

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT MUSOMA

MISC. LABOUR APPLICATION NO. 11 OF 2021

KASERKAND'S CONSTRUCTION

& TRANSPORT COMPANY LTD APPLICANT

VERSUS

SEBASTIAN MATHIAS SABAI RESPONDENT

***(Application for stay of execution from Labour Execution No. 15 of 2021,
Originating from the award of the Commission for Mediation and
Arbitration for Musoma in Labour Dispute CMA/MUS/127/2019)***

RULING

2nd and 5th July, 2021

KISANYA, J.:

On 26th January, 2021, this Court dismissed the applicant's application for revision of the proceedings and award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/MUS/127/2019. Aggrieved, the applicant lodged the notice of appeal to the Court of Appeal on 11th February, 2021.

About four months later, on 15th June, 2021, the applicant filed the present application. The following orders were prayed for:-

- 1. That this Honourable Court be pleased to grant an order for stay execution in Execution No. 15/2021 pending the hearing and*

determination of the intended Appeal of which the notice of Appeal has been lodged to it.

2. Any other relief(s) the Honourable Court shall deem fit and equitable to grant."

The application was predicated under "rule 24(1), (2) (a), (b), (c), (d) (e), (f), (3)(a)(b),(c) and (d) and Rule 24 (11) (a) and Rule 43 (1) (a) and (b) of the Labour Court Rules, G.N. No. 106 of 2007, section 91(3) of the Employment and Labour Relations Act No. 6 of 2004 and sections 51 and 52 (1) of the Labour Institutions Act, No. 7 of 2014". It was supported by an affidavit deposed by Ms. Tupege Anna Mwambosya, learned counsel for the applicant. The respondent was duly served with the application. He filed a notice of opposition and a counter-affidavit to contest the application.

At the hearing of this matter, the applicant was represented by Ms. Tupege Anna Mwambosya, learned advocate whereas, the respondent appeared in person.

Having considered the background of this case, I found it apposite to require the parties to address the Court on the following issue before hearing the application on merit-

1. Whether the provisions cited in Chamber Summons enable this Court to hear the matter and order stay of execution in the circumstances where

the notice of appeal against the judgment and decree subject to this application is pending in the Court of Appeal.

On taking the floor, Ms Tupege Anna Mwambosya readily conceded that there was an error in respect of the provision cited in the Chamber Summons. However, she argued that this Court has jurisdiction to determine the application for stay of execution. Her argument was based on the contention that, the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC) applies under rule 55(1) of the Labour Court Rules, 2007 because the labour laws do not provide for the Court with mandate to hear and determine issue related to stay for execution in the circumstances of this case.

Referring to Order XXXIX, rule 5 of the CPC, the learned counsel argued that, since the appeal is pending, the jurisdiction to order the execution to be stayed is vested in this Court or the court which passed the decree. She went on to argue that this Court has the power to order the execution to be stayed pending determination of an appeal in the Court of Appeal because it is mandated to execute decision pertaining to labour matters.

When probed by the Court as to whether there was an appeal pending in this Court for the provision of Order XXXIX, r. 5 of the CPC to apply, Ms. Mwambosya's reply was not in affirmative. However, she urged me to consider the case of **Finca Tanzania Microfinance Bank Ltd vs Bupoki Kyoma**, Misc.

Labour Application No. 33 of 2020, HCT at Mwanza (unreported) in which this Court heard and determined the application for stay of execution while the notice of appeal against the decision subject to the application was pending in the Court of Appeal.

The respondent being a lay person had nothing to submit on the above legal issue. He left it to the Court to decide on the matter.

Having heard the parties, I am of the view that there are two issues for consideration. **First**, whether the Court has been properly moved to determine the application. **Second**, whether this Court has jurisdiction to determine and order execution to be stayed if the notice of appeal against the decision subject to execution is pending in the Court of Appeal.

I propose to start with the first issue, which is in regard to the propriety of the provision cited in the Chamber Summons. This issue is premised on the trite law that, non-citation or wrong citation of provisions of law renders the application incompetent. There is a list of authorities on that position. One of them is **Hussein Mgonja vs The Trustees Tanzania Episcopal Conference**, Civil Revision No. 2 of 2002, CAT at Arusha, (unreported) where the Court of Appeal held:

"If a party cites the wrong provisions of the law the matter becomes incompetent as the Court will not have been properly moved."

