

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT ARUSHA

MISC. LABOUR APPLICATION NO. 61 OF 2021

*(Arising from Revision Application No. 88/2019) originating from
CMA/ARS/MED/552/2019)*

BETWEEN

CHODAWU..... APPLICANT

VERSUS

NGORONGORO CONVERSATION AREA AUTHORITY.....RESPONDENT

JUDGMENT

Date: 26/9/2022 & 30/9/2022

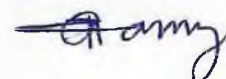
BARTHY, J.

The chamber summons along with the notice of application were brought at the instance of CHODAWU seeking to this court for the following orders;

- 1. That, this honourable court be pleased to re-enroll the Revision Application No. 88/2019 that was dismissed on 21st October 2021 before Honourable Kamuzora for want of prosecution due to non-appearance of the applicant.*

The application was found under Rule 36(1)(2) and (3) of the Labour Court Rules, G.N. 106 of 2007 and other enabling provisions of the law.

The application was supported by the affidavit of Mr. Asubuhi John Yoyo the counsel for the applicant.



The respondent contested the application by counter affidavit of sworn by Mr. Jumanne Dede Masangwa the Acting Legal Service Manager for the respondent.

The brief background of this matter is such that, the applicant had filed before this court an Application for Revision No. 88/2019 against the respondent. The matter was assigned to Justice Masara. Later on, the matter was re-assigned to Justice Kamala who dismissed the matter on 21st October, 2021 for want of prosecution.

Discontented with the said decision of the court, the applicant is before this court seeking to re-enrol the said matter.

During the hearing of the application, both parties dully enjoyed the service of the counsels. For applicant was Mr. Asubuhi Yoyo, where for respondent was Mr. Mkama Musalama.

I commend the great work by the counsel for each side on their oral rival submissions during the hearing of the application.

Mr. Yoyo the counsel for the applicant on his submission he prayed to this court to adopt his affidavit to form part of this submission. He went on to argue that, under Rule 36(1)(2) and (3) of Labour Court Rule GN. 106 of 2007 confers discretion powers to this court to re-enroll the dismissed matter.

He preferred to argue the application in two questions as follows;

- (i) Whether the application before this court have met the legal threshold required for it to be granted.
- (ii) Whether the counter affidavit contesting the application has any substance to deny the application.

He affirmed the first issue due to the following reasons.

He was assured that it is the requirement of the law that the applicant seeking for discretionary reliefs, he must place before the court sufficient material and explanation to enable the court to act judiciously.

He went on to submit that the applicant was attending the court for almost a year until there was a change of hand from Justice Masala to Justice Kamuzora: Who after taking over the file she ordered the parties to be notified.

He added that the parties had no knowledge there was the change of justice. The applicant banked on Honorable Masara whose presence and absence could be monitored by far, as he was also serving at the African Court of Justice. He insisted that the same misguided the parties not to appear and it was prompted by conduct of the court.

It was his firm argument that, the parties were to be dully notified to appear before the court to enhance justice and ensure the parties were not victimized. But he claimed, on this matter the parties were not notified.

On the second question as to the whether the counter affidavit has any merit, Mr. Yoyo submitted that, the parties were not notified on the change of hands of trial judge. The situation would have been different if the parties were notified.

He argued the proceedings were clear that, neither party had appeared due to predicament the parties had faced.

He concluded by citing Act No. 3/2019 on the principle of overriding objective which advocates for substantive justice. He maintained that in

this matter, the substantive justice should allow parties not to be victimized. He thus prayed to this court to consider the background of this matter and grant the application.

Responding to applicant's counsel submission, Mr. Musalama the state attorney prayed to adopt the counter affidavit sworn by Mr. Jumanne Dede Maswaga to be part of his submission.

He added that the issue of restoration or re-enrollment of the case is provided under Rule 36(1)(2) and (3) of the Labour Court Rules which is within the discretion of the court. In order for the court to exercise that discretion judiciously the applicant must adduce sufficient reasons of which the court can rely on.

Mr. Musalama thought that no sufficient reason was adduced by the applicant's council worth for this application to be granted. On the claim that when it was perceived Justice Masara was not around, then the applicant's council took the advantage to attend the religious matter (*makambi*) for the whole week, it needed the proof and the court ought to have been informed.

It was further contended that the applicant had the duty to make follow up on the status of case in person regardless the fact that they had employed the advocate. This principle is well stated in the case of **Lim Hna Yung ana another v. Lucy Treasas Kristensen**, Civ Appeal 219 of 2019 CAT at Dar es Salaam (Unreported).

Mr. Musalama went on to argue that, the counsel for the applicant as the officer of the court, was not performing his duty which amounted to negligence on his party. Therefore the lack of diligence on the advocate or the party cannot be the ground to re- enroll or restore the application.

Backing up the arguments there was the case of **Kambona Charles (as the administrator of the Estate of Late Charles Pangani v. Elizabeth Charles**, Civil Application No. 529 of 17 of 2019 CAT at Dar es Salaam.

Addressing the question of change of trial judges, it was said not to be a reason to warrant this court grant the application. The change of judges did not change the dates of the case. Mr. Musalama added that, the parties will not know the changes unless they appear before the court.

He was of the firm view that there is no law that requires the successor judge to inform the parties on the date, the duty is to inform them on the reason for re-assignment.

