IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

MISC LABOUR APPLICATION NO. 93 OF 2020

(Arising from Revision Application No.28 of 2019)

NGORONGORO CONSERVATION AREA AUTHORITY.....APPLICANT

Vs

AMIYO TLAA AMIYO.....1ST RESPONDENT

JUSTICE MUUMBA.....2ND RESPONDENT

RULING

Date of last order: 09/11/2021

Date of ruling: 16/11/2021

B.K.PHILLIP, J

This application is made under the provisions of Rules 24 (1) ,24(2) (a), (b),(c),(d),(e) and (f) , 24 (3) (a) (b), (c) and (d) and Rule 38(1) (a) (c) , 38(2) and 55(1) and (2) of the Labour Court Rules, 2007, GN. No. 106 (Hereinafter to be referred to as " GN.No. 106/2007").The applicant prays for the following orders;

i) This Honorable Court be pleased to set aside and /or rescind its order dated 10th November, 2020 Hon Y.B. Masara, J. Which dismissed Revision Application No 28 of 2019 for want of prosecution.

ii) Costs of this Application be provided for.

iii) Any other relief and or further orders the Court may deem just to grant.

The application is supported by two affidavits. The first one is sworn by learned Advocate Odhiambo Kobas, who appears for the applicant and the second affidavit is sworn by the learned advocate Henry Simon Katunzi. The respondents swore two affidavits in opposition to the application. The respondents are represented by the learned advocate Emmanuel Sood from Faith Attorneys.

A brief background to this application is that on 24th April 2019, the applicant herein lodged in this Court an application for Revision vide Revision Application No. 28/2019 in which he was challenging the decision of the Commission for Mediation and Arbitration (henceforth "CMA"), in complaint No. CMA/ARS/ARB/ 203/2015. On the 10th of November 2020 , when the said application was called for hearing the applicant and his advocate were all absent, consequently the same was dismissed for want of prosecution. Thus, the applicant filed the application in hand seeking for a Court order to set aside the dismissal order.

I ordered the application to be disposed of by way of written submissions. I commend the learned advocates for filing their written submissions timely as ordered.

Mr Kobas started his submission by adopting the contents of the two affidavits in support of the application. He went on submitting that the provisions of Rule 38(1) (a) (c),(2) and 55(1) (2) of GN. No. 106/2007 requires an application of this nature to be filed within fifteen (15) days from the date of the dismissal order. The applicant lodged this application within the time prescribed by the law and without any undue delay as the dismissal order was made on 10th November 2020 and this application was filed on 25th November 2020.Referring this court to the provisions of Rule 38(1)(a) and (c) and 38 (2) and 55 (1) and (2) of GN.No 106/2007, Mr Kobas argued that the aforementioned provisions of the laws confer powers to this court to set aside , vary or rescind any order or default judgment granted in the absence of the other party upon showing good cause. Referring this court to the contents of the affidavits in support of this application, Mr Kobas contended that the applicant has shown good cause for failure to appear in Court on 10th November 2020. In his affidavit in support of this application Mr Kobas deponed as follows; That on 4th August 2020, when the matter was

called for mention before the Honourable Registrar, the applicant entered appearance, the same was adjourned to 25th August 2020 to await for the original records from the CMA. On 25th August 2020 the matter was called in Court as scheduled, unfortunately he did not enter appearance. By that time the CMA record had already been forwarded to this Court, thus the application was fixed for hearing on 22nd September 2020.The Court ordered the applicant to be notified. He ordinarily resides in Dar Es Salaam. He was not notified of the hearing date. Consequently, on 22nd September 2020 he did not enter appearance. Hearing was adjourned again to 10th November 2020. He took initiative to call the respondents' advocate, the learned advocate Mr Method Kimomogoro who informed him that hearing of the application was scheduled on 11th November 2020. He noted that date in his diary. On 9th and 10th November, 2020, he was sick, thus he decided to call the learned advocate Henry Simon Katunzi who is based in Arusha. He requested him to appear in Court on 11th November 2020 to hold his brief and pray that the hearing of the application to be by way of written submissions. Mr Katunzi came to court as requested only to find out that the application was dismissed on 10th November 2020 for want of prosecution.

