

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

MISCELLANEOUS APPLICATION NO. 5 OF 2022

(Arising from Revision No. 10 of 2021 that was struck out on 30/8/2021 by Hon. Maghimbi, J)

BETWEEN

PM GROUP LTDAPPLICANT

AND

ZONGO A. ZONGO RESPONDENT

RULING

Date of last order: 24/04/2022
Date of Ruling: 11/5/2022

B. E. K. Mqanga, J.

Applicant has filed this application seeking extension of time within which to file an application for re-enrollment or restoration of revision application No. 10 of 2021 that was dismissed by this court (Hon. Maghimbi J) on 30th August 2021 for non-appearance and want of prosecution.

In the affidavit in support of the application, Mr. Nickson Ludovick, counsel for the applicant stated that the said revision application was dismissed while he was before Hon. W.S. Ng'humbu, the Deputy Registrar handling another case namely *Jenifer Akisofrey Mugeni v.*

PM Group Tanzania Ltd, Execution No. 152 of 2021 and that he became aware while in the chambers of the said Deputy Registrar on the same date. He stated further that, on 13th September 2021 he fell sick and was forced to isolate himself from 13th September 2021 to 12th October 2021, while fifteen days within which to file an application for restoration was expiring on 15th September 2021. He stated further that, when he recovered, he made efforts from 12th October 2021 to 20th December to be supplied with the copy of the order without success. That, on 21st December 2021 he was informed that his mother is sick in critical condition as a result on 22nd December 2021 he travelled to Bukoba to take care of her and returned to Dar es Salaam on 14th January 2022. But on 15th January 2022 his father passed away.

In his counter affidavit, Mr. Zongo A. Zongo, the respondent, stated that, applicant has failed to advance good cause for non-appearance and further that there is no medical evidence showing that Mr. Nickson Ludovick was handling another case before the Deputy Registrar. Respondent stated further that, there is no proof that the deponent of the affidavit in support of the application was sick for the dates mentioned because there is no medical report attached.

By consent, the application was disposed by way of written submissions.

In his written submissions in support of the application, Mr. Nickson Ludovick, learned counsel for the applicant submitted that he did not file the application in time due to acts of God that are beyond his control. He recounted and reiterated what is contained in his affidavit as pointed hereinabove. He maintained that Revision application No. 10 of 2021 was dismissed at the time he was in another chamber before the Deputy Registrar handling another case. He submitted that the matter was dismissed on the date it was scheduled for mention and not hearing and cited the case of ***Mrs. Fakria Shamji v. The Registered Trustees of Khoja Shia Ithnasheri (Mza) Jamaat, Civil Appeal No. 143 of 2019***, CAT (unreported) to implore the court to hold that the said revision was improperly dismissed. Counsel for the applicant submitted further that, granting this application will not prejudice the respondent and cited section 3A(1) of the Civil Procedure Code[Cap. 33 R. E. 2019] that the court should invoke the overriding objective principle.

Mr. Ludovick, counsel for the applicant submitted further that, the application be granted to afford applicant right to be heard as provided

for under Article 13(6)(a) of the Constitution of the United Republic of Tanzania and that there is overwhelming chance of success in the intended revision application. Counsel for the applicant cited the case of ***Abbas Sherally & Another v. Abdul S.H. Fezalboy, Civil Application No. 33 of 2002*** (unreported) to support his argument that any decision arrived at in violation of right to be heard will be nullified even if the same decision would have been arrived at had the party afforded right to be heard. He concluded that revision application No. 10 of 2021 was dismissed without affording the applicant right to be heard. He therefore prayed the application be granted.

On the other hand, Mr. Juma Nyamugaruri, learned counsel for the respondent, submitted that applicant has failed to adduce sufficient cause or reasons for delay and cited the case of ***Salum Sururu Nabhani v. Zahor Abdulla Zahor, [1988] T.L.R. 41*** to bolster his argument. He submitted further that applicant was being represented by Nashon Nkungu advocate and Nickson Ludovick and that one of them was supposed to appear if the other was attending another case. Counsel for the respondent submitted that counsel for the applicant was negligent and cited the case of ***Transport Equipment Ltd v. D.P Valambhia [1993] T.L.R. 91*** to support his argument.

Counsel for the respondent also submitted that, counsel for the applicant filed this application five months' thereafter especially after being served with notice to show cause in an application for execution of CMA award. He went on that; the delay is inordinate and further that, applicant has failed to account for that delay. He cited the case of ***Alhaji Abdallah Talib v. Eshakwe Ndoto Kiweni Mushi [1990] T.L.R. 108*** to support his argument and prayed that the application be dismissed.

In rejoinder, counsel for the applicant submitted that Nashon Nkungu, advocate had never been an advocate for the applicant hence it was impossible for the said advocate to represent the applicant. On failure to attach medical report, counsel for the applicant submitted that he used "Nyungu" to treat himself with covid 19 hence no medical report. He went on that he had no CCTV at home as such, an able to attach CCTV footage while taking "nyungu".

