

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

MISC. APPLICATION NO. 413 OF 2022

*(Arising from Misc. Labour Application No. 217 of 2022 filed at High Court Labour Division
at Dar es Salaam)*

BETWEEN

KATHLEEN ARMSTRONG.....APPLICANT

VERSUS

NATIONAL INVESTMENT COMPANY LIMITEDRESPONDENT

RULING

S.M. MAGHIMBI, J:

The applicant herein filed the present Application under the provisions of Rule 24(1)(2) (a)(b)(c)(d)(e) and 3(a)(b)&(d), 11(b), 38(1)&(2) of the Labour Court Rules, G.N. No. 106/2007 ("the Rules") and Section 51 of the Labour Institutions Act, Cap. 300 R.E 2019. They are seeking for an Order to set aside an Ex-parte order issued against the Applicant herein on the 6th day of October 2022, an order which referred the matter to the CMA after Misc. Labour Application No. 217 of 2022 had been withdrawn by the Respondent herein. The application is supported by an affidavit of Mr. Moses Mvungi, learned Advocate, deponed on the 20th day of September, 2022.

Brief background of the matter is that the Respondent had lodged an Application No. 217 of 2022 for an extension of time to file a Notice of Appeal out of time. The intended appeal was against the ruling and order of this Court(Honorable Nyerere, J) in Misc. Application No. 492 of 2016 dated 22nd June, 2018. On the 27th day of September, 2022 this Court raised an issue as to whether the application tabled before the Court is tenable, directing the Applicant (Respondent herein) to address the court on the same. On the 06th day of December, 2022 when the matter came for hearing , the respondent (Applicant herein) without any reasons being adduced, did not appear in court. The court proceeded with hearing the applicant who after considering the court's concern, the applicant prayed to withdraw the application and that the matter be remitted back to the CMA to determine the legality of the settlement deed, prayers which were both granted. The applicant was aggrieved by the order to remit the matter back to the CMA and has made the current application moving this court to set aside the ex-parte order.

This application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Mr. Andrew Mvungi,

learned Advocate while the respondent's submissions were drawn and filed by Mr. Benjamin Mwakagamba, learned advocate.

In his submission to support the application, Mr. Mvungi submitted that the prayer to revert the matter back to the CMA by the Counsel for the Applicant therein was made in absence of any Application before this Honorable Court hence rendering the same a nugatory for lacking a base to stand upon. That it is crystal and clear that as a matter of procedure, any prayer ought to be made in the presence of an existing matter before this Honorable Court and that when the said prayer was presented before the court, it was first, prayed to withdraw the said application and further prayed for an order to refer the matter to CMA. He argued that with the above context at a time, it is clearly confirmed that, when the respondent sought to be granted with a new prayer no formal application existed in court, thereat it was un-procedural to grant new prayer as the present application was first struck out due to prayer made by the respondent. He concluded that the Counsel for the respondent intentionally decided to mislead this Honorable Court maliciously with an intention to hinder the applicant to realize her rights.

He submitted further that in order to move the Court to refer the matter back to the CMA, the Applicant therein ought to have made a fresh application granting the same an avenue to make such prayer. That such application ought to have been made formally as per provision of Rule 24(11) of the Labour Court Rules, 2007, which emphasized that an application ought to be done formally by way of chamber summons supported by an affidavit. He argued that the Applicant therein acted contrary to the requirement of the law hence misleading this Honorable Court into making an order that in its entirety is a nullity.

Mr. Mvungi went on submitting that Rule 24(1) of the Rules, provides for the requirement in case of any Application being made in Court for notice to be issued to all interested parties. He then argued that in the matter at hand, the Respondent herein neither made a formal application into court nor issued any notice informing other interested parties. That it is an elementary principle in law that, Natural justice demand, parties to the case to be heard before an order can be made to the prejudice of their rights. Failure to hear a party is an error that goes to the root of the matter and is fatal. That the rule of natural justice states that no man should be

condemned unheard and, indeed both sides should be heard unless one side chooses not to.