In his affidavit Mr Katunzi deponed that he was requested by Mr Kobas to appear in Court on 11th November 2020 to hold his brief in application No. 28 of 2020 for the applicant because he was sick. On 11th November 2020 he came to Court and enquired from the Court clerk about Revision Application No. 28 of 2020, only to be told that the same was dismissed on 10th November 2020 for want of prosecution. He informed Mr Kobas what had transpired in the application for his necessary action.

Mr Kobas contended that the failure to appear in court was due to mistaken fact and belief that the application was scheduled for hearing on 11th November 2020 owing to the information received from Mr Kimomogoro , the respondent's Advocate. He contended that a mistaken belief and fact in the circumstances of this case constitutes good cause for setting aside the dismissal order.To cement his arguments he cited the case of **Bahati Musa Hamisi Mtopa Vs Salum Rashidi, Civil Application No. 112/07 of 2018.** (unreported) in which the Court of Appeal when deliberating on what constitutes sufficient cause had this to say;

" *like in the above cited case the applicant, as demonstrated above , upon being directed that the Reference will be heard by the Court of*

Mtwara by her advocate who was granted to her on legal aid , travelled to Mtwara to attend the hearing of the application for Reference on the scheduled date only to find the Court has no sessions thereof. She informed her advocate so but as it was already late, the latter could not enter appearance in Dar es Salaam Registry where the application was set for hearing. We find it unjust to impute the advocate's mistake into the applicant. The applicant was wholly innocent. She cannot, in the peculiar circumstance of this case , be blamed for the non- appearance when the application for reference was called on for hearing in Dar es Salaam. We instead, hold it that reason constituted sufficient cause"

Mr Kobas insisted that the interest of justice demands that a party to a case should not be punished for his advocate's mistaken belief. He believed that the hearing of the application was scheduled on 11th November 2020 only to find out belatedly that it was on 10th November 2020.

Expounding on what constitutes sufficient cause, Mr Kobas contended that, the respondent's advocate may come up with an argument that negligence of an advocate is not sufficient cause , but the reality is that it all depends on the circumstances of each particular case.To cement his arguments he referred this Court to the case of **Bahati Musa**

Hamisi Mtopa (supra), in which the Court made the following observation;

"General speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions. Some were cited by the appellant's advocate in his oral submission. But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the appellant's advocate as was held by a single judge of the court (Mfalila JA as he then was) in Felix Tumbo Kisima Vs TTC Limited and another- CAT Civil Application No. 1 of 1997 (unreported).

It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or cause which are outside the applicant's power to control or influence resulting in delay in taking any necessary step.

In the instant case the respondent had done the entire she could, leaving the matter to the hands of her advocate who had been assigned to her on legal aid. In the circumstances , while accepting that there were some elements of negligence by her counsel, in the circumstance

of the case , we join hand with our learned brother Mfalila JA in the case cited supra, and hold that learned counsel's negligence constituted sufficient reason for delaying in lodging the appeal between 1.8. 1996 and 24.10.1996"

It was the contention of Mr Kobas that he was not notified of the change of the respondent's advocate as required by the provisions of section 56(c) of the Labour Institutions Act No.7 of 2004 and Rule 43(1) (a) and (b) of the Labour Court Rules, 2007. He belatedly learnt that Mr Kimomogoro was no longer appearing for the respondents in the application. He maintained that failure to notify him on the change of the respondent's advocate attributed to being supplied with incorrect information regarding the hearing date.

The second reason advanced by Mr Kobas for his failure to appear in court on 10th November 2020 is that he was sick. He submitted that he started feeling unwell on 9th November 2020 and his condition continued to deteriorate. Consequently, on 11th November ,2020 he was taken to hospital. He insisted that the medical chit attached to his affidavit in support of this application proves that he was sick and sickness has been held by our courts as a sufficient reason for his failure to enter appearance in Court. He cited the case of **Pimak**

Professyonel Mutafak Limited Vs Primak Tanzania Limited and Farha Abdulah Noor, Mis Commercial Application No.55 of 2018, (unreported) to buttress his argument.

