

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 168 OF 2020

BETWEEN

GROBAL PUBLISHER & GENERAL ENTERPRISES LTD.....APPLICANT

VERSUS

LUQMAN MALOTO.....RESPONDENT

RULING

Date of Last Order: 18/03/2021

Date of Ruling: 21/05/2021

A.E. MWIPOPO, J

The applicant namely Global Publisher & General Enterprises Ltd filed the present application to set aside the dismissal order dated 21st Day of April, 2019 and re-enroll the Misc. Application No. 621 of 2019. The Applicant is praying for the following orders:-

- (1) That the Honourable Court may be pleased to hear and re-enroll Misc. Application No. 621 of 2019 between Global Publisher and General Enterprises Limited and Luqman Maloto given by Hon. Justice S. A. N. Wambura at Dar Es Salaam on the 21st day of October, 2019.

(2) That the Honourable Court may be pleased to call the Respondent and show cause why the matter should not be re-enrolled.

(3) Any other reliefs that the Honorable Court may deem fit and just to grant.

The application is supported by the affidavit of Emmanuel Elias, Applicant's Personal Representatives. Opposing the application, the Respondent's advocate namely Burton Yoram Mayage filed counter affidavit.

At the hearing, the Applicant was represented by Mr. Emmanuel Elias, Personal Representative, whereas the Respondent was represented by Mr. Mayage Burton, (Advocate). The hearing of the application was by way of oral submissions.

Arguing in support of the application, the Applicant's Personal Representative submitted that on the day when the matter was dismissed he was within the Court premises queued to enter in the Court. By the time he entered in the Judge's chamber he was informed that the matter has already been dismissed. He stated that he communicated with Respondent's Counsel that he was around the Court premises and he was

informed what made him to arrive late in the Judge's chamber. Since the Respondent's Counsel was already informed, he failed to understand why the Respondent's counsel did not inform the Court on the same. The Personal Representative submitted that the conversation between himself and the Respondent's counsel was admitted by the Respondent. To support his position, he cited the case of **Sadru Mangalji vs. Abdulaziz Lalani and Two Others**, Misc. Appl. No. 126 of 2016, High Court of Tanzania, Commercial Division at Mwanza, (Unreported). It was further argued by the Applicant's Representative that since the respondent is not going to suffer any reputable loss if the matter will be re-enrolled, he prayed for the matter to be enrolled.

Replying to the applicant submissions, Respondent's Counsel submitted that the Applicant failed to adduce sufficient explanation for the Court to restore the application. The Applicant has a duty to give a satisfactory explanation for the Court to grant an order requested under Rule 36(1) of the Labour Court Rules, G.N. No. 106 of 2007.

The Counsel averred that the reason for the application as found in paragraph 5 of the Affidavit is that he failed to appear due to the tense situation following the Covid-19 pandemic which made the means of transport within the city to be difficulty but he manages to arrive at the

Court within time. However, on the material date there was a tense situation at the Court which hindered the Applicant to appear before the Judge. The Counsel stated that Applicant's Personal Representative presence in the Court premises does not amount to appearance before the Court. In strengthening his argument he cited the case of **Phares Wambura and 15 others vs. Tanzania Electric Supply Company Limited**, Civil Appeal No. 186 of 2016, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported).

It was further submitted by the Respondent's Counsel that the Applicant did not mention the name of the Court Clerk who informed him on the hearing date that the matter was dismissed and even the alleged Court Clerk did not take an oath and his/her affidavit does not form part of this Application. In the case of **Phares Wambura and 15 others vs. TANESCO** (Supra), it was held that this is a mere speculation without proof.

Lastly, the Respondent argued that if the applicant was within Court premises he would hear when the case was called and nobody could have stopped him to appear before the Court bearing in mind that on that day there was no tense situation at Court premises. He stated that the case of **Sadru Mangalji vs. Abdul Aziz Lalani and 2 others**, (Supra), cited by

the Applicant differs to the present application for the reason that the Applicant in the cited case was sick as he had a diarrhea while in the present case the Applicant was negligent. Thus, the Court should ignore the cited case. The Counsel prayed for the Application to be dismissed.

In rejoinder, the Applicant emphasized that on the material date there was a bucket of water where all persons entering Court premises needed to wash their hands and sanitize his/her hands before being allowed to enter in the Court. This is a sufficient reason for the Applicant to arrive late before the Court. He prayed for the Court to re-enroll the matter.

