

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
MISCELLANEOUS APPLICATION NO. 14 OF 2020

BETWEEN

LYDIA DOMINICK MASSAWE.....APPLICANT

AND

VIETTEL TANZANIA LIMITED.....RESPONDENT

RULING

Date of Last Order: 20/10/2020

Date of Ruling: 11/12/2020

A. E. MWIPOPO, J.

The Applicant **LYDIA DOMINICK MASSAWE** filed the present application for Re-admission of Miscellaneous Application no. 49 of 2018 which was dismissed by this Court on 12th December, 2019 for want of prosecution. The application is supported by the affidavit of the Applicant. The Applicant is praying for the following orders:-

- a. That the Court be pleased to set aside an exparte judgment delivered by Hon. J.C. Tiganga on the 20th December, 2019.
- b. That the Ruling is unlawful, illogical and irrational.
- c. That the Court be pleased to revise and set aside the said ruling and make necessary orders thereof.
- d. The cost of this application be provided for.

e. Any other reliefs this Court deems fit and just to grant

Both parties to the application were represented. The applicant was represented by Mr. Steven Mwakiborwa Advocate, whereas the respondent was represented by Mr. Steven Nyari, Advocate. The hearing of the application proceeded orally.

In support of application, Mr. Mwakiborwa, Advocate, submitted that the Applicant filed Revision Application No. 49 of 2018 in this Court. The Applicant was attending during the entire time of 2018 when the matter was in Court. The Applicant Counsel appeared in Court before Hon. Justice Wambura on 29th November, 2019, where the matter was scheduled for hearing on 12th February, 2020. On 13th December, 2019, the Applicant received a phone call from Respondent's Representative informing her that the matter was scheduled for hearing on the same date which is on 13th December, 2019. The Respondent informed the Applicant Counsel that she cannot make it as she was in Kagera where she was employed. The Respondent's Counsel informed the Court that he contacted Applicant's Counsel known as Mr Kibodya an Advocate who is introduced by the Applicant. The said Applicant's Advocate prayed for another date as he cannot appear on that day. The Court adjourned the matter to 16th December, 2019 at 9:00hrs and ordered Mr. Kubodya be notified.

The next hearing date which is 16th December 2020, the Respondent Counsel appeared for the Respondent but the Applicant did not appear as she was not informed. The Respondent's Counsel informed the Court that the Applicant Counsel was informed at the hearing date but he said that he was not present and he could not attend hearing. The Respondent's Counsel prayed for the Court to proceed in *ex parte* as the Applicant's Counsel did not make his request for adjournment in writings. The Court granted the prayer. The Applicant Counsel argued that the Applicant was not informed of the hearing date. Respondent's Counsel communicated with the Applicant whom he stated that it was a male. But the Applicant is female. The Applicant was not given sufficient time to appear before the Court considering she attended the last adjournment on November, 2019 and she was never told of the hearing date on 16th December, 2019. For that reason, the Applicant's Counsel prays for the Court to find the *ex parte* order in Revision No. 49 of 2018 was not proper and set aside the *ex parte* judgment so as she may be heard and defend her rights as correctly awarded by the CMA.

In reply, the Counsel for the Respondent submitted that the Revision No 49 of 2018 was scheduled for hearing on 11th December, 2019, and both parties were not present. The Court set the hearing date on 13th December, 2019, and the Respondent was served with summons on 12th December,

2019, to appear for hearing in the special session on 13th December, 2019. The Respondent Counsel appeared in Court and he was ordered by the Court to call the Applicant. The Respondent's Counsel called the Applicant and the Applicant informed him that she is at Biharamulo. The Applicant gave the number of her Counsel namely Mwakiborwa to the Respondent's Counsel. The Respondent's Counsel called the Applicant's Counsel. The Applicant's Counsel informed him that he has to communicate first with her client. The Court was informed by the Respondent's Counsel of the Applicant's Counsel prayer and the Court adjourned the matter to 16th December, 2020 for the matter to proceed with hearing. The Respondent Counsel informed the Applicant's Counsel of the next hearing date. On the 16th December, 2019, the Court Clerk called the Applicant's Counsel and informed him that he has to appear otherwise the matter will proceed in his absence but the Counsel did not appear.

The Respondent argued that the Applicant and her Advocate were informed of the hearing date but still they did not appear in Court. It is the interest of the justice for the case to come to an end. The Respondent cited in support of his argument the case of **IPTL vs. Venerabilis Jigge and Another**, Misc. Application No. 206 of 2017, High Court Labour Division at Dar Es Salaam, (Unreported). The Respondent Counsel argued further that

ex parte judgment cannot be set aside if the party who failed to appear had knowledge of the hearing date. The Respondent then prayed for the application be dismissed.

In rejoinder the Applicant Counsel retaliated his submission in chief and argued that there is possibility that the Respondent's Counsel was communicating with someone else thinking that he was communicating with Applicant's Counsel. The information concerning the hearing of the application did not reach the Applicant. The Applicant distinguished the **IPTL vs. Venerabilis Jigge and Another case** cited by the Respondent that in the IPTL case the Applicant was not attending to the Court while in the preset application the Applicant was attending to Court save only for re scheduled hearing dates.

This matter before the Court is the application by the Applicant Lydia Dominic Massawe to set aside the *ex parte* judgment of the Court in Revision Application No. 49 of 2018 between the parties. The revision was heard in *ex parte* following the failure of the Respondent to appear on the hearing date. In applications for setting aside *ex parte* decision the main issue for determination is if the Applicant has sufficient reason for failure to appear in Court on the hearing date.

