

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 3 OF 2020

(C/F Misc. Civil Application No. 16/2019, arising from Civil Application No. 14/2019 Himo Primary Court, originating from Matrimonial Cause No. 2 of 2018)

ERICK CHRISTOPHER MANJIRAAPPELLANT

VERSUS

**JAMES .J. VUMILIA (under power of Attorney
of OLIVER JOSEPH MAHOO RESPONDENT**

JUDGMENT

MUTUNGI .J.

The appellant dully represented by Mr. Jeremiah Mjema has filed the instant appeal, preferred by him against the decision arising from Civil Application No. 16/2019 in the District Court of Moshi at Moshi. The same originates from Himo Primary Court, Matrimonial Cause No. 2 of 2018.

History has it that, the appellant who apparently was the Petitioner in Matrimonial Cause no. 2/2018 had petitioned for divorce from Oliver Joseph Mahoo who was represented in the matter by James Vumilia holding a power of Attorney. For

some reason the respondent never appear hence the petition proceeded ex parte. In the end the court was moved by the evidence of the Petitioner to the extent of the trial court issuing a decree of divorce. Since there was no question of division of Matrimonial assets raised nor discussed during the trial, the same was not deliberated upon and no determination done when the decision was delivered on 27/7/2018.

On 31/7/2019 the respondent instructed James .J. Vumilia to apply before the same court for the division of Matrimonial assets against the Petitioner. Having been served the Petitioner engaged an advocate to represent him. It is then when he applied for the transfer of the application from the trial court to the District Court at Moshi. Having considered the transfer application, the same was refused. The reasons in the Honourable Magistrate's words were and I quote;

“The cardinal principle of the law is that, the need of legal representation cannot give the court jurisdiction which it does not legally have. In this case, due to the nature and the question of law involved in this matter, transfer of the same would be improper”.

Further that: -

“The same court that granted divorce should be left to consider hear and determine the application of division of Matrimonial assets, the duty which going by the record, it never performed”.

In view of the above, the Honourable Magistrate was satisfied that the Petitioner had not demonstrated good cause to move the court to do that which he had prayed for and the application sanctioned to a dismissal. The appellant then the Petitioner is seen through the window of appeal in this court challenging the District's court decision on the following grounds: -

- (1) That, the trial court Magistrate erred in law and fact for holding that the right of legal representation is not sufficient ground for transfer of case.
- (2) That, the trial court Magistrate misdirected herself in law and fact in treating the matter before the court as if it were an appeal.
- (3) That, the trial court erred in law and fact for failure to take into account matters which it ought to take into

account and to take the matters into account which it ought not to take into account.

Wherefore: - The appellant prays that, this appeal be allowed and the decision of the trial court be quashed and set aside and in lieu thereof order the District Court of Moshi to transfer to itself and adjudicate Civil Case No. 14/2019 from Himo Primary Court.

When the appeal was called in court the same proceeded by way of oral submissions. Mr. Jeremiah Mjema representing the appellant submitted that, they are alive with the legal procedure that under order III of the Civil Procedure Code Advocates are not allowed to appear before the Primary Courts. In the event they are engaged, they are to apply to transfer such case by virtue of Section 47 (1) (b) of the Magistrates Court Act and this is what happened in this matter. He invited the court to the case of **Dorcas Luzuga @ Salma Mussa vs. Omary Ramadhan, Matrimonial Appeal No. 6/2018 – HCT Dodoma** and **Alli Iddy Hapi vs. Kilonzo Godfrey Kalage (PC), Civil Appeal No. 21 of 2019 (Arusha – HCT)** to support his stance. Considering that the District Court was clothed with jurisdiction to try the matter under Section 76 of

the law of Marriage Act, then it was expected of the District Court to transfer the same to itself, hence the first ground should be upheld.

Submitting on both the second and third grounds the learned advocate contended that, it is without doubt that what was before the District Court was an application to transfer the Matrimonial case from Himo Primary Court for the sole reason that the applicant had engaged an advocate. Surprisingly the District Court Magistrate went into extraneous matters not pleaded before her. The same can further be observed from the concluding paragraph where it would seem as though the matter filed was an appeal.

In response thereto Mr. Sylvester learned advocate explained that, they are also very much aware of the necessity of transfer of cases from Primary Courts to District Courts, once parties have engaged the services of an advocate. Be as it may such duty is a discretion of the court that is to grant the transfer. Submitting on the scenario at hand, the counsel stated the matter has its roots from the Himo Primary Court where the appellant had filed for divorce. At that time he found no need to engage an advocate

despite the law bestowing such powers to the District Courts under Section 76 of the Law of Marriage Act to try matrimonial causes. It was after the respondent had applied for the division of matrimonial assets that, the applicant developed an interest of engaging an advocate. It is definitely an afterthought and could not at that stage be allowed to transfer the case.

The counsel further remarked on the cited cases by the appellant's advocate as being distinguishable from the matter at hand. In all the cases the appellants were not the ones who had instituted the cases in the Primary Court but the adverse parties. The foregoing notwithstanding it is the court that granted the divorce which is empowered under Section 114 (1) of the Law of Marriage Act to order for the division of matrimonial assets. It was the respondent advocate's prayer that, the first ground should fail.

As far as the second and third grounds are concerned the advocate elaborated that, for the District Court Magistrate to make a sound decision she had to go through the Primary Court record. It is after going through the same that she

found reasons that, prompted her not to transfer the case file as prayed for by the appellant.

