

TANZANIA / JUDGMENT

morogoro plastic limited bh ladwa vs augustino kabalula 5 others 2022 tzhcld 1022 27 may 2022

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27 May 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT PAR ES
SALAAM MISC. APPLICATIO N0.106 OF 2022 BETWEEN MOROGORO PLASTIC LIMITED & B.H.
LADWA APPLICANT VERSUS AUGUSTINO KABALULA 1st
RESPONDENT EPAFLASO LUKASIMASOND 2nd RESPONDENT MOHAMED
SAID MTONYA 3rd RESPONDENT WINFRED BENO
MILINGA 4th RESPONDENT MOHAMED ABDALLAH
TINDWA 5th RESPONDENT SEVERINE PETRO MASIKA
6th RESPONDENT

RULING.

S.M. MAGHIMBI, J: The application is lodged under the provisions of Rule 24(1), 24(2),(a),(b),(c), (d),(e) and (f), 24(3),(a),(b),(c), and (d), and 55(1) and

- (2) of the Labour Court Rules, G.N. No. 106 of 2007; Order IX Rule 6 (1) and Section 95 of the Civil Procedure Code CAP 33. R.E. 2019. The applicant is moving this court for an order to set aside the dismissal order dated 28th February, 2022, pending hearing of this Application Inter-parte. As for the inter-parte prayers, the applicant is moving the court to set aside i the dismissal order dated 28th February, 2022, and restore Misc. Application No. 304 of 2021. He is also seeking for any other relief the Court deems fit to grant. The application was lodged by Chamber Summons supported by an affidavit of Mr. Nehemia Nkoko, learned advocate representing the applicant dated 14th March, 2022. The respondents opposed the application by filing a counter affidavit deponed by Mr. Augustine Kabalula on the 12th April, 2022. The brief background of the matter is that on the 28th February 2022, this court dismissed the applicant's Misc. Application No. 304/2021 for want of prosecution following absence of the applicant and her advocate. The Applicants are aggrieved by the dismissal on the ground that she was not afforded the right to be heard. Having considered the parties submissions and having gone through the records of the Misc. Application No. 304/2021, it is Mr. Nkoko's submission Wk that that the Misc. Application No. 372 of 2021 came for hearing

of the preliminary objection on the 16th February, 2022 and the advocate for the Applicants did not appear but advocate Patricia Patrick Tarimu appeared, holding brief of Mr. Nkoko, and dully informed the court that advocate Nehemiah Nkoko is appearing before Hon. Kakolaki, J, in Criminal Session 2 No. 169 of 2018 between Republic amd Mariam Steven Mrita & Another. The session was to run from 14th to 18th February, 2022, at the High Court of Tanzania Dar es Salaam District Registry. Upon the information, this matter was adjourned and set for hearing of the preliminary objection on the 28th February, 2022. Looking at the records, the above fact is not supported by any evidence on records. The records show that this matter was never scheduled for hearing on the 16th February 2022. The last time the advocate was here was on the 26/11/2021 and the matter was schedule for mention on the 15/02/2022, a date on which neither the applicants nor their advocate, entered any appearance. The respondents were present and the matter was scheduled for hearing on special backlog session on the 28th February, 2022 and again, the applicants nor their advocate were present. Therefore as correctly pointed out by Mr. Mkunza, personal representative of the respondents, Mr. Nkonko's statement in the affidavit that the matter was scheduled for mention on the 16th February, 2022 is misleading the court for lack of truth. The same goes with the statement that on the 16th February, 2022 the Misc. Application No. 304 of 2021, came for hearing of the preliminary objection because that is not what the records of the said 3 application say. The order was that the application comes for hearing, not particularly of PO and it came on the 15th February and not 16th February as deponed. I therefore wonder where Mr. Nkoko came up with the issue of hearing of preliminary objection unless he was attending another court which scheduled the mater on the 16th February, 2022 for hearing of P.O. As for the records of this court, the matter came for mention on 15th February, 2022 and on that date it was scheduled to come for hearing on th special backlog session on the 28 February, 2022, a date which the neother applicants nor their advocate appeared hence the matter was dismissed for want of prosecution. The argument that the advocate for the applicant was not present but the legal officer was at the Court's premises but could not hear when the matter was called up for hearing is nothing but a statement from the bar because it is not backed by any evidence. The applicant should have bothered to bring an affidavit of the alleged legal officer. On the allegations that the advocate was appearing before Hon. Kakolaki, J, in Criminal Session No. 169 of 2018 between Republic Vs. John Yohana Tumuangushe, at the High Court of Tanzania Dar es Salaam District Registry, it is unfortunate for Mr. Nkoko that this part is also not backed by 4 any evidence. There is no summons that was attached in the affidavit to support the assertion that he was appearing before the High Court Dar-es- salaam Registry on a Criminal Sessions Case, it also remains a word from the bar not backed by any evidence. Further to that, if he was so appearing in Criminal Session, the advocate could have sent the % ,A. information to the court in advance before the hearing date or have someone report the same before the Judge or Deputy Registrar and not wait until the case is dismissed for want of prosecution and come flag the summons of the session and expect to convince the court to reverse its decision. There were many ways the advocate could have informed this court of the matter, after all the summons for the criminal session were issued on the 14th

February, 2022 which is long after this court scheduled the matter to come for mention in the presence of Mr. Nkoko. Therefore he was duty bound to inform the court of his absence either in advance or on the day the matter was scheduled by this court. On the issue whether it was proper for the Honorable Registrar to dismiss the application without ascertaining as to the Applicants' whereabouts, I think as an advocate, Mr. Nkoko should be serious and certain with what he is tabling before court for arguing. He should be keen to go through the 5 court records and report that which is rightly reflected on the records and not to come up with his own version contrary to the records. In a court of law, advocate should approach with utmost respect and even in raising issues, they should do with diligence by reflecting what is in the court file. As per the records, this matter was dismissed by a Judge and not the Honorable Deputy Registrar as framed by Mr. Nkoko in his first statement of legal issue as deposed in the affidavit. As a matter of fact, the untrue statements in the affidavit this shows lack of seriousness in what the applicant is trying to move the court to do, otherwise he should have taken his time to go through the records of the application and only report that which is rightly reflected in the court records. On the above determination, the applicant has failed to convince the court on the grounds to justify setting aside the dismissal order. This application is therefore dismissed for want of merits. Dated at Dar-es-salaam this 27th day of May, 2022. 6

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