

TANZANIA / JUDGMENT

CIVIL APPLICATION NO 2025 HJF MEDICAL RESEARCH INTERNATIONAL INC VS EMMA BASIMAKI 32 OTHERS

COURT
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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CIVIL APPLICATION NO. 477 OF 2025 HJF MEDICAL RESEARCH INTERNATIONAL INC..... APPLICANT VERSUS EMMA BASIMAKI & 32 OTHERS..... RESPONDENTS (Application for Stay of Execution of the Judgment and Decree of the High Court of Tanzania, Labour Division at Mbeya) fNGUNYALE. J.1 Dated 13th day of September, 2022 in Labour Revision No. 19 of 2021

RULING

18th & 21st March, 2025 MANSOOR. J.A.: The applicant seeks for an order of stay of execution through a notice of motion dated 28th February 2025, filed under Rule 11 (3), 11 (4), 11 (5) (a) and (b) and Rule 11 (7) (a), (b), (c) and (d), 48 (1) and 49

- (1) of the Tanzania Court of Appeal Rules, 2009, "the Rules". The applicant applies for stay of execution of the decree of the High Court, Labour Division at Mbeya in Labour Revision No. 19 of 2021 pending the hearing and determination of the appeal. The application is accompanied by the affidavit of Mr Luka Elingaya, the advocate for the applicant, who has been authorised by the applicant to file the affidavit on her behalf. In the affidavit, Mr Elingaya stated that the respondents herein were the employees of the applicant. That the respondents' contracts of employment were a one year fixed term contracts and expired upon the expiry dates of the respective contracts. The respondents filed a complaint at the Commission for Mediation and Arbitration "CMA" alleging that their employment contracts were unfairly terminated as they had reasonable expectations of renewal of their respective employment contracts. On 25th June 2021, CMA issued an award in favour of the respondents finding that the 33 employees who are the respondents herein have been unfairly terminated and ordered the applicant herein to pay the respondents 24 months' salaries as compensation to the tune of TZS 3, 782,349, 187.00, (Tanzania Shillings Three Billion Seven Hundred Eighty-Two Million Three Hundred Forty-Nine Thousand, One Hundred Eighty-Seven Only). The applicant was aggrieved, he thus filed Labour Revision No. 19 of 2021 at the High Court, Labour Division at Mbeya. On 13th September 2022, the High Court confirmed that the termination of the respondents' contracts of employment were

unfair as they all had reasonable expectations of renewal of their employment contracts. The High Court, however revised the amount of compensation awarded to the respondents, and instead of 24 months' salaries; the amount was reduced to 12 months' salaries. Still aggrieved, the applicant filed a notice of intention to appeal intending to challenge the decision of the High Court in Labour Revision No 19 of 2022. The notice of appeal was lodged on 26th September 2022, within 13 days from the date of the decision of the High Court, which was delivered on 13th September 2022. The applicant filed the memorandum of appeal as well as the submissions in support of the appeal. The appeal before the Court of Appeal is yet to be determined. The applicant filed the application for stay of execution, and the affidavit in support of the motion has been sworn in by Advocate Luka Elingaya an advocate representing the applicant and who has been authorised by the applicant to swear the affidavit on her behalf. Mr Elingaya states in paragraph 11 of the affidavit that on 28th November 2024, almost two years after the decision of the High Court was passed, the applicant received an email from Standard Chartered Bank notifying the applicant that they have received a garnishee order nisi for attaching the applicant's Bank Account No. 01-080-11350-01 involving the sum of TZS 1,891,174,593.50. After the notification from the bank, the applicant realized that the respondents had filed an Application for Execution No. 28118 of 2024, and the application was determined by the court without issuing the notice to the applicant, and eventually a garnishee order nisi for attaching the applicant's bank account was issued. He states further that, as soon as the applicant became aware of the garnishee order nisi issued by the High Court in Execution No. 28118 of 2024, the applicant quickly filed before this Court an application for stay of execution. When the application for execution was called for hearing before the Court on 26 February, 2025, the counsel for the respondents informed the court that the Execution No 28118 of 2024 was already withdrawn, and they had already filed a fresh application for Execution No.32390 of 2024. Again, the new execution proceedings proceeded without notifying the applicant, and through the new execution proceedings the respondents obtained another order of garnishee nisi attaching the same account number in the same bank. The respondents served the applicant with the new application for execution on 28th February 2025, and soon after receiving it, on the same day, the applicant filed the present application for stay of execution. In the affidavit, the applicant's counsel states in paragraph 21 that the applicant will suffer a substantial loss as the applicant does not know the whereabouts of the respondents/ he does not know whether they possess any moveable or immovable property and does not know their source of income. Taking into account that, colossal amount of money will be taken out of the applicant's bank account, the applicant's counsel states that it will be impossible to recover the money from the respondents in case that the appeal pending before the Court of Appeal will succeed. In support of this, the applicant took a leaf from the case of MIC Tanzania Limited vs CXC Africa Limited, Civil Application No. 172/01 of 2019, at page 13, in which the Court had this to say: "With regard to substantial loss/ we wish to reiterate our stance in the case of Tanzania Cotton Marketing board vs. Cogecot Cotton Co SA (supra) that granting of a stay order is a matter of discretion which is to be exercised on common sense and balance of advantage basis. In that regard, in deciding whether to order a stay, the Court should

