

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

MISCELLANEOUS CIVIL APPLICATION NO. 74 OF 2021

(Arising from the Order of this Court in Matrimonial Civil Appeal No.2 of 2021, Originating from Consolidated Matrimonial Appeal No.1 and 3 of 2020 of the District Court of Bukoba, Original Matrimonial Cause No. 28 of 2019 of Bukoba Urban Primary Court)

HURUMA KATUNZI JOHN.....APPLICANT

VERSUS

JOHANITHA NYAKATO JOHN.....RESPONDENT

RULING

28/06/2022 & 22/07/2022

E. L .NGIGWANA, J.

This is an application for restoration of the appeal which was dismissed by this court on 26th July, 2021 for want of prosecution before (Hon.Mwenda, J). The same is entertained by the applicant by way of chamber summons brought under Rule 17 of the Civil Procedure (Appeals Originating in Primary Courts) Rules, 1963.

The brief material facts leading to this saga can be deciphered from the record. The herein respondent petitioned before the trial court to wit; Bukoba Urban Primary Court for divorce, division of matrimonial properties and maintenance of the two issues of marriage.

After hearing the evidence from both sides, the trial court granted divorce, and further made an order that the matrimonial house located at Bukoba Municipality should be valuated, and its proceeds be divided at a ratio of 60% to the respondent now, Applicant and 40%; to the petitioner now respondent. The trial court further directed that, if there is a party who wish to remain with the house, he/she should compensate the other. The trial court further ordered the Applicant Huruma Katunzi John to pay Tshs. 150,000/= per month as maintenance for the two issues.

Both parties were aggrieved by the distribution order. In addition to that, Huruma Katunzi John aggrieved by the maintenance order hence both parties appealed to the District Court of Bukoba, vide Appeal No. 1 of 2020 and Appeal No. 3 of 2020 which were consolidated because the District Court found it desirable to dispose of both Appeals at the same time.

Upon hearing the parties, the property distribution order of the trial court was quashed and set aside. The District Court ordered that the proceeds of the matrimonial house be divided at a ratio of **45% to the respondent Johanitha Nyakato John** and **55% to the Applicant Huruma Katunzi John**. The District Court further directed that, a party who wish to compensate his/her fellow can do so. The other orders were not disturbed.

Still undaunted, Huruma Katunzi John, filed the appeal in this Court on 26th May, 2020 as Matrimonial Civil Appeal No.2 of 2021. However, the same ended being dismissed for want of prosecution, hence the current application.

When the matter came for hearing, the Applicant was represented by Advocate Lameck Erasto so did advocate Bukagile for the respondent. Advancing the reasons for the non-appearance of the applicant to prosecute his dismissed appeal, Mr. Lameck first prayed to adopt the applicant's affidavit to form part of his submission and went on submitting that, after the applicant had filed his appeal to this court, he stayed at home waiting for the summons to call him to prosecute his appeal but in vain.

He further submitted that, it was until on 23/11/2021 when the applicant received the summons requiring him to attend at the Primary Court of Bukoba Urban on 26/11/2021 at 8.00hrs and when he appeared there, is when the applicant learnt that his appeal at the High Court was dismissed for want of prosecution on 26/7/2021 whereas, he was served with a dismissal order by the respondent. The learned counsel added that it was neither his client nor himself as an advocate was informed the hearing date of the applicant's appeal.

To elaborate more, Advocate Lameck submitted that he requested the proceedings which he received on 6/4/2022 and having perused the court file, he discovered that, on 19/04/2021, the matter came for mention. However, on 3/3/2021 before the Deputy Registrar, the court ordered that parties be notified.

The learned counsel for the applicant further submitted that there was no summons issued and served to parties following such order. It was advocate Lameck conviction that the court had the duty to satisfy itself

whether the applicant was ever served with a summons before dismissing the appeal. He was therefore of the convinced view that non-appearance of the applicant and/or his advocate was not due to negligence or deliberate.

He further submitted that on 2/6/2021, the respondent appeared but the appellant did not appear thus, the respondent urged the court to summon the Appellant. He argued that, it is a law that parties in appeal must be served and notified of the hearing date and where that is not done, the court is not justified to dismiss the matter for want of prosecution. He buttressed his stance with the case of **Ramadhani Amiri versus Yusufu Rajabu** (1995) TLR 26. He added that, if a summons or notice of hearing is returned unsigned, it is evidence that, a party was not aware of the hearing date.

He cited the case of **Deogratius Bakinahe and 2 Others versus Shirika la Usafiri DSM (UDA) and Another**, Misc. Application. No.361 of 2020 at page 9 where it was held that, it is well- established principle that the one who wish the order for non-appearance to be set aside must by affidavit evidence, adduce good reasons which the applicant's counsel views that they have done so.

In reply, Advocate Bukagile responded that the applicant's affidavit speaks about the background of the matter rather than explaining the reasons for non-appearance at the hearing date. He argued that, even looking at paragraph 5 and 8, there is no reason advanced. He further contended that there is no law requiring the court to phone the applicant to come at the

hearing date. That, in the affidavit, there is no where it was stated that the applicant made a follow ups on his appeal therefore, the applicant was negligence and relaxed.

He substantiated that the appeal was filed on 3/3/2021 and the same was dismissed in July 2021 thus, it is evident that the applicant was negligent. That, submission that the applicant kept on waiting, was a laxity as the law comes into play to help those who are vigilant and not those who sleep on their rights. Thus, the applicant did not discharge his duty.

