IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

**PC MATRIMONIAL APPEAL NO. 2B OF 2011**

**ALLY MWASI ..... APPLICANT**

**Versus**

**ALBERTINA MAYOKA ..... RESPONDENT**

**(From the District Court of Sumbawanga in Miscellaneous Application No. of 6 2011, Original Laela Primary Court Matrimonial Cause No. 112 of 2006)**

26th August & 24th November, 2014

**JUDGMENT**

**MWAMBEGELE, J.:**

This is an appeal from the decision of the District Court of Sumbawanga in Misc. Matrimonial Application No. 6 of 2011. The brief background facts that led to this appeal is that, in Laela primary court the appellant petitioned for a decree of divorce, the matter was heard *ex parte*; in the absence of the respondent. The decree of divorce was granted as prayed. The respondent was dissatisfied with the trial court's decision which was heard in her absence, she therefore lodged an application before the District court of Sumbawanga in Misc. Matrimonial application No.6 of 2011, one of the prayer was that;

This Honourable Court be pleased to extend time to file an appeal out of statutory time".

The present appellant filed his counter affidavit on 13.04.2011 and the applicant filed her rejoinder on 4.08.2011. That marked the completion of pleadings; hence the matter was supposed to fix a hearing date. However, with no clear record that the parties were heard by the Resident Magistrate, the judgment date was fixed to be on 29.08.2011. The record shows that it was delivered on 29.09.2011 with the following order:

"Appeal allowed and the decision of the lower court is quashed".

Dissatisfied with that order, the appellant has appealed to this court on an eight ground petition of appeal. But basically his complaint is that the District Court Magistrate erred in law and facts to quash the decision of the trial court and order retrial while the respondent was served.

Like in the lower courts, in this appeal the appellant appeared in person and the matter was heard *ex parte*; the respondent was served but she never entered appearance on the date when the appeal came up for hearing. A copy of the relevant summons is with this court's record. In consequence whereof, the court proceeded to hear the appeal *ex parte* under the provision of Order XXXIX Rule 17 (2) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 as prayed by the appellant.

As I have already alluded to above, the complaint by the appellant is essentially that the District Court erred in law and facts to quash the decision of the trial court. He repeated as well during the hearing of this appeal that the respondent was served in the primary court and there was ample evidence to that effect and that there was no reason why the District Court should allow her appeal.

He further submitted that the respondent had deserted him for three years that was the reason why he petitioned in the Primary Court. He added that their case is an old one, it was finalized on 2006 but the District Court made it to start afresh. He finally argued that the appeal was filed out of time, because the case was finalized in 2006 but the appeal was lodged in 2011.

I have dispassionately gone through the records of both lower courts. I see no reason of dealing with this appeal on merit, for the reason that the proceedings of the District court were marred with fatal procedural irregularities.

The matter before the District court was an application filed as Misc. Matrimonial Application No. 6 of 2011 with a prayer that the court be pleased to extend time to file an appeal out of statutory time. It was not an appeal as the learned Resident Magistrate erroneously perceived. The learned Resident Magistrate was required to deal with the matter which was before him; that is an application for extension of time to file an appeal out of time and not an appeal which was not before him. In

consequence thereof he quashed the decision of the trial court and ordered the matter be heard *de novo*.

Another fatal irregularity which I have noted is that, the parties were not given the opportunity to argue the application. Part of the record of the District court reads as follows:

> "30/05/2011
> Coram: A.B. Mwanjokolo- RM
> Applicant: Present
> Respondent: Absent
> C/C: Adelaida
> Sgd: A.B. Mwanjokolo- RM
>
> ORDER: The case is adjourned to 28/7/2011 for mention.
> Sgd: A.B. Mwanjokolo – RM
> 30/5/2011
>
> NB:
> Since the defendant/respondent is [not] present he be served a copy of grounds for appeal as to file his WSD on the above mentioned date.
>
> Sgd: A.B. Mwanjokolo – RM
> 30/5/2011"

When the matter came up for mention on 28.07.2011 the following is what transpired in court:

> "28/07/2011
> Coram: A.B. Mwanjokolo- RM
> Applicant: Present
> Respondent: Absent
> C/C: Rehema Malongo
> Sgd: A.B. Mwanjokolo- RM
> 28/7/2011
>
> ORDER: Judgment shall be [on] 29/8/2011.
>
> Sgd: A.B. Mwanjokolo – RM
> 28/7/2011"

As shown hereinabove, the record is crystal clear that the parties were not heard. This was a clear violation of the provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 of the Revised Edition, 2002. Also the Court of Appeal of Tanzania has, on several occasions, has insisted on the right of a party to be heard before adverse action or decision is taken against such a party. One such decision is ***Abbas Sherally & Another Vs Abdul Sultan Haji***

*Mohamed Fazalboy*, Civil Application No. 33 of 2002 (unreported), in which the Court of Appeal held:

> "The right of a party 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 will 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".
> (Emphasis supplied)

As the record speaks, on 29.09.2011 the learned Resident Magistrate delivered the Ruling with an order quashing the decision of the trial court and ordering the matter to be heard *de novo*. There is nowhere in the record District court to show that the parties were given a chance to argue the application. This contravened the above cited provision of the basic law of the land and it is against the principle of natural justice of ***audi alteram partem***. It also contravened the laws that govern civil litigation that parties are required to prosecute their cases. Thus failure to give them the opportunity to argue their case, the learned Resident Magistrate abrogated their right to be heard.

In the light of what I have stated above, the matter before the District court was wrongly handled. This appeal is allowed with costs. The proceedings and Ruling of the District court are hereby quashed and orders for retrial and quashing the trial court's decision are set aside. I order that the records of the lower courts be remitted to the District Court of Sumbawanga for hearing of Misc. Matrimonial Application No. 6 of 2011 before another magistrate with competent jurisdiction. Order accordingly.

DATED at SUMBAWANGA this 24th day of November, 2014.

**J. C. M. MWAMBEGELE**
**JUDGE**