essentially weigh the pros and cons of granting or not granting the order (see Global Tours & Travels Limited; Nairobi HCf Winding-up Cause No. 43 of 2000). In the instant application, the applicant has firmly stated in the founding affidavit that he stands to suffer substantial loss if execution is to proceed and the money is paid to the respondent who has no known fixed or immovable asset unlike in a declaratory decree such as in ownership of a landed property of which its execution may result into eviction hence cause both social, psychological and economic hardships which may be 13 detailed and particularised, in money decrees parting with money without any assurance of easy and quick recovery is sufficient detail of the substantial loss to be suffered. This being a money decree, we think,, no more details and particularisation is needed." The applicant's counsel also states at paragraph 22 of the affidavit that he is willing, ready and able to furnish security in the form that will be ordered by the Court. The respondents who were represented by Mr Daniel Muya and Mr Isaya Zebedayo Mwanri, learned counsel, vehemently opposed the application saying that the application was filed out of time, that the applicant failed to show that he will suffer substantial loss if the stay of execution will not be issued, also, the undertaking to furnish security for the due performance of the decree ought to have been given by the applicant and not the applicant's advocate. Mr. Muya spent quite some time to elaborate that the application has been filed out of the prescribed time of 14 days as prescribed in Rule 11(4) of the Tanzania Court of Appeal Rules, 2019. He attacked paragraphs 13,15,16 and 19 of the applicant's affidavit stating that these paragraphs contain untrue statements. The counsel prays that these paragraphs which depose untrue statements be expunged from the records. For the sake of clarity, I shall reproduce paragraph 15, 16 and 19 of the applicant's affidavit: Para 15: that the respondents withdrew Labour Execution and garnishee order nisi, the respondents refiled a new execution application to wit Labour Execution No. 32390 of 2024 and was issued with a garnishee order nisi dated 30th December 2024 without notice, service or knowledge of the applicant; Para 16: that after the court of appeal was satisfied that the applicant was not served with new Labour Execution No. 32390 of 2024 and subsequent garnishee order nisi, marked the application for stay of execution withdrawn as the said Labour Execution and garnishee order nisi were not attached to the application for stay of execution and ordered the respondents to serve the applicant with a copy of the execution application and garnishee order nisi and the applicant to file a new application for stay of execution within 14 days from the date of service." Para 19: the applicant became aware of the execution proceedings when Standard Chartered Bank informed her of the existence of the garnishee order on 28 November 2024 and when was served with the copy of the new labour application and garnishee order nisi on 28th February 2025, she lodged this application for stay of execution without unreasonable delay." The counsel for the respondents submit that the contents of paragraph 12 and 13 also contains falsehood as the banks had notified the applicant of the existence of execution since 28th November 2024, and after the notification, the applicant's counsel made appearance in court. The respondents however admit in paragraph 7 of the affidavit in reply that the Application for Execution No. 28118 of 2024 was withdrawn on 20th December 2024. With regards to the contents of paragraph 15 of the applicant's affidavit, the counsel for the respondents states

that it is not true that the applicant was not aware of the existence of the new application for execution, as on 29th January 2025, the applicant, through Advocate Juvenalis Ngowi filed an affidavit to show cause in which they state categorically that the applicant became aware of the existence of application for Execution No. 32390 of 2024 when Standard Chartered Bank received a garnishee order nisi arising from Labour Execution No. 32390 of 2024 for attachment of the sum of TZS 1,891, 174, 593.50. He insists that paragraphs 12, 13, 14, 15 ,16 and 19 be expunged from the records, and if these paragraphs will be expunged, then the application would be out of time as the affidavit in support of the application would not support the application the contentions that the applicant became aware of execution proceedings on 28th February 2025, as alleged, hence the application which was filed on 28th February 2025 would be time barred. On his part, Mr. Lingaya said he became aware of the existence of execution proceedings on 28th February 2025, the day he was served with the application for execution as exhibited in annexure HJMFRI8 of his affidavit, and filed the application for stay of execution on the same date. He said the application was filed in accordance to Rule 11 (4) of the Rules. Having heard the submissions from counsel of the parties on the issue whether the present application was filed on time as required under Rule 11 (4) of the Rules, I shall determine this issue first, as the issues of time limitations determines the jurisdiction of the Court. Rule 11 (4) provides: Rule 11 (4): an application for stay o f execution shall be made within fourteen days o f service o f the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware o f the existence o f an application for execution. The issue to be determined here is when the applicant became aware of the existence of an application for Execution No. 32390 of 2024. In determining this issue, I shali take into considerations the averments of the applicant's counsel in his affidavit, and those of the respondents in their affidavit in reply, as well as the submissions made by the counsel on behalf of the parties. It is true that in paragraph 13 of the applicant's counsel affidavit, he states that the applicant was notified of the order of garnishee nisi served to the applicant's bank on 28th November 2024. The applicant's counsel continues to depose under oath in paragraph 14 of his affidavit that he became aware that the Application for Execution No. 28118 of 2024 was withdrawn on 20th December 2024 only when the counsel for the respondents was addressing the court on 26 February 2025. In paragraph 15, the applicant's counsel deposes under oath that the new Application for Execution No. 32390 of 2024 was filed in court and a garnishee order nisi was issued on 30th December 2024 without the notice to the applicant, and in paragraph 16, he swears that he only became aware of the existence of an Application for Execution No. 32390 of 2024 when he appeared before the Court of Appeal for hearing of an Application for Stay of Execution No. 1431 of 2024 which was marked withdrawn on 26 February 2025. Again, in paragraph 19 of his affidavit, the applicant's counsel states under oath that he became aware of the new Labour Application No. 32390 of 2024 on 28th February 2025 when he was served with the application. The respondents' counsel insists that the averments in paragraphs 13, 14, 15, 16 and 19 of the affidavit in support of motion contains false statements as the applicant's counsel had sworn an affidavit on 27th January 2025 stating that the Standard Chartered Bank was served with garnishee order nisi arising out of Labour Execution No.

