IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT DAR ES SALAAM

PC CIVIL APPEAL NO. 68 OF 2019
(*Originated from Revision No 42 of 2018 before Hon. J Mushi at District Court of Kinondoni*)

NEEMA AMON...APPELLANT
VERSUS
AITAUFOO ONAEL SILAA...RESPONDENT

JUDGEMENT

15th and 21st December, 2020

MASABO, J.

This is a second appeal. The Appellant Neema Amon successfully moved the Primary Court for Kimara in Matrimonial Cause No. 93 of 2017 for a declaratory order 7under section 160 of the Law of Marriage Act, Cap 29 RE 2019, that there was a presumption of marriage between her and the respondent. The matter was heard ex parte as the whereabouts of the respondent was unknown and service through substituted service did not yield his presence. After the exparte judgment, the respondent resurfaced. Being disgruntled by the exparte order he applied for revision in the district court of Kinondoni in Revision No 42 of 2018 praying the district court to revise the decision of Kimara Primary Court and to issue an order for temporary injunction restraining the respondent from executing the order for division of matrimonial assets pending the determination of the appeal

(sic). Having heard both parties, the court quashed the proceedings of Kimara Primary Court. It is this decision which has disgruntled the appellant.

She is praying for this court to set aside the decision and orders of Kinondoni District Court and uphold the decision of the Kimara Primary court. The appellant is armed with 12 grounds of appeal namely that the first appellate court erred in law by: hearing the application for revision which was subject to an omnibus application; failing to re-evaluate the evidences tendered by the appellant before the trial court; relying on the respondent forged documents; hearing, determining and ruling on the matter to which it had an interest; awarding prayers which were not sought by the parties; failing to consider and evaluate the legal arguments and evidences of the appellant and her counsel; applying and citing relying upon wrongful provisions of the law; entertaining and revising the trial court proceedings in favour of the applicant who failed to exhaust the first remedy available to him before filing the revision; presuming that, the appellant and respondent were business partners while they were not; ruling that, the trial primary court was wrong in ordering the substituted services through newspaper; relying on unreported cases (presented) without having and seeing the copy of it; and ruling on matters which were not disputed.

When the appeal was called for hearing both parties had representation. Mr. Johnson, learned Counsel appeared for the appellant and Mr. Raphael David, learned Counsel for the respondent.

Submitting in support of the appeal Mr. Johnson abandoned the 2nd and 12th ground of appeal and remained with 10 grounds. In regard to the 1st ground of appeal he submitted that the application for revision No. 42 of 2009 was an omnibus in the sense that it included two prayers, for revision for temporary injunction to restrain the Appellant herein, agents or servants from executing the decision of the Kimara Primary Court. The Applicant ought to have filed two separate application.

In the 3rd ground Mr. Fulgence argued that the district court relied on the forged copy of passports which are inadmissible as it was not certified by Commissioner for Oath pursuant to Rule 11 (1) (a) and (b) of the Magistrates Courts Act (Rules of Evidence in Primary Court) GN No. 62 of 1964 which requires the production of original documents and if it cannot be found the certified copy suffices.

Submitting on the 4th ground of appeal that the district court magistrate had an interest in the matter, he argued that the magistrate is related to the respondent and she knew the parties before the application for revision was filed in the district court. Due to this, the appellant wrote a letter dated on the 3rd December, 2018 requiring the Magistrate to recuse from the case but the said magistrate declined.

On the 5th ground it was submitted that the court made a ruling on two prayers namely the preliminary objection and revision of the proceedings which were not sought by either party. Submitting on the 6th ground Mr.

Fulgence argued that the district court magistrate failed to consider the arguments of the Appellant's counsel thar there is record that respondent was summoned and defaulted appearance. The appellant and the respondent agreed to file the case before the District Land and House Tribunal which was signed by the respondent in 2017 therefore the allegation that the respondent was not aware of the suit is not true.

In regard to the 7th ground, it was submitted since case originated from the primary court the law applicable is Rule 19 (1) (2) and (3) (d) of the Primary Courts Rules which provides for procedure on issuance of summons but the District Court invoked Order the Civil Procedure Code which does not apply to primary courts. He reiterated further that the trial court's records reveal that the respondent was dully served. On the 8th ground it was submitted that Rule 30 (i) and (ii) of the MCA GN No. 310 provides for the aggrieved party to apply for an order to set aside an exparte judgment. Mr. Johnson referred me to the case of **Kezia v NBC, Edith Majura & Magwega & Another**, Civil Appl. No. 127 of 2005 CAT at Dar es salaam and **Moses Mwakibete v Editor Uhuru, Shirika la Magazeti ya Chama and National Printing Cooperation** [1995] TLR . In these cases, the court declined to revise the proceedings as the party failed to exhaust available remedies.

