IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: OTHMAN, C.J., KILEO, J.A. And MANDIA, J.A.)

CIVIL APPLICATION NO. 1 OF 2014

1. MUSSA JOSEPH KUMILI
2. EDWIN FAUSTINE SAMIKE ....APPLICANTS

VERSUS

M/S AUSDRILL TANZANIA LIMITED..................................RESPONDENT

(Application from the decision of the High Court of Tanzania (Labour Division) at Mwanza)

(Wambura, J.)

dated the 27th day of September, 2013
in
Revision No. 50 of 2013

RULING OF THE COURT

5th & 12th August, 2014

KILEO, J.A.:

The application before us has its genesis in a labor matter which was decided on 27/09/2013 in the Labor Division of the High Court whereby Wambura, J. decreed the present respondents to pay the applicants 12 months' salary as compensation as well as their salaries from the date of unfair termination to the date of full payment. The amounts to be paid were not specified. Subsequent to the decree of 27/09/2013 each of the applicants, on 09/10/2013, filed an application for execution of the decree. The total amount as per the two

applications for execution was TZS 238,440,000/-. On 15/11/2013 the parties through their learned advocates, Mr. Mathew Nkanda for the decree holder and Mr. Faustine Malongo for the judgment debtor appeared before the Registrar whereby Mr. Malongo explained that they were ready to deposit in court the amount of TZS 40,000,000/-. Upon Mr. Malongo's offer to deposit this amount into court, Mr Nkanda prayed that the decree sum be deposited 'in court account' pending determination of appeal or settlement out of court by the parties. The Registrar made an entry in the record reading that 'the application was granted to that effect.'

On 04/03/2014 the applicants through the services of their learned counsel, (Mr Nkanda) filed the present application under rules 4 (2) (a) and 38 of the Court of Appeal Rules (the Rules) seeking "an order to make necessary incidental or consequential orders for security for costs amounting to TZS 238,440,000/- or attachment of, or arrest or actual seizure of Motor Vehicles with Registration Nos. T383CCD M. A.N; T988BBQ TOYOTA LAND CRUISER, T591 BZU CANTER and T662 TOYOTA LANDCRUISER." The grounds for seeking the above orders as contained in the Notice of Motion are among others that:-

-the respondent is about to wind up its business in Tanzania at any time;

-that the respondent does not have property within the United Republic of Tanzania and its proprietors are non-resident, there was no way they could be forced to satisfy any order that might have been passed against them on their appeal;

-that only attachable property in Tanzania by this time is the said vessels which, if not arrested, would sail out of the United Republic of Tanzania or to third party once the winding up is complete.

Edwin Faustine Samike, the second applicant swore an affidavit in support of the Notice of Motion.

The Notice of Motion was met with a Notice of Preliminary Objection lodged by Ishengoma, Karume, Masha & Magai (Advocates) on behalf of the respondent. Initially the respondent's counsel, (Mr. Faustine Malongo) preferred four grounds of objection but at the hearing he abandoned two and remained with the following two:

a) *That to the extent that this application is in respect of the execution of the High Court (Labor Division) decree, this Honourable Court has no jurisdiction to grant the orders being sought.*
b) *That the application is incompetent for wrong citation of enabling provisions of the law.*

Both Mr. Malongo and Mr. Nkanda filed written submissions with regard to the Notice of Preliminary Objection.

On the competency of this Court to grant the orders being sought Mr. Malongo submitted that when the affidavit in support of the Notice of Motion is examined it becomes clear that what the applicant is seeking is actually execution of the decree of the High Court and not security for costs. The learned counsel further argued that in terms of Rule 48 (3) of the Labor Court Rules, 2007, it is only the Labor Court which has powers to enforce its decrees and that for this reason the application before this Court is misconceived. The provision states:

> **"For the avoidance of any doubt, every decision of the Court notwithstanding that it has not yet been published in the Gazette, or that any party has a right of appeal or review, or intends to file an action in any court on grounds referred to in sub-rule (1), or that any party has a right of appeal or revision or reference or intends to file an action in any court to challenge the same decision, shall be enforced by the Court itself exercising the powers conferred by the provisions of Order XXI of the Civil Procedure Code Act, or any other civil court of competent jurisdiction as if it was a decree of the court"**

Regarding wrong citation of enabling provisions of the law, Mr. Malongo submitted that the Court of Appeal Rules has a specific provision governing security for costs in civil appeals which is rule 120 of the Rules and that the citation of rule 4 (2) (a) was improper. As for

the citation of rule 38 he submitted that it was inapplicable in the circumstances of the case.

