

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPEAL NO. 21 OF 2003

**ATHUMANI BELEKO.....APPELLANT
VERSUS
LILIAN BELEKO.....RESPONDENT**

JUDGMENT

ORIYO, J

In Matrimonial Civil Cause No. 11 of 2001 filed at the Resident Magistrates Court at Kisutu, the appellant, Athumani Beleko, petitioned for decree a of divorce, custody of two issues of the marriage and costs. The respondent, Lilian Beleko, duly filed Answer to the petition and Cross Petitioned for divorce, equal division of matrimonial assets (listed therein), custody of the two issues of the marriage, her contribution from business and rent from family house, payment of maintenance for herself and the issues, an order that petitioner hand over to respondent all her personal belongings including her passport and certificates, costs and any other relief(s).

At the hearing, the petitioner was represented by Mr. Msechu learned counsel and the respondent was represented by Mr. Nyangarika, learned counsel. After Mr. Msechu led the petitioner to adduce evidence in chief and before cross examination by Mr. Nyangarika; the latter questioned the competency of the petition and

the petitioners Reply to the Cross-Petition. Mr. Nyangarika argued that the pleadings were incompetently in court because the verifying affidavits were attested by Mr. Msechu who drew up the pleadings; contrary to the provisions of SECTIONS 7 and 8 of the Notaries Public and Commissioner for Oaths Ordinance, Cap 12. On that basis the respondent prayed for striking out the Petition and Reply to Cross Petition and the matter to proceed on the Cross Petition. The trial court (Kalombola, PRM) upheld the respondents submissions. The Petition and Reply to Cross Petition were accordingly struck out and the Cross Petition was allowed with costs

The appellant was aggrieved and appealed against the decision on one basic ground in that:-

- (1) The trial court erred in ordering the Cross Petition be allowed with costs without giving the appellant opportunity be heard

At the appeal level, the appellant was represented by the same counsel as at the trial while the respondent was represented by Mr. Hyera, learned counsel.

In arguing his client's case, Mr Msechu, learned counsel, conceded that the pleadings which were struck out contravened the law. But he further argued that those were mere errors and lapses by counsel which were curable by using the courts discretionary

powers. He cited several Indian decisions in support of his arguments.

On his part, arguing for the respondent, Mr. Hyera, learned counsel argued that the appellant, having contravened the law cannot at this juncture seek the courts exercise of its inherent powers to grant the appeal and order the trial magistrate to determine the matter on merit.

It is not in dispute that the petition was attested by the appellants advocate who drew it. Similarly it is not in dispute that the Reply to Cross Petition was attested by one M.M.H Koshuma Advocate but it was not stated in the jurat at what place the oath was taken or made. The issue here is whether the commission and/or omission were fatal. The relevant law is Cap 12. SECTION 7 thereof states:-

"No Commissioner for Oaths shall exercise any of his powers as a Commissioner for Oaths in any proceedings or matter in which he is an advocate for any of the parties or in which he is interested.

Further SECTION 8 of Cap 12 provides:-

" Every Notary Public and Commissioner for Oaths before whom any oath or affidavit is

taken or made under this Ordinance shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made." (emphasis mine)

The defects in the Petition and in the Reply to Cross Petition were not minor lapses by counsel as argued by Mr. Msechu. The pleadings contravened the mandatory provisions of Sections 7 and 8 above. The trial court cannot be faulted for striking out the relevant pleadings. This position is supported by the Court of Appeal (Ramadhani,J) in the case of D.B. SHAPRIYA & CO. LTD VS BISH INTERNATIONAL B.V. in Civil Application No. 53 of 2002, DSM, (unreported). The Petition and Reply to Cross Petition remain struck out.

The next issue is whether the appellant had a right to be heard by way of adducing evidence after the Petition and Reply to Cross Petition were struck out. Pursuant to the Matrimonial Proceedings Rules, 1971, RULE 29 (2) provide that hearing of matrimonial proceedings shall proceed as if it were a suit under the Civil Procedure code, 1966. After his pleadings were struck out, the appellants position was similar to that of a defaulter in filing pleadings and the other party is granted leave to prove the case exparte by oral evidence under OIX r. 6 (1)(ii) Civil Procedure Code; which states:

“where the plaintiff appears and the defendant does not appear when the suit is called for hearing then

(ii) if the suit is before any court other than the High court

(A) where the summons issued was a summons to file defence and it is proved that the summons was duly served, the court may proceed exparte”

In an ordinary civil suit, the plaintiff is required to proceed *exparte*. What the trial court here did was to enter judgment as prayed. It is general knowledge that matrimonial proceedings demand a judicious mind in its handling due to its personal and very sensitive nature. It has been established that the appellants status was that of a defaulter to file pleadings and there would not be much for him except that of a listener to the testimony of the respondent, if any. In the case at hand; granting judgment as prayed; that is allowing the cross petition with costs, left certain pertinent issues unresolved. A list of matrimonial assets is part of the cross petition and the respondent prayed for equal division of the assets. The trial court has to carry out the division of the matrimonial assets and order who takes what. On the maintenance of the respondent and the children, the court has to state the sum to be paid upon hearing the