

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

PC. CIVIL APPEAL NO. 11 OF 2019

(Originating from Misc. Civil Cause No. 44 of 2018)

LULU RICHARD MSOFFE.....APPELLANT

VERSUS

JOHN CHRISTOPHER MNZAVA.....RESPONDENT

RULING

Date of Last Order: 26/9/2019

Date of Ruling: 31/12/2019

S.M. KULITA, J.

This is an appeal against the ruling and order of the District Court of Kinondoni at Kinondoni in Misc. Civil. Application No. 44 of 2018 delivered on 12th September, 2018. Dissatisfied with the said order and ruling of the court, the appellant preferred this appeal relying on the following grounds:-

1. That the District Court erred in law and facts to close Matrimonial Cause. No. 27 Kinondoni Primary Court basing on the reason stated by the respondent only without considering strong reasons advanced by the appellant.
2. That the District Court erred in law to entertain and grant the application filed by the Respondent for transferring of the case without considering that he had already closed her case.

3. That the court erred in law by entertaining and granting an application which was bad in law from the beginning.
4. That the District court erred in law to base its decision on wrong interpretation of Section 75 of the Law of Marriage Act [Cap 29 RE 2002].

Upon the consensus opinion of the Advocates the matter was argued by way of written submissions.

In support of the appeal the appellant submitted that among the Respondent's reasons for praying the transfer of his case is his intention to engage an Advocate and that everyone has the right to be represented in court, but the appellant's advocate challenged that for this matter the primary court has the jurisdiction to try and determine the same as per the section 76(1) of the Law of Marriage Act [Cap. 29 R.E. 2002] it should be tried by that lower court. The counsel cited the case of **ASHURA M. MASOD V. SALIM AHMAD, PC Civil Appeal No. 213 of 2004** (unreported) to support his argument. He also said that financial ability to engage an advocate is not a sufficient cause for the court to grant a transfer. He supported his argument by citing the case of **ABUBAKAR MOHAMED MLENDI V. JUMANNE MFAUME (1989) TLR** at page 146-148.

The appellant further submitted that the Respondent also alleged the case being complex and technical especially on the issues of matrimonial properties and custody of the children but he failed to explain what are those complex issues.

On the second ground of appeal the appellant submitted that since the appellant has already adduced her evidence it would be wise that

the case be remitted back to Primary Court so that the respondent can adduce his evidence and wait for the judgment. If he won't be satisfied with the decision the law provides him a right to appeal.

On the 3rd ground of appeal the counsel contended on the circumstances upon which the transfer can be granted however, the District court findings based upon the respondent's reasons without considering the reason stated under Section 47(1)(c)(i) to (iv) of the Magistrates Court Act.

As for the last ground of appeal the appellant submitted that the District Court erred in law by making its decision basing on wrong interpretation of section 75(1) of the Law of Marriage Act. The counsel further contended that, in view of section 76(1) it is clear that the matter falls under the jurisdiction of the Primary Court hence the transfer should not be allowed if the case is required by law to commence at Primary Court.

In reply the Respondent submitted that the above stated ground is baseless and has no merit. He said that upon considering the question of the right to be heard the application should be granted. He cited the case of **Agnes Simbambili Gabba V. David Samson Gabba, Civil Appeal No. 26 of 2008, CAT at DSM (unreported)** where the Court of Appeal of Tanzania justifying the right to engage an advocate declared it to be a component of the Constitutional right to be heard as provided under article 13(6)(a) of the Constitutional of the United Republic Tanzania of 1977. The counsel further stated that the issue of transfer of cases is universally recognised. He cited the case of **Pett V.**

Greyhound Racing Association Ltd (1969) QB 125 to cement his argument.

The respondent further cited Section 47(1) of the Magistrates' Courts Act (Cap. 11 R.E 2002) which the law is very clear that where any proceeding has been instituted in a Primary court, it shall be lawful to transfer it to the District Court at any time before judgment. The counsel is of the opinion that the case can be transferred even after the parties have already closed their cases ie. at the stage of awaiting judgment. He said that under Section 47 of the Magistrate Court's Act [Cap. 11 R.E. 2002] the respondent just wishes to be represented by an advocate as there are complex and technical issues in the matter.

Replying the 3rd ground of appeal the Respondent submitted that the point that the District Court was not properly moved was supposed to be raised at the District court. It should not be raised at this appellate stage.

In the last ground of the appellant's appeal the Respondent submitted that the interpretation of section 47(1) it relates to cases which are required by law to commence at Primary Court but the case at hand does not fall under that category. He further contended that Section 76 of the Law of Marriage Act gives concurrent jurisdiction to the Primary Court, District Court, Court of Resident Magistrate as well as High Court in determining Matrimonial proceedings. He is of the opinion that the court was not barred by the proviso as submitted by the appellant.

I have given careful consideration to the submissions and arguments advanced by both parties to this application. It is my

considered view that inspite of being a constitutional right for every person to have a right of legal representation, need and ability to hire the advocate alone is not a sufficient reason to grant transfer of the case. In **ABOUBAKAR MOHAMED MLEND A VS. JUMA MFAUME (1989) TLR 145** it was held;

"Wish and ability to engage an advocate alone does not amount to good and sufficient cause to grant an application to transfer a case from primary Court to any other court."

It is also a cardinal principle of the law that the need of legal representation cannot give the court jurisdiction which it does not legally have. The court is duty bound to entertain matters in accordance with the law created them. If the case can be entertained by the Primary Court and the same had actually been instituted and hearing started, it cannot be transferred to the District Court just for the reason that the applicant has then decided to engage the advocate.

According to the records the original case at Primary Court was about to start a defence, ordering a transfer at that stage is nothing but abuse of section 47 of the Magistrates Court Act whose aim is to rescue the miscarriage of justice if the case will be tried at the wrong court, or for any other reasonable grounds justice won't be attained.

Section 13 of the Civil Procedure Code requires the suit to be filed in the courts of the lowest grade with competent jurisdiction to try them. As there was no substantive claim which could cloth the District Court with jurisdiction to the exclusion of the Primary Court, it was not proper for the District Court to transfer the case from Primary Court to itself.

In **MS. TANZANIA – CHINA FRIENDSHIP TEXTILE CO. LTD OUR
LADY OF USAMBARA SISTERS (2006) TLR 70** it was held;

"According to the principle contained in section 13 of the Civil Procedure Code every suit must be instituted in the court of the lowest grade competent to try it"

In view of the foregoing reasons I allow the appeal, quash the decision of the District Court and order the matter to be remitted back to the Primary Court for continuation of hearing, from the stage where it had ended up before it was transferred to the District Court. As nature of the case touches family matters I grant no order as to costs.



S.M. KULITA

JUDGE

31/12/2019