

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF BUKOBA  
AT BUKOBA**

**MATRIMONIAL APPEAL NO. 4 OF 2019**

*(Arising from the RM'S Court of Bukoba in Matrimonial Cause No.09/2018)*

**BUSHIRA YAHAYA.....APPELLANT**

***VERSUS***

**AISHAT AYUBU.....RESPONDENT**

**JUDGMENT**

*25<sup>th</sup> November, & 18<sup>th</sup> December, 2020*

***Kilekamajenga, J.***

The appellant appeared before this Court challenging the decision of the Resident Magistrate's Court of Bukoba. The appellant is armed with six grounds of appeal thus:

- 1. That, the Honourable Resident Magistrate grossly erred in law and facts to admit and hear the matter which was brought under a wrong and unknown pleading;*
- 2. That, the trial Hon. Court erred in law by deciding the case in favour of the respondent while the matter was not proved on balance of probabilities;*
- 3. That, the Hon. Resident Magistrate's Court of Bukoba grossly erred in law for giving its judgment without framing issues;*
- 4. That, the Hon. Magistrate erred in law and fact for entertaining the judgment in favour of the respondent without affording the appellant the right to be heard;*



- 5. That, the trial Court grossly erred in law and facts for basing its judgment on the nullity proceedings before it;*
- 6. That, in totality the judgment and the whole proceedings of the Resident Magistrate's Court of Bukoba is nullity and tainted with illegalities.*

When the parties appeared to argue the appeal, the appellant was absent but represented by the learned advocate, Miss Pili Hussein while the respondent was present and represented by the learned advocate, Mr. Lameck John Erasto. During the oral submission, the counsel for the appellant submitted that the application in this case was brought under wrong or unknown pleadings because the respondent lodged a petition for maintenance instead of a chamber summons. To bolster her argument, she cited **Rule 32 of the Law of Marriage (Matrimonial Proceedings) Rules GN No. 136 of 1971 as amended by GN No. 246 of 1997.** Therefore, the trial court erred in entertaining this application because pleadings always give power to the court.

On the second ground, the counsel for the appellant argued that the respondent failed to prove that she was deserted hence the case was not proved to the required standard. On the third ground, the counsel



submitted that the trial court decided the case without framing of issues and therefore it was wrong. On the 5<sup>th</sup> and 6<sup>th</sup> ground, she reiterated that there was irregularity in the proceedings of the trial court because the case was heard based on the petition for maintenance instead of chamber summons. She finally prayed to drop the 4<sup>th</sup> ground and urged the Court to allow the appeal and set aside the decision of the trial court.

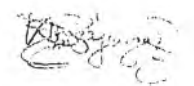
When the counsel for the respondent was invited to argue the appeal, he invited the Court to consider the principle of overriding objective in determining the first ground of appeal. He was content that procedures should not be applied to thwart the rights of the parties. He invited the Court to consider the cases of **Benedicto Mutachoka Mtungirehi v. Innocent Sebba Bilakwate and two others, Misc. Civil Cause No. 07 of 2015** and **General Marketing Company Ltd v. A. Sharif [1980] TLR 61.**

On the second ground, Mr. Erasto submitted that the respondent proved the case to the required standard by tendering exhibits showing the conduct of her husband. During the hearing, the appellant was duly served the summons but failed to appear in order to cross examine the

A handwritten signature in dark ink is written over a circular official stamp. The signature is cursive and appears to read 'R. S. M.'. The stamp is partially obscured by the signature.

respondent something which amounted to admission. He cemented his argument with the case of **Kwiga Masa v. Samwel Mtubatwa [1989] TLR 103**. He went further addressing the 3<sup>rd</sup> ground that issues are always framed after the facts by the plaintiff are denied by the defendant. This is according to **Order I, Rule 1** and **Order XIV, Rule 3 of the Civil Procedure Code, Cap. 33 RE 2019**. In this case, the appellant did not appear therefore, the respondent's facts were not denied. Furthermore, failure to frame issues is not fatal as it was stated in the case of **Norman v. Overseas Motor Transport (1959) EA 131**. The 5<sup>th</sup> and 6<sup>th</sup> grounds were a repetition hence the counsel for the respondent did not address them.

When rejoining, the counsel for the appellant insisted that format, rules and procedures are meant to guide the court. The principle of overriding objective does not circumvent the procedures as it was stated in the case of **Martin D. Kumaliya and 117 others v. Iron and Steel Ltd, Civil Application, No. 70 of 2018, CAT at Dar es salaam**. She further reiterated her arguments that the case was wrongly instituted, the case was not proved and the appellant was not given the right to be heard and that there was no determination of issues.



In disposing this appeal, I there is one issue calling for determination. On the first ground, the counsel for the appellant argued that the case was wrongly instituted because the respondent filed a petition for maintenance instead of chamber summons. I have considered the law which was referred by the counsel for the appellant with regard to the application of this nature. **Rule 32 of the Law of Marriage (Matrimonial Proceedings) Rules of 1971** provides that:

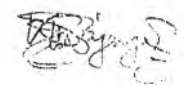
*'32 (1) Every application for maintenance (whether for maintenance of a party to a marriage or the children of the marriage) or for the custody of the children of the marriage shall be by a chamber summons supported by affidavit.*

*(2) Where any matrimonial proceeding is not by the Act or these Rules required to be instituted by a petition, the proceeding shall be instituted by a chamber summons supported by an affidavit.'*

This is a mandatory requirement of the law which cannot be circumvented. In my view, even the application of the overriding principle may not assist the respondent in curing this defect because the principle does not operate against the law. The same stance was taken in the case of Martin D. Kumaliya (supra) where the Court stated that:

*'We are aware that the Court is enjoined by the provisions of sections 3A and 3B of the Appellant Jurisdiction Act, Cap. 141 RE 2018 introduced recently vide the Written Laws (Miscellaneous Amendments) (No.3) Act, No. 8 of 2018 to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes. While this principle is a vehicle for attainment of substantive justice, **it will not help a party to circumvent the mandatory rules of the Court.** (emphasis added).*

Unlike in the case **Benedicto Mutachoka** (supra) which decided inter alia that '*...the irregularity in the format of the petition in the instant petition is not fatal, as it has occasioned no any injustice to either*', the above case puts a mandatory rule to be followed in filing the application for maintenance while in the later case there was no mandatory requirement. It has been the principle of the law, where there is a law specifying a certain procedure, a party cannot opt to circumvent the procedure under the umbrella of overriding objective. The principle of overriding objective was meant to facilitate substantive justice by avoiding over reliance on procedural technicalities but the same does not operate where there is a law giving specific directions. In the case of **Mondorosi Village Council**



**and 2 others v. Tanzania Breweries Limited, Civil Appeal No. 66 of 2017**, CAT at Arusha (unreported), the Court of Appeal stated that:

*'Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go the very foundation of the case.'*

In conclusion therefore, the respondent's application violated mandatory rules of the law which rendered the same incompetent for trial. I hereby allow the appeal, nullify the proceedings of the trial court and set aside the decision thereof because they are founded on wrong pleadings. No order as to costs. Order accordingly.

**DATED** at **BUKOB**A this 18<sup>th</sup> Day of December, 2020.

  
**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**18/12/2020**



**Court:**

Judgement delivered this 18<sup>th</sup> December 2020 in the presence of the counsel for the appellant, Miss Pili Hussein and the respondent present in person. Right of appeal explained to the parties.

  
**Ntemi N. Kilekamajenga.**

**JUDGE**

**18/12/2020**



