

TANZANIA / JUDGMENT

RASHID MWALE V

COURT
TANZLIIDECIDED
1 January 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 10622 OF 2024 RASHID MWALE.....
APPLICANT VERSUS KENTAN LOGISTICS LIMITED..... RESPONDENT

RULING

Date of last Order: 28/5/2024 Date of Ruling: 30/5/2024 B. E. K. Mganga, J. Rashid Mwale, the herein applicant filed this application against Kentan Logistics Limited, the herein respondent who is his former employer. In the Notice of application, applicant prays the court (i) to issue an interim injunction order against Respondent or its holding company not to transfer, alienate, sale or remove within the United Republic of Tanzania Motor vehicle with registration Number T347 DUE Toyota Noah, motorcycle with the registration number MC 209 CVU, 21 desktop computers, 30 office chairs, 18 office tables and 4 cabinets until final determination of Labour dispute No. CMA/DSM/TMK/376/2022/8/2023 that is pending before the Commission 1 for Mediation and Arbitration(CMA) and (ii) order the respondent to furnish security deposit a total of TZS 90,956,250/= that is equivalent to 18 months' salary and severance pay from the date of termination up to 31st May 2024, the date respondent intends to close down her operations. In the Notice of Application, applicant indicated that the application is made under Rule 24(1),(2)(a), (b),(c),(d),(e) and (f), 24(3)(a),(b),(c) and (d), 24(9), 24(1)(a), 55(1) and(2) of the Labour Court Rules, GN. No. 106 of 2007, Section 68(e) and 95, Order XXXVI Rule 6(l)(a) and (b), Order XXXVI Rule 6(2) and (3), Order XXXVII Rule(1)(b) and Order XXXVII rule (2)(1) of Civil Procedure Code Cap. 33 R.E 2019 and Section 94(f)(ii) of the Employment and Labour Relations Act Cap. 396 R.E 2019 and any other enabling provision of law. The application is supported by an affidavit of Rashid Mwale, the applicant. In the said affidavit, applicant deposed inter-alia that, the respondent is a foreign company registered in Tanzania owned foreigners where the shareholders are Kenfreight Group Limited, a company registered in Mauritius and Bastian Steffen, a German national who resides in Kenya. It was further deposed by the applicant that he was employee of the respondent, but his employment was unfairly terminated on 7th November 2022. That, aggrieved with termination, he filed labour dispute No. CMA/DSM/TMK/376/2022/8/2023 that is 2 currently pending before CMA at Temeke within the region of Dar es salaam wherein he is praying to be reinstated. Applicant deposed further that on 29th April 2024, respondent issued a general notice to the public that she will close down her operations in Tanzania effectively from 31st May 2024. Applicant also deposed that after closure of the respondent's business, the pending dispute at

CMA will be nugatory and moot as it will be impossible to execute the award hence this application. Opposing the application, respondent filed the counter affidavit affirmed by Ally M. Kileo, her legal counsel. In the said counter affidavit, it was deponed that applicant was fair fairly terminated and that the dispute is pending at CMA. It was also deponed on behalf of the respondent that, applicant has no chance of success in the said dispute. It was further deponed on behalf of the respondent that applicant has failed timely to arbitrate the said dispute due to his routine absence. In the said counter affidavit, the deponent disputed the contents of paragraph 4 of the applicant's affidavit relating to shareholders, nationality and residence of the said shareholders and put applicant to strict proof. The deponent of the counter affidavit further disputed paragraph 10 of the applicant's affidavit in which applicant stated that, the only property owned by the respondent in Tanzania are Motor 3 vehicle with registration Number T347 DUE Toyota Noah, motorcycle with the registration number MC 209 CVU, 4 cabinets, 21 desktop computers, 30 office chairs, 18 office tables and 4 cabinets and put applicant to strict proof thereof. Respondent further disputed the contents of paragraph 11 and 12 of the applicant's affidavit in which applicant stated that after closure of respondent's business, the dispute pending at CMA will be nugatory and mere moot as the award will not be executable. Respondent also deponed that, she has never intimated to close her business permanently because her presence in the country has not been revoked. When the application was called on for hearing, Mr. Lucas Nyagawa, advocate appeared and argued for and on behalf of the applicant while Ms. Mercy Chimtawi, advocate appeared and argued for and on behalf of the respondent. Arguing in support of the application, Nyagawa submitted that, once respondent's business is closed and if it happened that applicant is awarded at CMA, applicant will not be able to enforce the said award. He submitted further that, there is no provision that can allow applicant to enforce CMA award outside our jurisdiction hence, if the application will not be granted, applicant will suffer irreparable loss. When probed by the court, counsel for the applicant submitted that, applicant has no 4 guarantee to any loss of the respondent's physical property mentioned hereinabove if the same are damaged during the interim injunction order prayed. Counsel conceded that, applicant has not stated in the affidavit as who will take care of the property mentioned in the notice of application other than the money that will be deposited in court if injunction will be granted. He was however quick to submit that, applicant can only compensate the respondent on that loss if proven that it was not due to the respondent's negligence. Mr. Nyagawa submitted further that, during the time of injunction, respondent should continue to enjoy the use of the said physical property and that, if it happens the said motor vehicle and motorcycle are involved in an accident and written off, applicant will resort to other properties mentioned in the notice of application. Mr. Nyagawa cited the case of *Atilio v. Mbowe* [1969] HCD 284 and submitted that, the conditions stipulated therein for injunction to be granted namely, (i) presence of a serious triable issue to be determined, (ii) necessity of interference to protect the applicant from the type of injury he may suffer before legal rights are established, and (iii) balancing great hardship that applicant will suffer due to withholding of injunction and hardship respondent will suffer when injunction is granted have been met. He submitted further that, applicant has established 5 the above conditions because, respondent is about to close her business in Tanzania hence execution will be impossible. He added that, shareholders of the respondent being foreigners, they cannot

