IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

APPLICATION IN LABOUR EXECUTION 418 OF 2009

CAPITAL DECORATION & BUILDING WORKS – APPLICANT/Judgment debtor

AND

EDWARD RUGAYAZA & 45 OTHERS - RESPONDENT/Decree holder

(Original CMA/DSM/KIN-ILA/2212)

6/1/2010 & 8/1/2010

Rweyemamu R. M. J.:

RULING

This application was brought by the *applicant/judgment debtor cum employer,* seeking an order for stay of execution of the Registrar's order dated 13/10/2009 issued in execution of the Commission for Mediation and Arbitration (CMA) *exparte* award in the sum of Shs 40,841,052.02/= issued in favour of the *respondent/decree holder cum employees.* The CMA award in question was handled down on **18/9/2009**. The application is filed under Order XXI rule 24(1), section 68 and 95 of the Civil Procedure Code (CAP 33 R.E. 2002) (herein CPC) and section 91 (2) of the Employment and Labour Relations Act, 6/2004 (herein-the Act). Both parties were represented by advocates namely *Mr. D. J. Msemwa* and *Mr. A. M. Balomi* for the applicant and respondent respectively.

I wish to commence by examining the basis of this court's competence in the matter, an issue not directly addressed by the parties.

The application was brought under provisions of the CPC and the Act. The procedures under the CPC are not ordinarily applicable in conduct of cases in this court but; under section 89 (2) of the Act, read together with rule 48 (3) of the Labour Court Rules. GN 106/2007 (the rules), an arbitration award by CMA is served and executed in the Labour Court *"as if it were a decree of a court of law"*. Under the rules a court decree is enforceable by the court exercising powers conferred by the CPC, and enforcement is made following application by the decree holder under rule 49 (2) of the rules.

The Registrar(s) of this court appointed under section 54 of the Labour Institutions Act. 7/2004 are responsible for execution processes under Order XLIII (g) to (i) of the CPC. It is under such powers that application for execution of the CMA award, subject matter of the impugned Registrar's order was filed on **5/10/2009** as Exe. No 418/2009. I hasten to mention at this stage that the subsequent execution process was rather unusual. The process went thus:

1. On **13/10/2009,** the Registrar ordered execution to proceed and or **16/10/2009,** a 'prohibitory order' was issued. On **20/10/2009** the

applicant filed the present application for stay; but on **17/11/2009,** the Registrar issued an order for "proclamation for sale" yet on **15/12/2009,** the Registrar issued an order worded as follows, " *hearing on 15/2/2010, status quo be maintained till then.'*

2. It is not clear to me what status quo was ordered to be maintained; it was only following complaints by the respondents regarding the stalled execution, that the parties were summoned and questioned regarding the pending matter, when it was agreed that the pending matter was the **present application filed on 20/10/2009** subject matter of this ruling. It is to be noted that the application sought to be stayed is the **Registrar's order of 13/10/2009** although long after the applicant filed the present application on 20/10/2009; on **17/11/2009,** the Registrar issued a proclamation for sale- almost an end process in execution. It is not clear again what prompted the last order of **15/12/2009,** subject of complaint by the respondents, or whether the proclamation for sale was stayed by that last order.

What is clear from the above is that the decree remains unexecuted but three issues have exercised my mind. The first is whether the current application filed on 20/10/2009 to set aside the Registrar's order made on 13/10/2009 was not overtaken by events when the Registrar issued the proclamation for sale on 17/11/2009. The second is whether this court has powers to review the Registrar's order in execution- that is whether the order made by the Registrar on 15/12/2009 ordering the status quo maintained, which amounted to an order for stay can be reviewed by this court. And last, whether

his court has powers to deal with the application for stay, pending hearing of the applicants' application by the CMA.

On the first and second issue, I find that the order of 13/10/2009 which was followed by the proclamation for sale order of 17/11/2009 was not acted upon instead it was overtaken by the order made on 15/12/2009. The fact is that the decree remains unexecuted because that last order in effect amounted to a stay of execution awaiting hearing of this application. But that last order simply ordered the status quo maintained pending hearing of the application for stay filed under a certificate of urgency. It was treated with the urgency required and is now being heard earlier than ordered, as such, that order is no longer an issue.

