of merit. In rejoinder submissions, Mr. Said submitted that, CMA was supposed to issue orders on how to resolve the issue between the parties. I have considered submissions of the parties in the CMA record and find that, it is undisputed by the parties that, on 23rd August 2023, they signed settlement certificate (CMA F6) before Hon. Mvungi H.A, Mediator. It is also undisputed by the parties that, in the said CMA F6, they agreed that applicant shall be reinstated and that, on 1st September 2023, he shall sign a new contract of employment. In terms of section 87(4) of Cap. 366 R.E. 2019 (supra) as it was correctly submitted by Mr. Mwamkwala, the personal representative of the respondent, the said settlement agreement concluded the dispute between the parties and 7 was enforceable as a decree of this court. In the said CMA F6, the parties agreed two things namely, (i) applicant shall be reinstated and (ii) applicant shall sign a new contract of employment. It is undisputed by the parties that, applicant filed Execution No. Execution No. 3595 of 2024 before this court praying to attach and sell different items /property of the respondent to

satisfy the award of TZS 2,640,000/= to enforce the settlement agreement (CMA F6). It is my view that, the executing officer (Hon. R. G. Tarimo, DR), rightly refused to grant the application because, the said TZS 2,640,000/= that applicant sought to recover by selling property of the respondent were not reflected in the settlement agreement (CMA F6). It was correctly, in my view, held by the Executing officer that, the mode of execution was inconsistent with the settlement agreement (CMA F6). In fact, no evidence was adduced by the applicant at CMA showing that respondent refused to reinstate him for the court to resort to the provisions of section 40(3) of Cap. 366 R.E. 2019(supra) by ordering respondent to pay him 12 months salaries in addition to wages due and other benefits from the date of termination to the date of final payment. For the provisions of section 40(3) of Cap. 2019(supra) to apply, the employer must have not complied with the order of reinstatement or reengagement. The said section does not apply in the circumstances 8 where the employer is willing to comply with the order of reinstatement or reengagement, but the employee is unwilling. In my view, if the employee is unwilling to be reinstated or reengaged, that becomes the end of the matter. He or she cannot further claim to be paid 12 months salaries and other benefits mentioned under section 40(3) of Cap. 366 R.E. 2019(supra). In other words, after the prayer of reinstatement or reengagement has been granted in favour of the employee, the same employee cannot go back either to the CMA or the Court and change the prayer. In my view, that will be vacating from the pleadings at CMA which he or she is bound with. Again, after granting the prayer, CMA becomes functus officio hence with no jurisdiction. In the application at hand, since the settlement agreement (CMA F6) was clear that applicant shall be reinstated and shall sign a new contract of employment, then, in execution No. Execution No. 3595 of 2024 applicant was supposed to apply to the court praying an order compelling the respondent to reinstate him and sign a new contract of employment. Had the respondent refused to sign a new contract and reinstate the applicant, then, the court could have invoked the provisions of section 40(3) of Cap. 2019(supra). In absence of evidence that respondent refused to comply with settlement order, the prayer of 12 months cannot be granted. 9 I have pointed out herein above that, the said settlement certificate (CMA F6) determined and concluded the dispute to its finality. It was therefore not open to the applicant to go back to CMA praying for calculations of the amount he was entitled to be paid as 12 months salaries alleged after refusal of reinstatement. I am of that view because, as I have pointed out shortly a while herein above, CMA F6 is enforceable as the decree of this court. The arbitrator and or the mediator are not executing officers of the CMA awards. That is the domain of the Deputy Registrars before this court. Both the mediator and the arbitrator had no power to enforce the award by calculating the amount applicant was entitled allegedly that respondent has refused to reinstate the applicant. Had there been evidence that respondent refused to reinstate the applicant, in the strength of the holding 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 (2 March 2022), the executing officer would have made calculations. In Ngonyani's case (supra), the Court of Appeal held inter-alia that:- "...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 10 expressly or constructively, it is within the power of the executing court to compute the same.” It is also undisputed by the parties that, applicant made an application to CMA through an administrative letter praying the arbitrator to make calculations on the amount he is entitled to be paid allegedly that respondent refused to comply with reinstatement order. It was correctly submitted by Mr. Mwamkwala that, there is no application in the eyes of the law that was filed at CMA. Applicant was supposed to make application in terms of Rule 29 of GN. No. 64 of 2007(supra) supported by an affidavit. Since there is no proper application that was made by the applicant, there is no proceedings and order to be revised because the purported proceedings and the order arising therefrom are a nullity. For the foregoing, I nullify CMA proceedings and quash the award arising therefrom. Dated at Dar es Salaam on this 12th December 2024 B. E. K. Mganga JUDGE 11 Judgment delivered on this 12th December 2024 in Chambers in the Mhindi Saidi, Personal representative for the Applicant but in the absence of the Respondent. B. E. K. Mganga JUDGE 12

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