be held as civil prisoners. To implore the court to grant the application, learned counsel for the applicant cited the case of *Alex Lazaro Mjoge & 104 others v. Fastjet PLC*, Miscellaneous application NO. 205 of 2019, HC(unreported) and submit that, this court issued injunction order and ordered respondent to furnish security in the said application with almost similar circumstances. Resisting the application, Ms. Chimtawi, learned counsel for the respondent submitted that, it is true that there is a pending dispute at CMA between the parties. On whether there will be irreparable loss, she submitted that, respondent has not issued a notice to the public that she intends to dispose her properties. She added that, the notice to the public does not suffice a conclusion that the respondent will be disposing her property neither does it prove that the respondent is winding up its activities in Tanzania. She went on that, the notice means that operation will stop but that does not mean that the company will be wound up. When probed by the court, learned counsel conceded that, in the notice to the general public, respondent indicated that she wants to close down 6 her operations. She submitted further that, there is no possibility that applicant will suffer irreparable loss. Learned counsel for the respondent submitted further that, on balance of convenient, the court has to consider that the said injunction does not cause hardship to either party. She added that, applicant has not proved that he will suffer more hardship if the application is not granted. She went on that, if the applicant will be granted, respondent is likely to suffer as she will be not in a position to utilize the property subject to injunction because, she will continue to keep and maintain the said property until conclusion of the dispute pending at CMA. Ms. Chimtawi further submitted that, applicant can still enforce CMA award at any place where respondent will be operating. She added that, the headquarters of the respondent is in Nairobi but when she was probed by the court, she readily conceded that, that is not in the respondent's counter affidavit. Counsel for the respondent further submitted that, applicant can enforce the CMA award outside our jurisdiction under the Reciprocal Enforcement of Foreign judgment Act, [Cap 8. R.E. 2019]. When probed by the court as to whether CMA award is also covered by the said Act, learned counsel for the respondent answered in affirmative. She added that, section 3 of Cap. 8 R.E. 2019(supra) gives the President, powers to extend foreign countries 7 to be given reciprocity treatment. In her submissions, learned counsel frankly submitted that she can't state with certainty that there is reciprocity arrangement between Mauritius and Tanzania or between Tanzania and Germany for the said Act to be applicable. Ms. Chimtawi cited the case of *Flipos Gebremedhin v. Asmara Transport Company Ltd*, Misc. Commercial Application No. 189 of 2023, HC(Unreported) in which this court quoted the case of *Sea Saigon Shipping limited v. Mohamed Enterprises (T) Limited*, Civil Appeal No. 37/2005[2005] TZCA 36 (11 August 2005) and submitted that, principles to be considered before the court can order deposit for security are that, one; there must be a reasonable chance for the decree to be passed against the defendant i.e., there must be a prima-facie case. She submitted that this condition was met because there is a dispute pending at CMA. Two; plaintiff must establish that defendant is attempting to remove or dispose assets. She submitted that there is no proof to that effect in the application at hand. Three, plaintiff/applicant must establish that removal or disposal of the assets by the defendant is being done with the intention of defeating the decree that may be passed against the defendant by delaying or obstructing its execution. She argued that, there is no proof that respondent intends to obstruct

