

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

**CIVIL APPEAL NO. 16 OF 2022**

*(Arising from the Ruling of Resident Magistrate's Court at Mwanza in Misc.  
Matrimonial Application No. 75 of 2021)*

**BETWEEN**

**FREDY ROBI CHACHA ..... APPELLANT**

**VERSUS**

**LIDYA MARWA KITENGWE.....RESPONDENT**

**EX-PARTE JUDGEMENT**

*Last Order: 27/10/2022  
Ruling Date: 28/10/2022*

**M. MNYUKWA, J.**

This appeal is preferred by the appellant after he was aggrieved by the decision of the Resident Magistrate's Court of Mwanza at Mwanza, before Hon. B.M. Lema, dated 18/02/2022, when he attempted to set aside the dismissal order and restore the Matrimonial Cause No. 4/2019 which was dismissed on 11<sup>th</sup> October 2021 before Hon. Lukumai, through Misc. Matrimonial Application No. 75 of 2021.

The appellant had 5 grounds of appeal which are;

- 1. That the Resident Magistrate erred in law and in fact by evaluating and giving his decision by considering respondent's counter-affidavit as part of respondent's submissions while it was not filed in court.*



- 2. That, the Resident Magistrate erred in law and in fact to admit the evidence from the respondent emanating from the counter affidavit which was not admitted/submitted in court.*
- 3. That the Resident Magistrate erred in law and in fact in deciding that the appellant had no sufficient reason to set aside the dismissal order of the resident magistrate dated 11<sup>th</sup> October, 2021 in Matrimonial Cause No. 4 of 2019.*
- 4. That the Resident Magistrate erred in law and in fact for he failed to take into consideration the grounds, submission and evidence of the appellant in his application for setting aside the order of Resident Magistrate Court dated 11, October, 2021 in Matrimonial Cause No. 4 of 2019.*
- 5. That, the Resident Magistrate erred in law and in fact for giving the ruling that considered the respondent's submission which was against the evidence in court records.*

The appellant prayed for the following reliefs;

- 1. The appellant prays for appeal to be allowed and the decision of the Resident Magistrate Court in Misc. Matrimonial Application No. 75 of 2021 to be set aside.*
- 2. The appellant prays this court, to set aside the order of Resident Magistrate Court dated 11<sup>th</sup> October 2021 in*



*Matrimonial Cause No. 4 of 2019 and restore the same for trial. .*

*1. Costs of the case.*

*2. Any other order the court deems fit and just to grant.*

Before I go further in determining this appeal, I find it necessary to briefly explain what gave rise to this appeal. The records reveal that; the appellant herein instituted Matrimonial Cause No. 4 of 2019 on 18/9/2019, against the respondent in Resident Magistrate Court. The matter was not decided on merit as it was dismissed on 6/11/2019 for the non-appearance of the appellant. The appellant instituted RM. Misc. Application No. 77 of 2019 in efforts to restore the dismissed Matrimonial Cause No. 4 of 2019, in which the application was dismissed for insufficient reason for non-appearance. The appellant was further aggrieved and decided to appeal against the decision of the Resident Magistrate's Court of Mwanza in Misc. Application No. 77 of 2019 through HC Civil Appeal No. 55 of 2020. Fortunately, the respondent conceded to the filed appeal, and therefore Matrimonial Cause No. 4 of 2019 was restored and the matter was scheduled for hearing at the trial court.

However, despite the main case Matrimonial Cause No. 4 of 2019 to be restored, it was once again dismissed for want of prosecution on 11/10/2021 before Hon. E. Lukumayi. The appellant did not get tired in



chasing his right as he instituted Misc. Matrimonial Application No. 75 of 2021, to try his luck in setting aside the dismissal order dated 11/10/2021 before Hon. Lukumayi. The Application was also dismissed for the same reason of lacking sufficient reason for non-appearance. Being further aggrieved, the appellant has now appealed to this court with 5 grounds of appeal as reproduced above.

