THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE MISC APPLICATION No. 33/2019.

ARISING FROM MA/186/2018

KYAMBOGO UNIVERSITY ..... APPLICANT

VERSUS

NAMBIRIGE ROINAH & 53 OTHERS ..... RESPONDENT

BEFORE:

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MR. EBYAU FIDEL.

2. MS. HARRIET MUGAMBWA NGANZI

3. MR. FX MUBUUKE

RULING

This application was brought by notice of motion under Section 82 and 98 of the Civil Procedure Act and Order 46 Rule 1 and 8 of the Civil Procedure Rules, for orders that:

1. The Garnishee order absolute issued on the 16/11/2018, by the Acting Registrar Her Worship Sylvia Nabaggala, for the recovery of Ugx.796,362,933/-, is reviewed with the effect of reducing overpaid monies.

2. That an order issues directing the release and or refund of Ugx.205,468,789/= alleged to be double payment by the Applicants to the Respondents.

The application was supported by an Affidavit deponed by a one Musimenta Felix. Wherein he stated that, the Applicant processed Ugx.300,000,000/- using BOL a Stanbic payment platform software to process payment to various accounts which belonged to its former employees. However, because some of the accounts were not operational, only Ugx.205,468,789/-was transferred. The Bank confirmed the transfer of the said Ugx 205,468,789/- after the Applicant informed it that Court ordered repayment of the same money because of lack of evidence of its payment.

According to Musimenta the Bank is precluded by Policy and Bank regulations from accessing individual accounts because this would be divulging customer information details which is a breach of its duty of confidentiality. However, the Applicant has found new evidence confirming receipt of the said monies by the beneficiary Banks on accounts of the Respondents.

Therefore, there is sufficient evidence to review the Order directing the release or refund of Ugx.205,468,789/- that was purportedly a double payment by the Applicant to the Respondent.

In reply, Robinah Nambirige deponed that the Applicant and Respondents entered into a consent agreement for the Applicant to pay Ugx.1,246,362,933/-, in respect of the Respondents claims against her.

That the Registrar of the Industrial Court ordered the Respondent/Applicant to effect payment for the said sum and subsequently the Applicant represented to Court that a sum of Ugx. 339,000,000/- had already been paid to the Respondent's

accounts, but she never mentioned the contended Ugx.205,000,000/=. When Court directed that the Applicant produces evidence of payment of the Ugx. 339,000,000/-, the Applicant brought the same evidence she has attached in support of this application, but Court rejected the same because it was in support of Ugx. 205,000,000/- and not Ugx. 339,000,000/-

The matter was escalated to the Industrial Court's full Panel, who granted the Applicant an extension to produce evidence of the alleged payment of Ugx.339,000,000/=. The Applicant failed to produce the required evidence, leading to the Respondents filing of Garnishee proceedings via Misc. Application No. 186/2018 between the same parties. The Court issued a Decree Nisi which was duly served on the Applicant's Bank, a hearing of the Garnishee was fixed and notice was served on the Applicants Bankers who did not appear and subsequently a decree absolute ordering the Applicant to pay Ugx. 1,246,362,933/- was issued, by then, the Applicants had not furnished court with the evidence in support of the purported payment of the contended Ugx. 205,000,000/=. The Respondents were paid the said money save for the estate of a one late Sanyu.

She further contended that once a garnishee decree absolute is granted and is paid the Judgement debtor was not permitted to resurrect the matter on the amount due after the garnishee process has been concluded and the Judgement creditor has been paid. She contended that the Applicant was only attempting to take advantage of a sum already set off when the sum was negotiated from Ugx. 1.4bn to Ugx.1.2bn and sufficient time was granted to them to produce evidence in vain. The Respondent contented further that the Applicant was peddling lies before

court and she can not explain how Ugx. 339,000,000/ became 250,000,000/- then 205,000,000/=.

According to the Respondent this application does not meet the stringent conditions applicable to reviews and costs amounting to Ugx.110,000,000/= have not yet been paid by the Applicant.

