

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

MISC. APPLICATION NO. 361 OF 2020

BETWEEN

DEOGRATIUS BAKINAHE AND 2 OTHERS.....APPLICANT

AND

SHIRIKA LA USAFIRI DAR ES SALAAM(UDA).....1ST RESPONDENT

PARASTATAL SECTOR REFORM COMMISSION.....2ND RESPONDENT

RULING

Date of Last Order: 29/07/2021

Date of Ruling: 06/08/2021

B. E. K. MGANGA, J.

The Applicants herein namely Deogratias Bakinahe, Augustino N. Emmanuel and Rajabu Bakari has filed the present application praying for the Court to set aside the dismissal order in Misc. Labour Application No. 94 of 2020 and order re-enrollment of the said application. The Application is supported by the joint affidavit of the applicants.

The background to this application in brief is that; the applicants filed in this court Miscellaneous Labour Application No.94 of 2020 seeking leave of the court to extend time within which to file application for Revision. On 20th July 2020 this Court (I. D. Aboud, J) dismissed the said

application for want of prosecution as they failed to honour scheduled court order that required them to file written submissions on 23rd June 2020.

When the application was called for hearing, Mr. Lucas Nyagawa Advocate appeared and argued for and on behalf of the Applicants while Ms. Serina Kapange, State Attorney appeared and argued for and on behalf of the Respondent.

Counsel for the Applicants argued that the said Misc. Labour Application No. 94 of 2020 was dismissed while Applicants being unaware that they were required to file written submissions. It was further argued that, on 28th May 2020 both parties were in court premises but due to Covid 19 pandemic, they received information from court clerk one Edina Kanju that the said application was scheduled for mention on 20th July 2020. That, on 20th July 2020 they were in court premises waiting to be called so that they can enter appearance before the presiding judge in chambers but the same was not called. Instead, they were informed by the said Edina Kanju that their application has been dismissed. Counsel for the Applicants cited the case of ***Mount Meru Flowers Tanzania Limited vs Box Board Tanzania Limited, Civil Appeal No. 260 of 2018(CAT)***

Arusha, in which the court of Appeal held that parties should not be punished for errors committed by the court to bolster his argument that Applicants were misinformed by the court clerk. He however conceded that, there is neither affidavit of the said Edina Kanju nor a paragraph in the Applicant's affidavit to the effect that the said Edina Kanju refused to swear an affidavit. Mr. Nyagawa for the Applicants went on that, information to the effect that Applicants were required to file written submissions, was communicated to **Jonas Maheto Advocate** and not the Applicants and or their advocate one Lucas Nyagawa. He pointed out that, the said Jonas Maheto advocate was not representing the Applicants in the aforementioned application. He concluded that, Applicants were misinformed which is why, they failed to file written submissions that led to dismissal of the aforementioned Miscellaneous Labour Application. He therefore prayed the application be granted.

Opposing the application, Ms. Kapange State Attorney submitted that, on 28th May, 2020 both parties were in Court premises and that due to Covid 19 pandemic, parties received information from court clerk with the order of filing written submissions. Counsel for the respondent submitted that on the material date, the Respondent was represented by

Adelaida Ernest while the Applicants were represented by Jonas Maheto Advocate. She stressed that, the argument that the Applicants were misled by the court clerk is without merit for lack of an affidavit of the alleged court clerk. She therefore, prayed the application be dismissed for want of merit.

Having heard oral submissions and gone through both affidavit and counter affidavit of the Applicants and the Respondent, main issues for determination are (1) whether the Applicants were misinformed and (2) whether the applicants adduced sufficient reasons for their non-appearance for the Court to set aside the dismissal order.

It was argued on behalf of the Applicants that they were misinformed by Edina Kanju, the court clerk. As submitted by the State Attorney and rightly conceded by counsel of the Applicant, there is neither affidavit of the said court clerk nor a paragraph in the joint affidavit of the Applicant to the effect that she refused to swear an affidavit. It was further argued that, the information that the Applicants were required to file written submissions was given to Jonas Mheto Advocate, who was not representing them. Once again, the affidavit of the said Jonas Mheto Advocate was not attached to the joint affidavit of the Applicants. Any

reasonable person would have expected affidavits of the Court clerk and the advocate to form part of the Applicants' joint affidavit, as such, all what is averred relating to these two persons becomes unsubstantiated. A similar issue was discussed by this court in the case of **Tanzania Milling and Co. Ltd v. Zacharia Aman t/a All Gold Co. & Another**, Civil Application No. 415 of 2018, HC at DSM, where it held that; -

'If an affidavit mentions another person, that other person has to swear an affidavit. However, I would add that is so where information of that other person is material evidence because without the other affidavit it would be hearsay.'

