

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

MISCELLANEOUS APPLICATION NO. 444 OF 2022

JOHNSON NYAKWISOMA APPLICANT

VERSUS

IPSOS TANZANIA LIMITED RESPONDENT

RULING

*Date of Last Order: 30/11/2022
Date of Ruling: 13/12/2022*

B. E. K. Mganga, J.

Facts of this application briefly are that, on 23rd July 2021 applicant filed Revision application No. 284 of 2021 before this court challenging the CMA award. On 30th November 2021, this court (B.E.K. Mganga, J) dismissed the said revision application for want of prosecution. On 10th November 2022, applicant filed this application urging the court to restore Revision application No. 284 of 2021 that was dismissed on 30th November 2021. In support of the application, applicant filed his affidavit stating that in the said Revision application, he was being represented by Mecky Humbo, his personal representative and that the said personal representative failed to enter appearance on the date Revision application No. 284 of 2021 was called on for hearing

because he was taking care of his sick father who was admitted at Muhimbili National Hospital on 8th August 2021. Applicant attached to his affidavit medical reports of Kimoni A. Humbo, resident of Mwananyamala as annexure J to form part of his affidavit.

On the other hand, respondent filed the counter affidavit of Honoratha Mrutu, her Senior Officer to oppose the application. In the counter affidavit, the deponent deposed that the matter before the court was between the applicant and the respondent and not the personal representative.

When the application was called on for hearing, applicant enjoyed the service of Mr. Mecky Humbo, his Personal representative, whereas the respondent enjoyed the service of Methuselah Boaz Mafwele, learned advocate.

Arguing in support of the application, Mr. Humbo submitted that, Revision No. 284 of 2021 was dismissed on 30th November 2021 the date he was taking care of his father who was admitted at Muhimbili National Hospital. He submitted further that, his father was admitted at Muhimbili National Hospital on 08th August 2021 and that he was discharged on 23rd February 2022 which is why he failed to enter appearance. Mr. Humbo submitted that applicant filed this application on

10th November 2022 being nine (9) months' from the date his father was discharged from hospital namely on 23rd February 2022. Briefly as he was, Mr. Humbo prayed that the said Revision application be restored so that parties can be heard on merit.

In opposing the application, Mr. Mafwele, learned counsel for the respondent submitted that the dates it is alleged that father of personal representative was admitted, does not tally with the date on which the aforementioned Revision was dismissed for want of prosecution. Counsel submitted further that, in the affidavit in support of the application, applicant has not given reasons that prevented him to appear in court personally. He went on that, it seems that after engaging the representative, applicant lost interest, which is why, he did not make follow up in Court. Counsel for the respondent strongly submitted that applicant was supposed to make follow up of his case instead of dumping it to the Personal Representative.

Mr. Mafwele harmed further that applicant has not shown good cause for nonappearance on the date the said revision was dismissed for want of prosecution and cited the case of ***Elias Masija Nyang'oro & 2 Others V. Mwananchi Insurance Company Limited***, Civil Appeal

No. 278 of 2019, CAT (unreported) and ***Shaha v. Mbogo & Another*** [1967] EA 116 to cement on his submissions.

In winding up his submissions, counsel for the respondent submitted that, applicant was supposed to file an application for restoration within fourteen (14) days but did so after a long time and concluded that applicant had no good reason for non-appearance and delay to file application for restoration. He therefore prayed that the application be dismissed for want of merit.

In rejoinder, Mr. Humbo submitted that applicant was supplied with the dismissal order on 25th August 2022 and filed this application on 17th October 2022 and that 55 days passed from the date applicant was served with the order to the date of filing this application. In his rejoinder submissions, Mr. Humbo conceded that in the affidavit of the applicant in the support of the notice of application there is no paragraph showing the date applicant prayed for the dismissal order and further that there is no paragraph showing the date applicant became aware of the dismissal order. He submitted further that applicant became aware in March 2022, that the said Revision was dismissed for want of prosecution. It was further submitted by Mr. Humbo that

according to the Law of Limitation Act[Cap. 89 R.E. 2019] this application was filed within time.

I have considered evidence in both the affidavit and the counter affidavit and submissions made on behalf of the parties in this application and find that the main issue to be determined is whether, applicant has adduced sufficient reason for non-appearance on the date Revision application No. 284 of 2021 was dismissed for want of prosecution. I am of that opinion because that is the spirit of Rule 36(1) of the Labour Court Rules, GN. No. 106 of 2007 that the party making an application for restoration of an application, must give explanation by an affidavit for his non-appearance. Rule 36(1) of GN. No. 106 of 2007 provides that :-

*36(1) Where a matter is **struck off** the file due to absence of the party who initiated the proceedings, the matter may **be en-rolled if that party provides to court with satisfactory explanation by an affidavit, for his failure to attend to court**".*

I should point out that though the said Rule speaks of the matter being struck off due to nonappearance, in my view, the words "struck off" were inadvertently inserted because the drafter intended to mean "dismissed". I am of that view because nonappearance of the party who initiated the matter attracts dismissal of the matter and not striking

off. In my view, the said Rule should be amended by deleting the words “**struck off**” appearing between the words “matter is” and words “the file” and substitute them with the word “**dismissed**”. I am of that view because in the Labour Court Rules , GN. No. 106 of 2007 there is no a similar provision to Rule 2 and 3 of Order IX of the Civil Procedure Code [Cap. 33 R.E. 2019] that relates to non-appearance of the party who initiated proceedings hence the recourse is to Rule 55(1) and (2) of GN. No. 107 of 2007 that allows the court to adopt any procedure that is appropriate in the circumstances. Since Cap. 33 R.E. 2019 (supra) provided the remedy for non-appearance as dismissal of the matter, then, by amending Rule 36(1) of GN. No. 106 of 2007 (supra) as pointed out hereinabove will be in line with Rule 2 and 3 of Order IX of Cap. 33 R.E. 2019(supra) which provides as hereunder:-

