

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
PC CIVIL APPEAL No.156 of 2020**

(Originating from Civil Appeal No. 68 of 2019 at District Court of Temeke)

**YASINI JUMANNE ABEID.....APPELLANT
VERSUS
SHAKIRA ABDALLAH.....RESPONDENT**

Date of Last order: 23/04/2021

Date of Judgment: 18/06/2021

J U D G M E N T

MGONYA, J.

The Appellant mentioned herein has filed before this Honourable Court four (4) grounds of appeal that appears in the amended Petition of appeal to the effect that:

- 1. That, the 1st Appellate Court erred in law and in fact by failure to consider the fact that at the time of deciding the case at the Primary Court of Temeke there was no representative for the appellant as the present representative was appointed after a decision and no summons was communicated to appellant as he was outside the Country.***

- 2. That, the trial Court erred in law and fact by failure to elevate, analyse the party's argument and give the reason for decision.***
- 3. That, the trial Court erred in law and fact by granting cost to the Respondent without any justification.***
- 4. That, the Appellate Court erred in law and fact by failure to consider that the Appellant had the right to be heard as established in the Constitution of the united Republic of Tanzania.***

Wherefore the Appellant prays before this Court for orders that:

- i) The decision of the lower Courts be quashed and set aside.***
- ii) Allow the matter to be retried de novo.***
- iii) Any other relief(s) this Honourable Court may deem fit and just to grant.***

The matter before this Court was heard by way of written submissions. Submissions were in place as scheduled, hence determination of the instant appeal.

The Appellant upon the **1st ground** of appeal averred that the trial court erred by failing to consider that the legal representative of the Appellant was appointed in October

2018 when the decision the Court was already passed. It is the Appellant's submission that the Respondent had not communicated to the Appellant any summons. Therefore, the application for extension of time and objection proceeding were denied which amounts to illegality. It was the Appellant's prayer that since there was no proper summons, then he prays the *ex parte* judgement be set aside and the matter be heard to its finality.

On the **2nd ground** of appeal, the Appellant states that, if one goes through pages **5, 6, 7** and **8** of the 1st appellate Court's decision, it provides on the reasoning that made the Court to reach its decision on the fact that service of summons was properly affected. The procedure is that the Summons to be effectively effected must be served to the party himself upon failure a Court Process server is to be involved and if failure occurs, the Court process server would then swear an affidavit to that failure. And in this circumstance, there was no affidavit that was tendered in Court to prove the same.

Moreover, it is in the Appellant's submission that the record of the trial Court clearly shows that the Appellant was outside the Country. It is however undisputed that such fact was not considered and the mere fact that the same was published in **Mwananchi Newspaper** a question has to be

considered if the newspaper extends outside the country where the Appellant is living.

Referring to the **3rd ground** of appeal that every person has to be treated equally according to the Constitution of the United Republic of Tanzania, Appellant contends that his right has been violated. One of the reasons for seeking extension of time at the first appellate Court was to address the illegality that the two lower Courts has denied the Appellant his right to be heard.

Submitting on the **4th ground** of appeal, the Appellant states that the court erred to have ordered costs to the Respondent herein who was the Petitioner without justifiable cause. The Respondent obtained assistance through legal aid centre in which no costs were incurred on the part of the Respondent therefore granting her costs was a misdirection of the Court itself.

In reply, the Respondent preferred to begin with the **3rd ground**, where it was her argument that, it is the Appellant's contention that since the Respondent was assisted by WILAC then she does not deserve costs, however it is the principle of law that costs follow the event. A party that wins is entitled to costs. The case of ***BAHATI MOSHI MASABILE T/A NDOÑO FILING STATION VS CAMEL OIL (T), Civil Appeal No. 216 of 2018*** was cited to

support the argument by the Respondent upon the 3rd ground.

Further, the Respondent avers that this appeal is the second appeal and since the matter commenced at the Primary Court and the Appellant has been filing cases every time making the Respondent to incur costs of transport and other incidental costs throughout.

