IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(KIGOMA DISTRICT REGISTRY)

AT KIGOMA

MISC. LABOUR APPLICATION NO. 7 OF 2019

(Arising from Labour Application No. 16 of 2019).

THE ATTORNEY GENERAL.....APPLICANT

VERSUS

1. ABDALLAH MABENGA AND OTHERS
2. RELI ASSETS HOLDING COMPANY (RAHCO) **RESPONDENTS**
3. TANZANIA RAILWAY LTD (TRL)

RULING

Date of Last order: 13/5/2020

Date of Judgment: 4/6/2020

Before: A. Matuma,J

The applicant is seeking an order for restoration of her application which was dismissed by this Court on the 26/11/2019 for want of prosecution.

The back ground to this application is that the first respondent Abdallah Mabenga and his fellow others successfully sued the 2nd and 3rd respondents at the commission for Mediation and Arbitration, and an award of a total of **Tshs 702,614,755/=** was issued to them against the 2nd and 3rd respondents on the 18th March,2013.

The 1st Respondent and his fellows applied for execution of the decree. In 2015 they obtained execution order of the Court for attachment and sale various properties of the 2nd and 3rd Respondents.

The applicant feeling that the execution order was illegal because properties of the 2nd and 3rd respondents are not liable to attachment,

brought an application intervening the execution and sought the same to be set aside.

The application was before me and I ordered the applicant to effect service to the respondents. I further ordered the parties to appear and address me on the tenability of the application having been brought by the Attorney General who was not party to the original suit. There were some other legal issues to be addressed by the parties.

Despite of such order, the applicant defaulted appearance and did not serve her application to the 2nd and 3rd respondents. In the circumstances I decided to dismiss the application for want of prosecution.

The applicant is now seeking a restoration order to have her application Labour Application No. 16 of 2019 restored and be heard on merit.

At the hearing of this application Mr. Erigh Rumisha learned State Attorney represented the Applicant while Mr. Sadiki Aliki learned Advocate represented the 1st Respondent and M/S Pamela Swai learned legal officer represented the 2nd and 3rd Respondents.

Mr. Erigh Rumisha learned State Attorney stated that on the date fixed for hearing of the application he missed the flight but phoned another state attorney Shabani Juma Masanja to hold his brief.

About failure to have effected service to the 2nd and 3rd respondents he submitted that, on the date they filed their application it was not instantly registered but on some other future dates and that is why even the 1st respondent was served through Advocate Sadiki Aliki by the Court itself.

Mr. Erigh Rumisha (SA) further submitted that even though, the 1st Respondent had filed preliminary objections which ought to have been first disposed off before resorting to the main cause. He finally argued that the circumstances of this application dictates that their earlier on

dismissed application be restored for them to utilize their fundamental right of being heard. He cited various cases to fortify the principle of a right to be heard such as **Gania J. Kimambi versus Shedrack Gambi, Misc. Application No. 692 of 2018 and Mbeya -Rukwa Autoparts and Transport Limited versus Jestina Genge Mwakyoma (2003) TLR 251.**

On the need to dispose off the PO first before resorting to the main cause, he cited the case of **AG versus Wilfred Onyango Mganyi and 11 others, Criminal Appeal No. 256/2006 and that of Mulilege Mkombo Kameka versus Director of Immigration Service and others, Misc. Civil Cause No. 13/2018.**

The learned state attorney finally argued that restoration order is normally granted if either party won't be jeopardized and cited the case of **Sanduru Mangaliji versus Abdul-aziz Lalani and 2 others Misc. commercial application No. 126 of 201**6.

M/S Pamela Swai the learned legal officer for the 2nd and 3rd respondents did not object the application. She joined hands with the learned state attorney that the application be restored.

Mr. Sadiki Aliki learned Advocate for the 1st respondent on his party objected this application. He submitted that restoration is granted only when good and tangible reasons are advanced. He was of the view that the issue of a state attorney missing the flight is not a good cause as the state attorney should have gone further to explain the reasons for the missing of the flight such as whether he missed the ticket and if so when did he go for the booking.

About the ground that another State Attorney Shabani Juma Masanja was sent, he submitted that it was immaterial because such state attorney was

not even able to proceed nor he knew the reasons for the absence of the respectful attorney for the Applicant.

About availability of Preliminary objections and that they ought to have been determined first, the learned advocate argued that prior to his filing of the POs, this Court had already issued an order for the parties to appear and address it on some legal issues, and that the presence of POs by whether manner could not justify the absence of the applicant.

The leaned advocate further pressed this Court to consider the principle that litigations must come to an end. He drew the attention of this Court that this matter started way back in 2012, the execution was ordered in 2015 but since then the applicant has been a stabbing block to the execution and therefore, allowing this application will prejudice the 1st respondent.

I have carefully and considerately listened to the learned attorneys for the parties.

Admittedly this is a very weak application because restoration order is not a game of funny to be issued whenever a party wishes. The applicant must establish good cause for his absence and failure to prosecute his case at the time when the matter was dismissed for want of prosecution.