In rebuttal, the learned Advocate , Emmanuel Sood started his submission by adopting the contents of the joint Counter affidavits filed by the respondents, in which the respondents disputed the contents in the affidavits in support of this application with exception of the fact that on 22nd September 2020 when the application was fixed for hearing the applicant and his advocate did not enter appearance. The respondents deponed that there was no any duty to notify the applicant on the hearing date because he is the one who filed the application. Mr Sood went on submitting that this application has no merits because the applicant has not given any sufficient cause for his non- appearance in Court on 10th November 2020 when the application , the subject of this ruling was dismissed.

Responding to Mr Koba's argument that he failed to appear in court on 10th November 2020 because of a mistaken belief that the case was scheduled for hearing on 11th November 2020 following the misleading information he received from the learned Advocate Kimomogoro, Mr

Sood submitted that in the absence of an affidavit sworn by Mr Kimomogoro, Mr Kobas's contention aforesaid is a hearsay which is not admissible in evidence. To cement his argument Mr Sood cited the case of **Sabena Technics Dar Limited Vs Michael J. Luwunzu, Civil Application No. 4351/18 of 2020** (unreported) in which the court said the following;

".....likewise , in Benedict Kimwaga it was observed that if an affidaivit mentioned another person, that person must swear an affidavit , otherwise it will be hearsay"

With regard to Mr Kobas's argument that he was not able to enter appearance in Court on 10th November,2020 because he was sick, Mr Sood conceded that sickness is a sufficient ground which can move this court to grant the orders sought. However, he contended that the issue here is not only being sick but whether the learned Advocate was diligent enough to notify the Court and the respondent's counsel about his sickness. He went on submitting that there is no dispute that Mr Kobas neither notified the court nor the respondent's advocate about his alleged sickness. He insisted that advocates have the responsibility of being diligent when handling cases entrusted to them by their clients, failure of which they compromise their client's interests. He maintained

that the applicant's advocate was not diligent.To cement his arguments he cited the case of **Mohamed Iqubal Vs Esrom M. Maryogo , Civil Application No. 141/01 of 2017** (unreported) and **Maro Machange Maro Vs Augustino Katikiro & another , Civil Appeal No.18 of 2019,** (unreported) in which his Lordship Masaju, J said the following;

"Since the advocates are engaged in order to represent and appear for their clients who are in most cases laymen, their timely appearance in Court cannot be over emphasized here. Their no appearance in Courts for whatever reason, should be formally made known to the courts in time lest the courts, so rightly , in pursuit of control of proceedings in line with procedural law gives adverse orders against the defaulting party as it was the case in this matter. That being the case, the good reason , if any for non appearance of the parties in person or their advocate , representative and agents must be strictly proved before the Court in order to check either abuse of legal process or unnecessary delay of Justice_"

Mr Sood did not agree with Mr Kobas's stance that advocate's negligence cannot be imputed to his client. He contended that the laxity exhibited by the applicant and his advocate in this matter is not

acceptable in law. The applicant was duty bound to make a follow up of his case despite the fact that he engaged an advocate to represent him in Court, but did not do so and his advocate failed to discharge his duties diligently. To buttress his arguments he cited the case **of Maro Machange (Supra)** and **Samna (T) Investment ltd Vs Fast Forward International, Misc Civil Application No. 752 of 2018,** (unreported).

With regard to Mr Kobas's concern that he was not notified of the change of the respondents' advocates, Mr Sood submitted that this arguments is an afterthought as it was not raised in the affidavits filed in support of this application, thus the same should be ignored.

Secondly, Mr. Sood submitted that Mr Kobas's argument that Mr. Kimomogoro was terminated from handling this matter is unfounded. To his knowledge, Mr. Kimomogoro had not been terminated from representing the respondents in this application. He insisted that Mr. kobas had a burden of proving his aforesaid allegations as required in section 110 and 111 of the Law of Evidence Act, but he has not discharged his burden of proof.

In addition, Mr Sood invited this court to consider the following in the determination of this matter; that Mr Kobas had never appeared in

Court in the said application No. 28 of 2019.He contended that the court's record speaks for itself and this Court may be pleased to draw adverse inference. The applicant's advocate has not addressed this Court on the reason for non appearance in Court of the applicant's officer on 25th August 2020 whereas in the previous session which was on 4th June 2020, the applicant's officer , namely Mr. Jumanne Dede appeared in Court and the case was fixed for mention on 25th August 2020 in his presence.

