

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**PC. CIVIL APPEAL NO. 29 OF 2020**

*(Arising from Lindi District Court at Lindi Matrimonial Appeal No. 4 of 2020. Original Matrimonial Cause No.6 of 2020 from Lindi Urban Primary Court.)*

**FADHILISALUMU LATI.....APPELLANT**

**VERSUS**

**HALIMA MAULIDI TOSSIL.....RESPONDENT**

**RULING**

5 Nov. & 22 Dec. 2020

**DYANSOBERA, J.:**

The appellant, Fadhili Salumu Lati is, before this court, challenging the decision of the District Court of Lindi in which his appeal was dismissed for want of prosecution.

To appreciate the merit or otherwise of this appeal, a factual background will be necessary.

On 8.12.2017 the parties celebrated their marriage in Islamic rites in Dar es Salaam and were blessed with no issue. They managed to acquire

some assets of which each claimed to be the major source of income in the family especially on the acquisition of the matrimonial assets. On her part, the respondent claimed that she is an employee and was rendering services to the appellant who is unemployed and had no any source of income. The appellant told the respondent that he has a plot of land. Thus, they agreed to start construction work. The respondent claimed that she provided money which was used to construct their house. The first phase of money for construction the respondent took a loan from KIKOBA and she handed it to the appellant who supervised the construction work due to the fact the respondent is an employee. They completed the construction work thus, they shifted to that house. Besides, the respondent agreed with the appellant to construct another house for business purpose commonly called 'fremu'. Thus, respondent took a loan from NMB Bank to the tune of Tsh.12, 000,000/= for construction of business 'fremu'. The fremu were completed and parties entered into tenancy agreements with their tenants. The first round of rent was Tshs.1, 800,000/= of which the respondent took Tshs.800, 000/= for her hospital services while Tshs.1, 000,000/= was used to rehabilitate their residential house which was incomplete.

Sometimes, a confrontation emerged between the parties on the issue of the payment of the loan which she took from NMB Bank though they settled it before an advocate and other witnesses. Later on she was given a 'talak' on the allegation that she is a liar, prostitute and bustard and cannot continue living with him. The respondent was alleged to have

cheated the appellant while he was in Dar es Salaam whereby the respondent claimed to be in the night police security patrol.

On the part of the appellant he had a different story on how they acquired their matrimonial properties. Their life at Wales had a rent challenge which was big and far. They had house which they constructed for his mother. The appellant continued with the construction through his money and also he was assisted by his brother known as Hillary who gave him a 'kenchi', 20 iron sheets and 12 pieces of gypsum board. They continued with the construction via money obtained from the guest house. Later on the appellant asked his mother who was in Dar to shift the newly constructed house due to fact. Though his mother gave him a condition not to stay longer in that house since she would be dwelling in the same house. That in 2018 the parties started residing in that house.

Thereafter, they started construction of business 'fremu' with the initial capital of the appellant of Tshs.3, 000,000/= but before construction started the appellant informed his mother and they agreed that after getting back their capital and realization of profit then they would give his mother one room of 'fremu'. There happened a shortage of money for construction money and the respondent took loan at POLICE SACCOS of Tshs.9, 000,000/= whereby Tshs.5, 000,000/= was used to in their construction project. The remaining amount of money was used by the respondent in constructing her house situated in Dar es Salaam. With that additional money from the respondent the construction was completed and they managed to get tenants who paid their rent to the sum of

Tshs.1,800,000/= .Unfortunately, the respondent was suffering from eye problems. Seeing that, the appellant gave the respondent Tshs.1, 500,000/= from the collected rent for treatment whereas, the appellant remained with Tshs.300,000/=. Their evidence was supported with their witnesses. Eventually, the trial court granted a decree of divorce and divided the matrimonial assets to the parties in consequence of which the appellant was dissatisfied with the decision of the trial court and, therefore, lodged an appeal to the District Court of Lindi. The appellant's appeal at the first appellate court contained two grounds of appeal. The first ground was, that the honourable trial Magistrate erred in law and facts to include house situated at Plot Number 83 Block "K" Market Street as matrimonial property and neglecting evidence that house belong to appellant mother. The second ground of appeal was, that the honorable trial magistrate erred in law and facts for not taking into consideration Exhibit M1 clearly respondent knew that Plot Number 83 Block "K" was not matrimonial property. The first appellate court dismissed the appellant's appeal for want of prosecution.

Aggrieved with that decision the appellant has filed his petition of appeal which is characterized with three grounds of appeal which are follows:

1. The first appellate Magistrate erred in law and fact for failing to see that Section 101 of the Law of Marriage Act [Cap 29 of 2002] was contravened by the Trial Court at the petition was premature.
2. That the first appellate Magistrate erred in law and facts for dismissing the appeal for want of prosecution without giving the

appellant opportunity to be heard on the reason of delay to file written submission.

