

IN THE HIGH COUR OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 114 OF 2020

BETWEEN

RENATUS MABEYO.....APPLICANT

AND

NAFCO OIL LIMITED.....RESPONDENT

RULING

Date of Last Order: 03/08/2020

Date of Ruling: 11/12/2020

A. E. MWIPOPO, J.

The Applicant namely **RENATUS MABEYO** filed the present application for Re admission of Revision No. 633 of 2019 which was dismissed by this Court on 23rd March, 2020 for want of prosecution. The application is supported by the affidavit of Burton Mayage, Advocate representing the applicant. The Affidavit contains in paragraph 4 statement of legal issues arising from material facts. The issues are follows:-

1. Whether failure for the Counsel for the Applicant to prepare for hearing was due to her own negligence.
2. Whether it was proper for the Applicant to be punished for a mistake committed by his or her Advocate.

The hearing of the application proceeded by way of written submissions following the order of the Court.

It was submitted by the Applicant's Counsel namely Burton Mayage that the application was dismissed due to the failure of Advocate Gema Mrina appearing for the Applicant to proceed with hearing. The Counsel did not prepare herself for hearing because Advocate Burton Mayage who appeared on the last date when the matter was adjourned noted by mistake that the matter was coming for mention and that she was not aware of the facts of the case. Advocate Gema Mrina failed to prepare for the reasons that she travelled to Rombo, Kilimanjaro to attend burial ceremony of her father in law. When she returned to the office she was the only Advocate available in the office and she decided to attend to Court believing that the matter was scheduled for mention.

The Applicant's Counsel further submitted that the Applicant is innocent and the mistake was done by his Advocate. Dismissing his application is punishing him for the action done by his Advocate which is injustice, unfair and inequitable. The Applicant should not be punished for errors committed by the Advocate and more specifically where error is within the domestic affairs of the Advocate. This position was held in the case of **Ghania J. Kimambi vs. Shedrck Ruben Ng'ambi**, Misc. Application No.

692 of 2018, High Court, Labour Division, at Dar Es Salaam, (Unreported). The Court is encouraged not to consider simple mistakes which does not go to the root of the case as there will be no damages to the other party. To support the position the Applicant cited the case of **Githere vs. Kimungu**, (1976 – 1985) EA 101 (CAK). The Applicant prayed for the application be allowed with cost.

Replying to the Applicant submission, the Respondent's Counsel namely Felix Edward Makene submitted that Advocate Gema Mrina failed to proceed with hearing as she was not prepared because Advocate Burton Mayage who appeared on the last session recorded in the diary that the matter was scheduled for mention. This is not sufficient reason for re-admission of the application. There is no proof from the diary to show that the Court that Mr. Burton erred to record that the matter was scheduled for mention. The Applicant have burden to prove the existence of the allege facts as per section 110 (1) and (2) of the Law of Evidence Act, Cap. 6 Revised Edition, 2019. The assertion that Advocate Gema Mrina failed to prepare herself for the reason that she went for burial ceremony of her father in law in Rombo, Kilimanjaro is an afterthought as the same was not disclosed by Advocate Gema Mrina before the presiding Judge. The

Applicant's Counsel failed to prove as to when Advocate Gema went to burial ceremony and when she returned back.

The Respondent Counsel submitted further that the Applicant's Notice of Representation filed in Court on 26th July, 2019 stated that advocates Jimmy Mrosso, Burton Mayage and Gema Mrina are legal representatives for the Applicant. Since both were aware of the case then all of them were supposed to be prepared for hearing. The Applicant's argument that it is injustice to punish the Applicant for the mistake done by the third party is misconception as advocate – client relationship cannot be regarded as third party. It is a principal – agent relationship and their liability are legally connected.

The Respondent distinguished the case of **Ghania J. Kimambi vs. Shedrack Ruben Ng'ambi** cited by the Applicant that the cited case caters for non-appearance by an advocate while the case at hand the Advocate was present before the presiding Judge but refused to proceed with hearing without affording sufficient reasons. The Respondent averred that the Applicant has lost interest to litigate and he prayed for the application be dismissed with cost.

In rejoinder, the Applicant's Counsel retaliated his submission in chief and emphasized that Advocate Gema Mrina returned to the office on 23rd March, 2020.

From submissions, the issue for determination is whether applicant has provided satisfactory explanation for the court to allow the matter be re-admitted.

It is a trite law that the Court may re-admit the dismissed case for want of prosecution where the Applicant has provided to the Court sufficient explanation for the failure to prosecute. In the present case, the Applicant Counsel namely Gema Mrina, who was among the representative listed in the Notice of Representation filed in Court by the Applicant on 26th July, 2019, failed to prosecute on 23rd March, 2020, for the reason that she was informed by Advocate Burton Mayage who appeared on the last date that the matter was coming for mention. The record of the Court shows that Advocate Mrina informed the Court the matter was assigned to Mr. Burton Mayage and prayed for adjournment. The Court dismissed the revision application for the reason that Ms. Mrina is one of the person mentioned in the Notice of Representation as among the representatives for the Applicant and that the Court was not told as to why the Counsel who appeared on the

last date was not in Court to proceed with hearing. It was the duty of the Applicant to prove that the failure to prosecute the case was caused by satisfactory explanation.

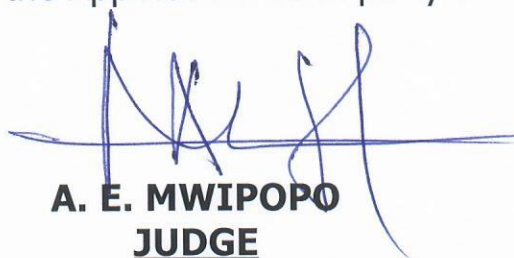
The Applicant has submitted two reasons for the failure to prosecute their case on the hearing date. The first reason is that the Advocate Burton Mayage who appeared on the last session when the matter was adjourned noted by mistake that the matter was coming for mention. However, as submitted by the Respondent Counsel there is no exhibit to support the Applicant's assertion that Mr. Burton Mayage erred to record that the matter was coming for mention on 23rd March, 2020, which was the date fixed by the Court for hearing. In the proceeding, Ms. Mrina informed the Court that the matter was assigned to Mr. Burton and that she was informed that the application was coming for mention. This explanation is not sufficient since the Applicant failed to go a further steps to show the Court the entry in the diary to prove the alleged mistake.

The second reason for the failure to prosecute the application is that Advocate Gema Mrina failed to prepare for the reasons that she travelled to Rombo, Kilimanjaro to attend burial ceremony of her father in law. Also, there is no evidence at all to show that she travelled to Rombo, Kilimanjaro

to attend burial of her father in law. This reason was not adduced before the Court on the hearing date before the presiding Judge as Ms. Mrina stated that the matter was assigned to Mr. Burton. Thus, I agree with the Respondent's submission that this is an afterthought to try to rescue the matter.

This Court has discretion to re-admit the case dismissed for want of prosecution where there is satisfactory explanation regarding the failure of the Applicant to prosecute his case and nothing else. It is so unfortunate for the Advocate who has been appointed by the client as his agent appears in Court on the hearing date and failed to proceed with hearing for unsatisfactory reasons. I'm of the same opinion with the presiding Judge in Revision No 633 of 2019 that it appears that the Applicant lost interest to prosecute the matter.

Therefore, I find that the Applicant has failed to provide this Court with satisfactory explanation for the failure to prosecute its case on the hearing date and I hereby dismiss the Application. Each party to take care of its own cost of the suit.



A. E. MWIPOPO
JUDGE
11/12/2020