In the application for extension of time like the application at hand, courts are called to exercise its discretion either to grant the application or not. That discretion must be exercised judiciously as it was held by the Court of Appeal in case of ***MZA RTC Trading Company Limited v. Export Trading Company limited, Civil***

Application No. 12 of 2015 (unreported) wherein the Court of Appeal held:-

*"an application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court **based on what is fair, under the circumstances and guided by the rules and principles of law ..."***

I have considered the affidavit and counter affidavit and submissions by both sides and case laws cited in therein in order to exercise my discretion properly. In the affidavit in support of the application, the deponent stated that revision application No. 10 of 2021 was dismissed while the deponent was attending another case before the deputy registrar. Odd as it may sound, there is no proof that the said revision was dismissed at the time Mr. Nickson Ludovick, learned counsel was attending another case before Hon. Ng'humbu, Deputy Registrar. There is no proof that on the said date, Execution No. 152 of 2021 between **Jenifer Akisofrey Mugeni v. PM Group Tanzania Ltd**, was called before the said Ng'humbu, Deputy Registrar and that Mr. Nickson Ludovick, counsel for the applicant appeared. In my view, if at all counsel for the applicant was attending that matter before the Deputy Registrar, strangely, anyway, he could have filed certified proceedings to

that effect. In my view, the allegation that on the fateful date counsel for the applicant was attending another case before the Deputy Registrar in the same floor of the same building, is a totally lie. With all the loud speakers available, in no way an advocate who had a case before a judge could have not heard that his case have been called and gone to attend it first and come back to the deputy Registrar after praying a short adjournment. As pointed out, in his affidavit, counsel for the applicant deponed that revision application No. 10 of 2021 was dismissed while he was before Hon. W.S. Ng'humbu, the deputy Registrar. This statement is not supported by evidence. If at all that is what happened, counsel for the applicant was supposed to attach an affidavit sworn by the said Deputy Registrar. 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.

It was submitted by counsel for the respondent that counsel for the applicant failed to attach medical report to prove that he was sick. In rejoinder, counsel for the applicant submitted that he used "Nyungu" to treat Covid 19 as such he had no medical report. The argument that counsel for the applicant used "nyungu" in my opinion, came as an afterthought, as he found that he cannot justify his allegation that he was sick. I am of that view, because it was open to counsel for the applicant from the word go, to expressly state so in his affidavit and submission in chief and not in the rejoinder submission. I find that the whole issue of covid 19 and 'nyungu" treatment is a mere fabrication to serve the purpose of this application.

It was argued by counsel for the respondent that, if at all Mr. Nickson Ludovick was handling another case before the Deputy Registrar, then, Mr. Nashon Nkungu, advocate could have appeared before Hon. Judge. In rejoinder submission, counsel for the applicant submitted that Nashon Nkungu had never been an advocate for the applicant hence it was impossible for the said advocate to appear before

the judge. With due respect to counsel for the applicant, as an officer of the court, I see no logic for him to refute even what is naked. I am of that view because the dismissal order, that is the subject of this application is loud that on 19th April 2021, Nashon Nkungu, advocate appeared for the applicant. This is the only date applicant entered appearance. I therefore agree with submissions by counsel for the respondent in that aspect.

It was submitted by counsel for the applicant that the dismissal order has denied right of the applicant to be heard and further that if this application will be dismissed, applicant will be denied his constitutional right to be heard. I have considered cases cited by counsel for the applicant in support of this argument. With due respect, right to be heard cannot be available to the applicant who willfully denied himself that right for his failure to appear so that she can be heard. In my view, that right is not there to every person who chooses not to appear in court and who does not follow the law and court calendar. Acceptance of submissions by counsel for the applicant is an invitation that the court should allow litigants to appear at the time and dates they wish. That invitation, in my view, at any cost cannot be

accepted because it is against the principle that there must be an end of every litigation.

Counsel for the applicant invited the court to invoke the overriding principle and allow the application. With due respect, that principle was not meant to enable parties to circumvent the mandatory rules of the Court or turn blind to the mandatory provisions of the procedural law which go to the foundation of the case as it was held in the case of ***SGS Societe Generale De Surveillance SA and Another v. VIP Engineering & Marketing Limited and Another, Civil Appeal No. 14 of 2017*** (unreported). Parties are required to appear before the court; therefore, the overriding principle did not do away with the procedure requiring their attendance in court.

In the affidavit in support of the application, counsel for the applicant did not explain what prevented him from making the application from 30th August 2021 the date revision application No. 10 of 2021 was dismissed for want of prosecution to 12th September 2021. He had ample time to file the application within those dates while in time, but he didn't and no explanation thereof. In my view, and from what I have discussed hereinabove, I hold that applicant has failed to show

that there was reasonable ground or sufficient cause for the delay. I therefore dismiss this application for want of merit.

Dated at Dar es Salaam this 11th May 2022.



B.E.K. Mganga
JUDGE

Ruling delivered on this 11th May 2022 in the presence of Zongo A. Zongo, the Respondent but in absence of the applicant.



B.E.K. Mganga
JUDGE