In rejoinder Charles Okello the University Secretary refuted the Respondent's assertion that the sum of Ugx. 1, 246,362,933/- was arrived at by consent of the parties but rather it was a computation by an adhoc committee that was constituted by the Applicant. He stated that although the sum of Ugx.300,000,000/- had been paid to the Respondents, it was not reckoned in the computation of Ugx.1,246,362,933/= and the committee's reduction of the Respondent's initial claim of 1,492,560,798/- to Ugx. 1,246,362,933/- was not in a bid to offset Ugx.250,000,000/= as claimed by the Respondent. However, the Ugx. 1,246,362,933/- was the respondents entire claim and all monies paid were deductible from the said amount. He reiterated that whereas the payments deducted and made payable to the Respondent amounted to Ugx.339,000,000/= it was established that only Ugx.205,000,000/- was successfully transferred onto the Respondent's accounts. He asserted that this was not a new figure and the Applicant had consistently notified the Court about it. He insisted that the Applicant attended Court at the hearing of the garnishee and asserted her position to no avail. Therefore, the payment of the Ugx.796,362,933/-was subject to reconciliation of some of the Respondent's claims against their lawyers.

According to him it was the respondents who were misleading Court by creating a mix up of figures introducing Ugx. 250,000,000/= as a purported set off, which has never been agreed by the Applicant.

He also refuted the claim to a consent of costs of Ugx. 110,000,000/= without proof and prayed that court finds that the respondents only intended to unjustly enrich themselves at the expense of the Applicant.

SUBMISSIONS

It was submitted for the Applicant that the Respondent's claim arising from the Labour Claim CB/NK/019/2009, were agreed and confirmed by both parties at Ugx. 1,246,362,933/-as due and payable to the Respondents. According to Counsel Ugx. 300,000,000/- was processed by Stanbic Bank, using a Business on line payment platform software to effect payment to the various accounts of the Respondents in addition to a previous payment of Ugx.30,000,000/=. However, because some accounts were not operational only Ugx. 205,468,789/- was paid out and despite this payment the Court attached the entire Ugx.1,246,362,933/- without regard to advance payments, hence paying the Respondents in excess of Ugx.205,468,789/- which the Applicant seeks to recover in this application.

Counsel argued that the applicant was an aggrieved party and cited Section 82 of the Civil Procedure Act Cap 71 and Order 46 rule 1 of the Civil Procedure Rules SI 71-1 respectively, to support his argument. Section 82 provides as follows:

> *Any person considering himself or herself aggrieved-*
>
> *(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

(b) By a decree or order from which no appeal is allowed by this Act

May apply for a review of judgement to the court which passed the decree or made the order and the Court may make such order on the decree or order as it thinks fit."

Order 46 rule 1 of the Civil Procedure Act Cap 71

Any person considering himself or herself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her , may apply for review of judgement to the court which passed the decree or made the order.

2) A party who is not appealing from a decree or order may apply from a review of judgement notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant , or when, being respondent , he or she can present to the appellate court the case on which he or she applies for the review..."

It was his submission that the Applicant is an aggrieved person as she suffered a legal grievance when the Acting Registrar Her Worship Sylvia Nabbagala on 16/11/2018, issued a garnishee order absolute for the recovery of Ugx. 796,362,933/-, in addition to Ugx.450,000,000/= which was paid out and Ugx. 205,468,789/- that was earlier paid by the applicant. According to Counsel this grant wrongfully deprived the Applicant of its legal entitlement to Ugx. 205,468,789/-. He cited **Ladak Muhammed Hussein Vs Griffiths Insingoma Kakiiza & Others, SCCA, No.8/1995** in which Court stated that:

> *" in order for a person to have locus standi to bring an application for review, he must be a person considering himself aggrieved. It seems well settled that the expression any person considering himself aggrieved means a person who has suffered a legal grievance."*

He also referred to In Re Nakivubo Chemists(U) Ltd (1971) HCB 12 which was of the same legal proposition.

He further submitted that O.46 r.1(b) provided that the discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of a party or could not be produced by a party by the time the decree was passed or the order is sufficient cause to warrant a review. According to him the Applicant discovered new important evidence from its Bankers, to show that the sum of Ugx. 205, 468,789/- was paid to the Respondent's accounts. He cited **Mboizi V Dauli & 4 others (HCT -)4-CV-MA-0080-2014,** in which Court when discussing Section 82 of the CPA and O.46 r.1 of the CPR, stated that the provision would only apply where there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge

or could not be produced by the applicant at the time when the order or decree complained of was made. According to counsel the Applicant's bankers discovered lists of the persons who received the Ugx.205,468,789/- from other banks such as Centenary Bank and DFCU Bank which could not be availed at the time of the garnishee because the period between the decree nisi and decree absolute was 4 days and therefore not sufficient time to enable the Applicant obtain such relevant evidence. Therefore, Court should review the ruling of her Worship to guard against injustice suffered by the Applicant and abuse of Court because Court had insufficient evidence. He prayed that Court orders the refund of the Ugx. 205,468,789/- that was paid to the respondents in excess to be refunded.

In reply Counsel for the Respondent's gave a genesis and trajectory of this application which commenced in 2009 until 2017 when the High Court ordered the Applicants to pay the Respondents Ugx. 1.49 billion. According to counsel its history in the Industrial Court started when the Respondents filed Execution proceedings in the Industrial court Vide LD1/ 2018, but before its disposal the Applicant contended the figure via M.A 16/2018 and recomputed it to Ugx.1,246,362,933/- in respect of 54 employees. 6 months later the Applicant had not paid but made another application via M.A 151/2018 insisting that she had made payments to the applicant via their bank Accounts. The Registrar ordered for evidence in support of the payment failure of which execution would occur on the 25/08/2018. The Applicants appealed before the full bench of the Industrial Court who according to Counsel, confirmed the Registrars decision and ordered the respondent to pay the Ugx. 1.2bn by November 2018 in vain. The Registrar issued a garnishee order in the sum of Ugx. 796,362,933/= via M.A 186/2018. The Applicants did not defend the same and it was rendered absolute on the

26/11/2018 and subsequently the money paid to the Respondents' lawyers for onward distribution.

It was counsel's submission that the Applicant having already applied to have the Court set aside an order relating to the same parties and in the same Court, the second application is barred by law. He cited O.46 rule 7 which provides that:

> *"...No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained."*

The same is prohibition is contained in section 7 of the Civil Procedure Act Cap 71 which provides that:

> *"... No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantiality in issue in a former suit between the same parties... litigating under the same title in a court competent to try the suit in which the issue has been subsequently raised and has been heard and finally decided..."*

It was his submissions that these submissions are intended to ensure that litigation ends at some point. He insisted that the Applicants have made several applications on the amount due and payable and failed to convince court and the evidence being adduced in the instant application is no different from the evidence adduced before showing that the payment was in process. According to Counsel the instant Application between the same parties in the same court and contending that the order for payment of the decretal sum is reviewed once again is wrong because the matter was already dealt with before. It was further his submission that on the 16/11/2018 no officer from the Bank showed up to produce the evidence of payment at the Industrial Court

He insisted that the repeated and endless claims brought in by the aforesaid provisions should fail in substance as provided for under Article 126 of the Constitution which affirms substantive justice and O46. R.1 (Supra) which requires certain conditions to be met before an application for review can be accepted. He also cited O46 r.3 which prohibits an application for review on the ground of discovery of new evidence which the applicant alleges without proof of the allegation.

Counsel insisted that the evidence adduced in support of this application was not new evidence because the remittances attached as annexure "B" to the sworn affidavit of Musimenta Felix were remittances of June 2018. He also contested Okello Charles Affidavit in rejoinder on the grounds that the contended figure stated therein was not new and it was always brought to the attention of Court in previous applications including MA No.151/2018.

He further submitted this application was a veiled appeal because there was no mention of any mistake or error apparent on the face of the record.

He contended that none of the provisions governing garnishee proceedings could support this application given the restrictive nature of the law on garnishee, because no bank disputed the amount due.

DECISION OF COURT

We have carefully perused the application, the affidavits in support of the application and in reply and the written submissions of both Counsel and find as follows:

It is not disputed that the amount due and payable was agreed by both parties as Ugx.1,246,362,933/=. It is also not disputed that when the Registrar of the Industrial Court ordered the Applicant to deposit the whole amount into the Court's Account, the Applicants opposed the order and the full Panel ordered that it is deposited in 2 instalments, of Ugx, 450,000,000/= each. The Respondents applied for attachment of the decretal sum by way of garnishee proceedings via MA 186/2018. It is not disputed that the Applicants paid Ugx. 450,000,000/= and on 16/11/2018, Court made a Garnishee decree Nisi for the attachment of Ugx. 796,362,933/-. Notice of the Decree nisi and the date for hearing, was served on the Applicant and her bankers, but no one appeared to show cause why the decree nisi should not be rendered absolute therefore it became absolute on 26/11/2018, for the sum of Ugx.796,362,933/- and the monies were paid to the Respondents

It is trite that the Judgement of a Court of competent jurisdiction takes effect immediately upon delivery. The genesis of this application however shows that whereas Judgement in this matter was delivered as far back as 2009 it was only in 2018 that the Respondents started enjoying the fruits of their judgement.