Further, as she went through the file she was moved to give her advice to the parties in her concluding remarks to avoid multiplicity of applications. In view thereof it was far from suggesting that, the District Magistrate had adjudicated on the matter or had dealt with the application as though it was an appeal. The counsel prayed these two grounds be dismissed.

In re-joinder, the appellant's advocate clarified that Civil Application No. 14/2019 filed by the respondent was a new case. It is wrong then to state that the appellant had filed the same whereas the one he had instituted (Matrimonial Cause No. 2/2018) had been concluded and finally determined. In the given circumstances the appellant was not limited in any way once he needed legal representation if he so wished.

The counsel reiterated that, the District Court was to confine itself on the transfer of the case to a court with concurrent jurisdiction and not to proceed to give advices to parties on issues that were not pleaded therein. Whole in whole the

appellant's advocate prayed the appeal be allowed. Having analyzed the above, the grounds of appeal can be reduced to one fold, whether the District Court was proper to refuse to transfer the case file to itself from Himo Primary Court. The District Court was faced with a situation such that the appellant herein was seeking for legal representation of an advocate who was by law barred from entering appearance before the Primary Court. To this advocates are strictly barred from entering appearance in Primary Courts by virtue of Section 33 (1) of the Magistrates District Act, Cap 11 Revised, 2002.

The court has also observed that the appellant had initially filed with the Himo Primary Court, Matrimonial Cause No. 2/2018 seeking for divorce which was ultimately granted on 27/7/2018 against the respondent. The respondent later appears in the scene through Civil Case No. 14/2019 before the same court praying for division of matrimonial assets. The same could not proceed since the appellant had filed Miscellaneous Application No. 16/2019 before the District Court of Moshi at Moshi praying to transfer Civil Case No. 14 of 2019 pending at Himo Primary Court to enable the

(applicant) appellant to get legal representation of an advocate.

Gathering from the appellant's submission, it would seem the appellant was moving with a belief that, the respondent had filed a new file (case) in which would now like to be represented by an advocate. The appellant seems to have harboured another belief that, once the new case was touching on matrimonial issues then by virtue of Section 76 of the Law of Marriage Act (Supra), the District Court having concurrent jurisdiction had powers to determine the new file instituted before the Himo Primary Court. For the sake of reference the same states: -

“76. Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a Court of a Resident Magistrate, a District Court and a Primary Court”.

I will come back to the issue of filing the purported new case before the Himo Primary Court later. What was at stake in the matter before the Primary Court was the issue on division of the matrimonial assets. The guiding provision as was properly pointed out by the District Magistrate is Section 114 (1) of the

Law of Marriage Act (Supra). The same is coached in the following words: -

“114 (1). The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale”

My interpretation of the above provision is that, the court empowered to order division of matrimonial assets is the court that did infact grant the decree of divorce. In this case it was the Himo Primary Court which subsequent to the grant of a decree of divorce can now proceed with the same powers to order for the division of the acquired assets during the subsistence of the respective marriage.

Perusing through the record, it is found that, the appellant initially having filed for divorce had not prayed for the division of matrimonial assets but now the adverse party had filed and prayed for the same. It was hence upon the same court despite the concurrent jurisdiction it has with the District Court to deal with the division of matrimonial assets pertaining to

the same marriage. The petitioner was to have mentioned in the same petition of divorce the terms related to the division of the assets acquired through joint efforts of the parties. The law lays such a requirement as envisaged by Section 106 (1) (f) of the Law of Marriage Act, (Supra) as hereunder: -

“106 (1) (f) “The terms of any agreement regarding maintenance of the division of any assets acquired through the joint efforts of the parties or, where no such agreement has been reached, the petitioner’s proposals.”

Once this was not done by the petitioner, the respondent had a right to claim for the same in the very court. See; **Fatuma Mohamed vs. Said Chikamba, [1988] TLR 130.**

Having explained as above, I would have concurred with the appellant had the petition for divorce not been determined and concluded (granted), then any matrimonial issues related between the spouse in this matter could have been transferred to the District Court but this is not the situation at hand.


Be as it may, it is a common principle of law that jurisdiction

of courts is conferred by statutes, therefore engagement of an advocate by itself cannot confer jurisdiction to a District Court to a petition filed and dully determined in the Primary Court when matters of division of matrimonial assets are raised. It was hence proper for the District Court to have refused to do that which it was asked to do. The same was underscored in the case of **Aboubarkar Mohamed Mlenda vs. Juma Mfaume [1989] TLR 145.**


Let me now reflect back on the file so desired to be transferred. The same was filed as a civil case by the respondent instead of raising her claims in the same court and in the same file. There was indeed a misconception in doing so. The District Magistrate should have noticed this anomaly once she had realized that the parties might be throwing themselves into a multiplicity of applications. She went on to give the parties advice which I find was rightly done, contrary to what the appellant's advocate alleges in his submission that, the District Magistrate was indulging herself into extraneous matters. She had a duty of going through the record in its totality to make a sound decision or directives which include giving opinions and advices. It is far from suggesting that she was making a determination in the

matter, which seemed as though she was dealing with an appeal.

In the upshot, I find no merits in the instant appeal and proceed to dismiss the same.


B. R. MUTUNGI
JUDGE
13/8/2020

Read this day of 13/8/2020 in presence of the appellant, Mr. Mjema for the appellant and Mr. Ibrahim Omari (Legal officer) for the respondent.


B. R. MUTUNGI
JUDGE
13/8/2020

RIGHT OF APPEAL EXPLAINED.