IN THE HIGH COURT OF TANZANIA

AT TABORA.

PC CIVIL APPEAL NO. 13OF 2014

(Arising fromCivil Revision No. 1 of 2013, in the District

Court ofTabora District, atTabora, Original Civil Case No. 32 of 2013 at the Primary Court of Tabora District, at Isevya)

RAJABU JUMA MWASEGERA..... APPELLANT

Versus;

MARIAM HASSAN.....RESPONDENT.

JUDGMENT

14/5/ & 22/9/2015.

The appellant in this appeal, RAJABU JUMA MWASEGERA challenges the Order of the District Court of Tabora District, at Tabora (District Court) in Civil Revision No. 1 of 2013. Before the District Court, the current appellant had applied for a revision against the decision of the Primary Court of Tabora District, at Isevya (the Primary Court). He had also sought for some other orders. The application was against the current respondent, MARIAM HASSAN and others. By its Revisional Order dated 10/12/2013 (impugned Order) the District Court dismissed the application with costs and upheld the decision of the Primary Court. The appellant was aggrieved by the impugned order, hence this appeal.

In his petition of appeal the appellant preferred the following four grounds of appeal which I reproduce verbatim;

1. That the first appellate District Court (Hon. H. B. Bally, Esq. RM) grossly erred on point of law in its failure to interpret the provisions of verse 229 of the Holy Quran, 2nd Juzuu of the Suratual Al Baqarah (Mohamedan Law), thereby erroneously treating the appellant's talaak dated 6th day of March 2008 as the third talaak instead of the first talaak.

2. That the first appellate court (Hon. H. B. Bally, Esq. RM) erred on point of law in over-looking and ignoring the provision of verse 230, 231 and 232 of the Holy Quran, second Juzuu of the Suratual Al Baqarah (Mohamedan Law) thereby holding that the 2nd Marriage between the appellant and the deceased person dated 14/08/2010 is illegal.
3. That the 1st appellate District Court (Hon. H. B. Bally, Esq. RM) grossly erred on point of law in holding that the Mohamedan Law is relevant and applicable to Tanzanian ordinary courts of law.
4. That the 1st appellate District Court (Hon. H. B. Bally, Esq. RM) totally erred on point of law in awarding costs to the respondent in the circumstances.

For these grounds the appellant urged this court to quash and set aside the impugned order with costs. The respondent objected the appeal. Parties argued the appeal by way of written submissions. The appellant was represented by Ndayanse, Advocates Law Chambers while the respondent fought sole.

I will however, not decided this appeal on the basis of the grounds of appeal and arguments made by the parties following the serious irregularity I discovered on the record, especially in the impugned order. I will rather exercise my revisional powers to make the necessary orders for the sake of justice. I follow this course though the parties did not address themselves to the irregularity. This follows the legal stance that courts of law are obliged to decided matters before them in accordance with the law and Constitution irrespective of the inaction of the parties. I underscored this stance in my other previous decisions including **Rashid s/o Khalid @ Masanjav.the Republic, High Court Criminal Application No. 36 of 2015, at Tabora**(unreported ruling dated 24/8/2015) and I reiterate the same in the case at hand. I am convinced that this is the spirit stressed under article 107B of the Constitution of the United Republic, 1977 Cap. 2, R. E. 2002 (the Constitution). I will thus be guided by this legal principle in deciding this appeal.

The fatal irregularity in the impugned order is that, it is very apparent from the record that the respondents before the District Court raised a preliminary objection (PO) against the application filed by the appellant. According to the Notice of the PO, the same was based on a single point that the application was less concerned with the suit (before the primary court) as per Islamic Marriage Law as stipulated in Surat Al Bagarah, verses 225 up to 229. The appellant resisted the PO. The

District Court ordered the PO to be argued by way of written submissions (see also pages 2-4 of the typed version of the impugned order). In the process of considering the arguments in respect of the PO the District Court changed course and determined the merits of the application. This is evident at page 5 of the impugned order where the District Court clearly indicated that the issue for determination before it was whether the application had merits. At the end of the day it answered the issue negatively to the effect that the application had no merits and proceeded to dismiss it with costs and upheld the decision by the primary court (see page 12, as the last page of the impugned order).

