IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 20 OF 2020

ATHUMAN MUSSA URRASA…… ……APPELLANT

VERSUS

FATUMA KHALIFA MTURI……RESPONDENT

(Arising from the decision of Kinondoni District Court)

(Mushi Esq- RM.)

Dated 15th August 2019

in

Misc. Civil Application No. 44 of 2019

JUDGEMENT

2nd December 2020 & 4th February 2021

AK. Rwizile, J

Parties to this appeal once lived together as husband and wife under Islamic marriage celebrated in 2006. They were blessed with one child. It was in 2017, when misunderstandings between the two became unbearable to the extent that the respondent petitioned for divorce, custody of their child and distribution of matrimonial properties at the

Primary Court of Kimara. The case was heard and determined exparte. A decree of divorce was granted, matrimonial properties were distributed equally and custody of their child was placed to the respondent. The appellant was further ordered to pay 100,000/= per month for maintenance. It is in record that, on 4th September 2017, the appellant filed an application (Misc. Civil Application No. 98 of 2017) to transfer Matrimonial cause No. 56 of 2017 from Kimara Primary Court to Kinondoni District Court, for legal representation. The same was dismissed, since the matter was already scheduled for judgement.

In March 2019, the appellant decided to file another application (Misc. Civil Application No. 44 of 2019) for extension of time to appeal against the exparte decision of the trial court in Matrimonial cause No. 56 of 2017. It was unfortunate that, the application was also dismissed by Kinondoni District Court for want of sufficient cause for delay. The appellant was aggrieved by that decision, he is now before this court appealing on three grounds;

1. *That, the District Court erred in law and facts when it dismissed the application with costs for lack of merits.*
2. *That, the District Court erred in law and fact when it failed to consider the illegalities and the incurable or fatal irregularities as sufficient ground for extending time to lodge an appeal.*
3. *That, the District Court erred in law and fact when it failed to consider the reasons for delay advanced by the appellant as sufficient ground for extending time to lodge an appeal.*

At the hearing, the appellant was represented by Mr Daimu learned advocate while the respondent was offered legal aid from WLAC who

prepared her submission. Parties argued this appeal by way of written submission.

In support of the appeal, Mr Daimu learned advocate argued that, at the District Court the appellant raised three issues which were supposed to be determined, instead, he said, the court determined only one ground. He added that, the court raised another issue *suo motto* without affording him right to be heard. According to him the same was unacceptable as was decided by the Court of Appeal in the case of **Wengesa Joseph M Nyamaisa vs Chacha Muhogo**, Civil Appeal No. 161 of 2016 (unreported)

It was his submission further that, the District Court was bound to assign reasons as to why it did not determine or considered other issues raised by the parties. Since they spent time and energy to argue them. This argument was supported by the case of **National Shipping Agencies Co. Ltd (As duly constituted Attorney of M/S Global Container Lines Limited) vs Tanzania Harbours Authority,** Civil Reference No. 12 of 2004 (unreported). He asserted further that, he was supplied with the copies of judgement and proceedings on 20th February 2019 and not on 3rd November 2017. He said, the same was averred in his affidavit at the District Court.

When submitting on the second ground, learned advocate argued that the District Court failed to consider illegalities and irregularities which tainted proceedings and judgement of the trial court, his submission was that, existence of the same is a sufficient reason to grant extension of time. To support the same, he cited cases of **Consolidated Mines Limited vs Mbeya Cement Company Limited**, Civil Application No. 5 of 1999

(unreported) at page 6, **Transport Equipment Ltd vs D. P Valambhia** [1993] TLR 91, **the Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 387 and **Andrew Athuman Ntandu & Another vs Dunstan Peter Rima,** Civil Appeal No. 551/01 of 2019. He argued as well that, the Primary Court had no jurisdiction to entertain the matter since no certificate from reconciliation board was filed, he added that the magistrate and court assessors cross examined the witness contrary to the Law. Moreover, he said the applicant was condemned unheard and the trial court determined the matter despite the presence of application for transfer of the same. It was his submission that, the trial court distributed the matrimonial properties without considering the other wife of the applicant. He stated that, a polygamous marriage in Islam is recognised by the Law of Marriage Act, [Cap 29. R.E 2019]

Lastly, it was argued that the District Court did not consider the appellant's reasons for delay as advanced. He argued, he was not supplied with copies of the judgement and proceedings by the trial court in time. He added, the appellant was not notified of the date of judgement by the trial court, which is wrong as was decided in the case of **Cosmas Construction Co. Ltd vs Arrows Garments Ltd** [1992] TLR 127 at page 128. Accordingly, he submitted, failure of the District Court to consider the same as sufficient reasons to grant extension of time, vitiates the decision of the District Court. He therefore prayed for this court to allow the appeal, quash and set aside the ruling of the District Court of Kinondoni and allow the appellant to file an appeal in the District Court of Kinondoni.

