

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 03 OF 2018

(From the Ruling of Ilala District Court in Misc. Application No. 391 of 2016
which emanated from Matrimonial Cause No. 43 of 2006)

WILLIAM MPALANGE.....APPELLANT

VERSUS

LILIAN BAVU.....RESPONDENT

JUDGMENT

Date of last order 27/09/2019

Date of Ruling 24/10/2019

NGWALA, J.

The appellant is praying for a Decree on Appeal against the Order in the Ruling of the trial court in an application that emanated from a decision in Matrimonial cause No.43 of 2006 be quashed. This prayer is premised on the main ground of Appeal that the trial court erred in law and fact to proceed to determine the matter on merit in an application in which the Appellant was just seeking the main suit to be placed before the trial magistrate for continuation of hearing of the counter claim.

The second ground is that the trial court was wrong to proceed to order division of the Vingunguti house as prayed by the Respondent while her petition had already been dismissed for want of prosecution. Thirdly, it was wrong for the trial magistrate to determine the matter on merit without taking evidence.

Pursuant to the request by the appellant who was unrepresented, this Appeal was argued by way of written submission. In his written submission, the Appellant didn't produce any authority or substantive arguments to support his grounds of Appeal. The appellant repeated the facts that had already been canvassed in the Ruling of the trial court.

The argument in support of the 1st ground that the counter claim was not considered in terms of Order VIII Rule 9 Sub Rule 2 of the Civil Procedure Code, is misplaced because the Application was not a suit. It was an Application for restoration of a Matrimonial Suit, that is Petition No. 43/2006 that had already been determined by the trial court long time ago. There was no Appeal against that decision in Matrimonial Petition No. 43/2006. It is only the subsequent Applications made thereafter by both the appellant and the Respondent. That is Misc. Civil Application No. 99 of 2014 decided by Hon. Mkasiwa RM on 23/12/2014 and

Misc. Application No. 391 of 2016. Todate there is no appeal against that main suit.

It is in this regard, upon perusing all the records, which had the counter claim, I tend to agree with Mr. Francis Nkoka, the Appellant's counsel that the trial magistrate was correct in determining the Application in accordance with the submissions by the appellant and the respondent who were the parties in the said Application. There was no way the court could have heard or determined the counterclaim that was long dismissed in the said matrimonial cause. In fact the Appellant who had filed an Application and made submission, did not adduce evidence. The applicant may understand that evidence is adduced in courts in accordance with both the procedural and substantive laws of this country, that includes the Law of Evidence Act [Cap. 6 R.E. 2002] specifically, **Section 110 (1) of the Law of Evidence Act** that provides clearly as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependant in the existence of facts which he asserts must prove that those facts exists”.

As there was no such existence of facts proved, the trial magistrate decided correctly when he held:-

"it would be very Serious and absurd if the court could be tempted to include decision of matrimonial proceedings property that might have been acquired by of the parties in this matter after their marriage was dissolved in 2009. Since there was no evidence whether the mentioned items were acquired during the existence of their marriage I refrain to order the same".

For the foregoing reason I see no reason to fault the decision/Ruling of the trial Resident Magistrate of Ilala that is correct in the eyes of Law. Accordingly the Ruling of the District Court is upheld. This Appeal is dismissed with costs.



A. F. Ngwala

JUDGE

24/10/2019

28/10/2019

Coram: A. F. Ngwala, J.

Appellant - Present

For Appellant - (Unrepresented)

Respondent - Absent

For the Respondent - Mr. Rukas Nkoka

B/C: Mrs. Lulu Masasi

Court: Ruling delivered in the presence of the Appellant and Mr. Nkoka for the Respondent.

Court: Right of Appeal to Court of Appeal of Tanzania explained.


A. F. Ngwala

JUDGE

24/10/2019