

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

MISCELLANEOUS LABOUR APPLICATION NO. 555 OF 2020

(Originating from Revision No. 73 of 2019 of the High Court Labour Division at Dar es Salaam)

BETWEEN

REGINA THOBIAS MIHIGA..... APPLICANT

VERSUS

RACHEL ANTHONY..... RESPONDENT

RULING

Date of Last Order: 19/11/2021

Date of Ruling: 08/12/2021

I. Arufani, J.

This application emanates from the order of this court dated 10th November, 2019 which dismissed Labour Revision No. 73 of 2019 for want of prosecution. The application is made under Rule 24 (1), (2) (a), (b), (c), (d), (e) and (f), 24 (3) (a), (b), (c) and (d), 36 (1), (2) and (3) and 55 (1) and (2) of the Labour Court Rules, GN No. 106 of 2007, section 94 (1) (e) of the Employment and Labour Relations Act, Act No. 6 of 2004, [Cap 366 R.E 2019], Order IX Rule 9 (1) of the Civil Procedure Code, Cap 33 R.E 2019 and any other enabling provision of the law.

The application is supported by the affidavit sworn by Anthony Kombe, the applicant's personal representative and it was replied by the

counter affidavit sworn by Peter Joseph Lyimo, Learned Advocate for the respondent. The application was argued by way of written submission following the successful prayer made to the court by the applicant's personal representatives which was not objected by the counsel for the respondent.

The background of the matter as can be found in the record of the matter is to the effect that, the applicant was employed by the respondent as a cleaner from 16th March, 2016 at a monthly salary of 250,000/= and worked until 13th March, 2018 when her employment was terminated. Having being aggrieved by termination of her employment the applicant filed labour dispute before the Commission for Mediation and Arbitration at Kinondoni (hereinafter referred as the CMA) claiming for payment of one month salary in lieu of notice, leave payment, severance allowance and twelve months compensation basing on unfair termination of her employment.

The CMA ordered the dispute to be heard ex parte as the respondent failed to appear before the CMA and on 1st February, 2019 the CMA dismissed the claims of the applicant for want of merit. The applicant was dissatisfied by the ex parte award issued by the CMA in her claims and filed in this court Revision No. 73 of 2019 urging the

court to be pleased to call for the record of the CMA and revise the award issued in relation to her claims. On 10th November, 2020 the court dismissed the revision of the applicant for want of prosecution and now the applicant has filed the present application in this court urging the court to be pleased to set aside the dismissal order and restore the dismissed revision.

The applicant's representative stated in his submission that, the court failed to take into consideration that when the revision was dismissed for want of prosecution it was his first time to miss to attend the court. He prayed the court to adopt his affidavit as part of his submission. He argued that, on 21st October, 2020 he travelled to Mtwara to see his daughter who was sick. He said he called the applicant to inform her to appear in the court on 22nd October, 2020 when the matter was coming for hearing but unfortunately the applicant was out of Dar es Salaam.

He went on arguing that, he came to the court on 5th November, 2020 to follow the matter himself and he was told by the court clerk of Hon. Muroke, J. the matter had been scheduled for hearing on 10th November, 2020. He said on 10th November, 2020 when the matter was

coming for hearing his daughter passed away at Mtwara Referral Hospital and that caused him to fail to appear in the court.

He went on arguing that, on that date the applicant attended the court but she didn't hear when the parties were called by the court clerk and when she asked the court clerk about the matter, she was told the matter had already been decided. He said when the applicant went to see Hon. Muruke, J. she advised her to file in the court the application for restoration of the revision. He submitted that, the reason for his failure to attend the court was due the death of his daughter. He prayed the court to revise and set aside the dismissal order and restore the Revision No. 73 of 2019.