- 2. Where neither party appears when the suit is called on for hearing the court may make an order that the suit **be dismissed**.*
- 3. Where a suit is **dismissed** under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he **may apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit.***

In an application for restoration of a matter dismissed for non-appearance, applicant must assign reasons for non- appearance as it

was held by the Court of Appeal in the case of [Elias Masija Nyang'oro & Others vs Mwanachi Insurance Company Limited](#), Civil Appeal No. 278 of 2019 [2022] TZCA 648. In [Nyang'oro's case](#) (supra) the Court of Appeal held inter-alia:-

*"...the law in this country, like the laws of other jurisdictions, recognizes that, generally the High Court may set aside an ex parte judgment upon an application being made by an aggrieved party and upon the **applicant assigning good reasons that prevented him from appearing when the matter was fixed for hearing**. Therefore, **the underlying factor in granting or not granting the application is for the applicant to demonstrate that they were prevented by good or sufficient cause to do what they were required to do by law or order of the court...**"*

Now, back to the application at hand. The issue is whether, applicant in his affidavit in support of the application, satisfactorily gave explanation for his failure to appear before the court on 30th November 2021. I will hold without delay that applicant has not offered sufficient or good cause for his non-appearance on 30th November 2021. The only reason given by the applicant is that, on 8th August 2021, father of Mr. Meck Humbo, his personal representative fell sick and was admitted at Muhimbili National Hospital. In his affidavit, applicant did not state as to when Mr. Humbo's father was discharged from hospital.

I should point out that there is no affidavit of Mr. Mecky Humbo, the personal representative of the applicant showing that his father was sick and that he was in hospital taking care his father on the date the said revision application was dismissed for want of prosecution. 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. The question that can be asked is, where did applicant get information that Mr. Humbo's father was sick?. Therefore, in absence of Mr. Humbo's affidavit of that information becomes hearsay. It can be argued by the applicant that name of Kimon Humbo, resident of Mwananyala who was admitted at Muhimbili is the father of the said Mecky Humbo. In my view, that is speculation based on surname. There is nothing in the medical reports showing that the said Kimoni Humbo is the father of

Mecky Humbo. That person may altogether be brother or unrelated to Mecky Humbo but sharing only surname.

Notwithstanding the foregoing, I have carefully read medical reports annexed to the affidavit of the applicant(annexture J) and find that they are not on applicant's side. The said report shows that **on 8th August 2021**, Kimoni Humbo was admitted at Muhimbili National Hospital but was **discharged on 12th August 2021**. The reports show further that on **22nd October 2021**, Kimoni Humbo was admitted at Muhimbili National Hospital but was discharged from hospital on the same date namely on **22nd October 2021**. The said reports show also that the said Kimoni Humbo was admitted at Muhimbili National Hospital On **2nd February 2022** but there is no date of his discharge from hospital.

It can be recalled that in dismissing Revision application No. 284 of 2021, the court noted that the said application was filed on 23rd July 2021 and it was called on 13th September 2021, 13th October 2021, 17th November 2021, and 30th November 2021 and that in all these dates applicant did not enter appearance without notice. On 30th November 2021, the court accepted submission made on behalf of the respondent that applicant might have lost interest in the said revision application

and dismissed it for want of prosecution. It is my view that the dates the said revision application was called for hearing does not tally with the dates the said Kimoni Humbo, the alleged father of the personal representative of the applicant was admitted. The said Kimoni Humbo having been discharged from hospital on 22nd October 2021 there is no record showing that in he was thereafter admitted in the year 2021. It is my view therefore that even if it can be assumed that Kimoni Humbo is the father of the personal representative of the applicant, there is no reasons disclosed as to why the said personal representative failed to enter appearance on 17th November and 30th November 2021. I therefore find the claim that the personal representative of the applicant failed to enter appearance on 30th November 2021, the date the aforementioned revision was dismissed for want of prosecution, as unsubstantiated and dismiss it.

More so, I agree with submissions by counsel for the respondent that there is no reason disclosed in the affidavit of the applicant as to why applicant himself failed to appear and pass that information to the court. It seem to me that applicant after engaging the personal representative, he dumped the matter and relaxed. In the case of [Lim Han Yung & Another vs Lucy Treseas Kristensen](#), Civil Appeal No.

219 of 2019 [2022] TZCA 400 the Court of Appeal discussed whether, negligence of an advocate is a good ground for extension of time and held as follows:-

""It is also our considered view that even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an exparte judgment passed against him." ..."

It seems applicant dumped his case to the personal representative and thought that it was over. Normally, it is not over until it is over. Since it was not over and since he waited for almost a year thereafter to file this application, applicant was not diligent. See [Nyang'oro's case](#)(supra). The conclusion that applicant was not diligent is supported by submission by Mr. Humbo, the personal representative, who submitted that his sick father was discharged on 23rd February 2022. It is not disclosed as to why applicant chose to stay for that long without filing an application for restoration of the aforementioned Revision application. As held hereinabove, submissions that sick father of the

personal representative was discharged on 23rd February 2022 is submissions from the bar which is not evidence as the same is not in the applicant's affidavit. That said and done, now it is over that this application stands to be dismissed as I hereby do.

Dated in Dar es Salaam on this 13th December 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 13th December 2022 in chambers in the presence of Mecky Humbo, Personal Representative of the Applicant and Methuselah Boaz Mafwele, Advocate for the Respondent



B. E. K. Mganga
JUDGE