He went on to state that on the counter affidavit by the applicant clearly shows he had failed to appear to contest the application. See the case of **Eugeina Thobias Mihiga v. Rachel Anthony**, Misc. Labour App. 555 of 2022 High Court Land Division at Dar es salaam, the matter was dismissed for failure to adduce good sufficient cause.

In consideration of their arguments, Mr. Mukalama prayed to this court to dismiss the application without costs for failure of the applicant to adduce good, sufficient cause to warrant this court grant the application.

Mr. Yoyo on his rejoinder submission he firm argued that, the succession of trial justices was argued out of context of this case. He also stated that there was no appearance on the honest belief that the judge was absent. He insisted on the parties to have not been notified on succession of trial judges, as the respondent did not appear as well.

On the cited three case authorities none of them was said to fit with the circumstance of the case before this court, that is to say the parties were ordered to be notified and the parties were not notified.

The reference in **Kambona's case and Lin Han Yung** (supra) they were said to be distinguishable to this application because each case is determined on its own circumstances.

With respect to this application, it was said that, it is on the discretion of this court to find there was sufficient good cause or not. He further rejoined that the absence of the party and the advocate was based on the honest belief that the judge was away. He concluded by saying that, it is upon this court to measure if there was a good sufficient reason on the honest belief that the judge was away against the one who absented without any excuse.

The court having heard the rival submissions of both sides, I commend the learned counsel of both sides for their valuable contribution. The court will therefore proceed to determine this application with the issue;

Whether the applicant has provided satisfactory explanation for the court to allow the matter to be re-enrolled.

The application for re-enrollment of the Revision Application No. 88 of 2019, follows the dismissal order made by this court for want of prosecution.

The application is found under Rule 36(1) of the Labour Court Rules, G.N 106 of 2007 which provides;

36(1) where a matter is struck off due to absence of a party who initiated the proceedings, the matter may be re-enrolled if that party

*provides the Court with **satisfactory explanation** by an affidavit, for his failure to attend the Court. [Emphasis is supplied].*

The emphasis of establishing satisfactory explanation for the matter to be re-enrolled was also stated by this court in the case of **Grobal Publisher & General Enterprises Ltd V. Luqman Maloto**, Miscellaneous Application No. 168 Of 2020, High Court of Tanzania Labour Division at Dar es salaam, making reference to the emphasis made in the case of **Tanzania Postal Bank Dar es salaam v. Thomas Edward Gambo**, Miscellaneous Application No. 152 of 2012, High Court Labour Division, at Dar es salaam (Unreported), where the Court held that;

It is true that a matter dismissed for want of prosecution can be stored but only if the party adduces sufficient grounds for the alleged absence.

Going through the affidavit of the counsel for the applicant he deposed that Revision Application No. 88 of 2019 was first assigned to Justice Masara. After a couple of adjournments, on 7/9/2021 the counsel for the applicant learned that Justice Masara was absent. He therefore took off to attend a religious camp meeting famously known as 'Makambi'.

It was further deposed that they were not notified that there was re-assignment of the matter to Justice Kamuzora until they made a follow up and learned the matter was dismissed.

To amplify this facts, Mr. Yoyo had stated that he took advantage of Justice Masara to be away and go for spiritual meeting without knowing the matter was re-assigned, as both parties were not notified on the change of judges therefore. The dismissal order was made in the absence of both parties.

Mr. Musalama resisted the application stating that the counsel for the applicant was negligent and the facts adduces were not sufficient to warrant the application to be granted. He added that the counsel for the applicant had no proof of attending the spiritual meeting and he never informed the court. Also, the applicant was obliged to appear before this court apart from their counsel.

Although the evidence made by Mr. Yoyo the counsel for the applicant is wanting, as to how he learned about Justice Masara being was away without the proof of the affidavit of the person who had informed him. But also, as rightly pointed by Mr. Musalama the learned state attorney that, there was also no proof of the attendance of religious meeting camp as there was no letter to inform the court over the same.

However, one thing is common from both sides that, there was the change of judges and none of the party had appeared before Justice Kamuzora until the matter was dismissed. This somehow hints that the parties were not notified.

I find that it was important for the parties to be informed there was change of judges on this matter to enhance justice. As the record of the trial court (attached to the affidavit) do not show that the service of the summons requiring the parties to appear was affected to afford the right of audience before the successor judge.

Addressing the issue of the parties not being communicated on court's business this court held in the case of **Iddy George v. MWITA Rogeko Tyenyi**, Misc. Land Application No. 3 of 2020, High Court at Musoma, the court held that;



I find that there was miscommunication on the venue of hearing of the appeal. This is because, it was not proved that, parties were duly notified of the change of venue, either in advance or on the hearing date. In such a case, it will be unjust to impute the judiciary administrative issues or inefficiency into the applicant. In other words, the applicant cannot be held responsible for failure to appear at the Resident Magistrate's Court of Musoma if he was not informed of the change of venue.

In the same vein, I find that the failure of the court to notify the parties on the changes of the judges will be prejudicial in the delivery of justice. From what has been stated above, I find that the application has the merit. Therefore, the dismissal order of Revision Application No. 88 of 2019 is set aside and the matter be re-enrolled and proceed from where it ended.

It is so ordered.

DATED at Arusha this 30th September, 2022.



A handwritten signature in blue ink, appearing to read "G.N. Barthly".

G.N. BARTHY
JUDGE
30/9/2022

Judgment delivered in the presence of Mr. Moffat Seth holding brief of Mr. Asubuhi Yoyo the counsel for the applicant and in the absence of the respondent and his counsel.