When this appeal was scheduled for hearing, the respondent never entered appearance and therefore, this court granted the appellant's prayer for the matter to be heard ex parte. The appellant enjoyed the services of Lubango Shiduki, learned advocate and the appeal was argued orally.

In his submission, Mr. Shiduki started by giving the background of the matter, and then he argued the 1<sup>st</sup> and 2<sup>nd</sup> ground together and the 3<sup>rd</sup> and 4<sup>th</sup> ground were also argued together and the 5<sup>th</sup> ground was argued separately.

In the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, it was his submission that, they challenge the trial court's reliance on the counter affidavit of the respondent which was not filed and therefore did not form part of the record of the trial court. He clarified that, the application was filed on 8/11/2021 and the respondent was served on 10/11/2021. That the respondent never filed their counter affidavit even when the matter was

scheduled for hearing and so, the same was not served to the applicant (the appellant herein).

The Appellant's counsel further submitted that, the trial magistrate made a reference to the reply of the affidavit as shown on page 3 and 4 of the trial court's Ruling dated 8/2/2022. That, there is no counter affidavit on the trial court records as he perused the trial court record.

He went on that, in absence of the counter affidavit, means the factual deposition on averment on the affidavit are not challenged and the court had to deal with legal aspects as the facts are not challenged. Mr. Shiduki cited the case of **Martin D. Kumaliya and 117 Others vs Iron and Steel Limited**, Civil Application No. 70/18 of 2018 at DSM, on page 4 where the Court of Appeal said the absence of the affidavit in reply means that the affidavit is uncontroverted.

He further cemented that, in absence of counter affidavit, it was not correct for the trial court to rely on the affidavit in reply which is not part of record and the trial court was ought to deal only with legal aspect of the restoration of the case.

Submitting on the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, Mr. Shiduki challenged the findings of the trial court that, there was no sufficient reason for non-appearance when Matrimonial Cause No. 4 of 2019 was



called on for hearing on 11/10/2021. He referred to page 4 of the trial court's Ruling, where the court stated that there was no reason for non-appearance. He faults the said decision by referring to the affidavit filed which stated the reason why the appellant's advocate was late to arrive in court and as he arrived, he found the petition was dismissed.

He further ventured in explaining what happened, as he states that, the record reveals that, Matrimonial Petition was scheduled for hearing on 23/8/2021, they attended but the matter was adjourned to 20/9/2021 in which the appellant attended but the respondent's counsel did not appear and so the matter was scheduled on 11/10/2021. He went on that, meanwhile, there was negotiation going on in respect of the matrimonial properties decision pending finalization of the divorce.

That, unfortunately, there was no response from the respondent's counsel by the time the petition was called on for hearing on 11/10/2021. That, the appellant was on the impression that the negotiation was going on. That, unfortunately, the respondent's counsel appeared in court and pray for dismissal of the petition for want of prosecution without the respondent's counsel to disclose that there was negotiation to settle in division of matrimonial assets. That in that regard, the failure to attend was supported by a good cause. That, this being the matrimonial issue, the restoration will not prejudice any party as they are in agreement to



divorce. And therefore, he insisted that there was good cause for failure to appear. He cited the case of **Waziri Msigiri vs Kisage Ginge Marwa**, Misc. Land Application No. 384 of 2021, HCT Land Division as the court considered the conduct of the applicant.

He then finalised his submission by abandoning the 5<sup>th</sup> ground of appeal and prayed for the appeal to be allowed and the decision of the trial court to be set aside and an order for restoration.

After the appellant's submissions, the issue for determination is whether this appeal has merit. On the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, the applicant's counsel has challenged the trial court's decision on the ground that it relied on the respondent's counter-affidavit as part of his submission while it was never filed before the court. In satisfying myself of the alleged irregularity, I had to revisit the trial court's records. My visitation came to the conclusion that, indeed the respondent never filed a counter affidavit at the trial court. The respondent, acknowledged the same, when he was arguing at the trial court and he even abided to the procedural principle that, he only had right to argue on points of law as it is reflected on page 6 of the typed proceedings of the trial court.