Regarding the 9th ground of appeal, he submitted that the district court wrongly that the Appellant and respondent were business partners while they were not and there was no evidence adduced to prove partnership. In

regard to the 10th ground the district court erred in holding that the Primary court erred in ordering the substituted service in the newspaper. It is the requirement of the law under rule 19 (1), (2) and (3) (b) of the GN 310 of 1964 that when the court is satisfied that the summons was dully served to order substituted service. Since there was proof from Mjumbe wa Serikali ya Mtaa Mjimpya that the respondent was served rule 19 was complied with. On the 11th ground, it was briefly submitted that the district court erred in relying on an unreported case which were not tendered in court.

In reply Mr. Raphael submitted that the law does not bar multiple prayers in the chamber summons. Multiple prayers avoid multiplicity of proceedings as stated in **MIC Tanzania Limited v Minister of Labour & AG**,Ccivil Appeal Bo. 103 of 2004, CAT (unreported). In regard to the 3rd ground of appeal it was submitted that there was no trial in the district court requiring production of evidence but there was an application by way of chamber summons to wit the question of contention based only on the right of the respondent to be heard. The Appellant contented that the respondent was dully served through publication. The Appellant knew that the respondent was in Uganda and the Newspaper where summons was published does not circulate up to Uganda. Therefore, the district court correctly nullified the proceedings of the primary court so that the parties could be heard inter parties.

Submitting on the 4th ground, Mr. Raphael argued that the appellant never raised a concern that the district magistrate had interest on the matter

despite that she appeared before the District Court on 1st October, 2019, 22nd October, 2019 and 15th October, 2019. On the 5th ground it was submitted that section 22 (1) of the Magistrates Courts Act (Supra) the district court is empowered to revise any proceedings from the primary courts so as to correct any proceedings of the primary court. Therefore, the order made by the district court was proper in the interest of justice.

Submitting in regard to the 6th ground, he argued that there was no evidence to be evaluated by the district court because the application was not an appeal. Appeal and revision are two distinct proceedings. Regarding the 7th ground of appeal, it was argued that it is devoid of merit as page 7 of the judgment shows that the court invoked its powers under section 22(1) of the Magistrates Courts Act.

Mr. Raphael vehemently resisted the submission as the cited GN No 310 of 1964 is inapplicable as it was based on the Magistrate Courts Act 1963 which was repealed and replaced by the Magistrate Courts Act, 1984, Cap 11 RE 2019. Therefore, the appellants Counsel has relied on a dead law which cannot support this ground of appeal. On the 9th ground that the parties are partners in business, it was submitted that, it was matters of evidence and that is the reason the district court ordered retrial. Lastly, Mr. Raphael submitted that, it has no merit that the court are not bound in saying whether the judgment relied upon is reported or not.

Rejoining on the omnibus application Mr Johnson submitted cited the case of **Ali Chaman v Karagwe District Council and Another,** CAT, Civil Application No. 41/4 of 2017 omnibus application ought to have been struck out. On the 4th ground of appeal, it was rejoined that the letter filed in the District Court on 3/12/2018 before ruling was an indicator that the Appellant has lost confidence over the magistrate. The magistrate could have recused form the matter.

In regard to the 7 ground Mr. Johnson submitted that the district Court had to apply applicable law and not open up the Pandora box since the genesis of this matter was at the primary court and applicable law was Magistrate Courts Act and its rules and the remedy available to person unheard is to file an application to set aside and not revision. Regarding the 8th ground Mr. Johnson rejoined that GN.310 of 1964 was consolidated into GN No. 119 of 1983 which was adopted by the MCA when it was enacted in 1984. In regard to the 10th ground it was reiterated thta at the District Court the respondent relied ipon uncertified copy of the passport to wit the district court relied on its decision.

Having dispassionately examined the submissions from both parties and the lower court's record which I have thoroughly read, I will now proceed to determine the appeal. I am called upon to determine 10 grounds of appeal. Of these, I will start with the 4th ground. The appelants counsel, while placing reliance on a letter written by the appelants on 3/12/2018, he has ardently argued that the magistrate was not impartial as she knew the parties before.