Last, the applicants seeks an order for stay –pending hearing of their application to the CMA for extension of time within which to apply to set aside the *exparte* award. That section however, deals with application for stay by an appellate court but, this court being the executing court, I find that it has powers to deal with the application for stay under Order XXI rule 24 and Order XXXIX rule 5 of the CPC, and to apply the usual principles that govern practice in granting stay of execution.

Further, after careful consideration of the facts of this case (which is detailed below) in light of the law, particularly section 68

and 95 of the CPC read together with rule 55 (1) and (2) of the Labour Court rules, I find that this court has inherent powers to act in the matter in the interest of justice.

That done I find it necessary, to give a brief background of the history of the dispute between the parties prior to the impugned Registrar's order for a better appreciation of the reasons for my decision, even at the risk of making this ruling unduly long. I find it convenient to give the same chronologically in point form as follows:-

1. The respondents referred a dispute to the CMA of unfair termination against the applicant on 11/12/2007 claiming compensation of an amount equal to 12 months salary and other statutory rights. On 20/5/2008, the CMA issued an **exparte** award under section 87 (3) of the Act.

2. Subsequently, the respondents made an application for execution of that decree dated 10/6/2006 registered as No. 170/2008. That was followed by the applicant's consolidated application filed under a certificate of urgency on 30/6/2008 for stay of execution of that award and its revision. It was registered as Revision 105/2008. I should point out that at least at this stage, the employer was aware of existence of the case preferred by its employees.

3. After a number of processes, the DR made an order on 25/8/2008 that: *"**The applicant**/respondent is ordered to file his application of review at CMA **within one week** and to deposit .....as security". Apparently the matter proceeded at the CMA as indicated below.*

Ultimately in its **ruling dated 6/10/2008**, the CMA dismissed the application on ground that the same was time barred, because the impugned award was issued on 20/5/2008, while the application to set it aside was filed on 9/9/2008

4. On **24/10/2008**, vide Mr. Rutahiwa advocate, the applicant filed Revision No. 239/2008 challenging the same CMA award of 20/5/2006, already subject of the unconcluded Revision 105/2008. In that second application, the following orders were sought:

    1. That this Honorable Court be pleased to reverse and set aside exparte judgements and Awards delivered by the commission for mediation and Arbitration (CMA) on 19th May 2008 and 20th May 2008, against the applicant.

    2. That this Honourable court be pleased to make any order it considers appropriate for the ends of justice.

    <u>While that revision and execution matters were pending, something disconcerting was revealed.</u>

5. In a ruling dated 13/11/2008 in execution file 170/2008, the DR granted a stay of execution and ordered status quo maintained on ground that *"I came to discover that there is two awards delivery by the same arbitrator, the first one dated 19th May award T shs 36,482,566.02 and the second one dated 20th May, 2008 award T sha 40,841,052.02 to my opinion this is a triable issue ...to be forwarded to Honourable Judge for further direction/decision."*

6. It appears the CMA arbitrator who issued the original **May** award, was moved thereafter to issue on 18/11/2008 a document

(order/statement) in the records, titled "Maelekezo ya Tume Kuhusu Usahihi wa`Tuzo" stating that the correct and only award was the one with the figure 40 841,052/02 and not the second one in the sum of shs 36, 482566./=, whose origin he could not verify/understand. I should again point out that this was the third time the dispute between the parties was considered by the CMA and the applicant was represented.

7. Ultimately, revision 239/2008 was scheduled for hearing before this court and in its ruling dated **30/4/2009, (delivered in presence of both parties representatives)** Revision 239/2008 and 105/208 were ordered consolidated and;
   a. the CMA award subject matter of both revision applications quashed on ground that the CMA had proceeded without jurisdiction when it failed to first hear the application for condonation of late referral filed by the applicants;
   b. ultimately it was ordered that the matter *"should stand as it was after the condonation form was filed, and the dispute should thereafter be processed according to law" and;*
   c. **The court expressed its dismay and disbelief regarding the issue of appearance of two CMA awards from same proceedings.**

8. The CMA then heard the application for condonation of late referral exparte and granted the same on **16/7/2009.** Thereafter, the dispute was arbitrated again exparte and an award subject matter of the applicant's key complaint issued on **18/9/2009,** whose execution application No 418/2009 was filed in this court on **5/10/2009** as explained herein. I have read the award in question, the arbitrator therein explained that both the application for condonation and the arbitration were conducted exparte, after

the CMA was satisfied that the applicant was served but chose not to appear.

Fortunately, the undisputed facts are less complicated. The applicant seeks execution of the CMA award stayed and the respondents want it executed. *Mr Msemwa* for the applicant gave grounds for the application in his affidavit and oral submission. They can be summed up thus:-

- The applicant has filed a twin application in the CMA; extension of time to apply to set aside the *exparte* judgment, and the application to set aside the award.
- The award was wrongly issued *exparte* because the applicant was not served to appear.
- In response to the respondent's averment in the affidavit that the applicant was served vide his advocate one Rutahiwha, he submitted that the latter was never instructed to represent the applicant, as such; service on him amounted to no service.
- Time if the decree is executed, the applications pending in the CMA would be rendered nugatory, on the other hand, the applicant's business is solid and it is capable of paying the decree holders – but only after the case is heard inter-partes and their entitlements proved.

In response, Mr. Malomi for the respondents submitted that:-

- The facts disclosed in the applicant's affidavit and submission in court lack merit as no sufficient cause to support the application for stay have been disclosed.
- In regard to the *exparte* award, counsel submitted that the applicant was duly served according to law. Service was made vide the advocate who represented the applicant in the case at the CMA and subsequent application for revision 105 and 239 (explained herein above). That ethically and as a matter of procedure, if the advocate had ceased to represent the applicant, either himself or the applicant should have informed the respondents and the CMA but did not.

In reply, the applicant submitted that service to a former advocate is no proper service, that Mr. Rutahihwa was never instructed by the applicant to handle the case in the CMA following this court's order of 30/4/2009 - (from the facts the fourth time around).

The issue for decision is one namely whether or not good reasons have been adduced to make this court exercise its discretion in favour of granting the applied for order. To begin, I agree with submissions made by counsel for the respondents that an appeal or pending application in this case, cannot operate as a bar to execution of decree. Stay can be ordered on conditions stipulated by law. Considering the issue, the CAT in **Albert Braganza & Another Vs Mrs. Flora**

Lourdu Braganza (1992) TLR 307 – stressed that an order for stay can be given when compelling reasons are shown. Under the law, stay is grantable when it is found that one " *substantial loss my result to the party applying for stay of execution unless the order is made; two that the application has been made without unreasonable delay; and that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."*

I begin with consideration of the second issue, whether the application has been made without delay. I believe the issue of delay by the applicant has to be looked at in the context of the bigger picture of the history of the dispute between the parties well painted under subparagraph 1 to 8 herein above. The applicant has submitted that he has filed an application for extension of time to apply for setting aside the *exparte* award. An award claimed to have been made without service of summons on them.

From the history explained, no reasonable tribunal would believe the applicant was not aware of the respondents' case in the CMA, when the same was made following an order of this court, delivered in the presence of its advocate, who must have reported back the results even if instructions were withdrawn from him thereafter. The distinct impression created is that the applicant has not acted with vigilance in the matter, its vigilance is only seen when an execution order is served.

Without prejudging the case before the CMA, it is obvious the applicant was aware of the case all the time, particularly the second and third time the same was before the CMA. He had counsel. If instructions had been removed from counsel the fourth time around, the advocate was duty bound to inform the other side and the CMA. There was no evidence to show that he did and as held a number of times by the courts in this country, negligence or inaction on the part of counsel is not sufficient cause for extending time. I wish to invite the applicant to be mindful of the observations made by Lubuva J.A, in **Abdul Ramadhani Vs Said Ramadhani Baamary and another**, Civil Application No. 14 of 1994, (TCA), a case where inaction by counsel was put up as a ground for extending time tha..

