

IN THE HIGH COURT OF TANZANIA

SHINYANGA DISTRICT REGISTRY

AT SHINYANGA

CIVIL APPEAL NO. 17 OF 2021

EMMANUEL MANYANDA..... APPELLANT

VERSUS

TIZLA FUNGO.....RESPONDENT

[Appeal from the decision of the District Court of Shinyanga at Shinyanga]

(Hon. P.G. Mushi RM.)

dated the 1st day of December, 2020

in

Misc. Civil Application No. 16 of 2020

JUDGMENT

19th April & 6th May, 2022.

S.M. KULITA, J.

The Appellant herein instituted a Civil Appeal No. 7 of 2019 at the District Court of Shinyanga against the Respondent. Due to his non-appearance, on the 20th day of February, 2020 the appeal was dismissed for want of prosecution. The Appellant decided to file the application before that same court seeking for restoration of the said dismissed appeal. Bad luck was still on his side, on the 10th day of August, 2020 the

Misc. Civil Application No. 6 of 2020 of which the Applicant had filed for the restoration of the Civil Appeal No. 7 of 2019 was also dismissed for his non-appearance as well.

On that account, again, the Appellant decided to file application No. 16 of 2020 seeking for order of the court to readmit Misc. Civil Application No. 6 of 2020, costs of the application and any other relief the court would deem fit to grant. Finally, the application was dismissed too for lack of sufficient reason. That was on 1st day of December, 2020.

Aggrieved with that decision, hence this appeal in which the Appellant relied on three grounds; **one**, that the court missed his (Appellant's) point on the issue of sending a report for fear of being late on the day his case was dismissed for want of prosecution, **two**, that the court failed to interpret paragraph 5 of his affidavit on the report he had sent before his appeal was dismissed for want of prosecution, **three**, that the court failed by confining itself on paragraph 5 alone of the Appellant's affidavit, leaving the other facts in the affidavit undiscussed.

On the 29th day of November, 2021 the matter was scheduled for hearing and the said order was fully complied with by the parties. Both parties were unrepresented.

Submitting in support of the appeal, the Appellant stated that, on the day that his appeal was dismissed, he had got a transport problem, hence reached the court at late time. He added that, he lives 60 kilometers away from the court's premise. He lamented that, in his application for restoration of the Misc. Civil Application No. 6 of 2020 that he had made through application No. 16 of 2020 these factors were not considered at all by the District court.

In her reply to the Appellant's submission, the Respondent submitted that, she and the Appellant live in the same village namely Luhungo and that the said premise has no transport problem. The Respondent stated that it was not the first time for the said case to be dismissed for want of prosecution. She further contended that, it is a normal habit for the Appellant not to attend the court and that is why his cases get dismissed. To this habit, the Respondent formed a considered opinion that, the Appellant simply plays the delaying tactics so that the matrimonial properties should not be divided as ordered by the trial court.

In rejoinder the Appellant stated that, he and the Respondent live at different villages. He added that, he lives 3 kilometers away from the main road which costs him Tsh. 4,000/= by motorcycle.

This was the end of both parties' submissions.

I have earnestly gone through the parties' submissions and the available records. I have also taken into consideration the rival issues as well. The issue is whether the Appellant's appeal before this court is meritorious.

The record in the Misc. Civil Application No. 16 of 2020 Shinyanga District Court shows at paragraph 3 of the affidavit that the Appellant's delay to attend at the District Court was due to the difficulty of the transport from his residential place, Didia Village to Shinyanga. Having gone through all over the ruling of the District Court, I have noted that the factor of difficulty of transport was not discussed at all which was not correct. The Magistrate ought to have dealt with that matter as it was also presented before him. See, **BHOKE KITANG'ITA V. MAKURU MAHEMBA, Civil Appeal No. 222 of 2017, CAT at Mwanza (unreported).**

Also, the record transpires that, the Respondent did not file counter affidavit at the trial court. But this cannot be taken that the application was uncontested, especially on matters of law. See, **The Editor Msanii Africa Newspaper V. Zacharia Kabengwe, Civil Application No. 2 of 2009, CAT at Mwanza (unreported).** However, whether it is contested or not, the application cannot be granted if the court is satisfied

that the reason advanced is not sufficient enough for the said application to be granted.

The District Court records provide that, the Appellant submitted nothing to support the reason for his non-appearance as stated in his affidavit. On that account, the Appellant remains with a single statement that, on the material date, he had a difficulty in transport from Didia Village to Shinyanga without any explanation.

The Appellant had to go beyond that point so that the court to believed his assertion. The Appellant never told the court as at what time he had got the transport. He also never told the court the means of transport he was talking about. Even on the difficulty in transport itself, the Appellant never said whether it was a breakdown or shortage of the said means of transport.

As well, the Appellant has never presented before the court a ticket to prove that on the material date he had travelled from Didia to Shinyanga. Without a ticket it can also be true that on the material date and time the Appellant was at Shinyanga but decided not to appear in court so as to delay the division of matrimonial properties. The Appellant never availed the District Court with this information which could be vital

for it to determine whether his application to readmit his dismissed application has merits.

All said and done, as the Appellant has not provided the court with requisite information to determine his application, I am settled in mind that the Appellant's appeal is unmeritorious, hence dismissed with costs.

Order accordingly.



S.M. KULITA
JUDGE
06/05/2022

DATED at **Shinyanga** this 6th day of May, 2022.



S.M. KULITA
JUDGE
06/05/2022