

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA

MISC. LABOUR APPLICATION NO. 01 OF 2021

KATAVI & KAPUFI LIMITEDAPPLICANT

VERSUS

- 1. KULWA DOMICIAN YUSUFU.....1ST RESPONDENT**
- 2. AMBOKILE ASALILE MWAKAPAFU.....2ND RESPONDENT**
- 3. GRIBERTH ALPHONCE KIPETA.....3RD RESPONDENT**
- 4. CHARLES GERVAS RUPIA.....4TH RESPONDENT**
- 5. JOHN KASIMBA NETA.....5TH RESPONDENT**
- 6. RICHARD REMMY.....6TH RESPONDENT**
- 7. PETER EVODIUS NGOMEN.....7TH RESPONDENT**
- 8. STEVEN CHARLES KATOTO.....8TH RESPONDENT**
- 9. OMARY ABAS CHUNDO..... 9TH RESPONDENT**
- 10.PHILIPO ROBERT MYEKEMI..... 10TH RESPONDENT**
- 11.ALBERT BONIPHACE KIFUNDA..... 11TH RESPONDENT**

RULING

Date of Last Order: 08/02/2021

Date of Ruling: 12/ 04/ 2022

NDUNGURU, J

The applicant above named, filed the present application seeking to set aside the order dated 09th February 2021 before Hon Mkeha, J which struck out Labour Revision Application No. 7 of 2020 for want of prosecution. The application is made under section 91 (3) of the Employment and Labour Relations Act, No. 6 of 2004 Rules 38 (1) (a) and

(c), 38 (2) and 55 (1) and (2) of the Labour Court Rules, 2007 GN. 106 OF 2007. The application is supported by an Affidavit of Advocate Patrick Toyi Kaheshi.

On 29th April 2021 the respondents' representative filed a notice of preliminary objection against the said application on three grounds. First the application is incompetent due to improper and wrong citation of the law. Second, that the affidavit of the applicant is defective due to his failure to describe the addresses of parties. Third, there are no sufficient grounds for the application and four, there are no merits on the grounds of the application.

The matter proceeded by way of written submissions. The applicant was represented by Mr Kipesha learned Advocate who held brief Mr Patrick Kahesha who was sick whereas the respondents were represented by 3rd respondent who also prayed for the application to be disposed of by written submissions. Mr Kipesha conceded.

However, the respondents did not attempt to argue the notice of preliminary objection in their written submission, thus it can be said they abandoned the objection.

Arguing in support of the application Mr Patrick Kaheshi adopted the affidavit sworn by himself to form part of his submission. He submitted

that the applicant acted diligently and promptly within prescribed time in filing the application for setting aside the struck-out order upon acquiring knowledge of the same. It was submitted that the dismissal order was delivered on 10th February 2021 and the application was filed on 16th February 2021 within the prescribed time.

He further submitted that the applicant had been appearing in court when the court premise was at Mkoani area. That he was not aware that the High Court premise has been under construction for several months, therefore shifted to another area called Kanondo round-about. He submitted that since the High Court was at Kanondo he never came to Sumbawanga. It was further submitted that , on 21st May 2020 the matter came for mention before Hon Mrango, J with a view of ascertaining whether call for records has been brought to CMA. The matter was fixed for hearing on 24th June 2020 and the same was assigned to Hon Mashauri, J. On the same date the matter was called to the Hon Deputy Registrar as Hon Mashauri, J was transferred to Mwanza. The matter was then fixed for hearing on 22nd July 2020 whereas the records were not brought and the order notifying the parties were entered. On 31st August 2020 the applicant requested Advocate Sanga to hold brief on behalf of Patrick Kaheshi and the matter was fixed on 10th November 2020. He

informed the court of his sickness through the letter, advocate Sanga appeared on his behalf. On 9th February 2021 when the matter was struck out after coming for hearing he was at Sumbawanga. Since he was not familiar with Sumbawanga he went at the High Court at Mkoani area, but the premise had already shifted to Kanondo junction. He did all the effort to attend the court, unfortunately after arrival he found the matter has been struck out for want of prosecution.

Mr Kaheshi went on submitting that mistakenly lead to believe and labouring under mistaken belief and fact in the circumstances of this case constituted good cause for setting aside the dismissal order and restore the application for hearing. To maintain his stance, he made reference to the case of **Bahati Musa Hamisi Mtopa vs Salum Rashid**, Civil Application No. 112/07 of 2018, unreported.

Mr Kaheshi submitted further that as he averred in his affidavit particular at page 7 and page 8 of the affidavit, there was intention of attending the matter at the High Court of Sumbawanga and he then travelled to Sumbawanga on 8th February 2021 by the bus called New Force. On 8th February 2021 he slept at Sumbawanga at the lodge called Sango's Lodge Annex. He argued that a distinction must be drawn between the negligence and mistakes committed by the party and those

committed by his advocate, he referenced to the case of **Bahati Mussa Hamis vs Salun Rashid** (supra). He also said the position was adopted to the case of **Githere Kimungu** [1976-1985] 1 EA 101.

He finally concluded that the reasons he advanced constituted sufficient cause warranting this court to exercise its discretion in setting aside the struck-out order and restore the application for hearing inter parte for the interest of justice.

Responding to the application the respondents' representative a national organiser (TAMICO), Benjamin Daudi Dotto adopted the notice of opposition and counter affidavit, however as hinted above he failed to discuss and submit on the preliminary objection. Mr Dotto submitted that it was their position and view that the applicant has failed to advance sufficient cause for the court to set aside the dismissal order. The reasons behind being that the applicant relied on mere explanations rather than proving the circumstances which prevented him to appear before the court.

He stated that the factors to be considered in determination of the principle of good cause was defined in the case No. 2014/22984, unreported dated 21/05/2018, High Court of South Africa between

members of the executive council: Health and Social Development, Gauteng Province and Mthimkulu, Daphine Busisiwe.

It was his further submission that the discretion of the court, the degree of lateness to appear before the court, the explanations therefore, the prospects of success, the importance of the case and the respondents' interest in finality are very important factors in determining whether the applicant has advanced good cause to warrant the setting aside of the court order. He added that the applicant has only relied on the explanations therefore but he has failed to prove strong contentions regarding the other described factors.

Finally, it was their view and position that the applicant has failed to provide good cause to enable the court to set aside the court order dated 9th February 2021. Thus, prayed for the application be dismissed for lack of merit.

From the submission of the parties, court records, I find the key issue for determination is whether the application has merit.

Turning to the point at issue, as stated above in the submission, the applicant is seeking restoration of its application for revision which was struck out on 09th February 2021 in Labour Revision application No. 7 of 2020 for want of prosecution. According to the record, in that application

the applicant had applied for revision of the decision of the District Land and Housing Tribunal for Katavi. In the application for revision which is sought to be restored, the applicant intends to challenge the decision of District Land and Housing Tribunal for Katavi.

Now thereof, in this application, the applicant's advocate in his averment in the affidavit he submitted that the applicant being aggrieved with an award in labour dispute No. KTV/CMA/3/2019 in the Commission for Mediation and Arbitration at Katavi filed Revision No. 7 of 2020 in this court which was assigned to Hon Mashauri, J and was fixed for hearing on 24th June 2020, however on the very date the parties were absent and the order for notifying the parties were entered. That on 24th June 2020 the Revision No. 7 of 2020 was adjourned before Hon. Mutaki, DR and the matter was assigned to Hon. Mkeha, J and the parties were absent. The order to notify the parties were entered, however he was not notified and the matter was fixed for hearing on 22nd July 2020. That on 22nd July 2020 the matter was before Hon Mkeha, J and the parties were absent and the order for calling for records and notice to the parties were entered, however he said the parties were not notified. The same were fixed for hearing on 31st August 2021. That on 31st August 2020 the matter came for hearing, however Advocate Sanga held a brief of the applicant's

advocate who was sick and the respondent was also absent. The matter was fixed for hearing on 10th November 2020. That on 10th November 2020, the matter was called on, however all the parties were absent and he wrote an adjourning letter as he was attending several criminal cases (pro bono) and the matter was scheduled for hearing on 9th February 2021. That on 9th February 2021 the matter was called in the absence of the applicant and the presence of the 1st respondent and 6th respondent and the matter was struck out for want of prosecution. He submitted that he was aware of the date fixed for hearing and he travelled from Dar es salaam to Sumbawanga to attend the case which was struck out. On the material date he was at Sumbawanga, but as a result of confusion of reallocation of the court premise he failed to appear on time. That he came to know of the existence of the order that has been struck out on the same date when he arrived to the court but very late.

Thus, it is apparent from the applicant's affidavit and the records availed to the court that the applicant's advocate was very late to the court premise on 9th February 2021 due to confusion of the actual premise the High Court was situated.

However, in their counter's affidavit the respondents strongly disputed the reasons as advanced by the applicant's advocate, he said the

same did not show strong and sufficient reasons for the court to set aside the order and restore the same. They stated that the applicant just relied on mere explanations rather proving the circumstances which prevented him to appear before the court.

As a matter of general principle, it is in the discretion of the Court to restore the matter which has been struck out for want of prosecution. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrary.

It is noteworthy that rule 38 (1) (a) and (c), 38 (2) and 55 (1) and (2) of the Labour Court rules cited as an enabling provision for this application is explicitly circumscribed the power to set aside an order and restore of an application that had been struck out in the absence of any party affected by it. For easy of reference, I extract the said rule thus;

"(1) The Court may, in additional to any other powers it may have, on its own motion, set aside, rescind, or vary any order or judgement if such order or default judgement: -

(a) Was erroneously sought or granted in the absence of any party affected by it upon showing good cause in accordance with sub rule (2)

(b) (b).....

(c) Was granted as a result of mistake common to the parties or fraud committed by any party.

(d) 38 (2) Subject to the provisions of sub rule (1), any affected party or person may, within fifteen days after acquiring knowledge of an order or default judgement granted in the absence of that party, apply on notice to all interested parties to set aside, vary or rescind the order or default judgement and the Court may, upon good cause shown, make such orders as it deems fit."

According to paragraph 7, the struck-out order now sought to be challenged was given on 9th February 2021. The applicant's advocate has availed to this court the EFD bus Ticket and the Lodge receipt as a proof that on the very last date when the matter was fixed for hearing and then struck out for want of prosecution, he was actually at Sumbawanga Town, but for reasons he advanced in the affidavit as confusion as to the exact venue of the court premise and the fact that he was not familiar with Sumbawanga Town made him to be late at the hearing of the matter. In that regard, I find the applicant had an intention to prosecute the matter before this Court.

Having realised the application was struck out for want of prosecution, the applicant's advocate filed the present application seeking to set aside the struck-out order on 19th February 2021 which was nine (9) days elapsed from the date it was struck out which was within the prescribed time by the law.

In view of the above, I find also there is justifiable reasons for the applicant's application to set aside the order and restore the application for revision. In the result, I set aside the order striking out Labour Revision Application No. 7 of 2020 and thereof for the interest of justice I restored the same for the parties to be heard on merit. No order is made as to costs.

It is so ordered.




D.B. NDUNGURU

JUDGE

12/04/2022