Referring to the **1st ground** of appeal, the Respondent claims that, the same is baseless and aims at deceiving the Court. The Respondent confirmed that the Appellant was dully served through publication in the **Mwananchi Newspaper** of **08/05/2018** pursuant to the order of the trial Court. Also, the Representative was served summons by the Ten Cell leader called Christada Michael Nyasulu who testified as SM2 at the trial Court. However, the Legal representative for reasons known to himself denied to reserve summons and even enter appearance hence waiving his right to be heard and decided to file an application of setting aside the *Ex parte* judgement which was however out of time.

Submitting on the **2nd ground** of appeal, the Respondent asserted that it is the law and practice that the second appellate Court should not interfere from the concurrent findings of facts by the trial Court and the first appellate

Court. The case of ***JULIUS JOSEPHAT VS THE REPUBLIC, Criminal Appeal No. 3 of 2017*** was cited to support the contention above. The Respondent further, submitted that the case cannot pass the test laid down by the Court of appeal as there was no misapprehension of evidence or violation of any principle of the law or procedure. Further, the trial Court clearly analysed the evidence tendered before it and reached at a just decision.

Lastly as to the **4th ground** of appeal, it is the Respondent's reply that the ground is a new one which was raised at the second appellate Court and hence not acceptable in law and in this honourable Court and the Court is invited to disregard the said ground of appeal. It is the Respondent's averment that the appeal be dismissed.

I have considerably gone through the grounds of appeal by the Appellant and the reply by the Respondent. In my considerable view, this matter raises the question of proper service of summons. Both the Appellant and the Respondent in the submission have each argued for and against proper service of summons.

Having gone through the records of the Court and bearing in mind that this appeal before the Court traces its origin way back to the trial Court which is the Primary Court respectively being the Primary Court of Temeke.

The Respondent herein being the Petitioner who instituted a Matrimonial cause at the Primary Court was supposed to be issued with a summons to serve the Appellant here in who was the Respondent in the trial Court. From the records of the trial Court an order for summons was issued to the Appellant on **18/04/2018** and the matter was scheduled for mention on **04/05/2018**.

When the matter came for mention on the **04/05/2018**, the Respondent informed the Court that the Appellant has not entered appearance as he is at Beira Mozambique. The Court went further to order that hearing will be on **30/05/2018** at **04:30** am and the summons be published in the newspaper. For ease of reference the said proceeding of the day is as hereunder:

"04/05/2018

Mbele yangu: Mhe. B. Pilla Hkm

Washauri: 1. A. Kinyalile

2. A. Tarimo

Mdai: Yupo

Mdaiwa: Hayupo

Mdai: Mdaiwa hajafika yupo Beira Msumbiji naomba kutoa K/shaurini gazetini.

Amri: Hg. 30/05/2018 saa 04:30 asubuhi K/shaurini gazetini itolewe. Mdai aje na mashahidi wake.

Washauri: 1. A. Kinyalile

2. A. Tarimo

Imesainiwa

Hakimu

04/05/2018"

It is from the above order that when the matter came for hearing on the date scheduled for hearing, the Appellant herein was not present before the Court and the Court therefore proceeded in hearing the matter *ex parte* against the Appellant.

Since the matter was instituted in the Primary Court then I am at this juncture persuaded to revisit the applicable law in Civil cases at the Primary Court which is the ***THE MAGISTRATE'S COURTS (CIVIL PROCEDURE IN PRIMARY COURTS) RULES, G.Ns. Nos. 310 of 1964,***

"18. Summons

(1) When a proceeding has been instituted, the Court shall issue a summons requiring the defendant to appear and answer the claim at the time and place mentioned in such summon, and

shall cause the same to be served on the defendant.

(2) Every summons issued under this rule shall state briefly the nature of the claim.

19. Service

(1) Subject to the provisions of sub rule (2), a summons or any other document required to be served under these rules shall be served on the defendant personally or, if he has an agent authorised to accept service, on such agent.

