

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 375 OF 2020

BETWEEN

BEACH RESIDENCE LTD t/a RAMADA RESORT DAR ES SALAAM.. APPLICANT

AND

SALUM BAKARI MNYAMANI.....RESPONDENT

RULING

Date of the last order: 23/11/2021

Date of ruling: 13/12/2021

B.E.K.Mganga, J

On 26th August 2020 applicant filed this application seeking the court to set aside an order that struck out revision application No. 46 of 2019 issued by Hon. E.B. Luvanda, J, on 17th August 2020, and appoint a day for hearing of the said revision application.

The notice of application is supported by an affidavit of Dieter Prancher. In his affidavit, the deponent deposed that initially revision application No. 46 of 2019 was scheduled for mention on 25th August 2020, but on 14th August 2020, a summons was served on the applicant indicating that the application is scheduled for hearing on 17th August 2020. That, the summons was received by a registry officer in absence

of the counsel who was attending the said revision application as the counsel had travelled out of Dar es salaam. That, the advocate upon becoming aware of the order striking out application, made effort for restitution so that it can be heard on merit.

Respondent was untraceable as a result on 10th June 2021, the court issued an order for substituted served. On 26th July 2021, substituted service by publication was made through Mwananchi Newspaper. The application therefore proceeded by hearing the applicant alone.

In her submission, Ms Wivina Karoli, advocate for the applicant submitted that on the date revision application No. 46 of 2019 was scheduled for hearing, Mr. Amin Mziray, advocate was in Mbeya. She submitted that, the said revision application was scheduled for hearing on 17th August 2020, but summons were issued indicating that it was scheduled for hearing on 25th August 2020 in a special session. She submitted further that, when Mr. Amin Mziray appeared in court o 25th August 2020, he realized that the same was dismissed on 17th August 2020. When asked by the court whether there is an affidavit of the said Amin Mziray, she readily conceded that it was not attached to the

affidavit of Dieter Prancher. Counsel was quick to submit that Mr. Amin Mziray, advocate is now deceased. When further probed as to when the said advocate died, counsel for the applicant submitted that it was in October 2021.

I have examined the affidavit in support of the application and submissions made thereof. I have noted that the affidavit and submissions are in conflict. It was deposed in the affidavit in support of the application that initially revision application No. 46 of 2019 was scheduled for mention on 25th August 2020 but later on applicant was served with summons indicating that it is scheduled for hearing on 17th August 2020. In her submission, Ms. Karoli, counsel for the applicant, submitted that it was scheduled for hearing on 17th August 2020, but later on applicant received a summons showing that it was scheduled for hearing on 25th August 2020. In resolving this conflict, I take what is contained in the affidavit as that is evidence and leave aside submissions that, in law, are not evidence.

The reason advanced in the affidavit for restoration of revision No. 46 of 2019 that was struck out for want of prosecution and absenteeism is that, summons were served to the registry officer on 14th August 2020

indicating that the same was scheduled for hearing on 17th August 2020. That, the summons was received while the advocate who was handling the application was out of Dar es Salaam. In the affidavit, deponent did neither explain efforts that were taken to make sure that the advocate attends on the date fixed for hearing nor steps that were taken to inform the court on absence of her counsel. It seems after being served with notice of hearing, principal officers of the applicant sat on their chairs comfortably as bosses with their hands folded around their chest waiting for the court to follow their calendar and that of their advocate. Any court sensible to justice, cannot in any way, follow calendar of the parties. The court has to manage its calendar and determine matters before it. This has, for smooth administration of justice, to be done by taking into account calendars of the parties if they are available and if they come up with options that are intended to speed up hearing and not to halt the process.

In the affidavit in support of the application it was deponed that the summons was received by the registry officer in absence of the advocate. Neither the name of the registry officer who received the summons nor the name of the advocate who was handling the said revision application were disclosed. More so, there is neither affidavit of

the registry officer nor that of the advocate. It was further deponed that the advocate was out of Dar es salaam without disclosing the place he was. Disclosure of the place was important as it could have helped the court to assess whether there was possibility of the advocate to come back in Dar es salaam to attend hearing on 17th August 2020 or not. These non- disclosure of names and place was with a purpose, which is why, the name of the deceased advocate was disclosed during submissions. Whatever the case, that did not help the applicant because the application was made even before death of the said advocate.

Absence of affidavit of the registry officer who received the summons and that of the advocate who was handling the aforementioned revision application, has made all reference to them in the affidavit in support of the application to be hearsay. There is a litany of case laws to the effect that an affidavit which mentions another person is hearsay unless that other person swears as well. Some of the case laws to that effect are ***Sabena Technics Dar Limited v. Michael J. Luwunzu, Civil Application No. 451/18 of 2020***, CAT (unreported), ***Franconia Investments Ltd v. TIB Development Bank Ltd***, Civil Application No. 270/01 of 2020, ***Benedict Kimwaga v. Principal Secretary Ministry of Health***, Civil Application No. 31 of

2000, ***NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd***, Civil Application No. 13 of 2002 (all unreported). For that reason, the affidavit in support of the application falls short to adduce good cause that can enable this court to restore revision application No. 46 of 2019.

In the upshot, the application stands to fail and is hereby dismissed.



B.E.K. Mganga

JUDGE

13/12/2021