IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 139 OF 2019

(Arising from the decision of the District Court of Kilombero in Miscellaneous Civil Application No. 30 of 2019 dated 23rd September, 2019)

Juliana Abdallah ..... **Appellant**

Versus

Godlove Nyagawa .....**Respondent**

JUDGEMENT

Date of Last order: 27.02.2020

Date of Ruling: 16.06.2020

Ebrahim, J.:

This appeal has a chequered history. The appellant and the respondent were married. In 2018 the respondent herein petitioned for divorce and distribution of matrimonial assets at the Urban Primary Court of Ifakara at Ifakara vide Matrimonial Case No. 102/2018. On 05.10.2018 the summons to be served to the appellant was endorsed by sub- ward secretary of Segerea, Ilala Dar Es Salaam that the respondent (appellant herein) has moved from the area. On 10th October 2018 the respondent served the appellant with summons via publication in Uhuru Newspaper. On 18.10.2018, the matter proceeded exparte against the appellant. On

29.10.2018 the trial court dissolved the marriage, distributed matrimonial properties and issued an order on the custody and maintenance of issues. Following the exparte judgement, the appellant herein lodged an appeal at the District Court of Kilombero at Ifakara, Civil Appeal N0. 49 of 2018. The appeal was struck out on 19.03.2019 and the appellant was directed to file an application to set aside the exparte judgement. On 12.04.2019, the appellant wrote a letter to the trial court seeking for an order that the exparte judgement be set aside and matter be heard inter-parties. The trial court after considering the reasons established by the appellant on failure to attend the case, dismissed the application to set aside exparte judgement on the reason that time to entertain such application has already lapsed.

Aggrieved the appellant lodged an application for revision at the District Court of Ifakara at Ifakara praying for the court to revise and set aside the proceedings and ruling of the Primary Court dated 10.05.2019.

At the District Court, the magistrate concurred with the decision of the trial court of dismissing the appellant's application of setting aside exparte judgement out of time.

Aggrieved again she has lodged the instant appeal against the decision of the District Court.

The appellant has raised the following grounds of appeal:

1. That, the court erred in law and facts by not adjudicating on issues raised and discussed by the parties
2. That, the court erred in law and facts by not taking time to consider that the matter before it involves the welfare of the child
3. That, the court erred in law and facts by not considering that the Primary Court was wrong in deciding that the matter was out of time while the appellant sought leave to be heard out of time on her application to set aside the Ex-parte Judgement.
4. That the court erred in law and facts by giving a Ruling which does not conform to the requirements of the law.

In this case the appellant was represented by Mr. Moses Mwitete, learned advocate while the respondent preferred the services of J.R. Kambamwene Advocates.

The court ordered the appeal to be disposed of by way of written submission and set a schedule thereat. Both parties adhered to the set schedule.

In addressing the grounds of appeal, I shall not recapitulate the submissions made by parties but rather shall consider them in adjudicating the matter.

I shall address the grounds of appeal in general.

I have dispassionately read the submissions and go through the records at every stage from the Primary Court. Before I even go further to consider the merits of the present appeal on the arguments for and against, the question is whether after being denied leave for the exparte judgement to be set aside out of time (extension of time to set aside exparte judgement) the recourse was to file revision instead of appeal against the decision of the Primary Court? From that background again, another question is whether the District Court was correct to entertain such revision and confirm the decision of the Primary Court on merits whilst he was considering the revision without addressing if there was any impropriety, illegality or incorrectness?

As intimated earlier, the appellant filed Miscellaneous Application No. 30/2019 praying for the District Court to call for and examine the record of the proceedings in the primary court for the purpose of satisfying itself as to the correctness, legality and propriety of the decision of the Primary Court.

Section 22(1) of the Magistrates Court Act, Cap 11 RE 2002 confers revisional powers to the District Court to call for the records of the proceedings and examine the correctness, legality and impropriety of the

decision reached. It follows therefore that, the revisional court is duty bound to firstly examine whether the decision was reached on adherence to the rules and procedure, principles of natural justice and legality. That notwithstanding, it is trite law that revision is not an alternative to appeal. A party cannot simply choose to invoke the revisional powers of the court where there is right of appeal.

On reading the affidavit of the appellant filed at the District Court, the applicant in revisional proceedings, after giving brief background of the matter, she complained that her application to set aside exparte judgement out of time was dismissed without considering the fact that the matter is a matrimonial issue involving children. She complained also that she began the process to pursue her rights on time but took the wrong route believing it was a correct one.

Certainly, the appellant's grounds for revision are based on merits of the application and not on any impropriety or illegality of the proceedings which led to illegal decision.

Infact, the Magistrate ought not to have entertained the application at first place leaving alone the fact that he did not even consider and examine if there was any irregularity or impropriety of the proceedings. He straight away went into considering the merits of the matters the course

which he could have taken had he been considering an appeal. In considering the matter he stated as follows:

"I have vigorously gone through their submission as well as record of proceedings one question this court asked (sic) whether or not trial court did dismissed (sic) the said application on legal and reasonable ground? As per finding of the trial court it clearly explained the applicant was duly served with all necessary copies seek (sic) for any available within time. Therefore I concur with a learned magistrate the applicant had not moved the court with sufficient ground to warrant to court grant application out of time".

