

**THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 379 OF 2021**

**BETWEEN**

**TROPICAL CONTRACTORS LIMITED..... APPLICANT**

**AND**

**SUMMARY DIGESKY AND 2 OTHERS..... RESPONDENT**

**RULING**

Last order 09/011/2021

Date of ruling 3/12/2021

**B.E.K. Mganga, J**

The applicant has filed this application seeking restoration of Revision application No. 387 of 2020 that was dismissed on 9<sup>th</sup> September 2021 by this court (Hon. Maghimbi, J). The application is supported by an affidavit of Ramadhan Msangi, the principal officer of the applicant. In the affidavit in support of the application, it was deponed that on 9<sup>th</sup> September 2021, Loy Sehemba, counsel for applicant failed to appear as she was attending her child on progressive

clinic and that Rose Mgallah, advocate who appears in the notice of representation has moved to Dodoma where she is now practicing.

The respondents filed a joint affidavit to oppose the application.

When the application was called for hearing, Roy Sehemba, advocate appeared and argued for and on behalf of the applicant while Summary Digesky, the 1<sup>st</sup> respondent argued for and on behalf of the respondents.

Counsel for the applicant submitted that on 9<sup>th</sup> September 2021, she failed to appear in court as she was attending clinic of her child and that Rose Mgallah, advocate mentioned also in the notice of application has shifted to Dodoma. She conceded that there is no notice filed in court showing that the said Rose Mgallah, advocate, has ceased to represent the applicant in revision application No. 387 of 2020.

Mr. Digesky submitted that counsel for the applicant knew the schedules of sending her child to clinic and that she was supposed to make arrangement with the court prior scheduling hearing of the application.

Having heard the submissions of both parties, the issue is whether applicant complied with the provisions of Rule 36(1), (2) and (3) of the

Labour Court Rules, 2007 GN. No. 106 of 2007, which requires applicant to give sufficient reason for non-appearance in order the Court to enroll the application dismissed on ground of non-appearance. The said Rule 36(1) of GN. No.106 of 2007 provided:-

*"36(1) where a matter is struck off the file (sic) due to the absence of a party who initiated the proceedings, **the matter may be re-enrolled if that a party provides the Court with satisfactory explanation by an affidavit, for his failure to attend the Court**".*

From the above quoted provision, the applicant has, by an affidavit, to satisfy or justify as to why she failed to appear.

It was deponed and argued that, on the material date, counsel for the applicant failed to enter appearance as she sent her child to clinic. Respondent countered that averment and argued that counsel for applicant knew it from the beginning as such, she was supposed to inform the court prior the date of scheduling the hearing date. I agree with the respondent on that aspect. I have examined the card showing dates the said child was attending clinic (annexture TC1) and find that dates are well known in advance. The said card shows that on 30<sup>th</sup> July 2021 Adriel Luphingo, the child of the said Roy Sehemba, counsel for the applicant, was sent at AKH clinic and was ordered to go back on 30<sup>th</sup> August 2021. On 30<sup>th</sup> August 2021, the child was not sent to clinic, but

the card shows that she was sent on 9<sup>th</sup> September 2021. There is nothing in the affidavit showing reasons for shifting from 30<sup>th</sup> August 2021 to 9<sup>th</sup> September 2021. In my view, that was by choice of counsel for the applicant, which cannot also be allowed to affect court activities. Considering the fate of the life of the child, that ground seems to be convincing if she was the only counsel for the applicant, but she was not.

The affidavit in support of the application shows that, in the notice of application in revision application No. 387 of 2020, applicant authorized Roy Sehemba and Rose Mgallah as her attorneys. It was deponed and submitted that Rose Mgallah has moved to Dodoma where she is practicing. In my view, it is not a requirement of the law that the advocate appointed to appear should be residing only in Dar es salaam as parties are at liberty to employ an advocate authorized to practice within this country. It doesn't matter where the advocate is residing because their appearance in court is not limited to geographical area. It was therefore, upon the two advocates namely Roy Sehemba and Rose Mgallah to make arrangements as who should appear when. On the other hand, if applicant thought that she doesn't need services of the said Rose Mgallah, for any reason including but not limited to her

shifting from Dar es salaam to Dodoma, was supposed to take action. In fact, Rule 43(2) of the Labour Court Rules, GN. No. 106 of 2007 requires the party who terminates representation to notify the Court (Registrar) and the other party. This was not done. In absence of that notice, there is no evidence to show that Rose Mgallah has ceased to represent the applicant. Therefore, non-appearance of the said advocate is not explained. It is my view, that non-appearance of the said Rose Mgallah, was not established as the affidavit of the said Rose Mgallah was not filed. In short, whatever was stated as to the whereabouts of Rose Mgallah advocate, is hearsay due to absence of her affidavit. There is a litany of decisions by the Court of Appeal that an affidavit which mentions another person is hearsay unless that other person swears as well. Some of these decisions 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 200, ***NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd***, Civil Application No. 13 of 2002. In my view, therefore, no explanation

has been offered for non-appearance of Rose Mgallah advocate on 9<sup>th</sup> September 2021.

For all said herein above, I find that applicant has failed to provide sufficient cause for non-appearance. The application is therefore hereby dismissed.



A handwritten signature in black ink, appearing to read 'B.E.K. Mganga'.

B.E.K. Mganga  
**JUDGE**  
03/12/2021

Labour Court-TZ.