or prevent execution. Four; the order 8 should not be granted on merely assumptions and speculations without cogent and tangible evidence. She argued that, there is no tangible evidence apart from the notice showing that respondent intends to close her business. Five; respondent should be given notice to show cause as to why, her property should not be attached. She submitted that this condition was complied with because, the notice was issued which is why she is submitting on behalf of the respondent. It was further submitted on behalf of the respondent that, Order XXVI Rule 6(2) of Cap. 33 R.E 2019 (supra) requires applicant to provide the estimated value of the property but has only mentioned the property without stating estimated value of the property subject to injunction. Learned counsel for the respondent further submitted that, in CMA F1, applicant indicated that he is claiming for reinstatement without loss of remuneration. She added that, the prayer for severance pay included in the prayer for deposits of TZS 90,956,250/= was not pleaded at CMA and that there is no breakdown of the said amount. Based on the foregoing submissions, learned counsel for the respondent prayed the application be dismissed. In rejoinder, Mr. Nyagawa, learned counsel for the applicant submitted that, it is true that at CMA, applicant did not claim to be paid the said TZS 90,956,250/= rather, he only prayed for reinstatement without loss of remuneration but in the circumstances which respondent is closing her business, reinstatement is impracticable. He submitted further that, in these circumstances, the arbitrator will prefer compensation. He further submitted that, in the application at hand, applicant is not praying the order of attachment before judgment, rather, he is praying for interim injunction and deposit for security. He further submitted that, applicant has fulfilled conditions in Asmara's case (supra). He strongly submitted that, applicant will suffer loss than the respondent. I have considered submissions of the parties in this application and wish to state the long established principle of law that, both affidavit and the counter affidavit, are substitute of oral evidence as it was held in the case of *Uganda v. Commissioner of Prison Ex parte Matovu*

[1966] EA 514, *Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited* (Civil Reference 15 of 2002) [2002] TZCA 6 (10 December 2002), *Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another* (Civil Appeal 82 of 2017) [2018] TZCA 297 (13 December 2018), *Rosemary Stella Chambejairo vs David Kitundu Jairo* (Civil Reference 6 of

2018) [2021] TZCA 442 (2 September 2021) and *Rustamali Shivji Karim Merani vs Kamal Bhushan Joshi* (Civil Application 80 of 2009) 10

[2012] TZCA 16 (27 February 2012) to mention but a few. That being the position, in my view, it is not expected the deponent of the counter affidavit to put the deponent of the affidavit to strict proof or just to state that contents of a particular paragraph of the affidavit are denied. Normally, the words putting the other party to strict proof or contents of a particular paragraph are denied are found in the written statement of defence and not in the affidavit. Reason and logic of not putting the other party to strict proof, in my view, is that, what is stated in the affidavit is already evidence hence the deponent cannot be put to strict proof or to any proof. Once deposed and filed in court, it is the duty of the court to

believe the said evidence in the affidavit or not. It is not duty of the party to say that the said evidence is strong or not because that is the domain of the court. The duty of the other party is to bring evidence countering that of the opponent. It was open therefore, in my view, to the respondent to adduce evidence in her counter affidavit, challenging what was adduced by the applicant in the affidavit in support of the application and not to put applicant to strict proof or just deny what was stated by the applicant. For example, in the affidavit in support of the application, applicant deponed that shareholders of the respondent are citizens of Mauritius and Germany. In the counter affidavit, when responding to the paragraph relating to nationality of the 11 respondent's shareholders simply stated that the contents are disputed and that applicant is put to strict proof. In fact, applicant attached a copy of Memorandum and Articles of Association of the respondent. In my view, respondent was supposed to come up with evidence showing that nationality of her shareholders are neither Mauritius nor Germany. From both the affidavit in support of the application and the counter affidavit opposing the application, it is apparent that, there is a pending dispute at CMA where the applicant complained that he was unfairly terminated. It is also undisputed by the parties that, respondent has issued a general notice to the public that she will close down her business in Tanzania with effect from 31st May 2024. In the counter affidavit, respondent disputed that fact and put applicant to strict proof thereof. As pointed out hereinabove, it was wrong for the respondent to put applicant to strict proof because what is contained in applicant's affidavit, is his evidence. In fact, in the affidavit in support of the application, applicant did not merely state that respondent intend to close down her business in Tanzania and end there. He went extra mile by attaching the general notice signed by the Group managing Director of the respondent on 29th April 2024. The said general notice reads:- "GENERAL NOTICE 12 We, the management of KENTAN LOGISTICS LIMITED hereby issue notice that we are closing down the operations of the company effectively from 31st May 2024. This notice acts as a general notice to the public and employees. Issued at Dar-es-Salaam on this day 29th April 2024. Sgd Group Managing Director." It was stated in paragraph 9 of the counter affidavit that respondent has never intimated to permanent close down her business in Tanzania. It is my view that, it was not enough for the respondent just to state that she has never intimated to permanently close down her business in Tanzania without specifying as for how long she will close down the business and reasons thereof. In my view, that would have given an indication to the court that, if the award will be issued in favour of the applicant, then, the latter can execute it. In absence of that evidence from the respondent, I agree with counsel for the applicant that, the possibility is that, if the award will be issued in favour of the applicant, then, it may become an empty egg. It was submitted by counsel for the respondent that applicant can enforce CMA award under the Enforcement of Foreign judgment Act, [Cap 8. R.E. 2019]. In my view, those submissions cannot be valid because, (i) CMA is not a court in terms of the said Act hence its award is not a judgment and (ii) the said Act applies to foreign judgments that 13 can be registered in Tanzania hence CMA award issued in this country cannot be regarded as a foreign judgment even if assuming that CMA award is a judgment. I am of that view because, part

