

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

CIVIL APPEAL NO.28 OF 2021

*(Originating from Shinyanga Resident Magistrate Court in Civil Appeal No.16
of 2019)*

ESTA EDWARD NDEKEJA..... APPELLANT

VERSUS

SHEILA ZONGO AND 4 OTHERS..... RESPONDENT

RULING

28 September, 2022

L.HEMED, J

On 17 july,2021 the file of the Resident Magistrate Court of Shinyanga, concerning case No. 16 of 2019, was called before Hon. Proches Mushi, RM, for orders. On the said date, the corum shows that the plaintiff appeared in person while the defendant were absent on notice. The plaintiff reported



among other that her advocate was absent and that she could not know his where about.

In response to what the plaintiff had reported, the Court proceeded to dismiss the suit for want of prosecution on the account that the plaintiff had lost interest to prosecute the matter. Following such dismissal order the plaintiff, one ESTA EDWARD NDEKESA preffered an appeal to this Court which was registered as Civil Appeal No.28 of 2021. When the matter came for hearing on 27/9/2022, appoint was raised by the court, as to whether it was proper for the trial court to dismiss the case, Civil case No. 16/2019, without affording the plaintiff the opportunity to prosecute her case, while she was present before the Court. The advocates were invited to address the Court on the said point.

Mr. Frank Samwel, advocate who represented the Appellant addressed the court that it was not proper for the trial court to dismiss the case for want of prosecution because the plaintiff had already adduced some evidence. He also stated that the fact that the plaintiff was present in court in person, the court would have ordered her to proceed with her case on the same day before dismissing it. He further submitted that since the defendant were



absent on notice the trial court ought to have adjourned the case instead of dismissing it for want of prosecution. Mr. Samwel asked the court to revise the said order and direct the matter to proceed from where it ended. He argued that since the point has been raised by the court each part should bear its own costs.

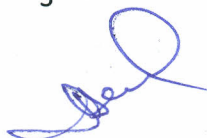
On his part, Mr. Godfrey Tuli, learned advocate who appeared for the respondents was of the view that since the plaintiff was present on the material date and the fact that the defendant were absent on notice, the proper order ought to have been adjournment instead of dismissing the suit. He asked the court to set aside the dismissal order and the matter he directed to proceed where it ended.

My perusal of the trial courts records has also noted that on 30th June 2021, the court had made the following orders.

"....court: The matter is adjourn (sic) to 29/07/2021

at 9:00 am pending the appeal at the High court....."

The said order implies that on 29/7/2021 was the date for ascertaining the outcome of the appeal which was pending in the High Court, before the



trial court could direct for continuation of hearing. It was thus improper to dismiss the suit on 29/7/2021, as the matter was not fixed for hearing.

I am aware that under Order IX r. 2, 5 and Order XVII r. 2 of the Civil Procedure Code [Cap. 33 RE. 2019], the court has power to dismiss a suit on non appearance of parties on the day fixed. However, in the matter at hand, the appellant who was the plaintiff in the case before the District court was present in court, while the defendant had informed the court on their absence. If at all the trial Magistrate found it necessary for the matter to proceed for hearing on the material date, he would have first directed the plaintiff to proceed prosecuting her case in the absence of her advocate. If she would have refused to proceed then, perhaps, the court would have been justified to dismiss the suit.

It is my firm opinion that, dismissing Civil Case No. 16/2019 in the presence of the plaintiff without affording her a hearing, amounted to breach of rules of natural justice of the right to be heard. The right of a party to be heard is paramount and cannot be under estimated. This was emphasized by the Court of Appeal of Tanzania in **Abbas sherally and another Vs. Abdul**



S.H.M. Fazalbay, Civil Application No. 33 of 2002 (unreported) where it held that:

"The right of a part to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it all be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."


Therefore in the present case, failure to avail to the plaintiff opportunity to prosecute her suit in her own was a fundamental breach of the rights of the plaintiff/Appellant to be heard.

Additionally, since the plaintiff had already brought one witness whose evidence had been recorded the correct take would have been to mark the plaintiff's case closed. Form the foregoing, it is thus inevitable to invoke the revisional powers vested to this Court under section 79 of the Civil Procedure Code [Cap. 33 R.E 2019] and section 31 of the Magistrate's Courts. [Cap. 11 R.E 2019]. I thus quash the proceedings of the trial Court dated 29/7/2021



where it was ended before another magistrate. Each parts to bear its own costs. It is so ordered.

DATED at SHINYANGA this 28/9/2022.


L. Hemed
JUDGE
28/9/2022

AT 11:45

Coram: L. Hemed, J

Applicant. Samwel, Advocate

Respondent: Tuli, Advocate.

B/C. Ogenga.

Court. Ruling is delivered, right of appeal explained.




L. Hemed
JUDGE
28/9/2022