Under Order IX Rule 9 (1) of the Civil Procedure Code, in which this application was brought, the law is very clear that a restoration order shall only be given if the applicant **"satisfies the court that there was sufficient cause for his none-appearance when the suit was called on for hearing".**

It is thus all about **sufficient cause** for a restoration order to be issued.

As rightly submitted by advocate Sadiki Aliki, the learned State attorney did not account for his missing of the flight so that this Court could

determine whether or not it was a deliberate missing. It is thus not stated whether he had a ticket at hand in respect of the alleged flight or he had none at all. We cannot therefore, assume if it is truly he had arranged for his journey to this Court for hearing of his application.

Even if the leaned State Attorney would have established that indeed he had a ticket for the alleged flight, he was duty bound to explain the manner of his delay whether it was a traffic jam, too much sleeping, some other businesses on the flight date e.t.c.

This Court cannot thus assume reasons for the allegedly missing of the flight as rightly doubted by Advocate Sadiki Aliki leaned advocate for the 1st respondent.

I would further agree with Mr. Sadiki Aliki learned advocate that the presence of Shaban Juma Masanja (SA) was immaterial because he had no case file nor he knew what was the matter before the Court. He was unable to proceed with the hearing. His presence was therefore, for a mere Coram for that date but not to heed to the order of the day. It should be in mind that dismissal of the suit for want of prosecution can be invoked even in the presence of the parties as the issue is not the presence but the continuation of the matter by hearing, i.e the party bringing it to be able to prosecute the same on that day. The absence of the applicant is thus one of the factors for dismissal for want of prosecution. If the applicant is present but for unjustifiable cause is unable to prosecute his claims, the Court is still enjoined the right to dismiss the claim for want of prosecution.

In the instant matter, the application was dismissed not only for the reason that the applicant was absent but also that she had not yet effected the service to other respondents. In the circumstances, even if the learned state attorney would have been present still the matter could

have not been prosecuted and his presence would have served no useful purpose in the progress of the application. To date the 2nd and 3rd respondents have yet been aware of that particular application and if the same is to be restored, it will necessitate a prolonged adjournment for them to be served, file their counter affidavits and a scheduling for the hearing. That would be a disturbing feature in our Court diary on unjustifiable cause.

About the ground that there were some POs which should have been determined first, I am in agreement with Mr. Sadiki Aliki that prior to the POs there were some legal issues raised by the Court suo motto. Those issues were to be argued by the parties before resorting to those POs and subsequently the main cause. The applicant defaulted appearance on those issues which would have perhaps pave a way to her application. But again, as rightly submitted by the learned advocate, the availability of POs could have in no way justify the deliberate absence of the applicant in the prosecution of her application.

Lastly, the parties contested on whether an order restoring the said application would prejudice either party.

Mr. Erigh Rumisha learned State Attorney argued that it will not prejudice either party.

Mr. Sadiki Aliki Advocate on his party maintained that the 1st respondent shall be prejudiced since the execution of the decree sought was issued way back in 2015 from the original decree of 2013 on the matter which started in 2012. Since then, he lamented, the applicant has been a stabbing block to the execution of the decree.

To determine this rival argument of the parties, I asked M/S Pamela Swai the learned legal officer for the 2nd and 3rd respondents who are the judgment debtors on whether they have taken any step to challenge the

decree. She expressly informed this court that they did not appeal against the decree which was issued in favour of the 1st respondent.

In the circumstances, justice demanded that the 2nd and 3rd respondents would have voluntarily executed the decree by paying to the decree holders the decretal sum since 2013 when it was so decreed. They did not however.

In 2015, the 1st respond sought and dully granted execution order by way of attachment of some properties. That is what led the current applicant to raise up and object the mode of execution so preferred.

It is my settled mind that execution of decrees mechanism is there to compel those unwilling parties to honour the decrees issued against them.

If one is adjudged a loser (judgment debtor) and immediately and or amicably settles the decree with the decree holder, there would be no necessity of instituting execution proceedings.

In this case, the 2nd and 3rd respondents were adjudged losers way back in 2013. To date it is almost seven years. This is a vey long period within which they would have settled the decree without being forced through execution process.

The applicant was not a party to the suit nor assisted the judgment debtors to challenge that decree. He is now before me purporting to block the execution on a mere ground of illegality of the mode of execution.

I am of a further view that the applicant as a chief adviser to the 2nd and 3rd respondents should play her role justiciary by bringing the parties together and settle out how the decree would be fulfilled since they have not challenged it rather than meandering in Court on technical basis to defeat justice by making the decree redundant.

Whether or not the mode of execution preferred by the 1st respondent is illegal, the 2nd and 3rd respondents have a big role to make it inexecutable by just settling the decree amicably with the decree holders. I therefore, by considering the length this matter has taken without the 2nd and 3rd respondents settling the decree which they do not challenge, I find that it would be to the prejudice of justice to grant this application.

I therefore, rule out that this application has been brought without justifiable cause. The same is hereby dismissed in its entirety with costs.

It is so ordered.

A. Matuma

Judge

4/6/2020