Thus, from the submissions and the evidence available in record, the issue for determination is whether the Applicant has provided the Court with the sufficient reason for non-appearance on the hearing date.

The granting or refusal to grant an order for setting aside ex parte Judgment is the discretion of the court or tribunal to which the application is made. The Court has to consider whether the Applicant has presented a good cause which prevented him from appearing when the application was called up for hearing (See. **Baraka A. Sauti vs. China New Era International Engineering**, Revision No. 13 of 2017, the High Court of Tanzania, Labour Division, at Mbeya; and **Aristibes Pius Ishebabi vs. Hassan Issa Likwedembe and Three Others**, Civil Appeal No. 5 of 2019, Court of Appeal of Tanzania at Mtwara). In the case of **Mbeki Teachers Sacco's Vs. Zahra Justas Mango**, Revision No. 164 of 2010, High Court Labour Division at Mbeya, (Unreported), this Court held that sufficient reason is pre - condition for Court to set aside exparte order.

In the present application, the Applicant argued that the Revision Application No. 49 of 2018, proceeded to be heard in exparte in absence of the Applicant without being informed of the hearing date. In response, the Respondent argued that the Applicant's Counsel was aware of the hearing

date but decided not appear on the respective date, hence the Court rightly decided to proceed in exparte.

Reading the evidence in record especially the proceedings of Revision No. 49 of 2018, it shows that the Applicant appeared twice in Court when the matter was fixed by the Court. The Applicant appeared in Court on 30th October, 2018, before Hon. Lady Justice Wambura, J., and on 4th November, 2019, before Hon. Ding'ohi, Deputy Registrar where the matter was fixed for hearing on 18th February, 2020.

The matter was re-scheduled in the absence of the parties and was fixed for hearing on 11th December, 2019 before Hon. Tiganga, J., who fixed the matter for hearing date on 13th December, 2019. When the matter came for hearing on 13th December, 2019, the Respondent's Counsel appeared but the Applicant was absent. The summons shows that the Applicant was not served. The Respondent's Counsel prayed to communicate with Applicant's Counsel the prayer which was granted and he informed the Court that he communicated with Applicant's Counsel namely Mr. Kuboja who was introduced by the Applicant. The Respondent Counsel informed the Court that the Applicant's Counsel has asked for another hearing date. Thus, the evidence available concerning the Applicant's knowledge of the hearing date is through communication between the Respondent's Counsel and the

Applicant and her Counsel. The Court Clerk also called the Applicant's Counsel who gave the same answer that he will not attend on the fixed date. The question is does the communication was sufficient to prove that the Applicant had knowledge of hearing date?

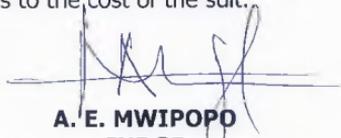
It was submitted by the Applicant's that on 13th December, 2019, the Respondent Counsel called the Applicant through mobile phone informing her that the matter was scheduled for hearing on the same date which is on 13th December, 2019. The Applicant informed the Respondent's Counsel that she cannot make it as she was in Kagera where she was employed. The Respondent's Counsel informed the Court that he was given Applicant's Counsel's phone number by the Applicant herself and he called the Counsel whom he named as Mr. Kibodya. This prove that there was communication between the Respondent's Counsel and the Applicant. The difference is on the name of the alleged Applicant's Counsel which the record shows his name is Mr. Kuboja while his name is Mr. Mwakibolwa. The Applicant's Counsel argued that Mr. Kuboja and Mr. Mwakibolwa are two different person's hence possibility of the Respondent Counsel to call somebody else. However, the facts that the Respondent's Counsel communicated with the Applicant who gave him the number of her counsel is sufficient to prove on balance of probabilities that the Respondent communicated with Mr.

Mwakibolwa. The name of Mr. Kuboja appearing in the Court record was typing error. The Applicant have not disputed at all in submission or in the affidavit that the Counsel for the Respondent did not communicate with Applicant's Counsel. Thus, I find that the Respondent communicated with Mr. Mwakibolwa who is Applicant's Counsel.

Another question is was the Applicant's Counsel aware of the hearing date which was fixed on 16th December, 2019? The Record shows that the Court ordered on 13th December, 2019, that Mr. Kuboja be notified of the hearing date. The only evidence available in record showing that Mr. Kuboja whom I have already ruled out that he is Mr. Mwakibolwa is that of Respondent's Counsel addressing the Court on 16th December, 2019, stating that he communicated with Mr. Kuboja who told him that he will not be around and that he will send a letter to inform the Court. But, the Respondent Counsel did not reveal as to when he communicated with the Applicant's Counsel. This means that there was possibility that the Applicant's Counsel was not informed of the hearing date on time. The evidence on record shows that the Court Clerk called the Applicant's Counsel on the hearing date which is on 16th December, 2019. Thus, if the Respondent's Counsel communicated with the Applicant's Counsel on the hearing date the possibility of him to appear in Court was least. There is

possibility that the Applicant's Counsel was not notified on time concerning the hearing date as it was ordered by the court on 13th December, 2019. I'm of the opinion that if the same facts showing possibility of late notification to the Applicant were presented before the Court, possibly the Court would have adjourned the hearing to another date.

Therefore, I find the Applicant to have provided the Court with sufficient reason for failure to appear on the hearing date and I hereby set aside the ex parte judgment of this Court in Revision No. 49 of 2018 delivered on 20th December, 2020. The hearing of Revision No. 49 of 2018 to proceed inter parties. No order as to the cost of the suit.



A. E. MWIPOPO
JUDGE
11/12/2020