

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

**MISC. APPLICATION NO. 377 OF 2021**

**BETWEEN**

**CALABASH PUB ..... APPLICANT**

**VERSUS**

**ALLY KACHUWA ..... RESPONDENT**

**RULING**

**S.M. MAGHIMBI, J:**

The applicant herein was also the applicant in Labor Revision No. 822/2018 which was dismissed for want of prosecution on the 30<sup>th</sup> September, 2021. She has moved the court under the provisions of Rule 24(1), (2), (a), (b) (c) (d) (e) (f) and (3) (a), (b), (c), and (d), Rule 24 (11) (c), Rule 55 (1) of the Labour Court Rules, 2007 ("the Rules"), Order IX Rule 6(1) of the Civil Procedure Code, Cap 33, R.E. 2019 ("the CPC"). She is seeking for the following orders:

- (i) That, this honorable Court be pleased to set aside the dismissal order passed by this Honourable court on the 30<sup>th</sup> day of September, 2021 in Labour Revision No. 822 of 2018 between the parties hereto,

- (ii) That, upon setting aside the dismissal order, the court be pleased to appoint a day to proceed with the said suit
- (iii) Any other order (s) this Honourable court may deem fit to grant.

The Chamber Summons was supported by an affidavit of Mr. Omary Ally Ngatanda, learned advocate for the applicant, dated 04<sup>th</sup> October, 2021. The respondent was represented by Mr. Gilbert Mushi, learned advocate. The application was disposed by way of written submissions.

In his affidavit in support of the application and the Chamber Summons, the applicant's main reason for the absence was that on the 13<sup>th</sup> September, 2021 a session before the date that the application was dismissed, their office had busy schedule of backlog cases at the High Court of Tanzania (Dar es salaam District Registry) and the Hight Court of Tanzania (Land Division). They sent a legal officer, Obora Kaduga, to appear and request any available advocate, including the Respondent's advocate at court's premises to appear on matter and hold brief of their advocates and when the matter was called before me, the advocate failed to so. The matter was adjourned to come for hearing on 30<sup>th</sup> September, 2021 at 1030 hours.

Mr. Ngatunda submitted further that on the said September 30, 2021, he arrived at the Court's premises at around 10:40 hours ready for attending the hearing of the matter as per the schedule and upon arriving he made inquiry on the matter at the court's officers/clerks at the front desk; who informed him that he should wait for announcement of the matter at the waiting lounge as the scheduled time for the matter to be called was not yet reached. That he waited and there was no announcement that was made in respect of the matter then at around 1110 hours, he decided to visit the Honourable Judge's chambers to meet her clerk and ask her about the matter and Miss Rose Siliti, the Honourable Judge's secretary, informed him that the Honourable Judge's clerk, Hamisa Tuli, was in the chamber as there were ongoing case at the chamber. He was also informed that his matter had not been called yet due to the ongoing matter which commenced at 1000 hours. That he was advised to wait as the same will be announce/called once the ongoing matter has ended and when he again came and met the clerk, he was informed that the matter had been dismissed at 10.30 am.

Mr. Ngatanda submitted further that the fact that the case was called out of the scheduled time is supported by the Respondent's counter

affidavit sworn by the Respondent's advocate, Ashura Ally whereby at paragraph 9 of the counter affidavit, the deponent affirms that the matter was announced to be called before the Honourable judge at 1030 hours which was contrary to the time provided. He then submitted further that though the Respondent contended further at paragraph 9 of the counter affidavit that after the case had been called at 1030 hours and the Applicant were absent, the court clerk told them to wait for the Applicant and that they would be called at 1100 hours. That they were called at 1130 hours and the clerk asked them about the whereabouts of the Applicant and the deponent responded that they did not see any one while they were on the waiting chamber of the honourable judge. He argued that the above referred depositions re-affirm the fact that the matter was not announced at all as per the normal practice of this honourable court; whereby all cases are called by announcement made through speakers set in various areas within the court's premises. That the deponent herself deposed that they were just called while they were inside the waiting room of honourable judge which means that the clerk did not go out and make an announcement of the matter. He argued that if she could do so, the Applicant's counsel who was in the advocates waiting lounge could have

heard the announcement and appeared before the Honourable Judge. He then diverted the blame on the court clerk, that she was negligent in performing her tasks as a result the Applicant's counsel failed to appear and, thus, the matter was dismissed.