Disputing the appeal, the respondent argued that, the decision of the District Court was right since the appellant failed to show sufficient reason for his delay. According to the respondent, the appellant failed to appeal in time due to his negligence and arrogance when he decided not to appear at the trial before the Primary Court. She cited the cases of **The Registered Trustees of The Archdiocese of Dar es Salaam vs the Chairman Bunju Village Government and 11 Others,** Civil Appeal No. 147 of 2000 (unreported), **Regional Manager Tanroads Kagera vs Ruaha Concrete Co. Ltd,** Civil Application No. 96 of 2007 (unreported) and **Kalunga and Co. Advocate vs NBC** [2006] TLR 235.

She argued cases referred are clear on what constitutes "sufficient cause". Further, she said, the appellant was supposed to appeal within 45 days from the date of the judgment which he failed. She made reference to section 80(1)(2) of the Law of Marriage Act. It was her submission further that, this appeal is among the appellant's tactics for delaying the respondent's right to her share in matrimonial properties. She therefore prayed for this court to dismiss this appeal with costs for lack of merit.

Having gone through the submissions of the parties and the records of the lower courts. It has to be noted that, it is not in dispute that, parties had a matrimonial case at Kimara Primary Court and the same was heard and determined exparte. This is what led to an appeal against the impugned ruling.

When considering the submissions of the parties, it came to my mind to ask parties address this court on ***whether filing Misc. Civil Application No. 44 of 2019, applying for extension to appeal out of time was***

a proper remedy against exparte decree made by the trial court on 9th October 2017, in Matrimonial Cause No. 56 of 2017.

Ms Loveness for the appellant told this court in response, that the trial court proceeded to hear the said matrimonial cause without informing the appellant the hearing date and a date of the judgement. As if that was not enough, she submitted, before the case was heard, an application for transfer of the same was filed before the District Court. It was Misc. Civil Application No. 98 of 2017. According to her, the appellant notified the trial court of the case but no action was taken. She said, upon notification, the trial court ought to stop hearing the case, pending determination of the application before the District Court. To support her assertion, she referred this court to section 47(1) (a) and (b) of the MCA. She therefore concluded that, appeal to the District Court was a proper cause of action to taken.

The respondent was of the view that the appellant was present before the trial court at first but later absented himself. She said, he was duly notified of the same but decided not to appear. She asked me to hold that this appeal is a wastage of time.

Maybe, I have to start with what is the import of section 47(1) (a) (b) of the MCA. For avoidance of doubt let me reproduce the same for easy reference;

> *47.-(1) Where any proceeding has been instituted in a primary court, it shall be lawful, at any time before judgment, for- (a) the primary court, with the consent of the district court or a court of a resident magistrate having jurisdiction, to transfer the proceeding to such district court or court of a resident*

magistrate or to some other primary court; (b) the district court or a court of a resident magistrate within any part of the local jurisdiction of which the primary court is established, to order the transfer of the proceedings to itself or to another magistrates' court.

As it is clearly seen from the above, section 47 deals with transfer of cases. It does not, as submitted by Loveness, mandate the Primary Court to stop hearing a case properly before it, merely because it is notified of the application for transfer pending before the District Court or a Court of Resident Magistrates or any other court. I do not therefore share Loveness' view in this aspect. The trial court was not therefore entitled to stop hearing the same. As it is clearly seen from the record, the appellant was aware of the case that is why he applied for its transfer. I have shown before, that the Misc. Civil Application No. 98 of 2017 was dismissed for the reasons best explained.

Going back to the question asked, the law provides the remedy when one is aggrieved by an exparte decision made by the Primary Court. According to the Magistrates' Court (Civil Procedure in Primary Court) Rules, GN No. 310/1964, 119/1983**,** Rule 30(1) provides *inter alia* that;

(1) *Where a claim has been proved and the decision given against a defendant in his absence, the defendant may, subject to the provisions of any law for the time being in force relating to the limitation of proceedings, apply to the court for an order to set aside the decision and if the court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause from*

appearing when the proceeding was called on for hearing, the court shall make an order setting aside the decision as against such defendant upon such terms as it shall think fit.

As it transpired, the appellant was supposed to apply to set aside an exparte decision. The application was to be filed at the same court. The rationale is to afford a party who was not heard, a right to present her side of the story.

It is my considered view that, an application to extend time to appeal against the exparte decision was not a proper remedy preferred by the appellant. That means the right to present his case before the trial court was dispensed with. Doing so in my view defeats the spirit and purpose for which Rule 30(1) of the rules was designed for.

The evidence in record is just one sided and that cannot be appealed against. What the appellant was therefore to first fight for, is to have his right of hearing. It can only be done as I have shown before by applying for setting that exparte decree aside. Appealing to the District Court would depend on the outcome of that application. Further, under the Magistrates' Court Act, section 44(1)(b) which provides for revisionary powers. The law states that;

44.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-

(a) ……

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application

being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit

It is my considered view that, although the decision of the District Court that dismissed the appellant's application was proper, it trailed on wrong principles. I therefore revise the same. This means, when dismissing the appeal, I also quash and set aside the ruling and proceedings of the District Court in Misc. Civil Application No. 44 of 2019.

AK Rwizile
JUDGE
04.02.2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY