IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL APPEAL NO. 23 OF 2020
(Originating from the District Court of Arusha, Misc. Civil Application No. 07 of 2010)

LAURENT LUCAS ..... APPELLANT

Versus

ABECOMBIE & KENT (T) LIMITED ..... RESPONDENT

JUDGMENT

28th October & 10th December, 2021

Masara, J.

The Appellant, **Laurent Lucas,** has preferred this appeal against the Respondent, after being aggrieved by the decision of the District Court of Arusha ("the trial court") made in Misc. Civil Application No. 07 of 2010 on 15/04/2020. In that ruling, the trial court held that it had no jurisdiction to execute the order of the Minister for Labour issued on 22/12/2009 in favour of the Applicant. The Appellant was aggrieved by that decision; thus, he has preferred this appeal on the following grounds:

a) *That the Hon. Magistrate manifestly erred in law and fact by failure to determine the preliminary Objection raised by the Respondent but rather raising the new issue of Jurisdiction of the Trial Court suo motto;*
b) *That the Hon. Magistrate erred in law and fact by rejecting the application on the ground of Jurisdiction of the District Court to execute the Order of the Minister while it is openly clear that the said Court has the requisite Jurisdiction;*
c) *That the Hon. Magistrate erred in law and fact by failure to recall that Misc. Civil Application No. 07 of 2010 is the continuance of Misc.*

Application No. 07 of 2010 to wit the same was not fully executed; and

d) *That the Hon. Magistrate erred in law and fact by treating Misc. Civil Application No. 07 of 2010 as a fresh application while in reality it is not a fresh application but the said application was filed in the Court with the aim of curing the defects which occurred in the partial execution of Misc. Civil Application No. 07 of 2010.*

At the hearing of the appeal, the Appellant was represented by Mr. Eliakimu Ndelekwa Sikawa, learned advocate, while the Respondent was represented by Mr. Qamara Aloyce Peter, learned advocate. The appeal was heard *viva voce.*

Facts preceding the appeal can be stated briefly as follows: The Appellant was employed by the Respondent in 2005. In the same year, that is November, 2005, the Appellant was terminated from his employment by the Respondent. He referred his dispute of unfair termination to Arusha Conciliation Board, which dismissed the claim, confirming his termination. Relying on the legal framework of the time, the Appellant appealed to the Minister for Labour. In his decision issued on 22/12/2009, the Minister reversed the decision of the Conciliation Board. He ordered reinstatement of the Appellant without loss of renumeration. On 26/07/2010, the Appellant filed an application in the trial court seeking to execute the order of the Minister vide Misc. Civil Application No. 7 of 2010. In that application, the Appellant sought attachment and sale of the Respondent's

properties, including the Respondent's motor vehicle, Landcruiser registration No. T. 351 AHF. In that application, the Respondent defaulted appearance. In its ruling delivered on 16/12/2010, the trial court granted the application, ordering attachment and sale of the Respondent's motor vehicle above stated to settle the Appellant's claim of TZS 8,060,000/=, being salary arrears of 55 months.

The record shows that on 01/03/2010, the Appellant was paid a total of TZS 1,974,000/=, being salary arrears for 12 months and severance pay for the whole employment period. Further, the record shows that on 06/01/2011, the Appellant and the Respondent (the decree holder and the judgment holder) signed a deed of settlement whereas the Respondent agreed to pay the Appellant the sum of TZS 8,414,194/= to settle all the Appellant's dues. The deed shows that the Appellant was to be reinstated on 04/01/2011. With respect of the above payments, cheque number 018598 was issued to the executing court broker, Lumaliza Court Broker. It is not known what transpired after that. Incidentally, on 30/04/2019, the Appellant filed another application for execution in the same court seeking to execute the same order in respect of Misc. Civil Application No. 7 of 2010. The amount to be executed was TZS 8,060,000/= plus interest. The total claim for execution was set at

TZS 18,856,032/=. In the course of hearing that application, the counsel for the Respondent raised a preliminary point of objection stating that the application was *res judicata*. In the course of composing the ruling pertaining to the objection, the trial magistrate found it appropriate to call the parties to address her on whether the court had jurisdiction to entertain the application. The advocate for the parties complied with the trial court's order. After going through the submissions of the counsel for both parties, the trial magistrate was satisfied that the court had no jurisdiction to entertain execution of the order of Minister since the laws applicable at the time were repealed and the transition period for entertaining such matters had lapsed. As already stated, the decision did not please the Appellant.

