

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

MISCELLANEOUS LABOUR APPLICATION NO. 409 OF 2020

BETWEEN

DAR ES SALAAM CORRIDOR GROUP.....APPLICANT

AND

INNOCENT MWIRU1ST RESPONDENT
GERALD MASANGA.....2ND RESPONDENT
MAGAFU MASANGA.....3RD RESPONDENT

RULING

Last order 05/10/2021

Date of ruling 18/10/2021

B.E.K. Mganga, J

Applicant filed Revision No.444 of 2016 in this court seeking to revise an award issued by the Commission for Mediation and Arbitration henceforth CMA in Labour dispute No. CMA/DSM/TEM/237/2014. The said revision application was struck out on 3rd August 2018 by L.L. Mashaka, J (as she then was) as the affidavit in support of the Notice of Application was incurably defective. Applicant was granted leave to file a competent application within seven (7) days from 3rd August 2018. After the said leave, Applicant filed Revision Application No. 435 of 2018. On 11th March 2019 when the application was called for hearing before Hon. S.A.N. Wambura, J (as she then was) Mr. Sammy Katerega, the Personal

Representative of the respondents raised a point of preliminary objection that the affidavit in support of the application is incurably defective. Judith Kyamba, advocate for the applicant conceded to the preliminary objection and prayed leave to file a proper application. The court struck out the said application and no leave was granted as the applicant repeated the very same error which caused the former application to be struck out. Applicant filed Miscellaneous application No. 449 of 2019 for extension of time within which to file revision application as she found already out of time. On 28th July 2020, the said application was dismissed by Hon. Muruke, J for want of prosecution as the applicant did not enter appearance on the date of hearing. On 26th August 2020 applicant filed this application seeking to set aside the said dismissal order.

The Notice of application is supported by an affidavit of Judith Patrick Kyamba, advocate. In her affidavit in support of the application, Judith Patrick Kyamba deponed that on 28th July 2020 she left office at 07:45 heading to court but she was blocked at the United Nations Road following a church Mass conducted at St. Immaculate Cathedral in Honour of the 3rd President of the United Republic of Tanzania, H.E. late Benjamin William Mkapa as the said Cathedral is along United Nations road. That, she arrived at court at about 8:42 hours to be told that the application has been

dismissed for want of prosecution. That, non-appearance was not due to negligence, but it was beyond her control. Respondents filed a joint counter affidavit to resist the application.

When the application was called for hearing on 5th October 2021, Othman Omary, advocate appeared and argued for and on behalf of the applicant while Sammy Katerega, personal representative appeared argued on behalf of the respondents.

Arguing the application, Mr. Omary, counsel for the applicant submitted that on 28th July 2020 Application No. 449/2019 was fixed for hearing at 08:30 hrs. it was his submission that the firm that was representing the applicant is located along the United Nations Road at Upanga area. Counsel submitted that on 28th July 2020 there was a Mass for burial of H.E. Benjamin Mkapa, the 3rd President of the United Republic of Tanzania as a result the road was closed in the morning. When asked by the court as to whether the occurrence was not in public domain, counsel conceded that the issue of the burial mass at st. Immaculata was well known in advance. Counsel for the applicant submitted that Court has to consider reasons for absence whether, it was deliberate, action taken promptly, conduct, and whether the other party will be prejudiced. He cited the decision of this court in the case of **National Bank of Commerce Ltd**

V. Ahmed Freight Ltd and 2 Others, Misc. Commercial Case No. 230 of 2016 to that effect to bolster his argument. Counsel concluded by praying the application be allowed.

Submitting on behalf of the respondents, Mr. Katerega, tge personal representative of the respondent submitted that there has been deliberate delay by the applicant and that this is evidenced by the the conduct of the applicant as deponed in the affidavit in support of the application. Mr. Katerega submitted that the argument that applicant's advocate was delayed by blockage of the United Nations Road is not valid as there was an alternative route. He went on that applicant has caused injustice to the respondents who has filed Execution Application No. 188 of 2019 now pending in Court for a long time. He concluded by praying the application be dismissed.

In rejoinder, Mr. Omary, counsel for the applicant submitted that the case has stayed for seven years both parties seeking remedies for their clients. He concluded that there is a probable cause for absence.

Having considered parties' rival submissions, this Court is called upon to determine, whether applicant has adduced good reason for restoration of the dismissed application.

The relevant provision in determining this issue is Rule 36(1), (2) and (3) of the Labour Court Rules, 2007 GN. No. 106 of 2007, which empower this Court, upon sufficient reason being advanced by the applicant for non-

appearance, to enroll the application. 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, it is clear that a person seeking to re-enroll an application that has been dismissed for non-appearance, has, by an affidavit, to satisfy or justify as to why he failed to appear. Now, the issue is whether, applicant has managed to comply with the above quoted rule for this court to allow her application.

In the application at hand, applicant alleges that her non-appearance was not due to negligence, but due to blockage of the United Nations Road. Counsel conceded that it was known in advance that on the said day in the morning, there will be a church Mass at St. Immaculate Cathedral along the said United Nations Road and that the said road will be closed for some time until conclusion of the Mass. In my view, any reasonable person who is diligent and keen to court business, could have anticipated this and used an alternative route or leave the place at early time before blockage of the road. More so, any prudence advocate, having found herself in that situation, could have called the personal

representative of the respondent or any other person at the court and relay information relating to the blockage of the road and anticipation of being late to the court. In so doing, the application could have not been dismissed for non-appearance.

Counsel for the applicant has cited the case of **National Bank of Commerce Ltd**, supra, that I should consider reasons for absence and whether, absence was deliberately, applicant took action promptly, assess or consider conduct of the applicant and whether the other party will be prejudiced. I associate with those criteria and apply the same in the application at hand.

On the issue of prejudice to the other party, it was submitted by Mr. Katerega that respondents filed Execution Application No. 188 of 2019 and that up to now, the same is pending in Court. Mr. Katerega invited me that the trend or conduct of the applicant has forced the respondent to be in that situation. In short, according to Mr. Katerega, the applicant, by filing incompetent applications that were being struck out several times has caused injustice to the respondents. I agree with him that in considering the conduct of the applicant, the court has to carefully consider conduct of the applicant on the date in question and previous days in relation to the dispute between the parties. I cannot close my eyes and ignore the

background of the matter as deponed by the parties both in the affidavit and counter affidavit in support and opposition of the application. By occurrence of events, the conduct of the applicant leaves much to be desired. It is unexpected, that applicant could have repeated similar mistake twice while guided by learned brother and sisters. I find it difficult to believe and apprehend in my mind that the same was done by a mere mistake or by design. For that, it is my considered opinion that the conduct and injustice criteria are both not in favour of the applicant.

I am convinced that after dismissal order, applicant did not act promptly. According to the affidavital evidence and court orders, the dismissal order was made on 28th July 2020, but this application was filed on 26th August 2020 almost one month thereafter. No reason has been advanced by the applicant as to why she took almost a month to file this application. This, in my view, proves that applicant acted not promptly to justify this court to grant the application for restoration.

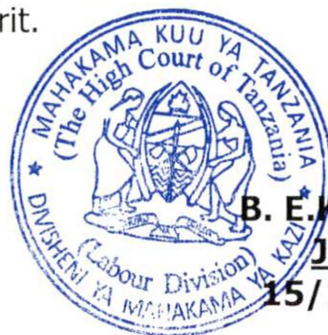
On deliberateness criteria, applicant is also bound to fail because she was aware that on the material date there will be a church Mass at St. Immaculate in Honour of the 3rd President of the United Republic of Tanzania, H.E. late Benjamin William Mkapa and that the United Nations Road will be closed in the morning. It was in public knowledge as counsel

for the applicant conceded. Counsel for applicant knew it a day before and did not find an alternative. In my view, I find that non-appearance was deliberate and that closure of the United Nations road on the material date is being used by the applicant as an afterthought. I therefore decide deliberate criteria against the applicant. In my view, even if we assume that counsel for applicant was blocked at the United Nations Road as submitted, it is equally that she was negligent or careless. It was held in the case of **Frank Kibanga v. ACU Limited, Civil Case No. 24 of 2003 (unreported)** that; -

"carelessness or inadvertence on the part of litigants or their counsel cannot be accepted as sufficient explanation to move the court's hand in the favor"

That case applies also in this application.

From where I am standing, applicant failed to adduce good reason for non appearance on the date the application she is applying to be restored was dismissed for want of prosecution. For the foregoing, this application for restoration of revision No. 266 of 2020 is hereby dismissed for lack of merit.




B. E. K. Mganga
JUDGE
15/10/2021