IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]
AT ARUSHA

MISC. APPLICATION NO. 46B OF 2019
(Originating from Execution Application No. 37 of 2019)

SAMSON ERALD ..... APPLICANT

Versus

OFF GRID ELECTRONIC TANZANIA ..... RESPONDENT

RULING

20th April & 25th May, 2021

Masara, J.

The Applicant has preferred this application under Rule 36(1) and (2) of the Labour Court Rules, G.N No. 106 of 2007, moving the Court to set aside a dismissal order dated 17/9/2019. The Applicant was the Decree Holder in Execution Application No. 37 of 2019 which was still pending in this Court, before J.F. Nkwabi, DR (as he then was). The Application was set for mention on 17/9/2019, but neither the Applicant nor his advocate entered appearance. On that date, the advocate representing the Respondent, Mr. John Mushi, informed the Court that the amount of money had been paid into the account of the decree holder on 25/7/2019. Mr. Mushi prayed for the matter to be marked closed. The advocate's prayer was not observed. To the contrary, the application was dismissed for want of appearance of the Applicant. This application is therefore aimed at moving this Court to set aside that dismissal order.

The application is supported by the affidavit deponed by Ms Suzan Michael, learned advocate for the Applicant. The Respondent was not served with the Application; therefore, the Application was uncontested.

I have strenuously considered the Applicant's application and the supporting affidavit in view of determining the competency of the Application before this Court. The application seems to have a lot of shortfalls which makes it incompetent before this Court.

First, the Application was premised on a wrong provision of the law. The application No. 37 of 2019 was dismissed for want of appearance, but the Applicant's advocate filed this application under Rule 36(1) and (2) of the Labour Court Rules, G.N No. 106 of 2007 (hereinafter referred to as "Rules"), which according to the Rules, it aims at re-enrolling a matter which was struck off in Court. This is not our case since the application was dismissed. The proper provision to move the Court to set aside a dismissal order ought to be Rule 38(2) of the Rules. For the purpose of clarity, the rule provides:

> *"Subject to the provisions of subrule (1), any affected party or person may, within fifteen days after acquiring knowledge of an order or default judgment granted in the absence of that party, apply on notice to all interested parties to set aside, vary or rescind the order or default judgment and the Court may, upon good cause shown, make such orders as it deems fit."*

That would be the proper provision of the law to move the Court to set aside the dismissal order. In the result, the Court was not moved properly. Failure to move the Court properly results to denial of the order sought. In this

aspect I am guided by the decision of this Court in ***Makene Robert Kabegi Vs. Ifakara Health Institute,*** Misc. Labour Application No. 141 of 2014, (DSM Lab Div.) where Mipawa, J. as he then was held:

> *"After going through the submissions of both parties especially on the first Preliminary Objection,* ***in ex abandunt cauteia*** *(with extreme eye of caution) and the pleadings thereto, it is undisputed that there is* ***wrong citation*** *and* ***non-citation*** *of the enabling provisions of the law. That can be noted* ***in limine*** *(at the outset) that the applicant Makene Robert Kabegi needs this Court to set aside the dismissal order for non-appearance. That being the case, citing of section 91 (1) (2) (3) and (4) of the Employment and Labour Relations Act 2004 is* ***purely wrong citation.***"

Again, the above cited rule, makes it mandatory for the Applicant to notify all the interested parties in the application. In the instant application, the Respondent was not notified of the application, that is why she never turned up to oppose the same. Therefore, the application was made in contravention of the law for failure to notify the Respondent. The application is therefore incompetent.

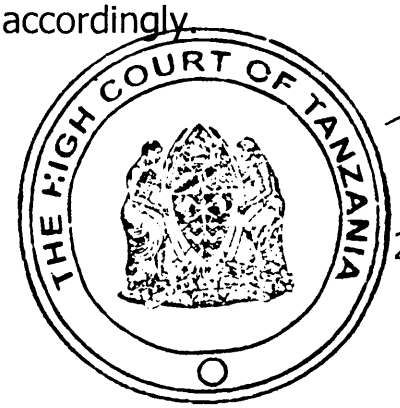
I also note that the order sought to be set aside was given by the Deputy Registrar. The instant application was assigned to a Judge, who did not participate in the hearing of the Execution Application. That may not be the fault of the Applicant. However, it is trite law that applications to set aside dismissal order are made before the same Court that dismissed the matter. Although Executions are filed before this Court, they are normally handled by Deputy Registrars. Ordinarily, the Deputy Registrar, should on good grounds, restore or set aside an application struck out or dismissed for non-

attendance of the Applicant. Therefore, procedurally, the instant application ought to have been determined by the Deputy Registrar.

I further note that what is filed in this Court does not suffice to be termed as an application since there are no prayers sought to be granted. In the instant application, the prayers sought to be granted are made in the affidavit. Always, applications are made through a chamber application; that is, a chamber summons supported by an affidavit adducing reasons for the application. The chamber summons will contain the prayers sought and the supporting grounds are deponed in the affidavit. Applications can also be made in terms of rule 24 of the Rules. This application is made without following any of the known methods of filing applications. This is a serious error considering that the Applicant was legally represented.

From the above analysis, the application before this Court is incompetent. It cannot succeed in the circumstances of the irregularities above highlighted. The only remedy is to strike it out with leave to refile, as I hereby do. The Applicant, if still interested, is at liberty to refile his application in the Court competent to adjudge the same within 14 days. No order as to costs.

Order accordingly.



Y. B. Masara
JUDGE.
25th May, 2021.