3. That first appellate magistrate erred in law and facts by not considering at appeal stage court may dispose of an appeal by looking at the grounds of appeal only.

When the respondent brought her reply to the petition of appeal it was accompanied with the notice of preliminary objection that the appeal is bad in law for contravening Order IX rule 3 of the Civil Procedure Code [Cap 33 R.E.2019]. Thus, on 1.10.2020 upon the prayer by the appellant the preliminary objection was ordered to be disposed of by way of written submissions. On 7.10.2020 the respondent filed his written submission in support of the preliminary objection. To the raised preliminary objection the appellant submitted that after the appellant had lodged his Matrimonial Appeal at Lindi District Court was ordered to file his written submission to support his appeal though he failed as per first appellate court order. The respondent further submitted that, the appellant was the one who prayed the appeal to be disposed of by way of written submission.

The respondent went on and submitted that it is a trite law that non-compliance to file written submissions tantamount to non-appearance whose consequence is to dismiss the appeal. To cement her argument she cited the case of **Salama Nassoro Mwalimu vs. Mariam Mathias Chilambo**, Pc. Civil Appeal No.79 of 2019, High Court of Tanzania at Dar es Salaam (unreported). In view of that the respondent submitted that District Court dismissed the appeal for failure to submit his written

submission to support his appeal which tantamount to failure to prosecute or defend one's case. The respondent further cited a case of **National Insurance Corporation of (T) Ltd and Another vs. Shengena Limited**, Civil Application No.20 of 2007 CAT at Dar es Salaam (unreported) whereby the Court observed that:

"Failure to lodge written submission after being so ordered by the Court is tantamount to failure to prosecute or defend one's case."

Thus, the respondent submitted that since the appellant's appeal was dismissed he was required to apply for restoration of his appeal in the District Court of Lindi as per Order IX Rule 3 of the Code and not to appeal to this honourable court. In addition, the respondent argued that it is improper for the appellant to file this appeal before exhausting other remedies. Thus; the respondent was of the view that the appellant's appeal contravened Order IX Rule 3 of the Civil Procedure Code.

Apart from that, the respondent submitted that the trial court was correct to dismiss the appellant's appeal and the appellant was required to apply for restoration of his appeal. Eventually the respondent prayed this court to dismiss this appeal with costs.

The appellant responded the respondent's written submission in support of her preliminary objection. In his reply the appellant submitted that the respondent's preliminary objection is baseless and has aimed at delaying this court's time. The appellant further submitted that the respondent lodged her preliminary objection using a law which is not

applicable in this matter and it must be born in mind and is a judicial notice that this appeal has originated from the primary court. In addition, the appellant submitted that it is a principle of law that the Civil Procedure Code[Cap 33 R.E. 2020] is not applicable in the primary courts and it is not applicable from the case arising from the primary court. To fortify his argument the appellant cited the case of **Agness Simbambili Gabba vs. David Samson Gabba**, Civil Appeal No.26 of 2008 where the Court stated that:

“For the sake of academic argument, it were assumed that the pending suit was the probate matter from the primary Court, then section 79 of the CPC Would not have applied because the CPC does not apply in the matter arising from primary Court.”

The appellant further argued that section 3 of the Code does not include the Primary Court thus for the respondent to bring her preliminary objection basing on the Civil Procedure Code is miss consumption of court time. Besides, the appellant submitted that even if it is assumed that the preliminary objection was properly brought it could have no legs to stand since it was brought in contravention of order IX Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2002] which provides:

“Where neither party appears when the suit called for hearing court may make an order that the suit be dismissed.”



From the above quoted provision of the law the respondent was of the view that he did not see how he is precluded from filing his appeal though the respondent made reference to O.IX Rule 4 of the Civil Procedure Code which makes reference to re-admission of the suit after a suit has been dismissed if neither party appears or if the plaintiff fails to serve defendant with summons in consequence of paying court fees. The appellant was of the view that nothing from the aforesaid can be practicable in this appeal and worse enough O. IX of the Civil Procedure Code refers to the suit and not appeal. He finally submitted that the respondent's preliminary objection has no room to stand and is required to be dismissed with costs.

In her rejoinder the respondent submitted that the appellant filed his written submission in reply on 13.10.2020 which was contrary to the court's order which required him to file on 10.10.2020 which means that the appellant has a tendency of disobeying court orders and wasting the time of courts. Also, the respondent lamented on the conduct of the appellant applying non existing and dead revised law of Civil Procedure Code [Cap 33 R.E. 2020 or 2002] but currently we have the revised edition of 2019 so the respondent wondered where the appellant got those two revised laws which do not exist. She further submitted that not every case originating from the primary court can bar the use of Civil Procedure Code but it depends on the circumstances of the case. She argued that the **Agness Simbambili's** case is distinguishable to case at hand because non-appearance happened at the District Court and not the primary court and that is why the District Court exercised its jurisdiction to dismiss the



matter and that under that circumstances, the Civil Procedure Code is applicable in the present case.