The Applicant's contention as we understand it is that the order for the recovery of Ugx.796,362,933/= in favour of the Respondents was made in excess of Ugx.205,468,789/= which the Applicant alleges was paid to the Respondents earlier.

The Respondents opposed the application on grounds that such application was wrong given that the issue regarding to the contested money was Res judicata.

The Applicant on the other hand argues that she is an aggrieved person within the meaning of section 82 of the CPA and O46. r. 1(b) of the CPR, already cited above,

given that the time that was given for them to produce evidence was too short for them to produce it. She argues that the review of the order to attach Ugx. 796,362,933/- despite the Applicant providing evidence to prove that it made a deposit of Ugx.300,000,000/- earlier was sufficient ground for the review of the garnishee order.

From the trajectory of the execution of the Judgement for the payment of Ugx. 1,246,362,933/- in favour of the Respondents and particularly proceeding before the Garnishee proceedings, it is clear that the contention of the Applicant was that she had earlier processed and paid the Respondents Ugx, 339,000,000/- although out of this amount only Ugx.205,468,789/= was actually paid onto the Respondent's Accounts, some of them having been non- operational. However the Court granted the Applicant an opportunity to adduce evidence of proof of payment which they did not produce hence the issuance of execution proceedings by garnishee proceedings. When the matter was set down for hearing the garnishee application, the Applicant's bankers and the Applicant were notified but they did not appear.

Although the Applicant now argues that the 4 days between the issuance of the Decree nisi and the decree absolute was too short to enable them produce the said evidence, our considered view is to the contrary because her Bankers had the opportunity to appear during the proceedings and apply for an extension of time to enable them produce the said evidence before the Decree Nisi was rendered absolute. This was not done despite the fact that they were served with the hearing notice.

Further the argument that the Applicant could not access the individual accounts of the Respondents on the ground that by doing so It would be a breach of customer confidentiality, cannot stand because this court has the power to order for the production of the Bank statements, for purposes of ascertaining that the said Accounts that were credited by the Applicant. But the Applicants did not make such an application.

This Court gave the Applicant sufficient time to adduce proof of payment of the contested Ugx. 205, 468,789/= whenever it was raised before the court and the said evidence was never produced.

Although this application to review the garnishee order could be entertained within the ambit of O.46 r.1(b), given that such a review has ever been done before, the subject matter of the review, that is the contested payment of Ugx.205,468,789/= to the Respondents has been substantially in issue in several applications before this one, between the same parties and in the same court. Actually, Counsel for the Applicant in his submissions in rejoinder, in the instant application, states that; *"The Applicant at all times informed court that it made a deposit of Ugx. 300,000,000/= to the Respondent's Accounts however Court found the evidence produced for payment insufficient."*

It is clear that Court heard the parties on the same and decided that the evidence adduced was insufficient and went on to order payment of the whole decretal amount. The Applicant had sufficient time to prove the assertion that they paid the contested sum earlier, but they failed to produce the required evidence as proof of payment hence the issuance of an order for execution by Garnishee proceedings. We are not convinced that the Applicant having failed to produce evidence of proof

of payment of the contested amount when Court granter her time, renders her an aggrieved party as envisaged under Section 82 of the Civil Procedure Act and O.46 r.1(b) of the Civil Procedure Rules. We are inclined to agree with Counsel for the respondents that this application is indeed a veiled appeal which is not acceptable. Litigation must come to an end at some point.

In the alternative even if we had entertained the review, the evidence adduced as new evidence is not sufficient proof of payment given that the report of the BOL payment system attached was the same report that was previously rejected by Court and the letters and emails from the recipient banks can not stand in the absence of a BOL systems report showing corresponding list of monies that were "delivered for processing" as "successfully processed and credited on to the respondent's Accounts." In the absence of the Bank statements of the Respondents whose Accounts were credited with the said money and the list of the Accounts which were considered non- operational, the evidence adduced is not sufficient proof that this money was paid.

In the circumstances this application fails with no order as to costs.

Delivered and signed by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE .....

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA .....

PANELISTS

1. MR. EBYAU FIDEL. .....

2. MS. HARRIET MUGAMBWA NGANZI .....

3. MR. FX MUBUUKE .....

DATE: 6/11/2019