IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LABOUR APPLICATION NO. 48 OF 2020

GEITA GOLD MINING LIMITED ..... APPLICANT

VERSUS

JOACHIM KITWALA WALWA ..... RESPONDENT

RULING

25th November, & 10th December, 2020

ISMAIL, J.

In this application, the Court is called upon to pronounce itself on whether an order for a stay of execution should be granted, against the decision of the Commission for Mediation and Arbitration (CMA), pending an application for extension of time within which to file an appeal to the Court of Appeal of Tanzania.

The application is supported by an affidavit sworn by Geofrey Geay Paul, the applicant's duly instructed counsel, and it sets out grounds upon which the application is based. The contention in the supporting affidavit is that the applicant is aggrieved by the decision of the Court in Labour Revision No. 100 of 2018, and that an application is pending, in this Court,

for an extension of time to file a Notice of Appeal which will pave the way for institution of an appeal against the decision of the Court. It is in the pendency of the said application that a stay order is craved, to halt execution of the CMA's drawn order whose execution entails issuance of a garnishee order against the applicant's bank account.

The application has encountered an opposition from the respondent, presented through a counter-affidavit sworn by the respondent herself. He contends that the application has not conformed to the requirements of the law as the applicant has not deposited any sums of money as security for the due performance of the award issued in the respondent's favour.

When the matter came up for hearing, the applicant enlisted services of Nuhu Mkumbukwa, learned counsel, while the respondent enjoyed the services of Mr. Kishosha, learned advocate.

Submitting in support of the application, Mr. Mkumbukwa first prayed to adopt the contents of the affidavit sworn in support of the application. He informed the Court that the application is for stay of execution of the CMA's award, pending determination of an application for extension of time to file a notice of appeal. Mr. Mkumbukwa submitted that there is a threat of execution as the respondent has filed an application for execution (vide

Execution No. 20 of 2020), seeking to enforce the CMA award dated 7th November, 2018. He contended that the mode of execution is by way of a garnishee order for the sum of TZS. 102,228,398.39.

Mr. Mkumbukwa submitted that the applicant is seeking to stay the order because the application is problematic and so is the decree, in the sense that the reliefs of reinstatement are contrary to what has been prayed in the application for execution. The Counsel contended further that the application for execution is at variance with the CMA award which ordered payment of TZS. 36 million. He also argued that the sum sought to be executed was awarded in "*Ufafanuzi wa CMA*" which was not brought to the attention of the applicant and was not ordered by the Court. He took the view that the execution is a misconstruction of the Court's order dated 29th May, 2020.

On the modality of execution, the learned counsel posited that the same is inconsistent with the Court's order that ordered reinstatement. On this he referred the Court to the decision in ***John Kerenge v. Joel Mabiba***, CAT-Civil Application No. 19 of 1998 (unreported). He argued that the applicant stands to suffer loss if the application is not granted, since the amount involved is colossal and it is not clear if the respondent would be able to refund the sum garnished.

With respect to the applicant's reliability and ability to satisfy the decretal sum, Mr. Mkumbukwa contended that the applicant is an established company with fixed assets and a financial muscle that can adequately satisfy the decree in the event the intended appeal falls through. He bolstered his argument by citing the case of **Tanzania Harbours Authority v. Mathew Mtalakule & 8 Others**, CAT-Civil Application No. 59 of 1999; and **Tanzania Railways Corporation v. Deogratias Alex,** CAT-Civil Application No. 26 of 2000 (both unreported).

On whether the applicant was diligent, the learned counsel made reference to paragraph 17 of the affidavit, while with respect to security, the counsel's contention is that furnishing of it is not a strict requirement of the law. He, however, submitted that the applicant is ready and able to comply with conditions of stay as the Court may deem fit to impose, including depositing of a bank guarantee. The counsel contended that the Court's discretion in this respect has been restated in the case of ***Indian Ocean Hotels Ltd v. Nitesh Suchak***, CAT-Civil Application No. 82 "A" of 2010 (unreported). He prayed that the execution of the order dated 29th May, 2020 be stayed.

Mr. Kishosha was valiantly opposed to the application. Praying to adopt the respondent's counter affidavit as part of his submission, the

learned counsel argued that the applicant's submission is based on the decision of the Court in Revision No. 100 of 2018. Mr. Kishosha argued that the question of illegality cannot be resolved at this stage of the proceedings as this Court has no powers to discuss it.

Mr. Kishosha submitted that the grounds for grant of stay of execution are provided for under Order XXXIX Rule 5 (1), (2) and (3) of the Civil Procedure Code (CPC). The learned counsel argued that the applicant will not suffer any substantial loss if stay is refused because, as conceded, the applicant is a big company with fixed assets. On the contrary, it is the respondent who has faced the brunt of the delays in the execution of the award, considering that he has been out of employment since 2017. He maintained that the respondent has the right to enjoy the fruits of his triumph.

Submitting on the timeliness or otherwise of the application, Mr. Kishosha contended that the ruling in Revision No. 100 of 2018 was delivered on 29th May, 2020, while the application for execution was filed on 7th September, 2020. He argued that this was after the applicant had been served on 17th September, 2020, and it is then, that the applicant woke up and took action. The learned counsel held the view that the applicant wouldn't have taken any action if it hadn't been served with the

application for execution. The learned counsel took the view that the applicant's procrastinated action means contentment with the decision on revision.