I subscribe and associate myself to that holding as a sound one in law. I have also found that, the Applicants has verified that all paragraphs in the joint affidavit is according to their knowledge. This was enough to dispose of the Application because in the same joint affidavit particularly in paragraphs 7 and 9 they indicated that they were informed by the court clerk. That was sufficient to dispose the matter as the affidavit is incurably defective. But as there are allegations against this court, I will not stop here.

In paragraph 10 of the joint affidavit, the Applicants stated as follows;-

*'10. That on following day we made follow up for the dismissal order after obtaining we found and became aware that our application was dismissed for want of prosecution due to our failure to honour Court's order to file written submission for supporting our application **despite that our Advocate Jonas Maheto received the order in (sic) 28/05/2020.'***

But in paragraph 11, they jointly deponed:-

*11. 'That; **we have never engaged or give instructions to the (sic) one Advocate Jonas Maheto to represent us in this case (Misc. Application No (sic) 94/2020) we neither know him nor familiar with him.'***

It is my settled view that the two quoted paragraphs are in conflict. While paragraph 10 shows that Jonas Maheto, their advocate received the order on 28/5/2020, paragraph 11 shows that they neither knew nor engaged the said advocate to represent them. Affidavit and counter affidavit being evidence, that is to say, substitutes of oral evidence, once found being in contradiction, it has to be resolved through the available evidence. For that reason, I have read the counter affidavit to see whether

it is of help but find nothing. This is because, in paragraph 7 of the counter affidavit, it was stated in part as follows:-

*'7. That, the contents of paragraphs 10, 11, 12 and 13 of the joint Affidavit are denied... In regarding to the issue of engaging Advocate Jones (sic) Maheto **is not a good cause of setting aside the dismissal order because on 28th May, 2020 Applicants were present in court and noted to receive the instructions from the Court Clerk.'***

Paragraph 7 of the counter affidavit quoted above is the only paragraph in the counter affidavit mentioning the name of advocate Maheto. It is however silent as to whether the said advocate received the order of filing written submissions on behalf of the Applicants. It is also worth to point out here that, the way paragraph 7 of the counter affidavit has been drafted, is not expected to be found in either the affidavit or counter affidavit for obvious reasons of offending rules on affidavit. It is argumentative and, somehow, is like a paragraph in the written statement of defence. The only place to anchor and reconcile paragraph 10 and 11 of the joint Affidavit by the Applicants is the dismissal order (annexture A to the joint affidavit. In annexture A, it is recorded:-

'Ms. Adelaida Ernest: ...we have not received the Applicant's written submission. So we pray the matter be dismissed for want of prosecution.

Court: Applicant's Advocate Mr. Jonas Maheto was in Court on 28/5/2020 and received the order that this matter was to be disposed by way of written submission as per the given schedule.

However, he failed to file the submission on 23/06/2020 as ordered and no any notice to this Court explaining the reason(s) for such failure...'

The said annexure A to the joint affidavit by the Applicants is referenced to paragraph 10 and not paragraph 11. Since the said Annexure A is referenced to paragraph 10 of the joint affidavit, and is in support that Mr. Jonas Maheto Advocate who was representing them was in court on the date the court issued order that the application be disposed by written submission, I hold that Applicants were represented by the said advocate and had knowledge of the court orders issued on 28/5/2020. The case of Mount Meru (Supra) cited by counsel for the Applicants to the effect that parties should not be punished for errors committed by the court is distinguishable in the circumstances of this application. In the Mount Meru's case, (supra), unlike to the application at hand, the Court of Appeal held so as there was an error in the summons issued by the court

and the trial judge invoked rule of practice and not the law. There is no evidence to prove the alleged misinformation caused by the court. For the foregoing, I cannot act on unsubstantiated claim.

In addressing the disputed issue i.e., whether the applicants adduced sufficient reasons for their non-appearance for the Court to set aside the dismissal order, the relevant provision of Rule 38(1)(a),(c) and (2) of the Labour Court Rules, 2007 GN, No. 106 of 2007 has to be considered. That Rule empowers this Court, upon sufficient reason for non-appearance, to set aside the decision passed. It is well established principle that, the one who wish the order for non-appearance to be set aside, must by affidavit evidence, adduce good reasons. As pointed out hereinabove, that evidence is wanting. For the foregoing, I find that, the application is devoid of merits and I hereby dismiss it without costs.

It is so ordered.



B.E.K MGANGA

JUDGE

06/08/2021