In my settled view, it was fatally irregular and a serious misconception of law for the District Court to determine the merits of the application during the process of testing the PO raised by the respondents. In law, when a PO is raised, it bars the hearing of the matter at issue. The PO is heard first and in case it is upheld then the matter is struck out depending on the nature of the PO, but if the same is overruled then the matter is heard on merits. I underscored this legal stance in the case of **SaumuWaziriMkumbwa v. ElibarikiMunaYosia, High Court (PC) Civil Appeal No. 20 OF 2011, at Dar essalaam** and I reiterate the same in the case at hand. This position is supported by the Court of Appeal of Tanzania (CAT) decision in**Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and another, Civil Appeal No. 79 of 2001, at Dar es Salaam** following the decision in the famous case of **Mukisa Biscuit Manufacturing Company Ltd. v. West End Distributors Ltd.(1969) EA 696**, which recognized the definition that a preliminary objection is in the nature of what used to be a demurrer, it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion, it consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. See also another decision by the CAT in **Karata Ernest and others v. Attorney General, TCA Civil Revision No.10 of 2010, at Dar essalaam** (unreported). There are in fact many other precedents to that effect, the citing of which may need a dissertation if not a thesis.

The fatal abnormality committed by the District Court had thus the effect of determining the merits of the application without affording the parties the right to be heard. This was more so considering the fact that even the submissions by the parties before the District Court indicate that they addressed themselves to the PO and not to the merits of the application. The slip thus amounted to a breach of Principled of Natural Justice. The law is trite that proceedings and verdicts that breach such fundamental principles cannot stand and must be quashed,see the CAT decision in **RazaSomji v. AminaSalum [1993] TLR 208** and that of this court in **Ndesamburo v. Attorney General [1997] TLR 137**.seealso **Haruna Said v. Republic [1991] TLR 124** and **Samwel S/O GitauSaitoti @ Samoo @ Josee and 10 others v. Director of Public Prosecution, High Court Misc. Criminal Appl. No; 8 of 2008 (C/F Rm's Court Moshi Cr. Case No; 12/2007).**

In underscoring the significance of the right to be heard in dispensation of justice, the CAT put it clear in the case of **Abbas Sherally and another v. Abdul Sultan Haji Mohamed Fazalboy, Court of Appeal, civil application No. 133 of 2002, at Dar es salaam** (unreported), and I quote the pertinent holding (at page 7 of the typed version of the ruling) for the sake of a readymade reference;

> "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 part been heard**, because the violation is considered to be a breach of principles of natural justice." (Bold emphasis is mine).

In reaching into the above quoted decision the CAT took inspiration from the decisions in **General Medical Council v. Spackman, [1943] A.C 627, HypolitoCassiano De Souza v. Chairman and Member of the Tanga Town Council [1961] E. A. 377** and **DPP. v. I. Tesha and another [1993] TLR. 237**.

The irregularity at issue therefore, violated the parties' rights to fair trial which is well enshrined under article 13 (6) (a) of the Constitution of the United Republic, 1977, Cap. 2, R. E. 2002 (the Constitution). Courts of this land must thus assign a great respect to this right and closely observe it. Our constitution does not define what is the right of fair hearing/trial, but the Constitutional Court of Uganda, observed correctly that, fair hearing/trial connotes that, a party should be given the necessary opportunity (in accordance with the Law) to canvass all such

matters before the Court that would support his case, see the case of **Major General David Tinyefuza v. Attorney General, in the Constitutional Court of Uganda, Constitutional Petition No. 1 of 1996, at Kampala** (athttp://www.ulii.org/ug/judgment/constitutional-court/1997/2).

It is for these reasons that I thought I should use the revisionalpowers of this court to make necessary orders as I hereby do. I therefore, declare the impugned order a nullity and I set it aside. I further order that, if the parties still wish the District Court, presided over by another competent magistrate, shall consider the written submissions made by the parties in respect of the PO raised before it and determine the PO before it can determine the merits of the application as per the procedure demonstrated herein above. Parties shall bear their own costs since it was the District Court which led to this appeal though it has been disposed of for other grounds apart from those in the petition of appeal. It is accordingly ordered.

JHK. UTAMWA

JUDGE

22/8/2015.

22/9/2015

CORAM; Hon. Utamwa, J.
For Appellant; Present in person
For Respondent; Presentin person.
BC; M/s. DottoKwilabya.
Court; Judgment delivered in the presence of the appellant and the respondent in chambers this 22nd day of September, 2015.

J.H.K. UTAMWA

JUDGE.

22/9/2015