II of the said Act specifically is for registration of foreign judgment. I should point out that the said part is the main body of the Act. In fact, section 3(1)(a) and (b) of Cap. 8 R.E. 2019(supra) clearly provide that, part II shall apply to foreign country and courts of that foreign country. Undoubtedly, any party aggrieved with the CMA award may file an application before this court and the court delivered its judgment hence presence of this court's judgment and decree that can be enforced outside our jurisdiction as a foreign judgment. In order the said judgment and decree to be enforced outside our jurisdiction, the said foreign country must have a law recognizing foreign judgments. More so, there must be reciprocity arrangements between the said foreign country and Tanzania. In the application at hand, applicant stated that shareholders of the respondent are nationals of Mauritius and Germany but neither of the parties disclosed nationality of directors of the respondent who can be held liable. Assuming that directors of the respondent are nationals of Mauritius and Germany, of which evidence is wanting, nothing was stated by counsel for the respondent showing that there is reciprocity agreement between Tanzania and Mauritius or 14 between Tanzania and Germany for the provisions of Cap. 8 R.E. 2019(supra) to apply and enforce the judgment and decree of this court in those countries. I therefore find that, there is high possibility that the CMA award may be an empty egg unable to produce a chick hence applicant will suffer irreparable loss. Submissions by counsel for the respondent that, respondent is likely to suffer as she will be not in a position to utilize the property subject to injunction because she will continue to keep and maintain the said property until conclusion of the dispute pending at CMA is not reflected in the counter affidavit. Therefore, that is not part of the respondent's evidence. Again, submissions that applicant will not suffer irreparable loss is not in respondent's counter affidavit hence not hence. In my view, these are submissions from the bar not worth to be considered. See the case of the case of Bruno Wenceslaus Nyalifa v. the permanent Secretary, Ministry of Home Affairs & Another, Civil Appeal No. 82 of 2017 ,CAT (Unreported). It was correctly submitted by counsel for the respondent that applicant has not estimated the value of the properly subject of this application of interim injunction. Considering that applicant has not estimated value of the said physical property and further that, applicant has not stated in his affidavit as who will take care of the physical 15 property mentioned in the notice, I find that, granting injunction is likely to be detrimental to the respondent. It was submitted on behalf of the applicant that, in case the aforementioned property are damaged, respondent will be compensated. With due respect to counsel for the applicant, that is submissions from the bar hence not evidence. In my view, in order to give assurance to the court that respondent will be compensated, applicant was supposed to state so in his affidavit in support of this application. I therefore reject the prayer for interim injunction. As pointed out hereinabove, it is undisputed by the parties that there is a dispute pending at CMA. From what I have held hereinabove, if the award will be issued in favour of the applicant, then, he will not be able to execute it. I agree with counsel for the applicant that the said award will be nugatory and moot. If that happens, applicant will suffer irreparable. From where I am standing, this court is not prepared to cause parties to suffer irreparable loss or injury. The court is prepared to see

justice being done to the parties. For the foregoing, I find that justice demands that the prayer for deposit of security be granted. For the foregoing and in the upshot, I grant the prayer for deposit of security. I therefore order that, respondent to deposit TZS 90,956,250/= in court as security pending determination of the dispute 16 between the parties at CMA and further pending and revision before this court, if any. The said security be deposited in court by 31st May 2024 Dated in Dar es Salaam on this 30th May 2024. B. E. K. Mganga JUDGE Ruling delivered on this 30th May 2024 in Chambers in the presence of Lucas Nyagawa, Advocate for the Applicant and Faidha Rajabu Mshana, Advocate for the Respondent. B. E. K. Mganga JUDGE 17

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/312546/source_file/RASHID_MWALE_V_KENTAN_LOGISTICS_LIMITED_MISCELLANEOUS_APPLICATION_NO_10622_OF_2024.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/rashid-mwale-v-kentan-logistics-limited-InterimInjunction-tanzlii-2024--6a3ea52d3b1caa9129826a5a>

Prepared on 13 October 2026 · Esheria