The respondent further submitted that the appellant is trying to confuse this Court but in reality since his appeal was dismissed by the District Court he has to apply for restoration of his dismissed appeal under Order IX rule 3 of the Code. The respondent insisted that the appellant had to exhaust other remedies before coming to this court by way of appeal in which he has contravened Order IX rule 3 of the Code. To substantiate his argument he recited the case of **National Insurance Corporation of (T) Ltd and Another vs. Shengena Limited** (supra). Therefore the respondent insisted that his preliminary objection be upheld and appellant's appeal be dismissed.

I have gone through the first appellate court's record and the submissions of the parties on the preliminary objection raised by the respondent. Before I make a decision of this Court in regard to the raised preliminary objection I would like to clear a doubt raised by the respondent when she was replying that the appellant filed his written submission in reply lately. On 1.10.2020 this court upon a prayer by the appellant ordered the preliminary objection to be disposed of by way of written submissions on the following time frame. First, written submission in chief by the respondent was to be filed by 1.8.2020. Second, reply was to be filed by 15.10.2020. Third, rejoinder, if any, was to be filed by 22.10.2020 and lastly, mention was scheduled on 5.11.2020. The record shows that the appellant's written submission in reply to preliminary objection was filed on

13.10.2020 via Exchequer Receipt No.24460617. This means that the appellant filed is reply within time.

Another issue raised by the respondent is the use of dead or non existing revision of the law. For sure the appellant has cited R.E. 2020, 2019 and 2002 throughout his submission in reply. It may be typing error for the appellant to cite R.E. 2020 or 2002 but at this moment I think citing R.E. 2020 or 2002 is minor issue which is not fatal at all and does not go to the root of the matter. It should not, therefore, detain me anymore.

What is at issue at this juncture is to settle the preliminary objection raised by the respondent. Surely, the case before the first appellate court was dismissed for want of prosecution due to the fact that the appellant failed to file his written submission on 1.7.2020 as it was ordered on 23.6.2020. Whereas, the respondent was also required to file his reply on 6.7.2020 and rejoinder by the appellant was to be filed on 10.7.2020.

Further that, the appellant submitted that Order IX of the Civil Procedure Code refers to the suit and not an appeal. Surely, this has prompted this court find out the meaning of suit so as to see if a suit and the appeal are two distinctive features. The Black's Law Dictionary, 8<sup>th</sup> Edition has defined a suit to mean the following:

"Suit. Any proceeding by a party or parties against another in a court of law."

Also, the same law dictionary has defined the term proceeding to mean:

"Proceeding.1.The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and entry of judgment.2Any procedural means for seeking redress from a tribunal or agency.3.An act or step that is part of a large action.4.The business conducted by a court or other official body; a hearing.5.Bankruptcy.A particular dispute or matter arising within a pending case-as opposed to the case as a whole."

Thus, from those two definitions of the term suit and proceeding I am of settled view that the term suit covers an appeal which is a proceeding brought by the appellant against the respondent.

Now coming to the central issue of the controversy, I associate with the respondent that the appellant was required to file an application to restore his dismissed appeal before the same court or to file a fresh suit/appeal subject to the law of limitation. See Order IX Rule 4 of the Civil Procedure Code (supra). Since the District Court dismissed the appeal upon failure of the appellant to file his written submission in support of his appeal which was rightly construed as non appearance or failure to prosecute one's case as far as the cited cases by the respondents are concerned, then the appellant could have exercised the remedies of

appealing if the District Court could have dismissed the application for restoration of the dismissed appeal and not to bring an appeal where the original matter was not decided on merits. As the matter stands of now, the appeal was dismissed not on merit but on the appellant's failure to prosecute it.

The legal position was re iterated by this court in the case of **Ms Olympia Kowero vs. Editor of the Express and 3 others**, Civil Case No.176 of 2005, Dar es Salaam (unreported) where it held that;


*"Where a party fails to file written submissions in compliance with a scheduled order, the consequences similar to those of failure to appear and prosecute or defend, as the case may be, come in to play".*

The first appellate court rightly dismissed the appellant's appeal for want of prosecution and the present appeal is misconceived.

In light of the foregoing reasons, I uphold the preliminary objection raised by the respondent and dismiss the appeal with costs to the respondent.

Order accordingly.




  
**W.P. Dyansobera**

**Judge**

**22.12.2020**

This judgment is delivered under my hand and the seal of this Court on this 22<sup>nd</sup> day of December, 2020 in the presence of the appellant and the respondent.



  
**W.P. Dyansobera**

**Judge**