THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CIVIL APPEAL NO. 5 OF 2019

(From Mbeya District Court, Misc. Civil Application No. 24/2012)

SIMBONEA KILEO ..... APPELLANT

VERSUS

1. GLADNESS KIMARO
2. SAUL H. AMON } **..... RESPONDENTS**

JUDGMENT

Date of last Order: 30/12/2019
Date of Judgment: 12/02/2020

Dr. A. J. Mambi, J

This appeal originates from an appeal filed by the appellant namely **SIMBONEA KILEO.** The matter which originated as matrimonial suit initially was dealt by the Iyunga Primary Court where the appellant was unsatisfied and appealed to the District Court of Mbeya. When the matter was brought to the District Court of Mbeya, the Court under Hon.Chaungu made the decision in favour of the respondent. The District Court dismissed the matter since it was filled under wrong provisions of the law. The District Court also

noted that the matter was filed out of time contrary to the law. The appellant appealed against the decision of the District court basing on six grounds of appeal as follows;

(a) The Hon. Magistrate confused himself to purport to consider Misc. Application No. 24 of 2009 and not No. 24 of 2012 while in actual fact he considered both applications hence came up with a wrong decision.

(b) Since the application before the court sought to set aside the sale of the suit house arising from District Court Matrimonial Appeal No. 05 of 2009 the Hon. Resident Magistrate erred to dismiss the application basing on G. N. 311 of 1964 as if the Matter was before the Primary Court.

(c) The Hon. Magistrate erred to invoke the law of limitation, G.N. 311 of 1964 without proof when and whether applicant had been notified the date when the exparte judgment and order for sale was made in Matrimonial Appeal No. 5 of 2009.

(d) The Hon. Magistrate erred to hold that the matter before him was based on wrong citation oblivious of the affidavit upon which counsel for applicant was allowed to argue the application and was deemed to have amended the chamber summons. In any case, the application ought to have been struck out than dismissal.

(e) While the matter for consideration was application no. 24 of 2012 by the appellant the Hon. Magistrate erred to told that appellant was aware of the execution process which took place in application no. 24 of 2012 and of which notice thereof was not served upon him by any clear evidence as respondent.

(f) The Hon. Magistrate erred to ignore grave irregularities that surrounded the alleged public auction such as non-publication of the auction, low price, the suit house not liable for attachment as it was not yet the property of the appellant.

During hearing, all parties agreed to argue by way of written submissions. While the appellant was represented by the learned Counsel Mr. Mushokorwa, The respondents appeared under the service of the learned Counsel Mr. Iddi Yasin.

In his submission, the learned Counsel for the appellant Mr. Mushokorwa briefly submitted that the District Magistrate erred in his judgment by failing to deal with the proper matter at his hand. He argued that although the Magistrate had a duty to deal with Misc. Matrimonial Application No. 24 of 2009, but his Ruling shows he also tried Misc. Matrimonial Application No. 24 of 2012 which was filed under Rule 85 of Primary Court Civil procedure Rule, GN 310 of 1964. He argued that this was wrong as the Magistrate misdirected himself by not dealing with one matter at his hand. He argued that it was wrong for the magistrate to dismiss application

No. 24 of 2012 on the mere ground that GN 310 of 1964 is not applicable to the District Court.

Addressing ground two and three of the appeal, the learned Counsel for the appellant Mr. Mushokorwa briefly submitted that it was not right for the Hon. Magistrate to dismiss the matter (No. 24 of 2009) on the ground of time limit as indicated at page 8, paragraph 3, of the Ruling. He argued that the Application No. 24 of 2009 was filed two months and eleven days after the District Court passed an ex-parte order to sell the suit house on 25/03/2009. He argued that the magistrate wrongly quoted item 1 of the schedule to the customary Law (Limitation of Proceedings) Rules, 1963, GN 311 of 1964. He referred the decision of the court in NBC **vs Grace Simbila (1982) TLR 248.**

Mr. Mushokorwa contended that in any case, the learned Magistrate was wrong to invoke these Rules, GN 311 of 1963, to the application before the District court because the Rules apply when an application is made to the Primary Court. He was of the view that the correct legislation would probably have been the Civil Procedure (Appeals on Proceedings Originating in Primary Court) Rules, GN 312 of 1964.

Addressing ground five and six of the appeal, the learned Counsel for the appellant Mr. Mushokorwa briefly submitted it was wrong for the trial Magistrate, to ignore an application and he seemed to be biased. He argued that in any case the High Court in Revision No. 16 of 2015 faulted the manner of execution ordered by Hon. Mteite that led to the demolition of the house which prompted the

court to order the re-building of the house. He was of the view that the trial Magistrate erred by going contrary to the holding of Ngwala, J and endorsing that auction. He argued that the trial Magistrate should have ordered a fresh auction to take place of the re-erected house and be conducted by another court official.

In response, the respondent Counsel Mr. Iddi responded to the first ground of appeal. He briefly submitted that the Appellant misdirected himself on the difference between *ratiodecidendi* and *obiter dictum* as understood in the legal discourse. The learned Counsel averred that the honourable Magistrate (Mr. Chaungu) directed himself properly on the Application before him by clearly stating at page 2 of the Ruling in Miscellaneous Application No. 24 of 2009 that what was before him was Miscellaneous Application No. 24 of 2009 and not Miscellaneous Application No. 24 of 2012. Referring At page 5 paragraph 2 of the Ruling by the District Court Magistrate, the learned Counsel submitted that the Magistrate in his Ruling by categorically ruled that the applicant wrongly filed his application under the provisions of Order. IX Rule 13 and Order XXXIX Rule 21 the Civil Procedure Code Act, CAP 33 R.E 2002 and section 35 of the Magistrates Court Act, CAP 11. He argued that the Application was made under wrong provisions of law, hence the court was not properly moved, and consequently, the learned Magistrate had no choice but to strike out the Application.

