

TANZANIA / JUDGMENT

kitenge shomvi vs the registered trustees of chama cha mapinduzi and 3 others 2023 tzhcld 1224 31 march 2023

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31 March 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS APPLICATION NO. 531 OF 2022 KITENGE SHOMVI APPLICANT
VERSUS THE REGISTERED TRUSTEE OF CHAMA CHA MAPINDUZI
..... 1ST RESPONDENT UMOJA WA WAZAZI TANZANIA
..... 2ND RESPONDENT REGISTERED TRUSTEES OF UMOJA WA WAZAZI
TANZANIA 3RD RESPONDENT KATIBU MKUU UMOJA WA WAZAZI
..... 4TH RESPONDENT

RULING

Date of last order: 17/03/2023 Date of Ruling: 31/03/2023 B.E.K. Mganga, J. Brief facts of this application are that applicant filed Execution application No. 254 of 2019 for execution of CMA award arising from Labour dispute No. CMA/DSM/KIN/R.928/17/60 at Kinondoni against the 2nd, 3rd, and 4th respondents. In the said CMA award, applicant was awarded to be paid TZS 149,526,412/=. In the said Execution application, applicant was praying to attach and sale plot No. 39/2 Block F situated at Sinza area within the City and Region of Dar es Salaam. The 1st respondent filed Miscellaneous Application No. 479 of 2022 for 1 objection proceedings that the said plot is not property of the 2nd, 3rd, and 4th respondents but it belongs to her and further that, 1st respondent was not a party to the CMA proceedings. Applicant filed two preliminary objections namely that, (i) the application is time barred on ground that the 1st respondent was supposed to file objection proceedings within 60 days from the date applicant filed execution No. 254 of 2019 and (ii) that, the application is incompetent. On 15th December 2022, Hon. E.M. Kassian, Deputy Registrar, the Executing Officer, delivered his ruling in which he held that, the 1st respondent filed the objection proceedings thirty days after an application by the applicant to attach the aforementioned property. Therefore, it was illogical the applicant to argue that the 1st respondent was supposed to file an application for objection proceedings in 2019 even before applicant himself has not prayed to attach the said property. The Executing officer found that the application was competent and dismissed both preliminary objections. Having dismissed the two preliminary objections, the Executing Officer proceeded to hear the parties in the said objection proceedings. On 19th December 2022, the Executing Officer delivered his ruling that, the 1st

respondent proved that she has interest in the property in 2 question and that, she was not a party to the dispute that was determined at CMA. The Executing Officer, therefore, discharged the aforementioned property from being attached. The Executing Officer noted that Execution No. 254 of 2019 has become a backlog. He, therefore, struck it out with leave to the applicant to refile upon getting appropriate mode of execution. Based on the foregoing facts, on 29th December 2022, applicant filed the Notice of Application citing the provisions of section 94(1) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], Rule 24(1)(2)(a)(b)(c)(d)(f) 3(a)(b)(c) (11) 35(1)(2) 38(b)(c) 55(1) and (2) of the Labour Court Rules, GN. No. 106 of 2007 praying the court to call the files relating to Execution No. 254 of 2019 and Miscellaneous application No. 479 of 2022 for reference and restore Execution No. 254 of 2019 on ground that the executing Officer, did not consider evidence of the parties. The said Notice of Application was supported by applicant's affidavit. On the other hand, the 1st respondent filed the Notice of Opposition together with the counter affidavit of Fabian Donatus, advocate, to resist the application. In addition, the 1st respondent filed the Notice of Preliminary objection that the application by the applicant 3 is barred by Rule 62 of Order XX1 of the Civil Procedure Code [Cap. 33 R.E. 2019]. The 2nd, 3rd and 4th respondents did not file the notice of opposition or counter affidavits. When the application was called on for hearing the preliminary objection raised by the respondents, Mr. Hemed Omari, personal representative, appeared for and on behalf of the applicant, while Pancrasia Protas, learned advocate, appeared for and on behalf of the 1st respondent. When the application was called on for hearing, the court asked the parties to submit whether the application was competently before the court. Arguing the preliminary objection on behalf of the 1st respondent, Ms. Protas, learned counsel submitted that, the ruling complained of, by the applicant relates to objection proceedings. Counsel argued that applicant was supposed to file/institute a suit and not to file this application. To support her submissions, she cited the case of Mohamed Enterprises Ltd vs. Tanzania Investment Bank & 2 Others [2011] TZCA 227 and prayed that the application be dismissed. Responding to the issue raised by the court, counsel for the 1st respondent submitted that the application for reference is improper 4 because applicant has not moved the Court properly. She went on that, there is confusion in the application because it is not known whether, the application is for revision, reference etc. Counsel submitted further that, Rule 35 of the Labour Court Rules, GN. No. 106 of 2007 cannot apply because Execution Application No. 254 of 2019 and Miscellaneous Application No. 479 of 2022 were heard and determined and not adjourned sine die. She concluded that, the executing officer struck out execution application No. 254 of 2019 and gave an order that applicant can refile a proper application for execution if he will secure good alternative. On his part, Mr. Omari, personal representative of the applicant, submitted that the provisions of Rule 62 of Order XXI of Cap. 33 R.E. 2019 (supra) is not applicable. He submitted further that, the application before the court originated from execution and added that, the preliminary objection raised by the 1st respondent does not relate to defectiveness of affidavit but objection proceedings. Mr. Omari submitted further that, Mohamed Enterprises's case (supra) is not applicable in the circumstances of this application. Responding to the issue raised by the Court, Mr. Omari submitted that, applicant has cited Section 94(1) of Cap. 366 R.E. 2007 (supra), 5 Rule 24(1), (2)(a)(b)(c)(d)(e)(f), 3(a)(b)(c), 11, 35(1)(2), 38(1)(b)(c) and 55(1) & (2) of GN. No. 106 of 2007 and maintained that the application is properly before the

Court. He prayed that the court should apply the Overriding Objectives Principles and proceed to hear and determine the application. He concluded his submissions by praying that the preliminary objection be dismissed. I have heard submissions of the parties in support and against the preliminary objection raised by the 1st respondent and the issue of competence of the application raised by the court. In disposing these issues, I will start with the issue raised by the court. It was submitted by counsel for the 1st respondent that the nature of the application is not clear. I agree with counsel for the 1st respondent that it is unclear as to the type of the application at hand. It is my view that, by citing the provisions of section 94(1) of Cap. 366 R.E 2019 (supra) in the Notice of Application, applicant created confusion. The said section has subsections relating to inter-alia appeal, review, revision, applications for declaratory orders and injunctions. It is not known which amongst the afore mentioned applicant is praying to the court. It is therefore, not known whether this is an application for revision, review, applications for declaratory orders or injunction. It is my view that the prayers in the Notice of Application created confusions. I should point out that, applicant titled this application as "MAOMBI ANUAI" meaning that it is a Miscellaneous Application. I have examined the prayers by the applicant in the Notice of Application and find that this is not a miscellaneous application, rather, an application for Revision. It is my considered view that, Revision application cannot be determined through this Miscellaneous Application because there is a separate Register for Revision. By titling this application as Miscellaneous Application, applicant caused this application to be registered in a wrong register. It is my view further that, Rule 24(1)(2)(a)(b)(c)(d)(f) 3(a)(b)(c)

- (11) 35(1)(2) 38(b)(c) 55(1) and (2) of the Labour Court Rules, GN. No. 106 of 2007 cited by the applicant in the Notice of Application does not exist. The proper Rules that exist are 24(1), (2) (a), (b), (c), (d), (f), 3(a), (b), (c), (11), 35(1) and (2), 38(b) and (c) and 55(1) and (2). I take it that, it was an oversight on part of the applicant to omit commas where it was supposed to be. I therefore apply the Overriding Objective Principle and insert comma where it was supposed to be, in order the law to be correctly cited in the Notice of Application. 7 It was correctly submitted by counsel for the 1st respondent that, Rule 35(1) and (2) of GN. No. 106 of 2007 (supra) is not applicable to the application at hand. I entirely agree with that submission. That Rule relates to matters adjourned sine die. I have read the order by the Executing officer and find that Execution No. 254 of 2019 and Miscellaneous Application No. 479 of 2022 were not adjourned sine die. Again, Rule 38 of GN. No. 106 of 2007 (supra) cited by the applicant is inapplicable because the said Rule relates to rescinding default judgment, of which, there is no such order or prayer. Rule 55 of GN. No. 106 of 2007 (supra) cited by the applicant can only be cited when there is no specific provision in GN. No. 106 of 2007 (supra) relating to the matter. For the foregoing, it is my view, that, the application is incompetent before the court and that the orders prayed by the applicant cannot be determined through this miscellaneous application. The application was filed in a wrong register because applicant titled it wrongly. I have considered the preliminary objection raised by the 1st respondent and find, in my view, that, the same can only be decided 8 when the application is properly before the court unlike the application at hand. For that reason, I will not

consider it. That said and done, I hereby strike out this application for being incompetent. Dated at Dar es Salaam on this 31st March 2023. B. E. K. Mganga JUDGE Ruling delivered on this 31st March 2023 in chambers in the presence of Hemed Omari, Personal Representative of the Applicant and Alex Miyanga, Advocate, holding brief of Pancrasia Protas, Advocate for the 1st Respondent but in the absence of the 2nd, 3rd, and 4th Respondents. B. E. K. Mganga JUDGE 9

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