From submissions, the issue for determination in this application is whether applicant have provided the Court with satisfactory explanation for the court to allow the matter to be re-enrolled.

Rule 36 (1) of the Labour Court Rules, G.N 106 of 2007 provides for re – enrolment of the matter struck off due to absence of the Applicant. The rule provides that, I quote hereunder;

"Rule 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."

The above legal position was emphasized 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."

From above cited case, the Court have discretion to re - enroll the matter dismissed after being satisfied that the party have sufficient ground for the alleged absence. Therefore, it is well established principle that sufficient ground must be adduced for re-enrollment, and the one who initiate such application is placed on such duty to prove that the absence was not intentional and was for the reason out of his/ her control.

In the present matter Applicant have submitted that on the material date he failed to appear before the Judge on the hearing date despite the facts that he was in Court premises. The reason for non-appearance is that there was a queue to enter in the Court premises. In rebuttal, the Respondent argued that Applicant's personal representative presence in the Court premises does not amount to appearance before the Court and there is no evidence to prove that the Applicants representative was in Court premises.

The evidence available in record shows that the matter was fixed for hearing on 21st April, 2020 at 10.30 a.m. The matter was dismissed for non-appearance of the Applicant. The Applicant's stated in the affidavit that he arrived on time in the Court premises but there was a long queue in the gate of the Court which took almost 13 minutes to complete before he entered. When he reached the Judge's chamber he was informed by the Court Clerk that the matter was dismissed. The Applicant stated that after he arrived at Judge's chamber he was informed by the Court clerk that the matter has already being dismissed. But, the name of the Court Clerk was not mentioned and the Applicant did not take further step to ask the Court Clerk to swear an affidavit to confirm the story. In absence of the evidence on oath of the Court Clerk the Applicant's averments are just allegation without any proof.

Further, as it was submitted by the Respondent's counsel presence of the Applicant's representative in the Court premises does not amount to appearance in Court. The representative was supposed to appear before the presiding Judge in the time fixed for hearing of the matter. The allegation that there was long queue in the Court's gate which made him arrive late in the Judge's chamber has no merits since the Applicant knew the time to appear before the presiding Judge. Thus, he was supposed to

plan and arrange his timetable in order to appear before the presiding Judge within time. In the case of **Phares Wambura and 15 others vs. Tanzania Electric Supply Company Limited**, Civil Appeal No. 186 of 2016, CAT at Dar es Salaam where the Court held that: -

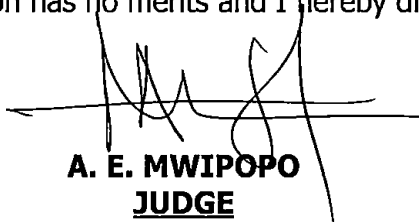
".....Mere presence of the party and/or his counsel in Court premises without physically appearing or being virtually linked with a presiding Judge or Magistrate on hearing date and time amounts to non-appearance".

Taking the above cited position, the mere presence of the Applicant's representative in the Court premises without physical appearing to the presiding Judge on the hearing date and time amounts to non-appearance. Thus, this reason have no merits.

The Applicant averred that he communicate with the Counsel for the Respondent that he was around hence it was not proper for the Counsel not to inform the Court that the Representative was in Court premises. The evidence available in the Applicant's affidavit shows that around 09:52 am the Applicant's representative received a call from the Respondent asking about the hearing date. Then, around 10:33 the Respondent Counsel sent him a text asking for his where about but he replied around 10:43 that he was in Court premises. This evidence does not show at all that the Applicant's Representative asked the Respondent's Counsel to hold his brief

or to inform the Court about his where about. Further, the evidence available shows that the matter was fixed for hearing at 10:30 a.m. The Applicant Representative sent a text to inform the Respondent's Counsel that he is in Court premises around 10:43 a.m., there is nothing to show that the text was received before the Court dismissed the matter. Thus, I'm of the opinion that the presence of communication between the Applicant's Representative and the Respondent's Counsel does not prove that the Applicant appeared in Court on the time on hearing date or the Respondent Counsel had duty to hold his brief or to inform the Court for his where about. Thus, I find that this reason is not sufficient.

Therefore, I find that the applicant failed to provide satisfactory explanation for the court to allow the matter to be re-enrolled. In the foregoing, the application has no merits and I hereby dismiss it.

A handwritten signature in black ink, appearing to be 'A. E. Mwiopo', is written over a horizontal line. The signature is stylized and somewhat illegible.

A. E. MWIPOPO
JUDGE
21/05/2021