Responding to the second ground of appeal, the respondent counsel submitted that The Application was misconceived since the Appellant Counsel's submission did not match with what was

prayed for in the Chamber Application. He argued that under those circumstances the trial court was left with no choice but to dismiss the Application for being misconceived. The Counsel was of the view that at any rate, submission by the Appellant's Counsel were alien to what was before the Court and served to the Respondents and there was no submission capable of moving the court for prayers sought in the chamber application.

I have carefully gone through the grounds of appeal and reply by the respondent. I have also keenly gone through all records from the District Court and the Primary Court. In my observation and considered view, the main issue at hand is whether the District Magistrate was right in holding in favour of the respondents. In other words whether the District was properly moved or not.

In his grounds of appeal, the appellant is claiming that The Hon. Magistrate confused himself to consider Misc. Application No. 24 of 2009 instead of application No. 24 of 2012. However, at one point the appellant counsel is saying that the magistrate considered both applications hence came up with a wrong decision. Having gone through the decision by the Magistrate I found that the magistrate rightly considered the application at his hand and observed that the application No.24 of 2002 was wrongly filed under wrong provision of the law. Indeed it is on the records that application No. 24 of 2012 was wrongly filed under Order. IX Rule 13 and Order XXXIX Rule 21 the Civil Procedure Code Act, CAP 33 [R.E 2002]. The position of the law is clear that all matters originating from the

primary court to the District Court are governed by the Primary Court Civil Procedure Code Rules, 1964, G.N.310/1964. This means that where the party is aggrieved by the decision of the primary court and he intends to file his application to the District Court he must do so under the Primary Court Civil Procedure Code Rules. I wish to refer the decision of the court as also cited by the Magistrate in ***HERMELINDA GABRIEL VRS SALVATORY SADOTH, (HC) CIVIL REVISION NO. 7/2004, HC AT BUKOBA (UN REPORTED***. In this case the court under his lordship Luanda J at page 4, observed that:

> *"...This code (Civil Procedure Code Cap 33) is not applicable in Primary Courts have their own Civil Procedure Code called The Primary Court Civil Procedure Rules, 1963 GN 310/1964".*

In this regard, I entirely agree with the respondent counsel and even the District Magistrate that the application by the appellant at the District Court was wrongly filed contrary to the law. Worth referring the decision of the Court in ***Abdul Aziz Suleman versus Nyaki Farmers Cooperative Ltd. and Another*** (1966) held that:

> *"the applicant was required to cite the relevant provision from which the Court derives the power to hear and determine the application."*

It hardly needs to be emphasized that in any application, an applicant must state the specific provision of the law under which the applicant wants to move the Court to exercise jurisdiction. Failure to do so, renders such application incompetent and must be dismissed accordingly. I wish to refer the decision of the court (that was also cited by the appellant) in ***Joseph Ntongwisangue***

another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005 (unreported) where it was held that:

> *"in situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple . experience shows that the civil litigations if not controlled by the court, may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.*

The other issue raised by the parties, was the issue of limitation. The District Magistrate in his reasoning for dismissing the application was based on the time limitation. In his decision the Magistrate observed that the application was time bared as per the schedule of the customary law (Limitation of proceedings) Rules, 1963 GN 311 of 1964. Indeed under that Rules the time limitation is six weeks but the applicant filed his application after two months and eleven days (around nine weeks). This in my view was contrary to the law.

I therefore agree with the respondent and the District Magistrate that the application at the District Court was filed out of time limit required by the law. Addressing the consequences of filing an appeal out of time was underscored by the court in ***TANZANIA DAIRIES LTD v CHAIRMAN, ARUSHA CONCILIATION BOARD AND***

ISAACK KIRANGI 1994 TLR 33 (HC). In this case the court observed that:

> *"Once the law puts a time limit to a cause of action, that limit cannot be waived even if the opposite party desists from raising the issue of limitation"*

All in all the records clearly show that the application was not brought timeously before the District court since it was brought beyond the legal requirements days. This means that the appeal was in any event hopelessly time-barred. Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others*** Criminal Appeal No. 254 of 2009,

CAT (unreported) where the court held that:

> *"this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings."*

Assuming that the appellant followed the procedures in filing his application at the District Court, the question is, was the auction to sale the property in dispute properly done?. I have thoroughly gone through the records from the lower courts and found that the auction was properly conducted and the appellant was availed with the notice before the property was auctioned on 05.7.2012. Indeed it has now taken a long time (almost nine years now) since the said property was sold.

From my analysis and observations, I find the appellant's grounds of appeal are non-meritorious and I hold so. In the premises and from the foregoing reasons, I have no reason to fault the findings reached by the District Court rather than upholding its decision. In the event as I reasoned above, this appeal is non-meritorious hence dismissed. The decision of the District Court is upheld and it is hereby declared as done by the decision of the District Court the property was legally sold under the proper auction and bonafidely bought by the second respondent. I make no orders as to cost.
Each party to bear his own costs.

Dr. A. J. Mambi
Judge
12.2.2020

Judgment delivered in Chambers this 12th day of February, 2020 in presence of both parties.

Dr. A. J. Mambi
Judge
12.2. 2020

Right of appeal explained.

Dr. A. J. Mambi
Judge
12.2. 2020