He went on submitting that in the case at hand no consent was issued by the Applicant herein for the matter be heard in his absence, and the Ex parte Order that emanated from the same has jeopardized or rather infringed the Applicants rights which is contrary to the principles of natural justice. That it was and still is the Applicant right to have or rather be afforded an audience to adduce his reasons why the matter ought not to be reverted back to the CMA. he supported his submissions by citing **Misc. Application No. 753 Of 2019 Between Jackson Mwendu Vs. Agakhan Education Service**, where this court (Hon. Muruke J), cited a case of **Ridge Vs. Baldwin (1963) 2 All ER 66**, whereas it was insisted that the consequences of the failure to observe the rules of natural justice is to render the decision void and not voidable. That official of the court must comply with the rules of natural justice when exercising judicial functions.

Mr. Mvungi submitted further that because the the Respondent herein made a prayer to withdraw his Application, in essence nothing remained before the Court. he supported this line of argument by citing the

case of **Chang Jian Investment Ltd Vs. African Banking Corporation (T) Ltd & others Land Case No. 7 of 2019**, where it was held that the effect of withdrawing a suit means, before the court nothing remains. He then argued that with regard to the aforementioned case, it is crystal clear that Counsel for Respondent herein misled this Honorable Court by making a new prayer in Court whilst nothing existed before this Honorable Court and hence the Court had no mandate to order such reversion of the matter back to the CMA.

He concluded that the Applicant's basic right to be heard will be curtailed if it is not granted and that the respondent will not be prejudiced in any way as it is the Applicant who will stand to suffer the most than the respondent if this Application to set aside Ex parte Order is not granted.

In reply, Mr. Mwakagamba submitted that on the 27th September, 2022 when the Misc Application No. 217/2022 came for mention, this court raised a concern on the tenability of the said application and ordered both parties herein to address the court on that. Parties were to appear on 06th October, 2022 a date which the applicant failed to appear. He argued that the reason of mixed up diary is clear negligence and that it should not be condoned by the court. He submitted further that Mr. Mvungi's contention

that the matter proceeded ex-parte and applying to set aside an ex-parte order is misleading the court as no ex-parte order was issued, rather, he argued, matter proceeded in absentia. He also argued that the matter was struck out and should have been challenged through the Court of Appeal.

On the prayer that the respondent made on 06th October, 2022, Mr. Mwakagamba submitted that it was made without malice as it was a prayer made after research being made. That upon research they found that the proper remedy was to apply to set aside settlement deed.

In rejoinder, I have noted that Mr. Mvungi brought all new submissions as if they were submissions I chief, I will therefore not consider those submissions. He also reiterated that his absence on the 06th October, 2022 was due to a diary mix up. He also reiterated his submission in chief that on that day the respondent was not supposed to make an alternative order of being referred back to the CMA.

Having considered the parties' submission, it is trite law that in an application to set aside an ex-parte order, the applicant has to explain and convince the court on his absence on the date that the ex-parte order was passed. As for this case, as submitted by Mr. Mwakagamba, on the 27th

September, 2022 when the Misc. Application No. 217/2022 came for mention, this court raised a concern on the tenability of the said application and ordered both parties herein to address the court on 06th October, 2022. On the date fixed by the court, the applicant herein did not appear hence it is the duty of her advocate to explain on her absence.

As per the records, having a thorough look at the submissions of Mr. Mvungi, just explained to the court that he did not appear on the date set by the court while in the previous date was because a mere mixed up of diary dates. Other than that, all his submissions are only attacking the conduct of his fellow advocate to make a prayer before the court. He is forgetting that had he been in court, he would have the opportunity to so challenge the prayers made therein and not to miss the court and come and complain later. That being the case, it is apparent that the applicant has failed to adduce reasons for his absence on the date when the orders were sought so as to justify for the court to set aside its ex-parte order. Consequently, this application is hereby dismissed.

Dated at Dar es Salaam this 27th day of February, 2023.




S.M MAGHIMBI
JUDGE