

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

MISCELLANEOUS APPLICATION NO. 62 OF 2023

REGENCY MEDICAL CENTRE LIMITED APPLICANT

VERSUS

OMARY MSEHWA RESPONDENT

RULING

*Date of last Order: 17/05/2023
Date of Ruling: 31/05/2023*

B. E. K. Mganga, J.

Applicant has filed this application seeking enrollment of revision application No. 345 of 2022 that was dismissed on 23rd November 2022. In the affidavit in support of the application, John Ignas Laswai, learned counsel for the applicant stated that the said revision was fixed for mention on 24th November 2022 but on 22nd November 2022 the said mention date was adjusted such that instead of coming for mention on 24th November 2022, it was revised and came for mention on 23rd November 2022. That on 23rd November 2022 when the said revision came for mention, one

Yusuph Lule, the legal officer came to court and asked Kamal Abdul, advocate to hold brief of Hamisa Nkya who was on maternity leave and that other counsel who are mentioned in the notice of representation were not available due to abrupt change of the date from 24th November 2022 to 23rd November 2022. That, on 23rd November 2022, the court (B. E. K. Mganga, J) dismissed Revision Application No. 345 of 2022 for want of prosecution. Mr. Laswai deponed further that on 23rd November 2022 he was in Arusha filing Civil Appeal to the Court of Appeal. He stated further that the matter was fixed for mention on 24th November 2022 but this date was revised on a short notice to 23rd November 2022, so the remaining legal counsel, namely Dr. Onesmo Michael, Makarious Tairo, Prisca Nchimbi and Mazoea Africa could not reschedule their commitments of 23rd November 2022 on such a short notice and appear in court that is why they sent their legal officer, namely Yusuph Lule to assist on that date. John Ignace Laswai attached the affidavit of Dr. Onesmo Michael, Makarious Tarimo, Prisca Nchimbi, Africa Mazoea and Yusuf Lule to support what he stated in his affidavit.

In his affidavit, Dr. Onesmo Michael stated inter-alia that, as a member of Fair Competition Tribunal, on 23rd November 2022, he was

assigned a special task by the Chairperson of the Tribunal Madam Justice S.M. Maghimbi and that non-appearance of the applicant on 23rd November was not due to negligence or lack of interest.

In his affidavit, Makarious Tarimo, he stated inter-alia that, as a lecturer of the Law School of Tanzania, on 23rd November 2022, he was supervising examinations at the Law School of Tanzania. Ms. Prisca Nchimbi stated in her affidavit that on 23rd November 2022, her son had a teething fever all the night that she had to stay at home the whole day attending her son.

In his affidavit, Africa Mazoea stated inter-alia that from 21st November 2022 to 25th November 2022 he was in Singida and Arusha attending the case of *Juma Kiringa v. National Bank of Commerce limited and Grace Mazengo v. Exim bank Tanzania Limited* respectively. On his part, Yusuf Lule, in his four paragraphed affidavit, he deponed that, he is employed by Locus Attorneys and that he was instructed to handle the filing and service of the documents in revision No. 345 of 2022 which was before Hon. B.E.K. Mganga. That, he called Omary Msehwa, the respondent through his Mobile No. 0713158001 and that the latter informed him to get in touch with his lawyer whose office is located

at Muhimbili area and get back to him but respondent did not get back which is why respondent was not served.

Respondent file both the Notice of Opposition and the counter affidavit to resist the application. In his counter affidavit, respondent stated that there was no excuse for non-appearance of the applicant.

When the application was called on for hearing, Mr. John Ignace Laswai, learned Advocate, appeared and argued for and on behalf of the applicant while Mr. Eneza Msuya, learned Advocate, appeared and argued for and on behalf of the respondent.

Arguing in support of the application, Mr. Laswai submitted that Revision No. 245 of 2022 was scheduled for hearing on 23rd November 2022 the date it was dismissed. He submitted further that, initially the said revision was scheduled for hearing on 24th November 2022 as they were informed by Yusuf Lule who appeared in court. Counsel submitted further that, on 22nd November 2022 Yusuf Lule was called over the phone that the application is scheduled for hearing on 23rd November 2022. He added that the said Yusuf Lule was informed by the Court Clerk. During submission, counsel for the applicant conceded that there is no paragraph in the affidavit of Yusuf Lule showing that he was called over the phone by

a Court Clerk that the application is scheduled for hearing on 23rd November 2022 instead of 24th November 2022. He went on that, on 23rd November 2022 he was in Arusha as indicated in Annexure Regency 3.

