

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

**MISCELLANEOUS LABOUR APPLICATION NO. 489 OF 2020**

**BETWEEN**

**CITIBANK TANZANIA LIMITED.....APPLICANT**

**AND**

**EMMA MWENDA ..... 1<sup>ST</sup> RESPONDENT**

**EDNA NDUGUZI.....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of Last Order: 24/06/2021*

*Date of Ruling: 01/07/2021*

**Z A. Maruma, J.**

This ruling emanated from application to set aside the dismissal order for non-appearance of the applicant in revision application No. 252 of 2019 delivered on 16<sup>th</sup> March 2019. The application is brought under section 24 (1), (2) (a), (b), (c), (d) and (f) (3) (a), (b), (c) and (d) and Rule 24 (11), 32 (7) Rule 38 (1) (a) and (2), Rule 55 (2) of (1) and section 95 of the Civil Code Cap 33 R.E 2019.

The application is supported by affidavit of Paschal Kamala, Sabas Shayo and Ester Msangi all advocate from Kesaria & Co.

Advocates. Contesting the application, respondents filed a joint counter affidavit of Emma Mwenda and Edna Nduguzi.

On the hearing date, the applicant Citibank Tanzania Limited was represented by Mr. Sabas Shayo and the respondents had a service of Mr. Flavian A. John.

Arguing in support of the application, Mr. Sabas Shayo adopted the three affidavits to form part of his submission. Mr. Sabas argued that Applicant was continuously appears in court as indicated in paragraph 9, 10 & 11 of his affidavit. He submitted that on 20<sup>th</sup> Nov. 2020 applicant was represented by advocate Ms. Ester Msangi who later on informed him that, the matter was scheduled for hearing on 16/03/2020 at 10:30 am. Then a notice was given to Mr. Pascal Kamala. Very unfortunate on the scheduled date Mr. Kamala was attended Court of Appeal session at Sumbawanga in Civil Appeal No. 195 of 2019 of Davis Bernard Haule Versus Nation Microfinance Bank PLC NMB a copy of summons and travelling ticket attached as annexure CITI-3. Following the received of summons, Mr. Kamala instructed advocate Sabas Shayo to hold brief and inform the Court that, advocate Kamala is attending Court of Appeal Session. This has reflected in the affidavit of Mr. Sabas Shayo and Ms. Ester Msangi

who confirmed that the matter was scheduled at 10:30 am. Mr. Sabas Shayo attended to the Court at 10:20 am and informed that the matter was called on 10:00 am and dismissed for non-appearance. Checking on the court record Mr. Sabas submitted that, the court clerk informed him that the matter was scheduled 10:00 am and not 10:30 am. Following of the dismissal Order, application for restoration was made thereon. Mr. Sabas submitted that the advocate did wrongly record the time and according to him, that was a human error which this court should consider diligently to set aside the dismissal order. He cited a case of **Bahati Musa Hamis Mtopa V. Salum Rashid Civil Application No. 112/07** of 2018 to back up his submission. Mr. Sabas also referred this court to the case of **Kambona Charles (as administrator of the estate of the late Charles Pangani) Versus Elizabeth Charles**, Civil Application No. 529/17 of 2019, HC-DSM unreported whereby in these cases the mistake were done, but advocate took necessary actions. This shows how diligent he was and the right to determine his matter.

Also, he referred other authorities relevant to the issue in hand including the decision of **Ghania J. Kimambi Versus Shedrack Ruben Ng'ambi Misc. Application** No. 692 of 2018, Labour Court Division-DSM, which discussed the issue of error committed by an

advocate, should not prejudice the right of parties. According to him, an error in recording proper time is a human error and which can happen to anyone. He also submitted that, the record of the court shows applicant all the time entered appearance and is only one occasion which he failed to appear due to a record of time wrongly. He prayed the application be granted, so the applicant be given right to be heard.

Mr. Flavian A. John argued against the application to aside the dismissal order, he adopted affidavit as part of his submission. He argued that, the summons attached has no proof on whether advocate Sabas Kamala was the one addressed and no instruction that he was the one assigned to that case. Also, he argued that, Mr. Kamala did not prove that on 20/11/2020 Ms. Ester Msangi appeared in court and informed that the case was scheduled on 16<sup>th</sup> March 2019. Moreover, he argued no order of the court attached to show the matter was scheduled at 10:30 am and there was no proof of the facts alleged thereof. He argued that all authorities submitted to justify applicant application are distinguishable from this application as the fact that advocate did not appear in court, hence dismissal. He concluded that the reasons given are not sufficient to warrant this application.

I have weighed the arguments of the both counsels. The main issue in this application is whether the reasons given have shown sufficient reasons prevented applicant from entering appearance on 16<sup>th</sup> March 2019.

It is evident that the advocate for the appellant did wrongly note the hearing date hence dismissal order for non- appearance. However, this court cannot blame a part for the negligence of his advocate as it was stated in the case of Kambona supra. The fact that the cause for non-appearance is a human error is inevitable. Also, it is clearly known that, a negligence caused by an advocate cannot constitute a ground to set aside the dismissal order. However, for the sake of protecting rights of the litigants, I take a benefit of doubt that the reasons given by the applicant and circumstances of events happened are sufficient to warrant this application. In the end result, I find merit in the application and allowed. The dismissal order dated 16<sup>th</sup> March 2019 is set aside. The Revision Application No. 252 of 2019 restored.



Z.A. Maruma

**JUDGE**

01/07/2021