> *"The legal position regarding negligence and inaction in the performance of Counsel's duty in conducting the client's cases has been recapitulated in a number of cases by the Court of Appeal fro Eastern Africa and this Court. It is common knowledge that negligence or inaction on the part of counsel which causes in ordinate delay in the processing of cases has normally been held by the Courts as not as not sufficient reason for extending the time under Rule 8 of the Court Rules unless acceptable explanation is given. However, in rare and peculiar circumstances, depending upon the merits of individual cases, mistake of Counsel may be considered as sufficient cause. The logical behind this is easy to appreciate. Once an individual person has entrusted his or her case to counsel to defend the case, it is expected that such counsel is to exercise all due diligence and industry professionally in handling the case at*

all stages. If negligence and mistakes on the part of counsel were to be taken lightly, there would be no and to litigation in Court as losing parties would seek to re-instate cases out of time on grounds of negligence on the part of counsel. On the basis of this principle, the Courts have taken a strict view on alleged acts of negligence by counsel (The Court there then quotes, with approval, the cases of Henry Bharmal and Bothers V. Santosh Kumari w/o J. N. Bhola (1961) E.A. 679; Kighoma Ali Malimi v. Abbas Yusuf Mwingamno Civil Application No. 5 of 1987 (unreported): Institute of Finance Management and Simon Manyaki, Civil Application No. 13 of 1987 (unreported) and Maulid Juma v. Abdalla Juma - Civil Application No. 20 of 1988" (unreported). **Referred to in Misc Cr. Appl. 109/1994 (Mwanza registry – unreported).**

That apart, the applicant after withdrawing instructions from its counsel should have pursued the case as ordered by the court. It is in that wider context that I consider the issue of acting without inordinate delay and find that the applicant's inaction was a deliberate disregard of the necessity to have the dispute between the parties resolved, it was reckless at the very least and no reasonable tribunal would grant an application in the background of this case.

Admittedly, the other ground considered in granting such an application is that:

"the loss or injury that an applicant would be subjected to. The loss had to be of an irreparable nature which could not

be adequately compensated by way of damages;" See, CAT in **Nicholas Nere Lekule Vs Independent Power (T) Ltd & Another** 1997 TLR 58,

The issue for decision is whether the applicant has shown that he would suffer irreparable loss.

In the applicant's affidavit in support of this application it was pleaded in the last paragraph that irreparable loss would be occasioned if the application is not granted. At the hearing much of the submission was focused on showing merits of the application for setting aside the *exparte* award, in the event extension to file the same was granted by the CMA.

As to the issue of loss, the applicant submitted briefly that the decree holders would not be able to refund the monies received in the event the decree is set aside after execution. The applicants though added in reply that it would be able if ordered to put up half the amount in cash and the other half by way of registered properties as security.

Considering the history of this case however, I find that no compelling reasons exists to move this court to grant the application and it would not be in the interest of justice to deny the decree holders their valuable right persistently sought, by prolonging the

process or execution to the point may be when the value of the rights earned would be meaningless.

At this juncture I should repeat the observation made by the court in **Amratlal Damondar vs B. Jariwalla** (1980) TLR 31 that; *"the rule of law is not to be equated with a reign of litigiousness...dilatory procedure may defeat the very purpose of the judicial process, namely to vouchsafe justice, since if litigation is prolonged, not only is there waste of time and money and moral energy, but circumstances may change in such a way that what would have been at the outset a just conclusion is in the end no longer so."* To conclude, I dismiss this application and order the file returned to the Registrar to enable the execution process proceed.

R.M. Rweyemamu
JUDGE
8/1/2010

Date: 8/1/2010
Coram: R.M. Rweyemamu, J.
Decree Holder: Mr. Balomi Advocate - Present
Decree Debtor: Mr. D. Misemwa Advocate Present
C.C. Salehe

COURT: This matter is coming for ruling.
Ruling delivered this 8/1/2010 in presence of parties' representatives as above.

R. M. Rweyemamu
JUDGE
8/1/2010