

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC CIVIL APPEAL No. 81 OF 2020

(Appeal from the Judgment of the Temeke District Court delivered by Hon. M.B Ndelwa
RM, dated 28th February, 2020 in the Civil Case No. 126 of 2019)

AZIZA NASORO ZOMBE.....APPELLANT

Versus

MUSA RAJAB LIPATUKILE.....RESPONDENT

JUDGMENT

24th July, - 24th September, 2020

J. A. DE - MELLO J;

Dissatisfied with the Judgment of the Temeke District Court dated the 28th February, 2020 in the Civil Case No. 126 of 2019, the Appellant has moved this Court against the whole decision based on the following grounds;

- 1. That, the first Appellate Court's Magistrate erred in law and fact by upholding the Trial Court's decision was unprocedural something which was not true.**
- 2. That, the first Appellate Court's Magistrate erred in law and fact by disregarding the evidence adduced during trial instead ordered the matter to be heard afresh.**
- 3. That, the Appellate Court's decision was otherwise at default and bad in law.**

The Respondent has strongly resisted the above grounds in his reply to the Memorandum of Appeal, whose both prayers to hear the same by means of written submissions, was duly granted but, sadly nothing from his end.

What this translates to is Want of Prosecution for Non compliance with Court order to file written submissions which is legally equated to a hearing. See the case of **National Insurance Corporation of (T) Ltd & another vs. Shengena Limited, Civil Application No. 20 of 2007(unreported)** which observed: **"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case"**.

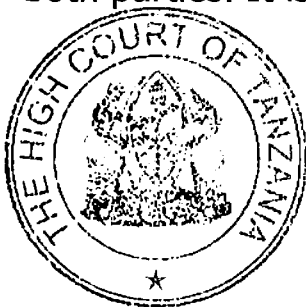
The factual setting giving rise to the appeal, is from **Matrimonial Cause No. 140 of 2019** at **Mbagala Primary Court**, granting divorce, awarded her 20% of the value of the house or TShs. 7,000,000/= as her shares in matrimonial division of the said properties. The Respondent found this unfair and hence an appeal to the District Court of Temeke, which quashed and set aside the primary Court judgment and decree while ordering a trial de novo. She in turn was not happy and, hence this second appeal. I am akin and alive of what it takes for a second Appeal that unless there is **"Misdirection or Non direction on the evidence, misapprehension of evidence, violation of the principles of law**, my

hands are tied. See the case **DPP vs. Jaffari Mfaume Kawawa [1981] TLR 149.**

In her submissions on the first ground, the Appellant is of a firm view that the judgment of the Primary Court for guidance only as opposed to scrutiny, of which evidence was considered and the judgment was extracted. With that, the first Appellate Court based its decision on the records from the Primary Court that, the Appellant testified twice at Mbagala Primary Court, on 29th August, 2020 and 12th September, 2020 while the judgment of the Primary Court was clear. Further that whether or not the procedure was fatal, it should not be given a room since the Magistrate has not indicated in his judgment which law was contravened for not making the respondent to defend his case. Regarding the second ground, the first appellate Court's Magistrate disregarded the evidence adduced during Trial and instead ordered the matter to be heard afresh.

Based on this, I will therefore proceed with the Appellant's submissions, as I peruse record to establish what I read from **page 5** of the Judgment, where the trial Magistrate did the same by recording the Appellant's evidence twice without adducing any reasons as to why that was so. This, was improper and which the first Appellate Magistrate found it irregular and thus fatal. Sadly and, as seen from **page 6** of the Judgment, neither

the Petitioner's case nor the Respondent was closed, in which the Appellate Magistrate exercising his powers under **section 21 (1)** of the **Magistrates Courts Act, Cap 11, R.E 2019** ordered trial *de novo*. Suo Motu however, it is my further observation, of the absence of names of the assessors both from coram, proceedings and even the judgment. This is fatal again, as it contravenes **section 7 (1) and (2)** of the **Magistrates Courts Act, Cap. 11, R.E 2019**. I also see a missing proof for marriage certificate attached to form No. 3, much as it was claimed that the marriage is Islamic. In conclusion, I am satisfied that this Appeal has no merits, although the Respondent had not filed his written submissions. I therefore hereby uphold the first Appellate Court decision, as I dismiss the appeal in its entirety. No costs is ordered, considering the marital status of both parties. It is so ordered.



 Recoverable Signature

X *J. Mello*

Signed by: J.A. DE-MELLO

JUDGE

24th September, 2020