Unfortunately, the revisional magistrate did not even extend himself in explaining what was the analysis, reasoning and justification of those grounds which he found them to be legal, the issue that I would not dwell much at the moment. The fact that he considered that the applicant was served with copies within time it means he considered merit of the matter. Therefore, it is clear that, the application for revision was misplaced and the District Court Magistrate ought not to have considered it. This Court, had in the case of **Israel Mwakalabeya V Ibrahim Mwaijamba**, Miscellaneous Civil Application No.21 of 1991, Mbeya HC held the following principle:

*"**the right to invoke the Court's power of revision is not an alternative to appealing. Where the order complained against is appealable, the court will not use its revisional powers, for the right to appeal is a remedy open to the aggrieved party**. Even where the time for appealing has expired, a party has a remedy of applying to appeal out of time"* (emphasis supplied).

In insisting that revision is not an alternative to appeal, the Court of Appeal has in so many occasions insisted that revisional jurisdiction of the High Court can only be invoked in special circumstances and cannot be used as an alternative for appeal. The said principle was illustrated in the case of **TANZANIA TELECOMMUNICATIONS CO. LTD and 3 Others V TRI TELECOMMUNICATIONS TANZANIA LTD**, CIVIL REVISION NO. 62 OF 2006, the CAT quoted with approval the case of **Hallais Pro-Chemie V Wella A.G.** (1996) TLR 269 where it was inter alia stated:

"(i) .....

(ii) Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court".

Applying the same principle to our instant case, the appellant (applicant at the District Court) after being dissatisfied with the decision of the Primary Court had an avenue to appeal against the refusal to entertain the application to set aside exparte judgement out of time and not opt for revision. In her appeal she would have explained and averred all her reasons and concerns that she had advanced in the revision.

Consequently, I find that the revisional proceedings before the District Court were misplaced and improper. Accordingly I invoke the revisional powers of this court under **section 44(1) (a) and (b) of the Magistrate's Court Act, Cap 11 RE 2002 (see the case of Abdul Hassan v Mohamed Ahmed** (1989) TLR 181 where it was insisted that High Court revisional powers to be exercised where there is material irregularity) to quash the proceedings of the District Court and the ruling in Civil Application No. 30 of 2019 and all the resultant orders therefrom.

I would have left the matter to end there and let the appellant proceed with proper channel. Nevertheless, I have put into consideration the time already taken in this matter, ends of justice and the fact that this court has general powers of supervision over all courts in the exercise of their original jurisdiction and may at any time call for and inspect the records of

proceedings and exercise the powers conferred on exercising its appellate jurisdiction as per **section 30(1) read together with section 31(1) of the Magistrate Court Act.** I therefore proceed to address the issue before the Primary Court.

After the exparte decision of the trial court, the appellant herein firstly unsuccessfully appealed to the District Court. Thereafter and realizing that the time to set aside exparte judgement has lapsed, she wrote a letter to the trial court praying for the exparte judgement to be set aside out of time. For the purpose of clarity, the last part of the letter read as follows:

"Kwamba nilishindwa kufika hata baada ya kuona uwepo wa kesi hiyo kupitia kipande cha gazeti hilo alichonitumia mdai kwa picha katika simu yangu, baada ya uamuzi wa mahakama nilipata matatizo ya kuuguliwa na watoto wangu wote wawili kama viambatanisho vinavyoonyesha, ***na hivyo kushindwa kufika kwa muda ili kuomba kutengua uamuzi huo". (emphasis is mine)***

Reading the above passage in its context, it is obvious that the appellant was applying for the exparte judgement to be set aside out of time. In essence she was seeking for extension of time to set aside exparte

judgement. That fact was acknowledged by the trial court in its ruling when they stated as follows:

"Kanuni za utaratibu wa madai katika mahakama za mwanzo, sheria namba 55 ya 1963 zimeweka muda ambao mtu anaweza kuiomba mahakama itengue maamuzi/hukumu yake, muda huo ni majuma sita. Sasa hukumu ilikuwa tarehe 29.10.2018, naye alipata taarifa tarehe 31.10.2018 yaani siku mbili tu baada ya hukumu kusomwa, ***ina maana ilikuwa ndani ya muda****...Na inaonyesha kabisa alianza mchakato mapema wa kisheria mapema, sema hakupata mwongozo sahihi, badala ya kuomba kutenguliwa maamuzi ya upande mmoja, yeye alikata rufaa mahakama ya wilaya, matokeo yake alipoteza muda".*(emphasis added).

It is clear here that the trial court refused to set aside the exparte judgement out of time because the appellant delayed due to the reason that she was pursuing an appeal which was not the right route.

Court of Appeal of Tanzania has always insisted that the delay to file a matter while a party was pursuing another legal avenue believing to be a correct route amounts to a **"technical delay"** and it is a sufficient reason for a court to grant extension of time. This principle has been extensively

expounded in the cited case of **Elly Peter Sanya V Ester Nelson**, Civil Appeal No. 151 of 2018, (CAT – UR – Mbeya).

In the circumstances therefore, invoke the revisional powers of this court as explained above to quash and set aside the ruling of the trial court of 10.05.2019 of dismissing the application of the appellant. Consequently I proceed to extend time and avail the appellant with 14 days from the date of being availed with a copy of this ruling to file her application to set aside exparte judgement at the trial court. I further order that the same to be presided by another magistrate with a different set of wazee wabaraza.

Considering the relationship of parties that they were spouses, and partly the anomalies were contributed by the courts, I give no order as to costs. Each party to bear its own.

Accordingly ordered

R.A. Ebrahim

Judge

Dar Es Salaam

16.06.2020