Lastly, Mr Sood argued that this application is technically designed to waste time and deny the respondents their right of benefitting from their legal entitlements. To cement his arguments he cited the case of **Yazid Kassim t/a Yazid Auto Electric Repairs Vs The Attorney General, Civil Application No. 354/04/2019** (unreported).

Having dispassionately analyzed the submissions made by the learned advocates, let me embark on determination of the merits of this application. It is a common ground that this court has powers to set aside the dismissal order made on 10th November, 2020 provided that it is properly moved by an application filed within the time prescribed by the law and the applicant adduces sufficient cause for his failure to

appear in Court on the date the dismissal order was made. In this application there is no dispute that this application is made within the time prescribed by the law and under the correct provisions of the law. The only issue which I am supposed to deal with is whether the applicant has adduced sufficient cause for his non appearance in Court on 10th November 2020 when application No .28 of 2019 was dismissed for want of prosecution.

Starting with the first reason advanced by Mr Kobas, which is mistaken belief that the application was fixed for hearing on 11th November 2020 following the information received from the learned Advocate Kimomogoro, upon perusing the print out of the calls made by Mr Kobas from MIC Tanzania PLC (Tigo) , I found out that the same is of no help to the applicant as it does not show the alleged conversation in which Mr. Kimomogoro told Mr Kobas that the case was scheduled for hearing on 11th November 2020. As correctly submitted by Mr. Sood, the position of the law is that if an affidavit mentions another person, the person mentioned therein has to swear an affidavit to substantiate what is deponed in the affidavit otherwise the same is hearsay.

Let me interpose here Mr. Kobas's contention that he was not notified on the change of advocates in this matter. That Mr. Kimomogoro who was representing the respondents is no longer representing them instead the respondents are represented by Mr. Sood. The Court's records show that this application was filed by the learned Advocate Emmanuel Sood of Faith Attorneys. The learned Advocate Kimomogoro has never appeared for the respondents in this case.Likewise, Mr Sood's contention that Mr Kimomogoro has never been terminated from representing the respondents in this matter is misconceived as Mr Kimomogoro has never appeared in Court to represent the respondents in this matter. The Court's records show that Mr. Kimomogoro was representing the respondents in Revision Application No.28 of 2019 which was dismissed on 10th November 2020. It has to be noted that this application is different from Application No.28 of 2019. However, it is true that it emanates from Revision application No.28 of 2019.

In his submission Mr. Kobas contended that Mr. Kimomogoro declined to cooperate with him, thus he was not able to obtain the affidavit from him. This shows that Mr. Kobas was aware that in order to substantiate his averment that he was misinformed of the hearing date by Mr. Kimomogoro he was required to file in court an affidavit sworn

by Mr. Kimomogoro. In fact the Court's records show that Mr. Kobas prayed for leave to file an affidavit sworn by Mr. Kimomogoro and the same was granted. Thus, his averment aforesaid remains a hear say and this court cannot accord it any evidential value.

However, without prejudice to what I have stated herein above, I have noted that the circumstances of this matter is unique as I will soon elaborate hereunder.

In this matter, the affidavit that is missing in substantiating what is deponed by Mr. Kobas concerning the alleged misinformation on the hearing date , is the affidavit of Mr. Kimomogoro. However , there is an affidavit sworn by the learned Advocate Henry Katunzi which basically supports Mr. Kobas's averment that he was acting under a mistaken belief that Revision No.28 /2019 was fixed for hearing on 11th November 2020. In his affidavit Mr. Katunzi deponed that he was requested by Mr. Kobas to appear in Court on 11th November 2020 so as hold his brief in Revision Application No.28 of 2019.

Upon going through the affidavit sworn by the learned Advocate Henry Simon Katunzi and the copies of the medical chit, the whatasap's print out of the message from Mr. Kobas's mobile phone , attached to the affidavit sworn by Mr. Kobas (annextures "E" and "F" respectively) , I

am convinced that Mr. Kobas requested Mr. Katunzi to attend to Court on 11th November 2020 so as to his holding his brief in Application No.28 of 2019, believing that the same was coming for hearing on that date. In their joint counter affidavits, the respondents disputed Mr Katunzi's averment that he came to court on 11th November 2020 as requested by Mr. Kobas, but they have not provided any information which could move this court to doubt what is deponed by Mr. Katunzi in his affidavit. It has to be noted that it is not of matter of disputing what is deponed by the other party by putting him/her to strict prove. What is required is to give information or facts contradicting what is deponed by the other party because in law an affidavit is evidence. That is the position of the law. In the case of **East African Cables (T) Limited Vs Spencon Services Limited, Misc. Application No. 61 of 2016,** this Court (Hon Mruma ,J) while discussing on the status of an affidavit and /or Counter affidavit in an application, made the following observations;