Similar stance was taken in **Chama cha Walimu Tanzania vs. Attorney General**, Civil Application No. 151 of 2008, CAT at Dar es Salaam (unreported) and **Bahadir Sharif Rashid and 2 Others v. Mansour Sharif Rashid and another**, Civil Application No. 127 of 2006, CAT at Dar es Salaam (Unreported).

As indicated earlier, the application at hand has been made under "rule 24(1), (2) (a), (b), (c), (d) (e), (f), (3)(a)(b),(c) and (d) and Rule 24 (11) (a) and Rule 43 (1) (a) and (b) of the Labour Court Rules, G.N. No. 106 of 2007, section 91(3) of the Employment and Labour Relations Act No. 6 of 2004 and sections 51 and 52 (1) of the Labour Institutions Act, No. 7 of 2014". However, as rightly conceded by Ms. Mwambosya, none of the above provisions empower this Court to determine application for stay of execution pending determination of appeal lodged in the Court of Appeal. The Court's jurisdiction on stay of execution is in respect of the decision pending before it and not otherwise. This is provided for under section 91(3) of the EALRA which reads:

"The Labour Court may stay the enforcement of the award pending its decision." (Emphasize supplied).

In our case, there is no decision pending in this Court. The pending decision if any, is in the Court of Appeal which will determine the appeal on the judgment and decree subject to stay of execution.

I have carefully considered the provisions of Order XXXIX, r.5 of the CPC which Ms. Mwambosya relied upon in lieu of the provisions cited in the Chambers Summons. In my opinion, Order XXXIX, r.5 of the CPC applies where the appeal is pending in this Court. It cannot apply in the circumstances of this case where there is no appeal or revision pending in this Court.

From the foregoing, the application is incompetent for non- citation of the enabling provision of law which empower the Court to hear and determine the order sought in the Chamber Summons.

There is yet another issue, whether the Court has jurisdiction to determine the matter while the notice of appeal against the decision subject to this matter is pending in the Court of Appeal. It is a principle of law that, once a notice of appeal against the decision or order made by the High Court is lodged in the Court of Appeal, the High Court stops to have jurisdiction over the matter. This position was stated in **Serenity on the Lake Ltd vs Dorcus Martin Nyanda**, Civil Revision No.1 of 2019 (unreported), in which the Court of Appeal cited with approval its decision in **Tanzania Electric Supply Company Limited vs. Dowans Holdings S. A. (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No. 142 of 2012 (unreported), where it was held that:-

*"It is settled law in our jurisprudence which is not disputed by counsel for the applicant that the lodging of a notice of appeal in this Court against an appealable decree or order of the High Court commences proceedings in the Court. **We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter.**"* (Emphasize added).

The Court of Appeal went on to hold that:-

*"On the strength of the above decisions, we are settled in our minds that the Deputy Registrar, of **the High Court (Labour Division)** did not have jurisdiction to hear and order stay of execution By entertaining the application for stay of execution while there was a pending notice of appeal lodged in this Court, the Deputy Registrar slipped in an error for lack of jurisdiction. The order was **therefore unlawful.**"* (Emphasize supplied).

In my view, the above decision applies to the High Court. It is not limited to the Deputy Registrar of the High Court only. I have also considered the decision of this Court in **Finca Tanzania Microfinance Bank Ltd vs Bupoki Kyoma** (supra) cited by Mr. Mwambosya. Although the application for stay of execution was granted, the Court was of the similar stance when it held:

"..after lodging a notice of Appeal at the Court of Appeal against the order of the High Court, this Court ceased to have jurisdiction over the matter.

Having considered the position of the Court of Appeal in the above cited cases, I am of the firm view that the phrase "*the High Court ceases to have jurisdiction over the matter*" stated in the case of **Serenity on the Lake Ltd** (supra) extends to jurisdiction to determine the application for stay of execution. It follows that this Court has no jurisdiction to determine the present application due to the fact that the notice of appeal against the judgment and decree subject to stay of execution is pending in the Court of Appeal. That jurisdiction is vested in the Court of Appeal under Rule 11(2) and (3) of the Court of Appeal Rules, 2009 (as amended).

In view thereof, the application is incompetent before this Court. Therefore, it is hereby struck out with no order as to costs due the nature of this case.

DATED at MUSOMA this 5th day of July, 2021.




E. S. Kisanya
JUDGE

COURT: Ruling delivered this 5th day of July, 2021 in the presence of Mr. Sileo Mazulla holding brief for Ms. Tupege Anna Mwambosya, learned counsel for the applicant and the respondent in person.


E. S. Kisanya
JUDGE
5/07/2021