

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**PC. CIVIL APPEAL NO. 48 OF 2017**

**SALMA SALEHE .....APPELLANT**

**VERSUS**

**HAMAD HAMDANI.....RESPONDENT**

*13/12/2017 & 27/2/2018*

**JUDGMENT**

**I.P.KITUSI, J.**

The undisputed facts of this case are that Salma Salehe the appellant and Hamad Hamdani the respondent, have been wife and husband since 1989. In 2013 the appellant petitioned the Primary Court of Kinondoni for divorce on the ground that the respondent had issued her with a Talak, an expression of dissolution of marriage under Islamic Marriages. Thus the Marriage blessed with four issues was dissolved with some resistance from the husband the respondent .

The respondent's testimony was that the appellant was the source of it all having vacated the couple's bedroom and decided to stop talking to him accusing the husband of flirting with his workers.

He said that he still loved his wife and was ready to reconcile if the court facilitated a mediation. He further rationalized his decision to issues a talak to the appellant as having been on the latter's own demand.

The court further order equal division of matrimonial assets details of which I need not go into, at the moment. The respondent

was aggrieved and appealed to the District court mainly challenging the order as to distribution of assets. Again I do not intend to go in to the details for reasons that will be clear in due course. The District Court partly allowed the appeal and varied the shares to the matrimonial assets.

This appeal challenges the District Court's decision on the ground that it was made when there was pending before it and application for extension of time to set aside the court's previous order that had dismissed the suit for want of prosecution. It is submitted by Daimu Halfan, learned counsel who represented the appellant and filed written submissions as per the court's order, that the District Court erred in determining the appeal that has been dismissed without first setting aside the dismissal order. Further that the dismissal order could not have been set aside when even the application for extension of time to apply for setting aside the dismissal order had not been determined.

The respondent's submission was that the District Court proceeded with the merits of the appeal after extending the time and after setting aside the dismissal order.

With respect this is a matter that may be determined on this point alone by merely going through the record. What does the court record tell?

The record shows that the appeal was first called on for orders on 2/6/2014 and none of the parties attended. It was then adjourned for six times without any of the parties attending, up to 21/1/2015 when the appellant (then respondent) entered appearance. The appellant was still in default. The appeal was adjourned to 4/3/2015.

On that date both parties were in default again, following which the court dismissed the appeal for want of prosecution.

The proceedings were resurrected more than a year later, as on 4/10/2016 the appeal was mentioned. Nowhere does the record show that there was ever any application for extension of time to set aside the dismissal order whether finally the dismissal order was set aside to warrant the parties address the appeal. In the absence of an order vacating its earlier dismissal order it is right to contend as the appellant does that the court had no appeal before it to dispose of as it purported to do. Although very well-reasoned in my view the decision of the District court (Mushi - RM) was made when there was no appeal pending. That decision is quashed and set aside as prayed.

If there is at the District Court Registry any application for extension of time or of setting aside the dismissal order the same should be determined first. For those reason this appeal is allowed with costs.



**I.P.KITUSI**

**JUDGE**

**27/2/2018**

27/2/2018

Coram: Hon Magutu DR

For the Appellant : Present

For the Respondent : Present

Cc: Masasi

Court : The judgment delivered on 27/2/2018 is presence of the parties

**A.A.MAGUTU**

**DR**

**27/2/2018.**

Right of appeal full explained

**A.A.MAGUTU**

**DR**

**27/2/2018**