At the hearing, Mr Sikawa abandoned the first ground of appeal, while the rest of the grounds were jointly submitted on. Mr. Sikawa faulted the decision of the trial court contending that the matter giving rise to the dispute was referred to the Minister for Labour as a reference and that the law applicable at the time was the Security of Employment Act, Cap. 387 (hereinafter referred to as 'SEA'). He made reference to section 29(1) of the same Act, stating that the Appellant applied for execution vide Misc. Civil Application No. 07 of 2010, the matter was heard and execution was

partly done. That, the trial court ordered that the Appellant be paid arrears but it made no order regarding reinstatement of the Appellant. Further, that the Appellant was not reinstated to date. It was his further submissions that according to section 26(1)(b) of the SEA, order of reinstatement has to be complied with, unless an employee decides otherwise.

In Mr. Sikawa's view, the trial Magistrate erred because paragraph 13(1) and (2) of the 3rd Schedule of the Employment and Labour Relations Act, Cap. 366 [R.E 2019] ("the ELRA") directs that all applications for execution arising from the repealed Act be dealt with in accordance with the repealed Acts. He maintained that on that basis, the trial court had jurisdiction to deal with the matter in accordance with SEA.

On his part, Mr. Qamara did not agree with Mr. Sikawa. He submitted that the trial court did not have the requisite jurisdiction as per the ELRA; particularly, section 94(1)(c) and(f) and the 3rd schedule which is made pursuant to section 103(1) of ELRA. He fortified that section 103(1) deals with repealed laws, including SEA. That, Schedule 3 deals with the transition period as referred to in section 103(3) of the ELRA. Mr. Qamara made reference also to the Written Laws (Miscellaneous Amendments) (Act No. 2) of 2010. He stated that Part XVII of the said amendments puts

time limit of three years with possible extension of three years for the operation of repealed laws. He maintained that without a document showing extension of such application, it cannot be said that the trial court had jurisdiction.

It was Mr. Qamara's further submissions that the word used in the amendments is "shall" which implies that it is mandatory. He added that even if execution was made three times, the application will still be outside the time limitation, hence the trial court lacked jurisdiction. On another dimension, Mr. Qamara was of the view that even if the trial court was to be held to have jurisdiction, this Court lacks jurisdiction. He made reference to section 94 of ELRA stating that the dispute ought to have been filed in the Labour Court.

In rejoinder submission, Mr. Sikawa contested the arguments presented by Mr. Qamara stating that the trial court was not dealing with a new application in 2019, that that is why the old number was retained. He insisted that paragraph 13(1) and (2) of the 2010 cements the position. Mr. Sikawa further contended that the transition referred to in section 103(3) relates to cases pending in courts which are not to be dealt with using the repealed law. He reiterated his prayers that the appeal be

allowed with costs and the trial court be ordered to determine the application on merits.

I have given deserving weight to the grounds of appeal and the submissions of both counsel for the parties. The main issue calling for this Court's determination is whether the trial court was right in holding that it had jurisdiction to entertain Misc. Civil Application No. 07 of 2010.

At the outset, I need to restate that jurisdiction of any court in determination of a dispute is conferred by law. That has been held times and again by both this Court and the Court of Appeal. For example, in the case of **Ramadhan Omary Mtiula vs. Republic,** Criminal Appeal No. 62 of 2019 (unreported), it was held inter alia that:

> *"Jurisdiction of courts is a creature of statute and not what the litigants like or dislike. We are fortified in that account because our courts are creatures of statutes and they have such powers as are conferred upon them by statute."*

In determination of any matter, it is crucial that the Court must be assured that it has the requisite jurisdiction to try the same. Principally, the question of jurisdiction of the court in determination of any dispute can be raised at any stage of the proceedings. Its essence was underscored in the case of **Fanuel Mantiri Ng'unda vs. Herman Mantiri Ng'unda and 2 Others** [1995] TLR 155, where it was underscored that:

"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature. In our considered view, the question of jurisdiction is so fundamental that the courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. This should be done from the pleadings. The reason for this is that it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case. For the court to proceed to try a case on the basis of assuming jurisdiction has the obvious disadvantage that the trial may well end up in futility as null and void on grounds of lack of jurisdiction when it is proved later as matter of evidence that the court was not properly vested with jurisdiction"

Did the trial court have jurisdiction to entertain the application for execution of the order of the Minister for Labour issued on 22/12/2009. As well elaborated by counsel for both parties, the laws applicable in labour disputes at that time included the Employment Ordinance, Cap. 366 and the Security for Employment Act, Cap. 387. These laws were repealed and replaced in 2006. This is reflected under section 103 of the ELRA, which provides:

"103.-(1)The laws specified in the Second Schedule are repealed subject to the savings and transitional provisions set out in the Third Schedule.
(2) Each of the laws specified in the Second Schedule are amended to the extent specified in that Schedule.
(3) The Third Schedule governs the transition from the administration of the laws repealed under paragraph (1) to the administration of the matters in this Act."

The decision of the Minister was based on the SEA, which was as well repealed. The decision of the Minister was issued on 22/12/2009.

Execution of that order was filed in the trial court as per sections 29 and 43 of the SEA. Execution was partly done, as submitted by Mr. Sikawa. According to the record, the execution seems to have been carried on 01/03/2010 in respect of the payment of TZS 1,974,000/=. Although there is another deed suggesting that the Respondent agreed to settle the Appellant's claims on 04/01/2011, there is no record showing that the deed was complied with. Even if I was to assume that it was complied with, that marks the end date when the execution was enforced.

The Written Laws (Miscellaneous Amendment) (Act No. 2) of 2010 amended the ELRA by deleting paragraph 13 of the 3rd Schedule to and replacing the same with a new paragraph 13 that provided for time limit within which to pursue execution applications against the order of the Minister in the repealed laws. That period is restricted to three years. The new paragraph 13(9) is specific that the application of paragraph 13 is limited to three years, subject to extension of other three years. The relevant paragraph provides:

> *"13. (9) The provisions of this paragraph of* ***the Third Schedule shall apply for a period of three years from the date of publication of this amendment in the Gazette and, the Minister may,*** *upon consultation with the Council and by notice published in the Gazette extend that period for an aggregate period not exceeding three years."* (Emphasis added).

The 3rd schedule covers the transitional provisions. The above provision lucidly speaks for itself. The second application subject to this appeal was filed in the trial court on 30/04/2019. That is to say, the application could not have been covered by the repealed laws since the specified period of three years had lapsed. As correctly submitted by Mr. Qamara, there is no information to suggest that the Minister extended the period. Without such extension, the trial court did not have jurisdiction to deal with the matter referred to it on the repealed law. Mr. Sikawa contended that the transition referred relates to cases pending in court. In my view he is incorrect. The new paragraph 13(1) and (2) of the 3rd Schedule to the ELRA (as amended by section 42 of Amendment Act No. 2 of 2016) is very clear that the transition provisions also cover execution applications against the order of the Minister. The relevant provisions provide:

> *"13. (1) All disputes originating from the repealed laws shall be determined by the repealed substantive laws applicable immediately before the laws commencement of this Act.*
> *(2) All disputes pending and* ***all applications for executions filed arising from the decision of the Minister in the subordinate courts prior to the commencement of this Act shall proceed to be determined by such courts****."* (Emphasis added).

From the foregoing, it is apposite to note that applications for execution are also covered by the amendments. It is unfortunate that Mr. Sikawa read paragraph 13(1) and (2) in isolation of paragraph 13(9), which provides for time limit upon which the repealed laws could still be

applicable. Since the application was filed outside the prescribed time of three years and since there was no extension of time, there is no basis upon which the Appellant's contention can be salvaged. I entirely agree with the trial magistrate that the trial court had no jurisdiction to entertain the matter before it.

From what I have endeavoured to discuss, the appeal lacks legs to stand on. It stands dismissed in its entirety. The decision of the trial court is hereby confirmed. Considering that the matter originates from a labour dispute, I make no order as to costs.

Order accordingly.

Y. B. Masara

JUDGE

10th December, 2021