IN THE HIGH COURT OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

MISC. LABOUR APPLICATION NO. 12 OF 2020

(C/F Labour Revision No. 17/2018)

OFF GRID ELECTRIC LIMITED.....APPLICANT

Versus

TUMAINI MOSHI.....RESPONDENT

RULING

08/10 & 19/11/2020

MZUNA, J.:

In this application, the applicant seeks the court's order to re-enroll Labour Revision No. 17 of 2018 which was dismissed on 12th March, 2020 for want of prosecution. It is supported by an affidavit of Mr. Salvatory Mosha, learned counsel who represented the applicant in this application and strongly opposed by the counter affidavit of Mr. Henry Simon, learned counsel, who entered appearance for the respondent.

The main issue is whether there is satisfactory explanation by the applicant for the failure to attend court leading to such dismissal?

Submitting in support of the application, Mr. Mosha stated that on the date the main application was dismissed, a tax which he hired, experienced

a mechanical defect when on his way coming from the Arusha Resident Magistrate's court where he had appearance before a Magistrate named Meena, leading to a delay.

Mr. Mosha also argued that the dismissed application should be restored since there was a filed preliminary objection which was expected to be determined first. In that, the learned counsel referred to the case of **Zahara Kitindi & Another v. Juma Swalehe & 9 Others,** Civil Application No. 04/05/2017, Court of Appeal at Arusha (unreported) to bolster his submission.

In reply, Mr. Simon resisted the application on the ground that the applicant did not assign reason for the remedy of restoration of his dismissed application for revision. That, the applicant's counsel violated the principle of courts' hierarchy by entering appearance at the subordinate court as first preference to this court. It was his view that the proper remedy by the applicant was to apply for review as he claimed the dismissal order was irregular. He insisted that there is no any harm to the applicant if this application is refused.

In rejoinder, Mr. Mosha reiterated that the main reason for non-appearance was car breakdown. He emphasized that he did not ignore the rule of hierarchy of courts by appearing at the subordinate court prior to the court as the matter was fixed earlier than the one dismissed.

In determining the above issue, I am guided by Rule 36 (1) of the Labour Court Rules, G.N No. 106 of 2007, which provides that:-

> *"Where a matter is struck off the file due to the absence of a party who initiated the proceedings, the matter may be re enrolled* ***if that party provides the Court with a satisfactory explanation by an affidavit for his failure to attend the Court."*** [Emphasis supplied]

In other words, there must be "satisfactory explanation by an affidavit for his failure to attend the Court".

The question is, <u>is there such satisfactory explanation?</u> The applicant cited two grounds in the affidavit. **One,** that there was a car breakdown leading to delay in attending his case; And, **two,** that the court ought to proceed with the matter as there was a filed preliminary objection awaiting determination of the court.

The applicant has attached a copy of taxi driver's affidavit alleging that there was a mechanical breakdown on their way to the court. I am aware, much as even the advocates are aware through our established rule, that the appearance of advocates must be by precedence of the hierarchy of courts. I would agree that appearing at the subordinate court was subject to the schedule that the said advocate could have also appeared at the High court, but such failure was due to breakdown which he encountered.

There is an argument by the respondent's counsel that the applicant counsel's firm could dispatch someone else to deal with the matter at the trial court. Even so, such argument cannot take away the mishap experienced by the applicant's counsel on his way to the court. The affidavit discloses the reason and cause of his failure to attend to court. Whether or not the dismissal order was for the main application or the preliminary objections filed thereof, is not the question for determination at this stage. I say so because, it is clear from the record that what was dismissed is the application for revision.

The law, above cited, clearly says there must be *"satisfactory explanation by an affidavit for his failure to attend the Court"* by a party

who initiated the proceedings, in our case the applicant, not otherwise. The case of **Zahara Kitindi and Another (supra)** cited by the applicant reiterated the position of the law that:-

> *"In the wake of preliminary objection, the main application had to be kept at abeyance pending the determination of the preliminary objection."*

That case is however distinguishable because in our case, there could not have been a preliminary objection unless and until there was filed an application. Failure to prosecute the application it has to be dismissed. Giving priority to hear the preliminary objection first, does not, in my view, grant the applicant a leeway to default appearance once there is a preliminary objection unless she says she concedes to the raised preliminary objection which will make this application to be of an academic exercise. Similarly, a review application cannot be an appropriate remedy.

I would cement my position thus, the court's power to dismiss a suit or application for non-appearance is based on the default of the party which instituted the application, regardless of whether there is a filed preliminary objection.

All facts being equal, it is my view that for the interests of justice, the revision application should be heard inter parties based on the advent of the overriding objective principle where substantive justice is paramount, see, the case of **Yakobo Magoiga Kichere v. Peninah Yusuph,** Civil Appeal No. 55 of 2017, CAT (unreported). In a similar case of **Christina Thomas Koonge *(suing as the administratix of the estate of the late Tomasa Koonge) v.* Raphael Lengiten & Others**, Misc. Land Case Application No. 102 of 2019, High Court at Arusha (unreported), the applicant was praying for an order of restoration of a dismissed application. I remarked thus:-

> *"Time and again it has been held that court should deal with dispensation of justice and not to be tied up with technicalities. The respondents have not said how are they prejudiced if this application is granted."*

Similarly, as in our case at hand, the respondent has not shown the degree of prejudice he stands to suffer should the application be granted. The second reason to grant this application is based on the fact that "an error of counsel should not necessarily be visited on his client." This position was well stated in the case of **Rwabinumi v. Baimbisomwe** (2010) I.E. 337 cited in the case of **Rosebay Elton Mwakabuli v. Haruna Mohamed**

Kitelebu, Misc. Land Application No. 664 of 2015, High Court Dar es Salaam (unreported) where it was held that:-

> ***"It would be a grave injustice to deny an applicant such as this one pursue his right of appeal*** *simply because of the blunder of his lawyer* ***when it is well settled that an error of counsel should not necessarily be visited on his client****".*
> [Emphasis added]

Similarly, as in our case, the blunder of the advocate, which however I have found was with "satisfactory explanation" should not be used to punish the innocent applicant.

As above said, for the interest of justice, this application is allowed with no order for costs.

11/19/2020

X

Signed by: M G MZUNA JUDGE