

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(KIGOMA DISTRICT REGISTRY)**

AT KIGOMA

(APPELLATE JURISDICTION)

PC. CIVIL APPEAL NO. 11 OF 2020

(Appeal from Civil Revision No. 1/2020 before Hon. I. Batenzi – (RM), arising from Misc. Civil Application No. 3/ 2020 before Hon. I. E. Shuli - (RM) both of the Kasulu District Court, original Civil Case No. 94/2019 of the Primary Court of Kasulu District at Kasulu before Hon. R.F. Mtuli – (PCM)).

MAGALA NGANYILA..... APPELLANT

VERSUS

NEKA RAPHAEL.....RESPONDENT

JUDGMENT

26/10/2020 & 10/11/2020

I.C. MUGETA, J.

This appeal composed of four grounds of appeal, was argued under one major complaint that the District Court did not exercise its discretionary power judiciously when it dismissed the application for the restoration of the case that had been dismissed for non-appearance of the applicant.

Mgeta

The brief facts of the case are that on 2nd day of January, 2020, the respondent sought to execution the decree in Civil Case No. 94 of 2019 of the primary court of Kasulu District at Kasulu town. He prayed the appellant's properties such as motor vehicles No. T.866 CRC and T. 342 CKB make Hiace and a house located at Kibondo town to be attached. The application for execution was granted. As a result, the appellant filed Civil Revision No.1 of 2020, in the District Court to challenge the execution. The same was dismissed for non-appearance of the applicant. Upon dismissal, he filed Misc. Civil Application no. 3 of 2020 praying among other orders, for the setting aside of the dismissal order and restoration of the Civil Revision No. 1 of 2020. The application was unsuccessful, hence, this appeal.

The appellant is represented by Mr. Ignatus Kagashe, learned advocate while the respondent is served by Mr. Hamis Kimilomilo, learned Advocate.

In his submissions, the learned Advocate for the appellant submitted that the cause for non-appearance stated in the affidavit constituted a sufficient cause to warrant the restoration of the application because the appellant failed to arrive in court on time due to mechanical defects of the car he traveled with and regular police points due to Covid19 pandemic combat

strategy which required public transport vehicle to carry passengers at level seat.

In response, the learned advocate for the respondent strongly argued that the court used its discretionary powers rightly to dismiss the case for non-appearance on the reason that the appellant could have planned to arrive at Kasulu to attend his case one day before rather than traveling on the same hearing date from Kibondo to Kasulu.

The issue for my determination is whether the reason for delay constituted as sufficient cause to allow the application.

As per record of the lower court, the major reason for non-appearance was mechanical defects of the motor vehicle used by the appellant from Kibondo to Kasulu and the regular police check points. The record, per paragraph 6 of the affidavit shows that the court started at 08:30 hours while the appellant arrived at around 08:40 hours. This allegation is disputed under paragraph 6 of the counter affidavit. Therein, it is averred that the case was called at 08:55 hours. The appellant did not file a reply to the counter affidavit despite the order to do so. On 19/3/2020 he said this to the court:-

"I have gone through all documents and decided not to file a rejoinder. I pray for hearing date"

Mgeta

The principle goes that he who alleges must prove. It was upon the appellant to prove that he, indeed appeared in court on the date when the case was dismissed particularly, after the respondent had disputed his allegation on his arrival and the time when he arrived. Under the circumstances, the appellant ought to have filed a reply the counter affidavit to explain his experience at the court accompanied with an affidavit of the court clerk from whom he learnt the dismissal of the case. This way, he would have proved that he, indeed, appeared in court on that date. Since he failed even to name him/her, it is right to consider his statement about appearing in court as a mere allegation.

There is no gainsaying that the court schedules and orders ought to be respected. The appellant attached the bus ticket to the affidavit to prove that he, indeed, travelled from Kibondo to Kasulu on 26/3/2020. However, the issue is whether he physically appeared at the court where there is no proof of his arrival. Further, the ticket shows the traveler was one Magaran while the appellant is Magala. It is my view that these are two different persons and if there was name recording error, the same is not explained.

In reaching the decision, the learned magistrate noted that the appellant ought to have exercised diligence by avoiding travelling on the date

scheduled for hearing to evade such unprecedented eventualities. This is, however, true where such an endeavor is an impossibility considering the distance and the means of transport between the two points. Where one can travel and reach the court in time, such a process is welcome to reduce litigation costs. The only problem in this case is that the appellant has not proved that he, indeed, arrived at the court by failure to file an affidavit of the court clerk who attended him and by filing a ticket with a different name. Therefore, even though for different reasons, I find that the decision of the lower court is justified. No sufficient cause was demonstrated for failure to appear in court. The appeal has no merits and it is accordingly dismissed with costs.




I.C. Mugeta

Judge

10/11/2020

Court: Judgment delivered in chamber in the presence of the respondent and his advocate, Hamis Kimilomilo and in the absence of the appellant.

Sgd: I.C. Mugeta

Judge

10/11/2020