Advocate Bukagile conceded that there was an order from the Deputy Registrar which ordered the parties to be notified and that; it is true that there was no summons issued to that effect. However, he argued that the applicant did not specify which party was not issued with the summons.

Bukagile went on submitting that the applicant dumped his appeal and the court cannot be a dumping place therefore, the cases cited by the applicant are distinguishable. He ended his submission that no reasons for non-appearance have been adduced.

In rejoinder, Advocate Lameck insisted that the court did not discharge its duty of issuing summons. That the impugned judgment was delivered on 28/4/2020. Thereafter, on 26/5/2020, the dismissed Appeal No.2/2021 was filed in District Court as required by law. It was mentioned for first time on 3/3/2021 before Minde DR. and no summons was issued to the applicant or his advocate and that, parties were not called via telephone.

Having heard the submission by both learned advocates, the task of this court therefore, is to determine whether or not the applicant has demonstrated sufficient cause for his non-appearance in court so as to warrant restoration of his dismissed appeal.

Un-hesitatively, I agree with the respondent's counsel, Mr. Bukagile that the applicant has not assigned reasons in his affidavit which prevented him from appearing in court to prosecute his case. What is ostensibly viewed from the advocate's submission is the exhaustion of the blame and challenges on the proceedings of which came to his knowledge after the applicant's affidavit was sworn and filed.

In application proceedings, the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought. In the application at hand, the said reasons by the Advocate do not feature in the filed applicant's affidavit. The said blames were that, the order of the Deputy Registrar to notify the parties was not implemented by issuing summons. With such, applicant's ground is like the applicant is suggesting that after he had filed his appeal, he remained at home and dry being aware of his appeal but waiting to be notified or reminded to prosecute his filed appeal by the court, of which he was aware of, and in fact, being the one who filed it. Indeed, this court is not ready to condone to that act because it is against the proper administration of justice.

Moreover, it is not in dispute that he made no effort or follow ups to have his appeal prosecuted for a period above **one year** from the date of filing on 26th May, 2020 to the date in which his appeal was dismissed on 26th

July, 2021. The period which suggests that the applicant had lost interest and greatly abandoned his appeal.

This is apparently supported by clear state of the record and as well, throughout the hearing of this application, there is nowhere, neither applicant nor his advocate have averred in the affidavit or elaborated during hearing that, they ever made a follow up of their filed appeal in this court.

In my view, I think this is a gross negligence and laxity on the part of the applicant and his current advocate who was the same advocate representing the applicant in the dismissed appeal, considering the fact that both of them are residents of Kagera Region.

In my view, the duty of the applicant, advocate or any party filing a case goes beyond the act of mere filing, thus, must also include attending in court, making a follow up and taking active role in prosecuting a case so as to prevent endless litigations. Courts are not clothes hangers for hanging suits and tie for a long period.

Addressing the issue of dumping cases in court or conducting proceedings in a manner manifesting an intention not to bring them to an expeditious conclusion, the High Court of Uganda in the persuasive case of **in Isadru versus Aroma & 6 Others (2018) UGHD 3**, had this to say;

"Litigants who, having started litigation, elect to allow that litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that litigation, and who have, in consequence, acted, in respect of

the litigation, in a knowing disregard of their obligation to the court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner”.

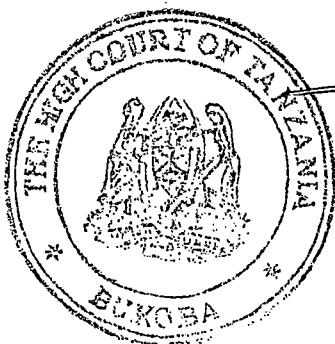
In the same spirit, it is my view that, failure by the plaintiff or applicant who filed his or her case to attend and prosecute his case or appeal, instead, he or she dumps it for a period above a year from the date of filing, cannot be heard blaming the court for not notifying him or her especially where neither him/her nor his/her advocate had discharged the duty of making the necessary follow-ups to have the case/appeal prosecuted, like what transpired in the instant case.

Under the circumstances of this matter, I am constrained to hold that the non-appearance to prosecute his appeal by the applicant was not prevented by any sufficient reason whatsoever but rather his negligence and laxity which make no grounds for restoration of a case.

In the upshot, the application fails and is hereby dismissed. Given the nature of the matter; I enter no order as to costs.

It is so ordered.

Dated at Bukoba this 22nd day of July 2022

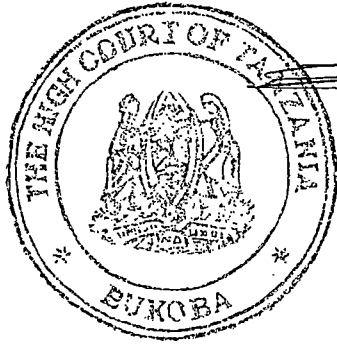


E. L. NGIGWANA

JUDGE

22/07/2022

Ruling delivered this 22nd day of July, 2022 in the presence of the applicant and his advocate Mr. Lameck Erasto, Hon. E. M. Kamaleki, Judges' Law Assistant, Ms. Tumaini Hamidu, B/C but in the absence of the respondent.



E.L. NGIGWANA

JUDGE

22/07/2022