

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM
CIVIL APPEAL NO 69 of 2010

(From Kinondoni District Court, Civil Appeal No. 74 of 2009-Kabate-RM dated
26th June 2010)

MAJURA KAFUMU.....APPELLANT

VS

PILI RASHIDI.....RESPONDENT

JUDGMENT

Date of last Order: 25-02-2011

Date of Judgment: 04-03-2011

JUMA, J.:

This is an appeal against the judgment of the District Court of Kinondoni (R. Kabate-RM) dated 25 June 2010 wherein the district court overturned the judgment of the trial primary court by ordering an equal division of matrimonial property to replace the 30% share (for Respondent) and 70% share (for the Appellant) the Primary Court of Kimara had ordered on 2nd September 2009. Appellant (Majura Kafumu) has preferred five grounds in his Petition of Appeal, which include the one that the district court proceeded to determine an appeal without first making a decision on the Notice of Preliminary Objection. Appellant in.

addition contends that the district court decided the appeal without hearing the parties to the appeal.

The factual background to this appeal may be stated as follows: The Appellant Majura Kafumu and Respondent Pili Rashidi had been living as husband and wife from 1993 till 2009 when the Appellant petitioned for a divorce 2009 and the Primary Court Kimara dissolved that marriage, divided 70% of the matrimonial property to the Appellant and remaining 30% to the Respondent. The Respondent was aggrieved by the decision of the primary court and filed her Petition of Appeal to the District Court of Kinondoni (Civil Appeal No. 74 of 2009) to claim not only equal division of the matrimonial property but also the custody of Majura Kafumu and Jasmini Kafumu, the two youngest children from the dissolved marriage.

When this appeal came up for mention in this Court on 4th October 2010, the Appellant was represented by Advocate Francis Kamuzora who was holding for Advocate Makaki. Respondent Pili Rashid represented herself. It was agreed that the appeal be argued by way of written submissions. Both parties duly filed their written submissions as scheduled. In the written submissions filed on his behalf by MM Attorneys, Appellant asserted that once preliminary objections on points of law had been raised at the district court, the magistrate should not have proceeded to determine the appeal before that court without first disposing of

the preliminary objections. Appellant further asserted that since the points of preliminary objection questioned the jurisdiction of the district court, the district court was obliged first to satisfy the issue of jurisdiction before moving on to determine that appeal on merit.

Submitting on the second ground that the District Court decided the Civil Appeal No. 74 of 2009 before it without giving a hearing to the parties to that appeal, Appellant reiterated that the written submissions which the district court ordered the parties to file were with respect to the Notice of Preliminary Objection but not for the hearing of the Civil Appeal No. 74 of 2009 on merit. That it was not in order for the district magistrate to compose the judgment of that court without according the parties to appeal their right to be heard on the grounds of appeal.

Respondent's brief submission to oppose the appeal was filed by the Women's Legal Aid Centre (WLAC). Respondent submitted that the points of preliminary objection were all determined by the District Magistrate that is why the Civil Appeal No. 74 of 2009 was decided on merit. Respondent further brushed off contention by the Appellant that parties were not heard on the grounds of appeal. Respondent insisted the Judgment of the District Court clearly shows that both the Appellant and the Respondent were afforded an opportunity to be heard on their grounds of appeal.

From the submissions, there are several arising issues calling for determination by this Court. First issue is whether the district court determined the preliminary point of objection on points of law which the Appellant had noticed the district court, and what is the effect of failing to determine the objections. Second issue is whether the parties at the district court were heard on the grounds of appeal. My perusal of the records of the District Court found that on 27th November 2009 Appellant (Respondent in the District Court) together with his reply to the petition of appeal, filed a Notice of Preliminary Objection contending that in terms of section 80 (1) of the **Law of Marriage Act, 1971** the District Court had no jurisdiction to hear and determine the appeal before it. The second point of objection contended that the appeal to the district court was filed out of time contrary to section 80 of the **Law of Marriage Act, 1971**.

Record of the district court show that by 15th March 2010 exchange of pleadings were completed. The district court ordered the hearing of the preliminary points of objection by way of written submissions. Appellant herein (as respondent in the district court) filed his written submissions on 26th March 2010. Respondent herein (as appellant in the district court) filed her replying submissions on 16 April 2010. Rejoinder submissions were filed on 20th May 2010. It was on 21st May 2010 when the district court scheduled its judgment to be on 25th June 2010 when it was finally delivered.

As to whether the District Court heard the noticed preliminary points of objection, my perusal of the judgment of the district court clearly confirm Appellant's contention that the Judgment of the District Court did not notice the two points of objection which the Appellant had filed earlier on 27th November 2009. In other words, the points of preliminary objection were not dealt with in the judgment and the learned magistrate proceeded to deal with appeal on merit as if the preliminary points of objection were never raised. He ended up allowing the appeal before the district court by reversing the 70% (for Appellant) and 30% (for Respondent) which the Primary Court of Kimara had ordered. Instead, the district court ordered equal division of matrimonial property.

For purposes of this appeal I will not overstress the need for courts to deal with preliminary points of objections which invariably raise pure points of law. The Court of Appeal in case of **Hezron M. Nyachiya vs. 1. Tanzania Union of Industrial and Commercial Workers, 2. Organisation of Tanzania Workers Union, Civil Appeal No. 79 of 2001** cited its earlier decision in **Shahida Abdul Hassanali Kasam v. Mahed Mohamed Gulamali Kanji – Civil Application No. 42 of 1999 (unreported)**, expressed the aim of preliminary objections as,

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily."

From the guidance of the Court of Appeal one would inevitably ask whether the preliminary points of objection that were raised at the District Court are within the definition of preliminary objections for purposes of disposal of the appeal before the district court without going into the merits of that appeal? With due respect, the preliminary objection to the effect that the district court in terms of section 80 (1) of the Law of Marriage Act had no jurisdiction to hear an appeal from the Primary Court falls squarely within the definition of what is a preliminary objection. Likewise, the second point of objection that the appeal to the district was filed out of time raises a pure question of law challenging the jurisdictional mandate of the district court. It was incumbent upon the District Court to address itself to those two points of preliminary objection. It is not for this Court on second appeal, to determine whether the two points of objection before the district court are in fact sustainable or are not sustainable if in the first place the points of objection were not dealt with by the district court.

From the foregoing, the failure to deal with the two points of preliminary objection touching upon the jurisdiction of the **Kinondoni District Court (Civil Appeal No. 74 of 2009)** amounted to a serious error apparent on the face of the record of the district court. There is no need for me to address myself to other remaining grounds of appeal.

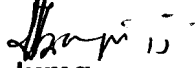
This appeal is allowed, the Civil Appeal No. 74 of 2009 at Kinondoni District Court shall be heard de novo by a different magistrate. The

new magistrate shall first determine the preliminary points of objection.



I.H. Juma
JUDGE
04-03-2011

Delivered in presence of: Shadrack Samwel, Adv. (Holding Mr. Makaki's brief for the Appellant) and Respondent Pili Roshidi.



I.H. Juma
JUDGE
04-03-2011

