

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CIVIL APPEAL NO. 26 OF 2023

*(Arising from Misc. Civil Application No. 6 of 2023 and Civil Appeal No. 65 of 2022 Muleba District Court
Originating from Mubunda Primary Court in Matrimonial Cause No. 7 of 2022)*

JALIA ABDULRAHAMAN..... APPELLANT

VERSUS

MWESIGA NASSORO..... RESPONDENT

JUDGMENT

7th and 13th September, 2023

BANZI, J.:

The appellant has filed this appeal faulting the decision of the District Court of Muleba in Misc. Civil Application No. 6 of 2023 which dismissed her application for re-admission of Civil Appeal No. 65 of 2022 that was dismissed for want of prosecution.

Before the trial court, the respondent claimed to marry the appellant in February, 2009 under customary law. However, due to misunderstandings between after the respondent married the appellant's sister, the duo decided to end their marriage peacefully. Thereafter, the respondent referred the matter to Muleba Marriage Conciliation Board, but the reconciliation bore no fruits as each one was no longer interested to continue with their union. Upon failure to reconcile them, the Board referred them to the court for

further process. The respondent instituted Matrimonial Cause No. 7 of 2022 before Mubunda Primary Court (the trial court) seeking for divorce against the appellant and prayed for division of matrimonial properties they acquired jointly. However, on her side, the appellant denied to be the wife of the respondent contending that, they were living in concubinage life and had never been officially married. After hearing both sides, the trial court was satisfied that they were husband and wife who had contracted customary marriage. As a result, the trial court concluded that, the marriage between them was broken beyond repair, hence continued with granting the divorce and distribute the matrimonial properties.

The appellant was aggrieved with the division of the matrimonial properties, she appealed to the District Court of Muleba vide Civil Appeal No. 65 of 2022 which was later, dismissed for want of prosecution after she had failed to appear before the court five times consecutively since she filed that appeal. After dismissal, the appellant applied for re-admission of the appeal vide Civil Application No. 3 of 2023 which was however withdrawn with leave to refile. Thereafter, she filed Misc. Civil Application No. 6 of 2023 seeking for re-admission of the dismissed appeal. After hearing of the application, the District Court dismissed the application for want of merit, and hence, she appealed before this Court with one ground thus:

"That the Senior Resident Magistrate erred in law and fact by denying the re-admission of a dismissed Civil Appeal No. 65 of 2022 while the appellant had adduced sufficient reasons for her non appearance on a hearing date."

At the hearing, both parties appeared in person unrepresented. In her submission, the appellant stated that, her appeal was dismissed for non-appearance although she did not intentionally fail to attend before the court. She contended that, on the day the case was called for hearing on 14/02/2023, she was on the way from Kigoma where she went attend the sick person, but the car she boarded got a breakdown and therefore, she arrived very late incapable of attending before the court. When she went to the court, she was informed that her appeal was dismissed for non-appearance. She prays for this appeal to be allowed and her appeal be re-admitted before the District Court.

In his reply, the respondent contended that, although the appellant produced the returning ticket but she had never travelled as she alleged. She was seen everyday going to her business as they live in the same environment. He went on stating that, since she filed the appeal, she had never attended before the court while he was attending before the court until the appeal was dismissed. According to him, the appellant had no sufficient reasons for failure to appear before the court rather than playing

technical delay so that she can continue to benefit from all matrimonial properties which are still under her custody. He therefore prayed for the appeal to be dismissed.

In her brief rejoinder, the appellant stated that, it is not true that she was seen in the village because soon after filing the appeal, she travelled to Kigoma to attend her sick child and that was the reason for her failure to attend before the court. She conceded that apart from the returning ticket, she did not produce any exhibit.

Having perused and considered the record of the two courts below and rival submissions of both sides, the main issue for determination is *whether the appellant had established sufficient cause for non-appearance.*

It is worthwhile noting here that, any civil appeal before the High Court or District Court which originates in Primary Court is governed by the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964 ("the Rules"). Rule 17 of the Rules provides that:

"Where an appeal has been dismissed under subrule (2) of 13 in default of appearance by the appellant, he or his agent may apply to the appellate court for the re-admission of the appeal; and if the court is satisfied that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing it may re-admit the

appeal on such terms as to costs or otherwise as it thinks fit."
(Emphasis is added).

This also was stated by this Court in the case of **Teresia Marwa Francis v. Francis Mussa Chacha** [2021] TZHC 6691 TanzLII, that:

"First of all it should be remembered that restoration of an appeal dismissed for want of prosecution is only grantable when sufficient cause or causes are established."

From the cited Rule and the case above, it is apparent that, the High Court or District Court has discretion to order restoration of the appeal which was dismissed for non-appearance after being satisfied that, the appellant had established sufficient cause that prevented him from appearing either personally or by agent.

In the instant matter, the record of the District Court shows that, the appellant filed her appeal to the District Court of Muleba vide Civil Appeal No. 65 of 2022 on 02/12/2022. After filing, on 06/12/2022 the learned Magistrate ordered for summons to be issued to parties so that, they can appear on 20/12/2022. However, on 20/12/2022, it was the respondent alone who appeared. Thereafter, the appeal was adjourned for two consecutive dates on 11/01/2023 and 26/01/2023 and the appellant did not appear. On 14/02/2023 when the case was called in for hearing, the court dismissed it for non-appearance stating that the appellant had never attended before the court since she filed that appeal. Up to this juncture, it

is apparent that, since the inception of her appeal before the District Court, the appellant has never appeared.

In her affidavit before the District Court, although she stated that she had gone to Kigoma for medical issues, she did not even disclose when did she go to Kigoma. Also, she didn't disclose the so-called medical issues which prevented her to appear before the court for more than two months. Equally, she did not explain the efforts she took to find alternative transport after being stuck to the place known to herself following the alleged car malfunction from 12/02/2022 to 14/02/2022. Therefore, it is not known how long did she stay in Kigoma and the reasons that prevented her to make follow up of her case from 2/12/2022 to 14/02/2023. The record shows that, on 11/01/2013, she sent her relative to inform the District Court that, she was sick but that claim was not supported by any medical chit and her relative did not disclose whether she was in Kigoma or not. Besides, in her rejoinder before this Court, she claimed to have gone in Kigoma to attend her sick child. This explanation is unfounded because, it is not supported by her affidavit before the District Court.

Under these circumstances, it is evident that, after filing her appeal, she abandoned it for more than two months without making any follow up. In that regard, I am satisfied that, the appellant had no sufficient cause for

non-appearance and thus, the District Court was justified to dismiss the application for re-admission of her appeal.

Consequently, the appeal is devoid of merit and it is hereby dismissed. Owing to the nature of appeal which arises from matrimonial proceedings, I make no order as to costs.

It is accordingly ordered.



I. K. BANZI
JUDGE
13/09/2023

Delivered this 13th day of September, 2023 in the presence of the appellant and the respondent both in person. Right of appeal duly explained.



I. K. BANZI
JUDGE
09/13/2023