Beginning with wrong citation of enabling provisions of the law, Mr. Nkanda conceded that rule 38 was not applicable in the circumstances of the case. Indeed rule 38 has no applicability whatsoever to the situation at hand where the applicants are seeking security for costs. The rule deals with general powers of the Court and it provides:

> **"38. The Court may, in dealing with any appeal so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court or Tribunal or remit the proceedings to the High Court or Tribunal with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders including orders as to costs."**

Mr. Nkanda however said that the citation of this provision was a mere slip of the pen. As for the citation of Rule 4 (2) (a) of the Rules Mr. Nkanda argued that they could not go back to the High Court Labor Division for remedy after a Notice of Appeal had been lodged. The learned counsel submitted further that the gist of the application was for the applicants to 'get assurance that the decretal sum will be available at the end of the intended appeal when a need arise'. He was of the view

that this Court has jurisdiction to entertain the application on the principle of equity.

This matter need not detain us. Mr. Nkanda already conceded that the citation of rule 38 was not proper. For this reason alone, the application would be incompetent as the Court was not properly moved. **In Lugano S. Kalomba & 22 Others vs the Permanent Secretary, Ministry of Education and Vocational Training and the Honourable Attorney General**- Civil Appeal No. 78 of 2008 the Court stated:

> *"We think that the law is now settled that where a wrong provision of the law is cited or where one exists and is not cited in support of an application, a court before which the application is placed cannot be said to have been properly moved, and so such a matter is said to be incompetent and so liable to be struck out."*

The wrong citation of rule 38 in moving the Court is not the only problem with the application. Even if we were to ignore the citation of that rule the question would still be whether the Court was properly moved under rule 4 (2) (a). Mr. Malongo suggested that the applicants ought to have cited rule 120. Nonetheless we are of the settled view that rule 120 is not applicable in the circumstances of this application because rule 120 comes into play when an appeal has been instituted.

Rule 90 makes provision for institution of civil appeals. It provides in part as follows:

> **"90.-(1) Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with-**
>
> **(a) a memorandum of appeal in quintuplicate;**
>
> **(b) the record of appeal in quintuplicate;**
>
> **(c) security for costs of the appeal**
>
> **..."**

Unlike in criminal appeals where the Notice of Appeal institutes an appeal, in civil appeals it is the memorandum of appeal, the record of appeal and the security for costs [momentarily fixed at two thousand shillings unless the Court directs for further security-rule 120 (3)]. The mere fact that the respondents lodged a Notice of Appeal does not mean that there is an appeal in Court, hence the inapplicability of rule 120.

Leaving aside the incompetency of the application on account of wrong citation of the law we would wish to hasten to say the even if the applicant had cited only rule 4 (2) (a) still it would not have been applicable because resort to this rule is made only where no provision is made in the rules or any other written law to deal with the matter in issue.

There is no gainsaying that even where there is an appeal (which is not the case in this matter) it does not operate as a bar to execution. The respondent has not applied for stay of execution therefore there is nothing to prevent the applicants from proceeding with the process of execution which they had started in the High Court if they felt that the amount of TZS 40,000,000/-deposited in the High Court was insufficient. The provisions of rule 48 (3) of the Labor Court Rules quoted above are very clear that a decree holder may put into motion the process of execution notwithstanding the fact that the other party intends to take an action to challenge the decision of the Court. In any case, in this case the applicants had already put into motion the process of execution. It appears that they were dissatisfied with the decision of the Registrar delivered on 15/11/2013 (but which on the face of it they appear to have acquiesced). The application before us looks like an appeal against the decision of the Registrar in disguise for which we are not competent to attend to.

Another point worth mentioning is the fact that the amount for which the applicants want assurance that will be paid is the decretal sum which they have pegged at TZS 238,440,000/- As we indicated earlier on, the decree of the High Court did not give figures. Again, we have no competency to determine the decretal amount for which

"assurance would be given that it will eventually be paid in case the intended appeal fails".

In view of our considerations above we find both points of objection to have merit and in the circumstances deserve to be upheld.

Before we are done however we would wish, for the benefit of everyone in this matter, make some observations on ground (d) in the Notice of Preliminary Objection which was abandoned by Mr. Malongo. The point relates to non-compliance with rule 12 (4) of the Rules. The rule states:

> **"In all applications and appeals every tenth line of each page of the record shall be indicated in the margin on the right side of the sheet."**

Going through the record of the application it turns out that it is only the applicant's written submissions filed subsequent to the filing of the Notice of Preliminary Objection which complied with the provisions of rule 12 (4). Probably Mr. Nkanda must have become wiser after he was served with the Notice of Preliminary Objection. Though this may appear to be just a technical matter nonetheless parties are enjoined to abide by the Rules as it makes administration of justice smooth.

All said and done, the Notice of Preliminary Objection raised by the respondent is sustained and the application is struck out with costs.

DATED at **MWANZA** this 7th day of **August**, 2014.

M. C. OTHMAN
CHIEF JUSTICE

E. A. KILEO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

F.J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL