

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 387 OF 2019

BETWEEN

DAUD GODFREY MACHA.....APPLICANT

AND

MEK ONE GENERAL TRADERS.....RESPONDENT

RULING

Date of Last Order: 11/02/2021

Date of Ruling: 19/03/2021

A. E. MWIPOPO, J.

The applicant namely Daud Godfrey Macha filed the present application to set aside the dismissal of Revision No. 808 of 2018 by the Order of this Court dated 30th May, 2019. The Applicant is praying for the following orders:-

- (1) That Court be pleased to make an order of setting aside the dismissal of Revision No. 808 of 2018 dated 30th May, 2019.

(2) Any other reliefs this Court may deem just and fit to grant.

The application is supported by applicant's sworn affidavit. The Respondent namely MEK One General Traders opposed the application and filed the counter affidavit sworn by Mohamed Edha Awadh, Managing Director of the Respondent.

On the date when the matter came for hearing both parties were represented. Mr. Paschal Temba, Personal Representative, represented the Applicant, whereas Mr. Dismas Mbambo, Advocate, represented the Respondent. The hearing proceeded by oral submissions.

The Applicant's Representative submitted that the matter was coming for hearing on 07th May, 2019 but the Applicant was bereaved by his mother on 06th May, 2019 and he travelled to Kilimanjaro. The Applicant informed Advocate Simon Mtunguja to represent him in court on the hearing date. The Advocate informed him that the matter was adjourned to 26th June, 2019. On 26th June, 2019 the Applicant attended to court to be informed that the matter was dismissed on 30th May, 2019. The Applicant filed the present Application to set aside the court order on 28th June, 2019, hence he is not negligent in handling the matter. He cited **Misc. Application No. 467 of**

2018 between Zambia Cargo & Logistics Co. Ltd and Richard Andrew, and five others where this court set aside the court order after finding that there is no negligence on the part of the Applicant for his failure to appear in court on hearing date. The Applicant prayed for the application be allowed and the main application be restored and be heard on merits.

In reply, the Respondent Counsel submitted that the reason given by the Applicant for failure to appear on the hearing date have no basis. There is no evidence at all to show that there was a person called Simon Mtunguja who was instructed to adjourn the case. The said Simon Mtunguja was supposed to swear the Affidavit to show the reason of failure to appear in court on the hearing date. The reason provided by the Applicant are just an afterthought after the matter was dismissed for want of prosecution.

He submitted that the matter before the court was fixed on 07th May, 2019, then it was adjourned to 22nd May, 2019 and later on it was adjourned to 30th May, 2019 but during all this time the Applicant failed to appear. Since the Applicant returned to Dar Es Salaam from Kilimanjaro on 14th May, 2019 the Respondent expected him to make a follow up and find that his case was

fixed for hearing on 22/05/2019 and on 30/05/2019. In the pleading of the respective Revision Application both sides provided their phone Numbers. The Applicant alleged that his phone number did get lost as result he was not reachable. The attachment D3 which is loss report shows that the phone was lost on 27th June, 2019. By this time the Revision application has already been dismissed for want of prosecution. The Applicant live is Dar Es Salaam and in case there was any problem he was supposed to inform the court by a letter or through coming himself to the court.

The Respondent Counsel distinguished the case of **Zambia Cargo & Logistics Co. Ltd**, (Supra), which was cited by the Applicant's Personal Representative. In **Zambia Cargo and Logistics Co. Ltd's case** the Applicant was sick and was attended at Hospital on the hearing date. In the present case the Applicant had 14 days to make a follow up after coming from burial ceremony but he did not make a follow up. The Applicant was negligent and the matter has been struck out more than three times for his negligence. If we are going to allow the negligence to continue we will not be doing justice to the Respondent. Respondent Counsel prayed for the matter to be dismissed for want of merits.

In Rejoinder, Applicant's was of the view that being bereaved by mother is sufficient ground for failure of the Applicant to appear in court on the hearing date. The absence of Simon Mtunguja's Affidavit is not a reason not to believe what is stated by the Applicant. The Applicant did not make any follow up as he was informed that the matter was coming for hearing on 26th June, 2019. There is no way whatsoever that the Applicant was informed that the matter was adjourned to 22nd May, 2019 and 30th May, 2019. The Applicant was attending in court all the time the matter was fixed. The Revision No. 808 of 2018 has never been struck out before. The Applicant is of the view that the **Zambia Cargo and Logistics Co. Ltd's** case is relevant to this case.

From the submissions, the Court is called upon to determine whether the Applicant have provided the Court with satisfactory explanation for the court to allow the matter to be re-enrolled.

Rule 36 (1) of the Labour Court Rules, G.N 106 of 2007 which the Applicant cited as enabling provision in this matter provides for re – enrolment of the matter which was struck out for non-appearance. The Rule reads that, I quote;

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

From above cited rule, satisfactory explanation by the Applicant for the reason for failure to attend Court is relevant for the Court to re-enroll the dismissed matter. This Court in the case of **Tanzania Postal Bank Dar Es Salaam v. Thomas Edward Gambo**, Miscellaneous Application No. 152 of 2012, High Court Labour Division, at Dar Es Salaam, (Unreported), held that, I quote:-

"It is true that a matter dismissed for want of prosecution can be stored but only if the party adduces sufficient grounds for the alleged absence."

From the above cited case the Court has discretion to re - enroll the matter dismissed after being satisfied that the party have sufficient ground for the alleged absence.


In the present matter, the Applicant alleges that he failed to attend on the hearing date since he was bereaved by his mother on the 06th May, 2019 and he travelled to Kilimanjaro. The Applicant stated that he came back from

Kilimanjaro on 14th May, 2019. I agree with the Applicant that being bereaved by a parent is sufficient reason for re-enrolment of the Application dismissed for absence. However, after he was back from Kilimanjaro the Applicant did not make any follow up of his case. The Applicant averred that he requested an Advocate by the name of Salum Mtunguja to adjourn the matter on his behalf on the hearing date and the Advocate informed him that the matter was adjourned to 26th June, 2019. Unfortunately, there is no evidence to support the allegation by the Applicant. This being the evidence heard by the Applicant from another person it was supposed to be accompanied by the affidavit of the said Salum Mtunguja. Even the Court Record show that on 07th May, 2019 nobody appear on behalf of the Applicant .There is no such evidence to support the Applicants allegation.

The Record shows that when the matter came for hearing on 07th May, 2019 it was adjourned to 22nd May, 2019 and later on to 30th May, 2019. During these hearing dates the Applicant was absent. It is on 30th May, 2019 when the Court decided to dismiss the matter for Applicant's non - appearance. I'm of the same opinion with the Respondent that after the Applicant came back from Kilimanjaro he was supposed to make a follow up for his case and this would allow him to find out that the matter was

adjourned to 22nd May, 2019 and thereafter to 30th May, 2019. It was due to his negligence the matter was dismissed for his absence. Thus, the evidence available in record shows that the applicant failed to provide with satisfactory explanation for his failure to attend the Court.

Therefore, I find that the applicant have failed to provide satisfactory explanation to the Court for it to re- enroll Revision Application No. 808 of 2018 which was dismissed for want of prosecution. Consequently, the present application is dismissed for want of merits. No order as to the cost of the suit.



A.E. MWIPOPO
JUDGE
19/03/2021.