Unfortunately, the trial court's ruling showed that, the respondent prayed for his counter-affidavit to be adopted to be part of his submission. Further, in his reasoning, the trial Magistrate stated on page 4 of the typed





judgement that, he went through the respondent's counter affidavit, which in reality, does not exist. I agree with the appellant's assertion that, it was not right for the trial court to rely on a counter-affidavit which was not in court's records. As rightly submitted by the respondent in the trial court was supposed to rely only on the respondent's submission on legal aspect.

The question now, is whether the irregularity is fatal. It is unfortunate that, the counter affidavit referred by the trial court does not exist. However, it is my firm view that, the irregularity by the trial court is not fatal, for the reason that, the trial court did not show as to what exactly was relied on the respondent's counter-affidavit as the respondent argued on point of law only as it was required.

It is true that, with the absence of counter affidavit the contents of the appellant's affidavit could not be disputed. From the trial court's ruling, there is no any assertion that, the contents of the affidavit was faulted by the trial court. That being the case, the appellant was not prejudiced in any way from the irregularity by the trial court. Thus, the 2<sup>nd</sup> and 1<sup>st</sup> grounds are hereby dismissed.

On the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, Mr. Shiduki faults the trial court's Ruling that there was no sufficient reason advanced by the appellant for setting aside the dismissal order. From the trial court's





record, after the main case was restored, the parties appeared in court for a hearing on two scheduled dates, in which the second time (on 20/9/2021) the appellant's counsel prayed for the short adjournment as they intended to finalise discussion for settlement. When the matter was scheduled on 11/10/2021, neither of them appeared and the matter was dismissed.

From the appellant's affidavit, specifically in paragraphs 9 and 10, it implies that, after the deed of settlement was drafted and sent to the respondent, he did not give any response until the hearing date on 11/10/2021 when the appellant went to court to find the matter was once again dismissed. I assume that, this was the explanation as to why the appellant did not enter an appearance, which led to the dismissal of the main case.

For the matter to be restored, the applicant must show sufficient cause as to why he did not enter appearance. It is a settled principle of law that, the term sufficient reason is not defined in our legislation as it depends on the circumstance of each case. In the case of **Mic Tanzania Limited vs Imelda Gerald**, Civil Appeal No. 186 of 2019, the Court of Appeal quoted with authority the case of **Felix Tumbo Kisima vs TTCL Limited and Another**, Civil Application No. 1 of 1997(unreported) and stated that;




*"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step"*

From the cited authority above, the appellant was supposed to give reasons or causes as to why he did not attend the matter on the scheduled date. The appellant submits that, as they were on process of drafting the deed of settlement and the respondent gave no reply, they were on the impression that, the negotiation was going on.

I do not agree with the appellant's counsel to his assertion. It is my firm view that, the appellant failed to adduce sufficient reason, as his allegation that he was under impression that negotiation was still going on, is unreasonable. Being on the process of negotiation did not preclude parties to enter appearance on the hearing date, taking into consideration that, the court was unaware of the delay made by the respondent, and so if the counsel was keen enough, he had all reason to attend and inform the court as to what was going on, as he was the one prayed to be given an opportunity to settle the matter.

In addition to that, the appellant was not diligent enough, because if the matter was scheduled for hearing, then parties were under obligation to obey court's order. Non-appearance with no reasonable




cause was negligence on part of the appellant. on that reason then, it was proper for the trial court to rule that, no sufficient cause was given. Furthermore, taking into consideration that the matter was pending since 2019, the appellant was supposed to be more diligent to show effort in making sure that the matter is finalised. His non-appearance is unjustified and therefore the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal are hereby dismissed.

In fine, the appeal has no merit and it is dismissed. No order as to costs.

It is so ordered.



  
**M.MNYUKWA**  
**JUDGE**  
**28/10/2022**

The right of appeal is explained to the parties.

  
**M.MNYUKWA**  
**JUDGE**  
**28/10/2022**

**Court:** Judgement delivered in the presence of the appellant's counsel.

  
**M.MNYUKWA**  
**JUDGE**  
**28/10/2022**