32390 of 2024, thus it cannot be true that the applicant became aware of the existence of Labour Execution No. 32390 of 2024 on 26th or 28th February 2025, as deposed in the paragraphs of the affidavit of the counsel for the applicant. Indeed, what has been submitted by the counsel for the respondents is true. From the affidavit in reply, particularly paragraph 8, it shows that the applicant was served with the Application for Execution No. 32390 of 2024 before 27 January 2025, as on 27th January 2025, the applicant through the affidavit of Juvenalis Ngowi, an advocate for the applicant, filed an affidavit to show cause in respect to Execution Application No. 32390 of 2024. Mr Ngowi said in paragraph 1 of the affidavit that he is an advocate from Denton's EALC East Africa Law Chambers, and was duly authorised by the applicant to swear the affidavit on behalf of the applicant. In paragraph 1 of Mr Luka Elingaya, an advocate who swore the affidavit in support of this present application, also says that he practices as an advocate in Denton's East Africa Law Chambers, the same law firm in which Mr Ngowi is practicing, and both the advocates were authorised by the same applicant to depose the facts shown in the affidavits. The two affidavits contradict each other, while advocate Ngowi swears an affidavit to show cause in respect of Execution No. 32390 of 2024 on 29th January 2025, Advocate Elingaya swears an affidavit stating that he was not aware of the existence of Execution No. 32390 of 2024, and he only became aware of the existence of the Execution No. 32390 of 2024 when he appeared in court on 26 February 2025, and when he received the copy of execution on 28 February 2025. Indeed, as submitted by the counsel for the respondents, the contents of paragraph 13, 14, 15, 16 and 19 of the affidavit in support of the application contains false information and it is unsafe to act on such affidavits. This was stated in the case of Jaliya Felix Rutaihwa vs Kalokora Bweshia and Another, Civil Application No. 392/01 of 2020, in which the Court at page 11 said that, "It is elementary that an affidavit that contains material falsehood cannot be acted upon." The Court, in Jaliya's case (supra) made reliance on the cases of Ignazio Messina v. Willow Investments SPRL, Civil Application No. 21 of 2001; and Kidodi Sugar Estates & 5 Others v. Tanga Petroleum Company Ltd., Civil Application No. 110 of 2009 (both unreported) where in Ignazio Messina (supra), it was expounded that: "An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue." In the premises, I find it unsafe to act on the supporting affidavit that patently contains substantial untruths tending to muddy the waters but work in favour of the applicant." It is therefore without a flicker of doubt that the affidavit of Mr Luka Elingaya contains untrue statements particularly paragraphs 13, 14, 15, 16 and 19 on the date the applicant became aware of the existence of Execution No. 32390 of 2024, as the averments in these paragraphs 13 contradicts materially with the affidavit of the applicant sworn by Advocate Ngowi on 29 January 2025. As stated in the cases cited above, not only that it is unsafe to rely on affidavits which contains untrue statements, but the affidavit that contains falsehood is no affidavit at all and cannot be used to support an application. Since there is no affidavit to support the application, the application becomes incompetent. The application as well has been filed out of the prescribed time of 14 days prescribed under rule 11 (4) of the Rules, as it was filed on 28th February 2025, while the applicant became aware of the existence of the Application for Execution No. 32390 of 2024

since 27th January 2025. Consequently, based on the above, this application is struck out for being incompetent, with costs. DATED at DAR ES SALAAM this 21st day of March, 2025. L. A. MANSOOR JUSTICE OF APPEAL The Ruling delivered this 21st day of March, 2025 in the presence of Ms. Beatrice Soka, counsel for the Applicant and Mr. Isaya Mwanri, counsel for the Respondents, via video link from Mbeya is hereby certified as a true copy of the original. A. L.i rKALEGEYA riii L v A L L v ji- ! n \ DEPUTY REGISTRAR Y*\ COURT OF APPEAL iff)

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