Mr. Ngatunda submitted further that it is trite law in our jurisdiction through various judicial decisions that; a party should not suffer for a mistake done by court/an officer of court. He supported his submissions by citing the case of **Attorney General v Ahmad R. Yakuti and others, Civil Appeal No. 49 of 2004** (unreported) whereby at page 8, the Court of Appeal of Tanzania held that, no party should suffer any detriment on account of a mistake or error committed by court. He further cited the case of **Mount Meru Flowers Tanzania Limited v Box Board Tanzania Limited, Civil Appeal No. 260 of 2018** (unreported), where the same position was held. He then submitted that pursuant to the principle established by the apex court of the land, the reason for the Applicant's non-appearance was due to the mistake done by court through its court clerk and that in line with case laws cited above, such mistake should not be used to punish the Applicant.

He concluded by praying that the present application be granted and the dismissal order should be set aside because the applicant's conduct before the dismissal of Labour Revision No. 822 of 2018 was good, he cited the decision where that position was held, the case of **Sadru Mangalji v Abdul Aziz Lalani & others, Misc. Commercial Application No. 126 of 2016** (unreported).

In reply, Mr. Ndossi submitted that most of the grounds have been answered in their counter affidavit which he prayed that it is fully adopted. He then cited the case of **Deogratius Bakinahe & 2 others Vs. Shirika la Usafiri Dar-es-salaam (UDA)&Another, Misc. Application No. 361/2020** where Hon. Judge B.E.K Mganga, while citing the case of **Tanzania Milling & Co. Ltd Vs. Zacharia Ama T/A All Gold Co. & Another, Civil Application No. 415/2018** held that:

*"If an affidavit mentions another person, that other person has to swear an affidavit. However, I would add that is so where information of that other person is material evidence because without the other affidavit, it would be hearsay."*

He then prayed that this application be dismissed for failure of the applicant to adduce sufficient reasons for setting aside the dismissal order.

I have heard the submissions of the parties and have gone through the records of the Revision No. 822/2018, indeed in the said file it was only the 30<sup>th</sup> September that the applicant was missing in court. However, in my order that dismissed the application, I noted that the applicant's attendance had been staggering and not steady. For instance I noted that the last time they appeared on 22<sup>nd</sup> February 2021 and were absent on the subsequent dated on 28/04/2021 and 01/07/2021 and the absence was without notice. On the 13<sup>th</sup> September he sent a legal officer who was aware of the date that the matter was dismissed.

Further to that, unlike what Mr. Ngatunda has deponed in his affidavit and the submissions in support of the application, the matter was scheduled for hearing on the 30/09/2021 at 10.30 am and not 11 as he would want the court to believe. So the fact he admitted that the matter was dismissed at 10.30 am is as per the records. His allegation that the matter was dismissed before time does not match with the records because the matter was scheduled at 10.30 am. So as per the case of of **Deogratus Bakinahe & 2 others**(Supra) cited by Mr. Ndossi, all the



allegations about the clerk or my secretary having told them that the matter was yet to be called should have been substantiated by affidavits of those whom he alleged to have received information from. In the absence of that, his allegations remain words from the bar not worth value as evidence.

On those findings, it is clear that the applicant has failed to adduce reasons for his absence and as noted in the dismissal order, he was not serious in pursuing his rights. Consequently, this application is hereby dismissed for lacking merits.

Dated at Dar es Salaam this 16<sup>th</sup> day of May, 2022



A handwritten signature in blue ink, appearing to be 'S.M. Maghimbi', written over a horizontal dotted line.

**S.M MAGHIMBI**  
**JUDGE**