In his reply the counsel for the respondent prayed to adopt his counter affidavit as part of his submission in the matter. He argued that, it is a settled law that, an applicant seeking to set aside the order of the court dismissing any matter is required to furnish the court with sufficient reasons for none appearance. He argued that, the applicant's representative has not stated when he travelled back to Mtwara for funeral of his daughter and there is neither a bus ticket nor a death certificate attached in the matter to prove he travelled to Mtwara and he was bereaved by his daughter.

He argued that, although the applicant's representative argued the applicant was out of Dar es Salaam on 22nd October, 2020 when the matter was coming for hearing but he didn't state in his affidavit or submission he filed in this court as to where the applicant was. He argued that, although the applicant's representative stated when he came to follow up the matter on 5th November, 2020, he found the matter was coming on that date and told the matter had been adjourned until 10th November, 2020 but he didn't say where the applicant was, on that day.

He contended that, the argument that the applicant was present in the court on 10th November, 2020 but she didn't hear when the parties were called holds no water as physical presence in court's vicinity without appearing before a judge or magistrate is not appearance before the court. He supported his argument by using the case of **Phares Wambura and 15 Others V. TANESCO Limited**, Civil Application No. 186 of 2016 where the court held that, mere presence of a party or counsel in court premises without physically appearing or virtually linked with a presiding judge or magistrate on a hearing date and time amounts to non-appearance.

He went on arguing that, although the applicant's representative mentioned the name of judge's clerk as one Halma but the said court clerk never affirmed any affidavit to support what was said by the applicant's representative. He bolstered his submission by quoting the case of **Phares Wambura**, (supra) where it was in that circumstance there was a need for the court clerk to swear an affidavit to prove what was alleged by the applicant and his counsel. He argued that the court was right to dismiss the revision as it was found by the Hon. Muruke, J. that the applicant was appearing in the court reluctantly despite several court's orders.

He submitted that, if the application will be granted the respondent shall suffer in terms of time and legal expenses of engaging the advocate to represent her in the matter. He submitted further that, the applicant has failed to persuade the court to exercise its powers to grant her the orders sought in the application and prayed the application be dismissed for lack of merit. The applicant reiterated in his rejoinder what he argued in his submission in chief and stated he attached a bus ticket of travelling to Mtwara in his affidavit and the death certificate was not yet issued.

Having carefully considered the rival submission from both sides and after going through the record of the matter the court has found before going to the merit of the application it is proper for the purpose of putting the record of the matter right to state at this juncture that, the provision of Order IX Rule 9 (1) of the CPC cited in the application as one of the enabling provision of the law to move the court to grant the order sought in the applicant is not in existence and is not applicable in the present application.

The court has arrived to the above finding after seeing Rule 9 of Order IX of the CPC has no sub-rule 1 and Rule 9 of the CPC available in Order IX of the CPC is providing for setting aside an ex parte decree and not restoration of the matter dismissed for want of prosecution. To the contrary the court has found the provision of the law which was supposed to be invoked in the present application is Rule 3 of Order IX of the CPC. The court has found that, as the relevant provision of the law upon which the application at hand would have been made is in existence in the cited law the court can draw a leaf from the case of **Beatrice Mbilinyi V. Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020, CAT at DSM (unreported) where it was stated citing of a wrong provision of the law in an application is a slip of the pen. Although the stated principle of slip of the pen is not provided under the

CPC but the court has found it can resort into the principle of overriding objective provided under section 3A of the CPC to find the stated defect is curable under the stated principle.

Back to the merit of the application at hand the court has found that, as the application is for setting aside the dismissal order, the court has discretionary power to grant or refuse it. This discretion however has to be exercised judiciously and the important consideration is whether there is good or sufficient cause for setting aside the dismissal order. The above stated view of this court is basing on what was stated in the cases of **Meis Industries Limited and Others V. Twiga Bancorp**, Misc. Com. Cause No. 243 of 2015, HCCD at DSM and **Emelda Gerald V. MIC Tanzania Limited**, Revision No. 246 of 2018, HCLD at DSM where it was stated in the latter case that:-

"It is a trite law that restoration of the case is entirely in discretion of the court to grant or refuse it. This discretion however has to be exercised judiciously and the overriding consideration is that there must be sufficient cause for so doing. In order for sufficient cause to be determined there are factors to be taken into account including whether or not there is valid explanation for the non-appearance of the applicant during the scheduled hearing date, lack of diligence on the part of the applicant."

