

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 373 OF 2021**

**BETWEEN**

**OCEAN ALUMINIUM LIMITED..... APPLICANT**

**AND**

**ASHA YUSUPH SUDI..... RESPONDENT**

**RULING**

Date of the last order: 08/12/2021

Date of judgment: 10/12/2021

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

The applicant was an employer of the respondent. It happens that their relationship went bad as a result the applicant terminated employment of the respondent. Aggrieved by termination, respondent knocked the doors of the Commission for Mediation and Arbitration henceforth CMA claiming that she was unfairly terminated. The arbitrator at CMA found the claims of the respondent as valid and issued an award in her favour. Applicant was aggrieved by the award as a result on 30<sup>th</sup> December 2020 she filed Revision Application No. 564 of 2020 challenging the award. On 11<sup>th</sup> August 2021, the said revision

application was dismissed by this court (Hon. Maghimbi, J) for want of prosecution.

On 6<sup>th</sup> October 2021, applicant filed this application seeking extension of time within which to file an application to set aside the dismissal order. The notice of application is supported by an affidavit sworn by Emily Laus Christant, counsel for the applicant. In the affidavit, it was deponed that on 3<sup>rd</sup> August 2021 while at Labour Court parking compounds, he became unconscious and fell down, as a result, his driver one Mugisha Kanani rushed him to Sinza Palestina Hospital where he was diagnosed and found to have difficult breathing problem. It was deponed that due to difficult breathing he failed to enter appearance on 5<sup>th</sup> August 2021 and 11<sup>th</sup> August 2021 whereby revision application No. 564 of 2020 was dismissed for want of prosecution. That, after several follow up, he was availed with a copy of dismissal order in September 2021. It was further deponed that granting the application, will not prejudice the respondent.

The respondent filed a counter affidavit resisting the application. In her counter affidavit, respondent deponed that there is no proof that counsel for the applicant fell sick on the alleged dates as there is no

medical report supporting the affidavit. That applicant is playing delay tactic inflicting more suffering to the respondent after wrongful termination.

When the application was called for hearing, Mr. Emily Laus, advocate appeared and argued for and on behalf of the applicant while the respondent appeared in person.

Arguing the application, Mr. Laus, counsel for the applicant reiterated what he deponed in his affidavit and submitted that his non-appearance on 11<sup>th</sup> August 2021 was with good cause as he was sick. When asked by the court as to when he was discharged, counsel conceded that it was on the same date he fell sick namely 3<sup>rd</sup> August 2021. He conceded further that no medical report was attached to his affidavit as proof of his sickness. Counsel maintained that he was rushed to Sinza Palestina Hospital after he fell unconscious on 3<sup>rd</sup> August 2021 while at the vicinity of the court precisely at parking grounds. When asked by the court as to whether Sinza Palestina Hospital is the nearest hospital from the vicinity of the court, counsel conceded that it is not. He submitted that the nearest hospital is Mwananyamara referral hospital and that the said Mwananyamara hospital is a walking distance

from the court unlike Sinza Palestina Hospital and that both two are government hospitals. Counsel conceded further that the affidavit of Mugisha Kanani, the driver who rushed him to Sinza Palestina Hospital, was not attached to his affidavit. Counsel maintained that there is justification for non- appearance that led to dismissal order.

Respondent submitted that Revision application No. 564 of 2020 was scheduled for hearing on 3<sup>rd</sup> August 2021 but the applicant did not appear as a result it was adjourned to 5<sup>th</sup> August 2021 of which applicant did not show up. That, the matter was thereafter scheduled for hearing on 11<sup>th</sup> August 2021, but applicant did not enter appearance as a result the said revision application No.564 of 2020 was dismissed for want of prosecution. Respondent submitted that applicant is playing delay tactic to prevent execution application No. 344 of 2021 filed by her where in the applicant is the respondent, in which a garnishee nisi order has been issued.

I have considered evidence both in the affidavit of the said Emily Laus Christant, counsel for the applicant and counter affidavit of Asha Yusuph Sudi, the respondent and their submissions before me. I should say this is one of the applications filed by the applicant in abuse of court

process. I am of that view because in the application, applicant is seeking extension of time within which to file an application to set aside a dismissal order dated 11<sup>th</sup> August 2021. The application itself was filed in court on 6<sup>th</sup> October 2021 which is 56 days after the said dismissal order. Applicant stated that he made follow up of the dismissal order and that she was supplied with a copy in September 2021. Applicant, for reasons only known to her or with intention of misleading the court, did not want to disclose a specific date of September 2021, on which a copy was supplied to her. In short, applicant is playing hide and seek childish games. Had it that her allegation that the said order was supplied to her in September 2021, mentioning the date was a best option and any reasonable person would have done so contrary to what applicant has done.

Apart from that, there is no proof that counsel for applicant fell unconscious on 3<sup>rd</sup> August 2021 as there is no medical report attached as was deponed to by the respondent and conceded by counsel for the applicant during hearing. In absence of medical report to that effect, in my view, it cannot be proved that counsel was sick. I am alive to the truth that not at all time a person who is sick, has to be issued with a medical report. But taking into consideration of what was deponed by

counsel for applicant that he fell unconscious and rushed to hospital for treatment and that he was treated and discharged on the same day, a medical report was a necessary document to be attached in support. As it was not, the only conclusion that can be made is that the said counsel was not sick. This conclusion is justifiable also by looking on what was deponed by counsel for the applicant. It was alleged that counsel for applicant fell unconscious while at the vicinity of the court that is a walking distance to Mwananyala hospital. If this is true, then, wonders will never end. You may wonder, that, unconscious person is alleged to have been taken from vicinity of the court and nearby Mwananyamala referral hospital to Sinza Palestina hospital that is far away. In my view, this is a naked lie. Any reasonable person will reject this lie. It does not click in my mind that an advocate fell unconscious in the vicinity of the court and that went unnoticed either by the court or fellow advocates who were attending court proceedings on the same date. More importantly, by his status as an officer of the court, being carried from vicinity of the court passing through Mwananyamala referral to a lower ranked hospital of Sinza Palestina is illogical and incomprehensible. It is illogical considering distance between the two hospitals from court and presence of traffic congestion. More strangely, it was submitted that the

said advocate was diagnosed and found with difficulty breathing but he was discharged on the same date.

As pointed hereinabove, no medical report was attached to the affidavit in support that the said counsel was sick. It was deponed that one Mugisha Kanani, the driver of Mr. Emily Laus, counsel for the applicant is the one who rushed the said counsel to Sinza Palestina Hospital. Again, there is no affidavit of the said Mugisha Kanani. Absence of that affidavit has made all what is alleged to have been done by the said Mugisha Kanani to be hearsay. There is a plethora 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 (all unreported to mention but a few. This court cannot act on hearsay evidence that counsel for the applicant

was rushed to Sinza Palestina Hospital by Mugisha Kanani on 3<sup>rd</sup> August 2021 while unconscious.

Apart from the fore going, there is no dispute that respondent filed execution application No. 344 of 2021 and that a garnishee nisi has been issued against the applicant. Respondent submitted that the application is intended to delay execution process, but applicant submitted that if the application is granted, respondent will not be prejudiced. Taking into consideration in totality chronological of events and conduct of the applicant, I am of the considered view, that the application was filed as a delay tactic as there is no good reasons advanced.

For the foregoing, I hereby dismiss the application for want of merit.



B.E.K. Mganga

**JUDGE**

10/12/2021