

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

KIGOMA DISTRICT REGISTRY

AT KIGOMA

(PC) CIVIL APPEAL NO. 9 OF 2020

(Arising from High Court Misc. Civil Application No. 9 of 2019, originating from Kigoma District Court Misc. Civil Application No. 10 of 2019 that had commenced with Kigoma District Court Matrimonial Cause Appeal Case No. 1 of 2019 originating from Uvinza Primary Court, Matrimonial Cause No. 18 of 2018)

MACKSON S/O KABULA.....APPELLANT

VERSUS

TEDI D/O SADOCK.....RESPONDENT

JUDGMENT

Dated: 16/6/2020 & 13/7/2020

Before: Hon. A. Matuma, J

The appellant and the respondent were husband and wife. Sometime in 2018 they developed some misunderstandings which necessitated the respondent to petition for divorce, division of matrimonial assets and maintenance of children. The proceedings and judgment thereat ended in her favour upon which the appellant was aggrieved.

Timely, the appellant appealed against such impugned judgment through Matrimonial Cause Appeal No. 1 of 2019 which was dully heard between the parties and scheduled for judgment.

During judgment writing the learned Magistrate observed that the said appeal was filed, registered, and assigned for trial without payment of the requisite Court fees. He thus struck out the appeal.

The appellant was still eager to pursue his appeal but by the time of the struck out he was out of time to re-appeal. He therefore filed the application for extension of time so that he could re-appeal to the District Court but his application was dismissed for want of sufficient cause.

The appellant in the services of Mr. Ignatius Kagashe learned advocate has lodged this appeal with a total of 6 grounds of appeal.

The grounds of appeal have the following major complaints; -

- i. That the application was wrongly dismissed for want of sufficient cause.*
- ii. That the learned Magistrate erred in failure to distinguish the role and duties of parties, advocates and judicial officers.*
- iii. That the application was wrongly dismissed in disregard to the illegalities of the trial Courts proceedings and judgment.*
- iv. That the learned Magistrate erred for not observing that the appellant had no control over Court fees demands and payment process.*
- v. That the learned Magistrate erred for not observing that the appellant had diligently and timely filed his appeal.*
- vi. That judicial discretion was injudiciously exercised.*

At the hearing of this appeal, Mr. Kagashe appeared for the appellant who was also present in person. The Respondent was absent and her summons was returned with an endorsement that she has travelled. Due to the nature of this appeal and the fact that the reliefs sought are not



likely to prejudice the Respondent in her substantive rights decreed in the impugned judgment, I ordered hearing of this appeal *ex parte* rather than awaiting for too long, so that the respondent is traced and procured her attendance.

Then, I required Mr. Kagashe the learned advocate to address me first on the second and fourth grounds of appeal which I considered to supersede the rest of the grounds.

Mr. Kagashe learned advocate faulted the learned magistrate for rejecting the appellant's application attacking himself (the advocate) for matters which were beyond his powers and control. He submitted that once he drafted the Petition of appeal, he handed it to his client for filing in court. Such appeal was filed and assigned for trial. They then entered appearance for hearing of the appeal and they were accordingly heard. The court itself had a duty to demand the court fees from the appellant and its admission of the appeal and assignment thereof and the subsequent hearing thereof was presumed everything was okay and thus beyond his control and or his client.

Having heard the submission of the learned advocate as herein above and perused the records of the lower Court, I noted that in his application for extension of time, the appellant through his affidavit deposed that when he presented his petition of appeal to the Court, judicial officers took it and admitted the same.

He was not demanded any payment of Court fees up to the time his appeal was scheduled for hearing and accordingly heard. In the circumstances, he believed everything was okay. By the time the appeal was truck out at

the judgment stage he was already out of time and therefore was of the view that he was entitled to extension of time to re- appeal.

The learned Magistrate in dismissing the application reasoned that;-

"My perusal of the said purported Matrimonial cause Appeal No. 1 of 2019 show that the petition of appeal thereat was prepared/drawn and filed by Mr. Kagahse learned Counsel for the applicant herein.

My opinion is that Mr. Kagashe possesses vast experience in legal profession and is very conversant with Court procedures, cardinal of which in cases of this nature, paying of Court fee is a must. His failure to pay Court fee in respect of the struck-out appeal for failure to pay Court fee is an error that cannot be rectified. He ought to have known better".

With such observation and or reasoning of the leaned Magistrate, it is obvious that it was advocate Kagashe who was condemned in the ruling. But again, he was condemned unheard so that he could explain whether he had a legal role to pay the Court fees so stated. The records show that it was not advocate Kagashe in person who presented the petition of appeal for filing. Nor that the appellant had given him money for payment of the requisite fees.

He drew it and gave his client to file the same in Court. His client the appellant filed it and the relevant judicial officer who received it did not demand any fees, the petition then undergone the admission process and finally assigned to the Magistrate for hearing. According to his affidavit the appellant thought everything was okay.

The learned Magistrate instead of scrutinizing this reasoning and argument of the applicant now appellant so that he could decide whether or not the application before him had been brought with sufficient cause,

took all his time to attack Mr. Kagashe the learned advocate for the non payment of Court fee.

The learned Magistrate thus acted out of context since Mr. Kagashe learned advocate acted as a legal representative and payment of Court fees was the matter between the appellant himself and the Court.

Since Court fees is not mandatory in each and every case filed in Court, it was the duty of the judicial officer in the admission and registration office to inform the appellant that he was required to pay the relevant Court fees. It was the duty of the Court not to admit the appeal unless fees are paid, it was further the duty of the Magistrate who was subsequently assigned to hear the appeal to peruse the records and ensure himself/herself that the requisite fees have been dully paid. The abrogation of judicial roles by judicial officers could have not been used to be blame to the learned advocate of the appellant and denying the appellant his legal right to have his application determined on merit.

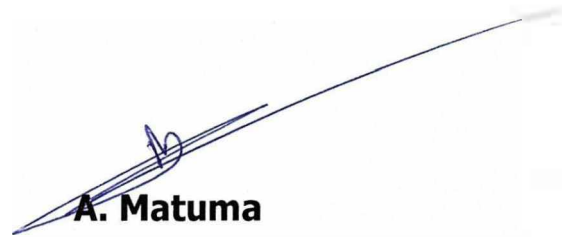
The learned magistrate in the District Court did not scrutinize and decide on the grounds advanced by the appellant in his application for extension of time. He ventured on extraneous matters not before the Court.

I therefore allow the second and fourth grounds of appeal and hold that the learned Magistrate did not infact determine the matter before it.

I therefore step into its shoes and rule out as herein above stated that the appellant had advanced good cause for the delay because, receiving his petition of appeal, admitting and registration into Court registers, assignment of it to the trial Magistrate and its subsequent hearing were all beyond his control as they were purely judicial processes and he was not to blame. He should have been properly lead by the judicial officers

to make good the requirements for his appeal to stand properly before the court and that was not either the role of his advocate since it involved assessments of Court fees which is solely vested to the court itself. All that process took his time unnecessarily and he was let out of time by the Court itself.

These grounds alone suffice to dispose off this appeal. I allow it and extend the appellant thirty (30) days within which he may file his petition of appeal to the District Court Against the impugned judgment of the trial Court. No orders as to costs.

A handwritten signature in blue ink, appearing to be "A. Matuma", is written over a horizontal line.

A. Matuma

Judge

14/7/2020