

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

PC. CIV APPEAL NO. 13 OF 2005
(Originating from Musoma District Court Civ Appeal No. 05 of 2004)

NYAGONE MARWA APPELLANT

Versus

GHATI MWERI RESPONDENT

RULING

G. K. RWAKIBARI.A. J

Applicant **Nyagone s/o Marwa** is an appellant in Pc. Civ. Appeal No. 13 of 2005 which was dismissed on 18.03.2008 by Hon. Madame R.M. Rweyemamu, J due to non appearance in court of appellant or his learned counsel Mr. Hezron.

In his affidavit of 03.04.2008, supported by a chamber summons and his oral submission before this court on 06.05.2010, Mr. Hezron put it that he failed to appear in court at Mwanza on 18.03.2010 when the appeal was dismissed because he was attending the High Court Criminal Session at Musoma on the previous day, i.e 17.03.2008. This learned counsel clarified that he therefore failed to shuttle back due to his delay in Musoma. He attached the cause-list to his affidavit which is an

Annexure JLC"A" to support his version.

But Mr. Rugaimukamu who is the learned counsel for respondent Ghati Mweri swore a counter affidavit of 23.04.2008 in which he pointed out that the criminal sessions case with No. 115 of 2003 where Mr. Hezron served as a defence counsel at Musoma on 17.03.2008 was attended in the morning on that day. So that Mr. Rugaimukamu opined that later on 17.03.2008, Mr. Hezron could have traveled to Mwanza in order to attend in court promptly in time on 18.03.2008.

Under Order XXXIX, Rule 17(1) of **The Civil Procedure Code, Cap.33 (R.E. 2002)**, it is provided that:

"Where on the day fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed" (emphasis added).

The use of the word "**may**" in an extract which was added emphasis above connotes that it is discretionary for the court to dismiss an appeal where the appellant fails to attend in court on the day fixed for hearing. That discretion need to be exercised judiciously, in order to protect interests of both sides.

Page 2 (of five pages)

In circumstances of this matter, Mr. Rugaimukamu's contention that appellant's counsel could have attended in court on 18.03.2008 after winding up matters for the High Court Criminal Session Case in Musoma on 17.03.2008 in the morning was proper. On top of that, it was pointed out by Mr. Rugaimukamu in respondent's favour that before the dismissal order was made by Hon. Madame Rweyemamu, J on 18.03.2008, appellant and his counsel had absented themselves several times in court from 13.02.2007. In fact according to court records, applicant and his counsel Mr. Hezron didn't attend in court on 13.02.2007, 10.05.2007, 19.07.2007 and 30.10.2007. They didn't also attend in court on 13.12.2007 and finally on 18.03.2008, when the appeal was dismissed.

That means appellant and his counsel absented themselves in court without notice for more than thirteen months continuously. It is a considered view of this court that the trend of applicant and his counsel in this appeal is to stagger the decision in Musoma District Court Civil Appeal No.05 of 2004 where the current appeal originated from. The appellate court does not need to give her blessings to appellants who lodge appeals and involve themselves in mischiefs of absenteeism like appellant **cum** applicant Nyagone s/o Marwa and his counsel Mr. Hezron

The tendency of applicant and his counsel deserved abhorrence on 18.03.2008 when Hon. Madame Rweyemamu, J correctly invoked her discretion under Order XXXIX, Rule 17(1) of **The Civil Procedure Code** (op. cit.) by dismissing the appeal due to non appearance of appellant. This application was therefore lodged without any merit and it is dismissed with costs.

It is clarified that after dismissal of this application (with costs) the decision of Musoma district court civil appeal No.5 of 2004 where this appeal originated from shall remain in force.



G. K. Rwakibarila
G. K. Rwakibarila
JUDGE
09.05.2010

Date: 11.05.2010

Coram: G. K. Rwakibarila, J

Applicant: Absent

Respondent: Mr. Mutalemwa for Mr. Rugaimukamu for respondent

Court:

Noted that even during this day for ruling, applicant and his counsel have unshamefully involved themselves in the mischief of absenteeism again.

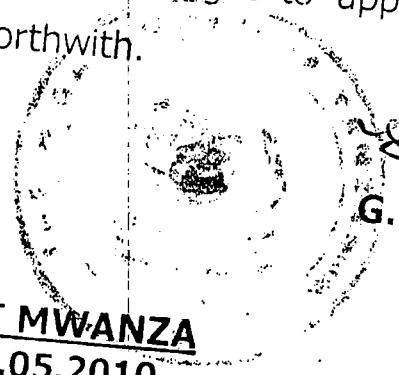
Page 4 (of five pages)

G. K. Rwakibarila

G. K. Rwakibarila
JUDGE
11.05.2010

Court:

Ruling has been delivered today Tuesday 11th day of May, 2010 and right to appeal in time to be explained to parties forthwith.



G. K. Rwakibarila

G. K. Rwakibarila
JUDGE

AT MWANZA
11.05.2010