On non-appearance of Dr. Onesmo Michael, he submitted that on 23rd November 2022 the said advocate was at Fair Competition Tribunal. He however conceded that in his affidavit, Dr. Onesmo did not attached any support to show that he was at the said tribunal. In respect of non-appearance of Makarious Tairo, Mr. Laswai submitted that in Tairo's affidavit, he stated at paragraph 3 and 4 that he was supervising examination at the Law School. When probed by the court as whether there is proof, he readily conceded that there is nothing supporting that the said advocate on that day, was at Law School supervising examination.

Counsel for the applicant submitted that Prisca Nchimbi was at hospital attending her son who was sick. During submissions, counsel conceded that there is no evidence to support that the said advocate was at hospital attending her child. On non-appearance of Africa Mazoea, Mr. Laswai submitted that the said advocate was in Singida and Arusha attending cases. In his submissions, counsel for the applicant also

conceded that there is no Court proceedings or summons to support that the said advocate was in those places.

Counsel for the applicant submitted further that Yusuf Lule, stated in his affidavit that he failed to serve the respondent. Counsel for the applicant concede that in his affidavit, Yusuf Lule said nothing in relation to 24th November 2022 and 23rd November 2022, the later date being the date the application was dismissed for want of prosecution.

Counsel for the applicant submitted that applicant became aware on 23rd November 2022 that revision Application No. 345 of 2022 was dismissed for want of prosecution and that 14 days thereafter namely, on 08th December 2022, they filed Misc. Application No. 519 of 2022 that was struck out on 28th February 2023 for being incompetent. Counsel for the applicant conceded that there are no reasons advanced as to why applicant waited 14 thereafter to file filing Misc. Application No. 519 of 2019. Counsel for the applicant concluded by praying that the application be allowed, Revision No. 345 of 2022 be restored and heard on merit.

Opposing the application, Msuya, learned advocate for the respondent submitted that in order the case that was dismissed for want of prosecution to be restored, applicant must adduce sufficient reason and

cited the case of *Regina Thobias Mihiga v. Rachel Anthony*, Misc. Labour Application No. 555 of 2020, HC (unreported) to bolster his submissions. He argued that in the application at hand, applicant has failed to explain as to why, one of the seven (7) Advocates failed to enter appearance. He submitted that, Laswai learned counsel for the applicant attached a flight schedule to his affidavit in support of the application but there is no boarding pass to prove that he boarded Precision Air. He went on that, Dr. Onesmo did not prove that on the material day he was at the Fair Competition Tribunal. Counsel was quick to add that, even if he could have tendered that evidence, he was supposed to attend before the Court and not the tribunal.

Learned counsel for the respondent submitted further that, Makarious Tairo, Advocate has also not proved that on the material date he was supervising examinations at the Law School. He added that, supervision of examinations cannot be a reason for his non-appearance because he consented in the notice of representation to represent the applicant. He submitted further that, it is not in public knowledge that he was supervising examinations.

Counsel for the respondent submitted that, Prisca Nchimbi stated that she sent her child at hospital but she did not attach proof that she was at hospital. He went on that, Africa Mazoea stated that he was handling a cases in Singida and Arusha but he did not attach cause list or bus ticket to that effect. He added that, it seems Yusuf Lule, was in Court but in his affidavit he refrained to state that he was in Court. Counsel for the respondent concluded his submissions by submitting that there is no good reason for non-appearance of the applicant. He therefore prayed that the application be dismissed.

In rejoinder, Mr. Laswai, learned counsel for the applicant submitted that he attached electronic ticket and a copy of the record of appeal filed on 23rd November 2022. He submitted further that, it is on the Court record/order that Yusuf Lule was in Court on 23rd November 2022. He further submitted that *Mihiga's case* (supra) is distinguishable because applicant has shown reasons for non-appearance of her on 23rd November 2022.

I have considered evidence of the parties in both the affidavit in support of the application and the counter affidavit opposing the applicant and submissions made thereto. I will, as a starting point, state that, in an

application for enrollment of the matter dismissed for want of prosecution, applicant must, by an affidavit, give satisfactory explanation for his failure to attend before the court as it is provided for under Rule 36(1) of the Labour Court Rules, GN. No. 106 of 2007. The said Rule provides: -

"36(1) Where a matter is struck 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 a satisfactory explanation by an affidavit, for his failure to attend the court"

I should point out albeit briefly that the drafter inadvertently used the phrase "a matter struck off...due to absence of the party who initiated proceedings..." instead of "a matter dismissed...due to absence of the party who initiated proceedings...". The proposal I have made will harmonize Rule 36(1) of GN. No. 106 of 2007 (supra) and Rule 32(5) of the same GN because under the later rule, non-appearance warrants the matter to be dismissed and not to be struck out. I am of that view because if the party who initiated proceedings doesn't appear, the matter has to be dismissed and not struck out.

For the foregoing, advise the drafters to amend that rule by deleting the phrase "struck off the file" appearing between the word "matter" and

the phrase “due to absence) and substitute them with the word “dismissed”.

Now back to the application at hand, in terms of Rule 36(1) of GN. No. 106 of 2007(supra), in order the matter to be re-enrolled, the court must be convinced that the affidavit of the applicant in support of the application, satisfactory explanations for non-appearance. In other words, there must be evidence in the affidavit to justify non-appearance.

In the application at hand, the reason given in the affidavit of John Ignas Laswai, learned counsel for the applicant is that revision No 345 of 2022 was fixed for mention on 24th November 2022 but on 22nd November 2022 the said mention date was adjusted such that instead of coming for mention on 24th November 2022, it was revised and came for mention on 23rd November 2022. It was stated that due to that short notice, all advocated who are in the notice of representation could not reschedule their commitment on 23rd November 2022 as a result they sent Yusuph Lule, their legal officer to assist. I have examined court proceedings in Revision No. 345 of 2022 and find that it is not correct that the said application was initially scheduled on 24th November 2022 for mention. Court proceeding does also not show that on 22nd November 2022, the

court revised 24th November 2022 that was a mention date was revised and came for mention on 23rd November 2022. Court proceedings in revision No. 345 of 2022 shows that on 13th October 2022, Applicant filed the said revision together with the notice of representation showing that she will be represented by **Hamisa Nkya Advocate, Dr. Onesmo Michael Advocate, Mariam Ismail Advocate, Makarios Tairo Advocate, Prisca Nchimbi Advocate, Africa Mazoe Advocate and John Ignas Laswai Advocate** all of them from Locus Attorney. Court record shows that revision No. m345 of 2022 came for the 1st time before the presiding judge on 19th October in absence of the parties and it was scheduled for mention on 10th November 2022. On the latter date, neither party appeared, as a result, it was scheduled for hearing on 23rd November 2022 at 10:00hrs. On 23rd November 2022, proceedings show that Kamal Abdul, Advocate appeared holding brief of Hamisa Nkya, advocate for the applicant. At that time, respondent was not served. Court proceedings on shows as follows: -

"Abdul Advocate

I am holding brief of Hamisa Nkya, Advocate who is on maternity leave.

Court. The notice of representation shows a list of (7) seven Advocates.

Where are others.

Abdul Advocate

My Lord, I was just informed by Yusuf Lule, the legal officer that Hamisa Nkya Advocate is on maternity leave, the same to Mariam Ismail, Advocate. But there is no information relating to the whereabouts of Dr. Onesmo Michael, Makarios Tairo, Prisca Nchimbi, Africa Mazoea and John Ignas Laswai, Advocates who are on the notice of representation. I concede that respondent has not been served with the application. That is all"

Based on that information, the court issued the following order: -

ORDER

When this application was scheduled for hearing today, Mr. Kamal Abdul, Advocate appeared and informed the Court that he is holding brief of Hamisa Nkya, Advocate for the applicant allegedly that the said Hamisa Nkya, Advocate is on maternity leave. When asked by the Court as to the whereabouts of other Advocates and reasons for their non-appearance, Mr. Abdul submitted that he is aware that Mariam Ismail, Advocate is also on maternity leave. He conceded that the whereabouts and reasons for non-appearance of Dr. Onesmo Michael, Makarios Tairo, Prisca Nchimbi, Africa Mazoea and John Ignas Laswai, Advocates who are on the notice of representation is not known. He also conceded that applicant has not served the respondent with the application.

I have examined the Court record and find that it shows that applicant filed this application on 13th October, 2022 intending to challenge the CMA award issued on 02nd September, 2022. The record is clear that, in the notice of representation that was filed on 13th October, 2022, applicant indicated that she will be represented by (i) Hamisa Nkya, Advocate (ii) Dr. Onesmo Michael, Advocate (iii) Mariam Ismail, Advocate (iv) Makarios Tairo, Advocate (v) Prisca Nchimbi, Advocate (vi) Africa Mazoea, Advocate and (vi) John Ignas Laswai, Advocate.

