

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
MISC. LABOUR APPLICATION NO.245 OF 2013

HAMID MFAUME IBRAHIM.....APPLICANT

VERSUS

KBC TANZANIA LIMITED.....RESPONDENT

(Original/ CMA/ILA/ARB/538/09/782)

RULING

30/6/2014 &18/7/2014

Aboud, J

This is an application to re- enroll the application for Revision No.92 of 2012 which was struck out due to the absence of the applicant on 17th May, 2013. It is made under Rule 24 (1) (2) (3), 36 (1) (2) (3), 43 (1) and 55 (1), (2) of the Labour Court Rules, GN. No.106 of 2007 and any other enabling provision of the law.

Shortly are the facts of the case. The applicant filed an application for revision No.92 of 2012 against the CMA award. The application for revision was dismissed by Hon. Wambura, J for want of prosecution. The applicant filed the present application to set aside the dismissal order.

At the hearing the applicant was represented by Mr. Zake, Advocate while Mr. Arbogast, Advocate represented the respondent.

Mr. Zake submitted on behalf of the applicant that, Revision No. 92/2012 was dismissed in this court for non-appearance. That non-appearance was neither due to negligence on the part of the applicant nor his advocate.

It was his submission that, on the date of hearing, that is 7/5/2013 he and the applicant were present at the court at the Advocate's waiting room/ place and the 'cases before Hon. Wambura, J were not called. He submitted that at around 9:30 am he went and asked Court Clerks, Mr. Salehe and Ms. Edith who told him that the cases before Hon. Wambura, J were not yet called. That he was advised by Ms. Edith to ask about his case to Ms. Happy, Court Clerk of the Presiding Judge. He further submitted that he looked for Ms. Happy who informed him that the case was already dismissed for no-appearance. That he

appeared before the presiding Judge and explained the situation but he was advised to follow the normal procedure since the matter was already dismissed. According to Mr. Zake on the material date, Mr. Arbogast, counsel for the respondent was present and he appeared before Sarwat, DR and he saw the applicant and his Advocate.

Opposing the application Mr. Arbogast, on behalf of the respondent submitted that he did not see the applicant and his Advocate on the material day as submitted by the applicant's counsel. He submitted that what has been alleged by the applicant's counsel has to be proved by affidavits of the court clerks whom he asked about the case on that date otherwise it is hearsay evidence. He submitted further that the fact that the applicant's counsel went to see the presiding Judge and the Registrar on that matter does not prove that the applicant was at the court premise for the matter at hand. Mr. Arbogast contended that Advocates negligence cannot form a ground for this prayer to be granted. He supported his argument with the case of **Simon Peter Manyaki vs. IFM and Attorney General, Civil Application No. 208 of 1996, CAT (Unreported)**.

In his rejoinder Mr. Zake submitted that the absence of the affidavits of the court clerks that were mentioned in this matter is not fatal to this case since his Affidavit is good evidence.

It is an established principle under the law that sufficient reasons has to be adduced for the court to set aside the dismissal order as provided under Order IX Rule 4 of the Civil Procedure Code (CAP 33 R.E 2002), that;

"Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."

I have been subjected to refer the above provision of the Civil Procedure Code because there is vacuum in our Labour Laws regarding such circumstance of the case.

Basing on the position of the law, the court asked itself whether the reason adduced by the applicant suffices the grant of the applicant prayer to set aside the order made by the court.

According to the records, the applicant and his advocate failed to appear on 24/11/2012 when the matter came for mention with a view of fixing hearing date and on 13/3/2013 when the matter was called for hearing. They allege to come to court on 7/5/2013 the date the matter was dismissed for nonappearance.

According to the reasons advanced by the applicant, he admitted that he was within the court premises but he just landed down stairs waiting for the Court Clerk to call them to appear before the presiding Judge, Hon. Wambura. Unfortunately the cases before Hon. Wambura, J were not called. It was until 9:30 he started making follow up of the case to the in charge of the Court Clerks. From that point I asked myself if Mr. Zake was present at the Court premises, and he knew the presiding Judge on the matter, why he decided to spend his time down stairs instead of going straight to where the Judge's Chambers are and

he could have heard when his case was called as he was sure that his case was before Hon. Wambura, J.

Mr. Zake told the Court that the circumstance should be considered to prove that it was not his negligence. As clearly submitted by the respondent that, the applicant did not produce any evidence to prove his assertion that on the material day he was at the court premise. Therefore to my view the court cannot rely on the assertion by applicant's counsel considering the tendency of previous nonappearance. The law under section 112 of the Evidence Act (Cap 6 R.E 2002) provides clearly that;

"The burden of proof as to any particular facts lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of such facts shall lie on any other person".

And in ***Abdul-Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph (2006), T.L.R 420*** the court held that;

"It is an elementary principle that he who alleges is the one responsible to prove his allegation."

Going back to the reason adduced by the applicant and with above position of the law, without hesitation I say the reason adduced by the applicant is sufficient to warrant the court to grant the application sought.

Respondent's counsel, as well as a court officer was supposed to act diligently and professional by alerting the court through the court clerk that the applicant as well as his advocate were within the court building so that would have been called to appear before the presiding judge.

Respondent's counsel admitted that he appeared before Sarwat Deputy Registrar on the same date, so this made the court to believe that what he submitted before the court was not true and he knew exactly what transpired on that material day that the applicant and his advocate were waiting at the court clerk's office which was down stairs.

I also considered that the applicant were somehow negligent as they just sat down and waited to be called, after they realized that time was passing they could have gone to the presiding judge's chamber for inquiry as to whether their case has been called or not, but they did that when it was late.

However for the interest of justice and considering the circumstance of this case and what transpired on the day the case was dismissed for non-appearance, the court is satisfied that the applicant has shown good cause as to why the dismissed order is to be set aside and the matter be heard enter parte to meet the objective of the Labour Laws which is to ensure that justice is reached for all parties in court.

Under the circumstance I found that the applicant adduced sufficient reasons to warrant the court to grant the application to set aside the dismissal order of 7/5/2013. In the result the application is allowed.

It is so ordered.

A handwritten signature in black ink, appearing to be 'I.D. Aboud', with a long horizontal flourish extending to the right.

I.D.ABOUD

JUDGE

31/7/2013

Date: 31/7/2013

Coram: Hon. I.D.Aboud,J

Applicant: Present

For Applicant: Mr. Isack Zake, Adv

Respondent:

For Respondent: Damas, Adv

CC: J.Kalolo

Order: Judgment delivered on 31/7/2014 in the presence of Mr. Isack Zake, Advocate for the Applicant and the Applicant himself as well as Mr. Damas, Advocate for the Respondent.



I.D.Aboud

JUDGE

31/7/2014