While being guided by the above stated position of the law the court has found that, despite the fact that the applicant's representative deposed at paragraph 3.1 of his affidavit and stated in his submission in chief that the court failed to take into consideration that it was the first time for the applicant to fail to attend the case but he is not supported by the record of the matter. The court has found the record of the matter and specifically the proceedings of this court shows the applicant and her personal representative failed to attend the court on 22nd October, 2020, 05th November, 2020 and 10th November, 2020 when the revision was dismissed for want of prosecution. Therefore, it is not true that when the matter was dismissed it was the first time for the applicant and her personal representative to fail to enter appearance in the matter.

The court has considered the argument by the applicant's representative that on 22nd November, 2020 he had travelled to Mtwara to see his daughter who was sick and the applicant was out of DSM but find that, as rightly argued by the counsel for the respondent in his submission it was not stated the applicant was in which specific place out of Dar es Salaam and caused her to fail to appear in the court. The court has also considered the argument that on 5th November, 2020 the applicant's representative came to the court and he was informed by the

court clerk that the matter had already been adjourned and fixed to come for hearing on 10th November, 2020 but find it was not stated why the applicant did not attend the court on the stated date if her representative had informed her, he had travelled to Mtwara to see his daughter who was sick.

The court has considered the further argument by the applicant's representative that he failed to attend the court on 10th November, 2020 as his daughter passed away and the further argument that the applicant was present in the court but she didn't hear when the case was called but find as rightly argued by the counsel for the respondent the stated arguments are not supported by any material evidence.

The court has found there is no travelling ticket for the applicant to attend the funeral of his daughter annexed in his affidavit. The bus ticket annexed with the affidavit is the ticket of 22nd October, 2020 while the alleged death occurred on 10th November, 2020. Although the applicant's representative stated in his rejoinder that he failed to annex the copy of death certificate of his late daughter with his affidavit as it was not yet being issued when the application was filed in the court but he didn't say why he didn't annex the copy of burial permit which is issued before funeral of a dead body with his affidavit.

The court has considered the argument that, the applicant was present in the court when the matter was dismissed but she didn't hear when they were called but find that fact is not deposed anywhere in the affidavit supporting the application. It is only raised in the submission of the applicant's representative. The position of the law is well known that submission is not evidence and it cannot be used in lieu of an affidavit. In addition to that, and as rightly argued by the counsel for the respondent there is no affidavit of the court clerk who informed the applicant's representative that the matter had already been adjourned up to 10th November, 2020.

The affidavit of the said court clerk of the judge who was presiding over the matter would have assisted to support the argument that the applicant was present in the court on the date when the matter was dismissed as the applicant's representative argued in his submission that she informed the applicant the matter had already been dismissed and thereafter the applicant went to the honourable judge who advised her to apply for restoration of the matter.

Notwithstanding what have been stated hereinabove the court has found the position of the law as stated in the case of **Phares Wambura** (supra) cited to the court by the counsel for the respondent

is very clear that, a mere presence of a party 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.

Basing on all what have been stated hereinabove the court has found there is no good or sufficient cause for using its discretionary power to restore the revision which was dismissed by the court for want of prosecution. In the upshot the application is dismissed for want of merit. It is so ordered.

Dated at Dar es Salaam this 08th day of December, 2021



I. Arufani

JUDGE

08 /12/2021

Court:

Ruling delivered today 08th day of December, 2021 in the presence of the applicant in person and in the presence of Ms. Angelina Mkinga, Counsel for the Respondent. Right of appeal to the Court of Appeal is fully explained to the parties.



I. Arufani

JUDGE

08 /12/2021