Mr. Kishosha fired another salvo at the applicant's failure to conform to the requirement of depositing or furnishing security as a prerequisite for the grant of the stay order. Arguing that this is a court of justice and not a court of sympathy, Mr. Kishosha contended that such failure renders the application lacking in legitimacy. On this, he cited the case of ***Hatibu Omari v. Belwisy Kuambaza***, CAT-Civil Application No. 35/17 of 2018 (unreported).

On what is contended to be the applicant's dilatory conduct, the respondent's counsel argued that the applicant was bound to follow-up on the progress of the matter, and the Court cannot be blamed for the applicant own indiligent conduct. He referred the Court to the decision ***Miyasi Changanga & Another v. Okore Manase***, HC-Misc. Civil Application No. 143 of 2014 (unreported). On the whole, the respondent's counsel prayed that this application be dismissed for failure to meet the requisite test for grant of stay orders.

Rejoining to the rebuttal submission, Mr. Mkumbukwa held the view that his submission and the application made reference to the decisions of the CMA and the Court's, and maintained that the Court order and the execution are at variance. With respect to applicability of Order XXXIX Rule 5 of the CPC, the learned counsel submitted that such provision cannot apply because in the instant case time for appealing has expired.

With respect to the substantial loss, Mr. Mkumbukwa submitted that the applicant has shown that it will be difficult or impossible to recover, considering that the respondent has been out of employment since 2017, and recovery of the money that may be paid to him may be a tall order. He maintained that the application for execution does not contain the fruits as awarded on 29th May, 2020. On whether the applicant acted diligently, the learned counsel submitted that the applicant applied diligence, adding that the current trend is to wait for execution before a stay order is applied. In this case, he argued, the process of challenging Hon. Madeha's decision has started.

Mr. Mkumbukwa discounted the impact of ***Hatibu Omari's case***, arguing that the same is distinguishable as in that case the application for stay was not pending the determination of the application. With respect to security, the learned counsel reiterated what was stated in **Golden Tulip's**

case, especially where it is not stated in any statute that issuance of security is a condition precedent. He held the view that this is still in the discretion of the Court and that the applicant's undertaking is enough. He believed that the respondent would not be prejudiced.

From these rival submissions one profound issue arises. This is whether a case has been made for the grant of stay order. It is trite law that stay of execution can only be granted where the applicant demonstrates that his application falls within any or all of the principles that govern such grant. These principles are as enunciated in ***Ignazio Messina & National Shipping Agencies v. Willow Investment & Costa Shinganya,*** CAT-Civil Reference No. 8 of 1999 (DSM-unreported) in which it was stated:-

> *"It is now settled that*
>
> *(i) The Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage;*
>
> *(ii) It is equally settled that the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory;*

(iii) Again the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so."

See also: ***SDV Transmi (Tanzania) Limited v. MS STE DATCO***, CAT-Civil Application No. 97 of 2004 (DSM-unreported).

Looking at the applicant's averments, as contained in paragraphs 19, 20 and 21 of the supporting affidavit, the applicant's contention is that it stands to suffer greater and irreparable loss if the application is not granted than what the respondent will suffer, should the application be granted. It is the applicant's averment that it may be possible to recover the sum that may be paid to the respondent whose source of income is unknown. Related to this, as well, is the contention that the applicant has known places of abode and movable and immovable assets, and numerous ongoing projects.

The respondent's challenge is no less than formidable, and the main contention is that key conditions for the grant have not been met.

As contended by the counsel for the applicant and conceded by the counsel for the respondent, there are pending proceedings which await a decision that will determine the applicant's journey to the Court of Appeal. These pending proceedings are essentially challenging the propriety of the

Award that bred the order of the Court in respect of which the attachment is in contention. If the applicant's pursuit succeeds, the triumph will be rendered nugatory and merely an academic exercise, should the application for stay fail, and the respondent is allowed to walk away with the humongous sums that are currently a subject of the garnishee proceedings. My view is in sync with the superior Court's decision in ***Tanzania Harbours Authority*** (supra) cited by Mr. Mkumbukwa.

Mr. Kishosha has urged this Court to realize that the respondent who has been out of employment since 2017 will see his dreams dampened if execution of award brought to a halt. While this may be true, I take the view that the balance of convenience militates in the applicant's favour, if this application is granted. I also take inspiration from the decision ***Tanzania Railways Corporation*** (supra) and hold that the established nature of the applicant and its resource endowment provide an assurance that it can easily settle the decretal amount with relative ease, should it lose the matter it is pursuing.

I also take the view that, whilst the requirement of furnishing security for the due satisfaction of the decretal sum is a mandatory prerequisite under the CPC, the same does not constitute a mandatory requirement in the provisions under which the application has been

preferred. I do not consider that to be the condition precedent which would render the application incompetent if the said security had not been furnished. Given what has been stated by the counsel, my firm conclusion is that the application is still valid and intended to serve the purpose for which it was filed, and I take the view that the applicant has demonstrated that grounds exist for its grant.

As I grant a stay order, I further order that such grant is conditional upon the applicant depositing, into the Court, the sum constituting the decretal sum or handing a bank guarantee for the said sum, as a security for the performance of the Award. The said sum or the bank guarantee should be deposited within seven (7) days from the date of this ruling.

It is so ordered.

DATED at **MWANZA** this 10th day of December, 2020.

M.K. ISMAIL

JUDGE

Date: 10/12/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Amos Gondo, Advocate for Mr. Mkumbukwa

Respondent: Mr. Kishosha, Advocate

B/C: B. France

Court:

Ruling delivered in chamber, in the presence of Messrs Gondo Amos and Kishosha, Advocate for the applicant and respondent respectively, this 10th December, 2020.

M. K. Ismail

JUDGE

At Mwanza

10th December, 2020