> *" In law affidavit and /or counter –Affidavit (as the case may be) is evidence .It is a Voluntary declaration of the facts written down and /or sworn to by the declarant before an officer authorized to administer oaths. Unlike pleadings (Plaint and written statement of defence and other pleadings) affidavit and counter affidavit are prima facie evidence of the facts stated therein.When a fact is*

stated on oath , it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn to or affirmed is not controverted , then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him /her is to swear a fact which tends to show that what he sworn to was false.Putting him to strict proof of the fact without giving your side of the story which you want to be believed , amounts to admission of that fact. A requirement of strict proof of the fact applies to pleadings in the suit (ie Plaint and written statement of defence , reply etc) not to affidavit and counter affidavit ....."

In my considered view, though , Mr. Kobas has failed to establish how he got the misleading information that Revision No. 28 of 2019 was fixed for hearing on 11th November, 2019, in my opinion that alone cannot change the vital fact that Mr. Kobas was acting under a mistaken belief on the date for the hearing which led to his failure to appear in Court on 10th November 2020. It has to be noted that the sufficiency of reasons depends on the matter at hand and the facts behind the same. As correctly submitted by Mr. Kobas sufficient causes are not exhaustive. It all depends on the circumstances of each case. [see the case of **Yusufu Same and another Vs Hadija Yusufu , Civil Appeal No. 1 of 2002**] (unreported)

Coming to the second reason advanced by Mr. Kobas that he failed to enter appearance in Court on 10th November 2020 because he was sick , it is the finding of this court that the same has been rendered redundant by Mr. Kobas's contention that he was acting under mistaken belief that the matter was scheduled for hearing on 11th November 2020. I am saying this because even if he would have not been sick, he would have not attended to Court on 10th November 2020 because he believed that the application was scheduled for hearing on 11th November 2020. Well, it can be taken to be a coincidence that on the 10th November 2020 he was sick too, but that cannot be a reason for his non appearance in court as he was not aware that the matter was scheduled for hearing on that date.

From the foregoing, I am convinced that Mr. Kobas did make efforts to follow up the application, unfortunately he got wrong information that the application was scheduled for hearing on 11th November 2019. I am of a strong view that it will not be in the interest of justice to ignore the efforts he made. And I think it is worthy pointing out here that the applicant's advocate was supposed to account for his failure to appear in Court on the date the application was dismissed not on the

previous dates when the application was adjourned. Therefore , non appearance of the advocate in the previous dates can move this court to deny the orders sought in this application if he manages to give sufficient reasons for his non appearance on the date the application was dismissed.

Lastly, I have gone through the cases cited by Mr. Sood. I commend him for his submission and am in agreement with all the principles of the law lied down in the cases he cited . However, with due respect to him, the cases he cited are distinguishable from this application as they have different sets of facts from the matter at hand. The same were for extension of time, therefore the major issue for determination by the Court in those cases was whether the applicants had adduced sufficient reasons for the delay in doing what they wanted to do. For instance, in the case of **Faimu Kamugisha** (supra) the issue for determination by the Court was whether the applicant had accounted for each day of delay in lodging the appeal to the High Court. The applicant was seeking for an order for extension of time for lodging his appeal to the High Court. The Court dismissed the application because the applicant failed to account for each day of delay. In the case of **Maro Machange** (supra) the applicant was seeking for an order for extension

of time to set aside a dismissal order, thus the task of the applicant was to account for the days of delay. In the case of **Samna (T) Investment Ltd** (supra), the applicant was seeking for an order for extension of time to file an appeal out of time.

In the upshot, it is the finding of this Court that the applicant has adduced sufficient cause for his failure to enter appearance in Court on the 10th November 2020.Therefore, I hereby set aside the dismissal order made on 10th November 2020. It is so ordered.

Dated this 16th day of November 2021

B.K.PHILLIP

JUDGE