It is clear from that out of the said six (6) Advocates, it was only reported by Mr. Abdul Advocate that Hamisa Nkya and Mariam Ismail, Advocates are on maternity and no reasons was assigned for non-appearance of the four mentioned Advocates. It seems to me that applicant does not wish to prosecute the application, which is why, from the date of filing it on 13th October, 2022 todate 24th November, 2022, she has never entered appearance nor served the respondent. That being the case, I hereby dismiss this application for want of prosecution.

It is so ordered.

B. E. K. Mganga

JUDGE
23/11/2022

It is my view that, there was a slip of pen in the above order. That is clear when referring to “todate 24th November, 2022” but instead of “todate 23rd November 2022” because the order was issued and signed on 23rd November 2022 as it was correctly submitted by Mr. Laswai, learned counsel for the applicant.

It is clear from the quoted proceedings that there no rescheduling of the application from 24th November 2022 to 23rd November 2022. In short, the affidavit of the applicant in support of the application contains lies. Affidavits containing lies cannot be acted upon as it was held by the Court of Appeal in the case of [*Jaliya Felix Rutaihwa vs Kalokora Bweshwa &*](#)

Another, Civil Application No. 392 of 2020) [2021] TZCA 62 and this court in the case of Cashsales Stores Ltd vs. Damas Njowi & Another (Rev. Appl 197 of 2022) [2022] TZHCLD 970. In Jaliya's case (supra) the Court of Appeal held:-

"It is elementary that an affidavit that contains material falsehood cannot be acted upon: see, for instance, Ignazio Messina v. Willow Investments SPRL, Civil Application No. 21 of 2001; and Kidodi Sugar Estates & 5 Others v. Tanga Petroleum Company Ltd., Civil Application No. 110 of 2009 (both unreported)."

The Court of Appeal went on to quote what it held in **Ignazio Messina** (supra) that: -

"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue."

In Jaliya's case, the Court of Appeal concluded: -

"In the premises, I find it unsafe to act on the supporting affidavit that patently contains substantial untruths tending to muddy the waters but work in favour of the applicant."

It is my considered view that, had the information in affidavits in support of the application been correct, Yusuf Lule could have informed

Kamal Abdul to inform the court as he did in relation to the two advocates who were on maternity leave. Therefore, there was no justification for all the aforementioned advocate not to enter appearance.

Again, the contention that the aforementioned advocates informed Yusuph Lule to assist them to adjourn the application cannot be true because that information is also not reflected in the affidavit of Yusph Lule. More so, if the said advocates were occupied with other schedules, they were supposed to file a notice of adjournment. It is my view that, assuming that what is stated in the affidavit of Laswai and annexures thereof are true, any reasonable advocate would have written a notice of adjournment and give the said Yusuph Lule to file in court on the same date. More so, in his affidavit, Yusuf Lule did not state that he was asked by the aforementioned learned counsel who were in the Notice of Representation to assist them to adjourn the matter that was scheduled for hearing on 23rd November 2022.

It is clear from the affidavits of counsel for the applicant that they failed to prove that on the material day they were at the respective places they claim they were. In fact, none of them save for Mr. Laswai who brought electronic flight ticket to show that he was in Arusha. Counsel for

the respondent submitted correctly in my view that, electronic ticket by itself is not a proof that he travelled. He was supposed to attach the boarding pass. Whatever the case, I give him benefit of doubt that he was in Arusha. But there is no justifiable reason for non-appearance of other advocates save for those who it was reported that they were on maternity leave.

It is my view that applicant has failed to give satisfactory explanations as to why she did not enter appearance on 23rd November 2022 the date revision application No. 345 of 2022 was dismissed for want of merit. It is my view that, applicant was aware that revision No. 345 of 2022 was scheduled for hearing on 23rd November 2022 but for reasons best known to counsel who were in the Notice of Representation, save for the two counsel who were no maternity, decided not to enter appearance. It was argued by counsel for the applicant that *Mihiga's case*(supra)is distinguishable on the ground that in the application at hand applicant had good reason or justification for no-appearance. With due respect to counsel for the applicant, there is no justification for non-appearance of the applicant on the date revision No. 345 of 2022 was dismissed for want of prosecution. Since applicant was aware and did not enter appearance

without sufficient reason or cause, then, I find that the application is unmerited.

For the foregoing, I hereby dismiss this application for lack of merit.

Dated in Dar es Salaam on this 31st May 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on this 31st May 2023 in chambers in the presence of Eneza Msuya, Advocate for the Respondent but in the absence of the Applicant.



B. E. K. Mganga
JUDGE