

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

MISCELLANEIUS APPLICATION NO. 213 OF 2020

BETWEEN

BOARD OF TRUSTEE OF THE NATIONAL SOCIAL SECURITY FUND..........**APPLICANT**

AND

GEORGE THOMAS MHANDI..........**RESPONDENT**

RULING

Date of last order:10/9/2021

Date of Ruling: 26/11/2021

B.E.K.Mganga, J

On 10th May 2020, applicant filed this application seeking the court to set aside the dismissal order of revision application No. 318 of 2019 made on 23rd April 2020 by this court (Hon. S.A.N. Wambura, J as she then was). The applicant filed the notice of application supported by an affidavit of Luciana Kagimbo, her principal officer. In the affidavit, the deponent deponed that on 23rd April 2020, when the matter was scheduled for hearing, the advocate for the applicant while on road coming to the court suddenly fell sick and was rushed to hospital due to serious heart attack (angina) and that on the way to the hospital, the advocate for the applicant called counsel for the respondent but his phone was not reachable. That after failure of that attempt, one Ado

Mwasongwe advocate was sent to court to rescue the situation but he didn't manage to arrive at court on time as Jangwani bridge was blocked by Traffic Police due to heavy rain and flood that occurred at the area around 11:30 am to 3 pm.

The respondent filed the notice of opposition together with a counter affidavit of Daniel Haule Ngugi, his advocate. In the counter affidavit, Mr. Ngugi deponed that applicant has failed to advance sufficient grounds as she had many advocates and further that the affidavit of Mr. Ado Mwasongwe is missing.

In his written submissions on behalf of the applicant, Mr. Opiyo Marcellus, advocate, submitted that on 23rd April 2020, while he was on the way to court, he suddenly fell sick due to serious heart attack and that he was rushed to hospital for treatment. He referred the court to medical examination report annexure 3 issued on 23rd April 2020 by Shree Hindu Mandal Hospital indicating an abnormal ECG. That, on 15th April 2020 he was also examined at Eden Medical clinic for the same problem as indicated in medical examination report part of annexure 3 issued by Eden Medical Clinic. Counsel submitted that parties were in discussion on how to settle the matter out of court and that non restoration will affect that settlement.

In his written submissions, Mr. Ngugi counsel for the respondent submitted that, there is negligence on part of the applicant as the diagnosis referred to are dated 15th April 2020 and 19th March 2020. Counsel argued further that applicant has a full-fledged legal department having more than one advocate and that knew in advance that the advocate had health problem therefore was supposed to assign the matter to another advocate. On what is alleged to have happened to Mr. Ado Mwasongwe advocate, counsel submitted that, the same is hearsay due to absence of Mr. Mwasongwe's affidavit. Counsel cited the case of ***Sabena Technics Dar Limited vs. Michael J. Luwunzu, Civil Application No. 451/18 of 2020***, CAT (unreported) wherein it was held that an affidavit which mentions another person is hearsay unless that other person swears as well.

I have carefully examined the affidavit and counter affidavit filed by the parties and arguments of both counsels on whether there are good reasons advanced for restoration of revision application No. 318 of 2019. In other words, whether there is good cause shown by the applicant for non- appearance on 23rd April 2020 when the said revision application was scheduled for hearing.

In the foremost, I should point that there is no affidavit of Mr. Ado Mwasongwe, advocate, who it was deponed that he was asked to appear in court after the advocate who was in his way to court fell sick and that the said Ado Mwasongwe was blocked by traffic Police at Jangwani bridge due to floods. In absence of the affidavit of Mr. Mwasongwe, that fact remains to be hearsay as it was held in the case of ***Sabena Technics***, supra, and correctly submitted by counsel for the respondent. I will not therefore take into consideration all facts relating to Ado Mwasongwe advocate in this ruling.

Counsel for applicant has submitted that he was prevented to appear on that date due to sudden heart attack and was rushed to hospital. Counsel for the respondent has submitted that the applicant was negligent as (i) knew in advance that the counsel who was appearing in court was sick as there were records, as such, applicant was supposed to choose another advocate from her office who is with healthier condition and (ii) medical reports submitted relates to 15th April 2020 and 19th March 2020 and not 23rd April 2020.

Let me start with submissions relating to dates on medical reports. I have carefully examined medical reports annexed to the affidavit in support of the application and find that it is not true that they only relate

to 15th April 2020 and 19th March 2020. These reports show that on 19th March 2020, Opiyo G. Marcellus attended at Eden Medical Clinic and that on 15th April 2020 he attended at Shree Hindu Mandal Hospital and was excused from duty for three days. The annexetures to the affidavit shows further that, on 23rd April 2020, he attended at Shree Hindu Mandal Hospital where he was attended by DR. Ramadhani Selemani. He was examined and found that there was abnormal ECG. He was therefore, excused from duty for one day for bed rest and recovery. From these records, it is clear that the said Opiyo Marcellus attended medical treatment as deponed in the affidavit in support of the application.

On the other limb, counsel for the respondent submitted that applicant was negligent as she had record and knew in advance that the said Opiyo Marcellus advocate was not in good health condition and that she was supposed to foresee and send another advocate. In my view, indirectly, counsel for the respondent does not dispute that counsel for the applicant fell sick, but only complains against lack foreseeability by the applicant. This criticism, in my view, is not supported by any medical expert report. It is my considered view that, in normal life of human being, more than often, those who are seen to be healthier sometimes

falls to the grave leaving behind the one bedridden for years or months, who later on may rise up. The key to the health secret of every individual is in hands of the creator and not in hands of the bosses of those individuals or the individual themselves. In other words, counsel for the respondent is suggesting that the said counsel for the applicant should not be given files to appear in court due to his health condition and either should do desk work or be terminated. I think, that is going far, as stated, those who think they are standing, they may fall at any time.

For all said herein above, I find that non-appearance of counsel for the applicant on 23rd April 2020 was justifiable. I therefore allow the application and restore revision application No. 318 of 2019.

It is so ordered.



B.E.K. Mganga

JUDGE

26/11/2021