Impartiality is a fundamental principle in the administration of justice. Every judge/magistrate is enjoined to perform his or her judicial duties without favour, bias or prejudice. (see Article 107A (2) (a) of the Constitution of the United Republic of Tanzania). Where the impartiality of a judge or magistrate impartiality is compromised litigants have a right to raise an objection and pray for his disqualification from the case. However, it is a settled principle of aw that a request for recusal or disqualification of the judge or magistrate must be grounded on concrete reasons (see Laurean **G. Rugaimukamu Vs Inspector General of Police and Another,** Civil Appeal No. 13 of 1999 CAT).

A judge or magistrate is not expected to heed to every prayer for disqualification. Upon an objection or prayer for disqualification/recusal been made, the judge/magistrate is expected to weigh the ground to see whether the alleged circumstances would lead a fair minded and informed observer to conclude that indeed there was a real possibility that the Court was biased. Heeding to every prayer for disqualification is tantamount to abdication of duty which is highly detested (see **The Registered Trustees of Social Action Trust Fund and Another Vs Happy Sausages Limited and Others** [2004] TLR 264). I have observed two things with regard to the appellants complaint. First, the letter for disqualification as appended to the application was authored on 3/12/2018 and received by court on 27/2/2019 which was about one month after the delivery of impugned decision on 29/1/2020. Thus, by the time the magistrate was composing and delivering

the decision, the letter ways yet to be filed. Thus, there is nothing to fault her. Besides, as argued by the respondent, the appellant appeared several times before the magistrate but raised no objection as to the qualification of the magistrate to preside over the matter. To that extent, this point is devoid of merit and I dismiss it.

Having resolved this issue, I will proceed to the 1st and 9th ground of appeal. It has been passionately argued that the application was an omnibus for containing two different prayers one being for revision of the decision of the Kimara Primary Court and two, an application for temporary injunction. Undeniably, the application, ***"made under section 22(1) (2) and (5) of the Magistrate Court's Act, 1984, and any other enabling provisions of law"*** contained two prayers. One **for revision of the decision of the Kimara Primary Court** and the second application **for a temporary injunction.**

I understand that, there is no specific provision of the law which prohibits omnibus applications. I am also aware of the of the decision in **Tanzania Knitwear Limited V Shamsa Esmail** (1989) TLR 48 where it was court held that the combination of two applications in one is not bad in law since courts of law abhor multiplicity of proceedings. There is however a myriad of other decision so the Court of Appeal in which the combination of application was held as bad in law and renders the application liable to be struck out. These include **Siri Nassir Hussein Siri vs Rashid Musa Mchomba (administrator of the Estate of the deceased Musa**

Mchomba Massawe) Civil Application No. 23 of 2014, CAT, (unreported) and **Ali Chamwali v Karagwe District Council Columbus Paul** Civil Appeal No. 411 of 2017 CAT at Bukoba (unreported), and **Mohamed Salmin versus Jumanne Omary Mapesa,** Civil application No.103 of 2014, CAT, unreported.

Basing on the principles above, I have found the argument raised by the Applicant meritorious because, I even if I were to apply the position in **Tanzania Knitwear Limited v Shamsa Esmail** (supra), that combination is tenable as it prevents multiplicity of action, given the nature of the application it would still be impossible to accommodate these prayers in one application as they are too disjointed. It is to be noted for example, the prayer for injunction was meant to restrain the appellant and its agents from executing the orders of the primary court 'pending determination of [sic] the application for revision. It is unimaginable how possible could these two be entertained in the same proceedings. I have keenly read the judgment of the revision court to unveil the magic applied in entertaining these two prayers. What I have discovered in this adventure is that the magistrate found it challenging and opted to dwell on the first prayer to the exclusion of the second prayer.

In the foregoing, I subscribe to the submission made by Mr. Raphael that the application was bad for having omnibus prayers and it was liable for being struck out. Since the proceedings of the district court was premised on an incompetent application, there is nothing to sustain the ruling

appealed against. As this one ground disposes of the appeal, I will not proceed to determine the remaining grounds.

Accordingly, the appeal is allowed. The proceedings and ruling of the district court are quashed and set aside. Costs to be shared.

Dated at Dar es Salaam this 21th day of December 2020.

J.L. MASABO

JUDGE