(2) Where the Court is satisfied that personal service cannot be effected or cannot be effected without undue delay and expense, it may direct that summons or documents to be served either by post or by leaving it with an adult male member of the family of the defendant or with some adult male servant residing with him, or with his employer, or by affixing a copy of the summons or document on some conspicuous part last

known residence of the defendant and another copy thereof on the court notice board.”

From the above provision of the rules that guide the Court on how to effect service, I have not in the records seen anywhere that the above has been complied with. Failure to have complied with then even proof of the same cannot be proved as illustrated under **sub rule 3 of the Rules (supra)**.

However, the Court did not even give more room of efforts of finding a friendly accessible way to serve the Appellant herein when he did not enter appearance even after summons being published in the Daily News Paper. Even after the Court having the knowledge of the whereabouts of the Appellant herein as informed by the Respondent.

I am fully aware that the Respondent herein sought for the Courts order to publish the summon in the newspaper and the same was granted as prayed for. And it is not disputed from the records of the Court that the same was published in the Mwananchi News Paper and the copy is filed in the records. However, it is a question of fact as to whether the Mwananchi News Paper crosses our borders into the borders of Mozambique just to think that the Appellant herein had access to the said newspaper, or if it was read by someone in Mozambique so as to notify the Appellant that the summons

was published summoning him to enter appearance before the Court so as to serve the purpose as intended by publishing the same in the Mwanachi News Paper.

It is my considerate concern that the intention of the Court to have published the summons in the Mwananchi newspaper was contrary to the rules that govern service of summons in the Primary Court. However, the Respondent in her submission has stated that a legal representative was served with a summons but failed to appear in Court. Having thoroughly inspected the records in the Primary Court file, I have not found a summons that is addressed to the said legal representative in respect of **Matrimonial Cause No. 39 of 2018**. The only summon in record in respect to the Matrimonial Cause is the one that is addressed to the Editor of Mwananchi Newspaper.

Therefore, I draw reference to the pillars of natural justice and hereby advocate the right to be heard as enshrined in the **Constitution of the United Republic of Tanzania as amended from time to time under Article 13 (6) (a)**.

From the circumstance of the appeal at hand and with the rise of the argument in the first ground of appeal, I find that the Appellant was not granted the right to be heard for failure of effective service of the summons as it should have been issued by the Court and served upon the Appellant.

Matrimonial causes are sensitive matters or rather cases that need for the parties to be availed with all possible ways to appear in court to testify personally. Either, a Matrimonial course according to its nature arises from a relationship that affects two individual persons to the extents of one's dignity and their life at large. Therefore, expecting a legal representative to appear in Court and step in the shoes of a party to a Matrimonial Cause to me does not suffice to testify to the extent of quenching one's urge of what really is taking place between the spouses to extent of having a Matrimonial Cause in Court.

Therefore, the legal representative stated to have been served although there is no proof of service to the said legal representative and failure to have served the Appellant herein in accordance to the rules hindered the Appellant to have been heard and, hearing the matter *ex parte* in the circumstances of this matter was a misconception. **It is from the above reasons that I find the first ground of appeal meritious.**

Moreover, since the 1st ground of appeal is **meritious** the other grounds of appeal fail and the same will not detain me from determining them. **I therefore quash the proceedings and judgment of the first appellate Court together with the proceedings and decision of the trial Court. The same is to be remitted to the Primary Court and be tried**

***de novo* and expeditiously before another Magistrate and a new set of Assessors.**

It is so ordered.

Each party to bear their own costs.

Right of Appeal Explained.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

**L. E. MGONYA
JUDGE
18/06/2021**

Court: Judgment delivered before Hon. Kisongo, Deputy Registrar in chambers in the presence of the Respondent in person and Ms. Veronica RMA, this 18th day of June, 2021.



A handwritten signature in blue ink, identical to the one above, appearing to read "L. E. Mgonya".

**L. E. MGONYA
JUDGE
18/06/2021**