

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DISTRICT REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM
CIVIL CASE NO. 62 OF 2020**

(Arising from the Decision of the Temeke District Court (Khamsin RM) in Matrimonial Cause No. 36 of 2012)

MENGI RASHID APPELLANT

VERSUS

CHIKU KIBIRA.....RESPONDENT

JUDGEMENT

Date of Last Order: 2/2/2021

Date of Judgement: 18/2/2021

MASABO J,

The judgment is in respect of an appeal from Matrimonial Cause No 62 of 2012 before Temeke District Court. The record has it that at the trial court the respondent petitioned for decree of divorce, distribution of matrimonial assets, custody of the issues of marriage and maintenance. She emerged successful as her marriage to the appellant was dissolved and she was subsequently awarded distribution of matrimonial assets and custody of the issues. The parties were further ordered to jointly maintain the issues of marriage, namely Rashid Mengi born in 1996 and Hawa Mengi born in 1999.

The appellant being disgruntled by the decree of the trial court, has filed an appeal armed with the following grounds: the court erred in ordering him to pay maintenance in respect of issues who have attained the age of majority,

the court erred in holding that the said issues are still in school as there was no evidence in support; the court erred in excluding one house from the matrimonial assets and in ordering attachment of his house.

When the matter was called on for hearing, the appellant appeared represented by Mr. Barnabas Lugua, learned counsel, whereas the respondent appeared unrepresented. She however informed the court that she relies on legal aid services.

Before commencement of the hearing, I invited the parties to address me on the appropriateness or otherwise of the trial court proceedings because, in the course of perusal of the records I observed several issues the major one being absence of record as to the hearing of the petition before trial court.

As one of the parties was not represented, it was found prudent in the interest of justice, grant leave to the parties to address the court in writing as per the schedule agreed. Both parties have complied by filling their written submissions.

For the appellant, Mr. Lugua, learned counsel, submitted that there are several irregularities in the proceedings, judgment and decree of the trial court. In regard to hearing he submitted that there are no records that hearing took place. Therefore, the court acted in contravention of section 81 and 84 of the Law of Marriage Act, Cap 29 RE 2019 as well as Rule 29 of the

Law of Marriage (Matrimonial Proceedings) Rules, which provides for hearing of matrimonial cause.

He argued further that for the order of the divorce to issue, the court must be satisfied that the marriage between the parties had broken down irreparably (section 99 of the Law of Marriage Act) a conclusion which can be arrived at based on evidence rendered by the parties to show that indeed their marriage has broken down irreparably by reason of cruelty, adultery, sexual perversion, desertion or other grounds provided for under section 107 of the Law of Marriage Act. Mr. Lugua argued further that the omission offended the provision of Order XVIII Rule 4 of the Civil Procedure Code, Cap 33 and section 144, 146 and 147 of the Evidence Act, Cap 6 RE 2019 on production and examination of witness.

With regard to the judgment, it was argued that, the judgment contravened the provision of Order XX rule 1 of the Civil Procedure Code which requires that judgement be composed after hearing the parties. Contrary to this provision, the trial magistrate composed and pronounced the judgment before trial. Second, there are three judgments in the record, that is, a hand written judgment and two typed judgments. The first typed judgement is in cyclostyle and the second is a computer print both of which are marred by multiple irregularities, including failure to indicate the date at which the judgment was pronounced, and variations in the content.

Lastly, in regard to the decree it was submitted that there are three decrees on record all of which are different in form and content. In addition, it was submitted that the decrees are signed by different magistrates.

The respondent's submission did not address itself to the issue. Rather, it only narrates the series of events pertaining to the appeal. Thus, I could not garner any assistance from the submission.

The records shows that the matter has a been a subject of multiple proceedings most of which is in respect of execution of the decree. Since execution is not the subject of this appeal, I will skip this part and confine myself to the trial court proceedings. As correctly submitted by Mr. Lugua, the records reveal that upon the petition being filed and assigned to Khamsini RM on 27/8/2012, it was fixed for mention on 20/9/2012 on which date the respondent appeared unrepresented before the presiding magistrate.

Thereafter, the matter was mentioned for two times in an attempt to procure the attendance of the appellant. On 14th November 2012, hearing of the petition was ordered to proceed *ex parte* the appellant on 3rd December 2012. Meanwhile, a re-service to the appellant was ordered. On the day fixed for hearing, that is 3rd December 2012, both parties appeared whereby the respondent was granted leave to file a reply to the petition and the matter was fixed for mention on 18th December 2012. On this date, the proceedings as could be deciphered from the court records are as follows:

18/12/2012

Coram: Hon, Khamsini RM

Petitioner

Respondent

Absent

cc Henjewele

Orders: (1) judgment on 24/1/2013.

Signed

18/12/2012

Judgment was not delivered on 18/12/2012 as scheduled. It was rescheduled to 24/1/2013, 27/2/2013; 20/5/2013; and later, on 26/6/2013 when the impugned judgement was finally delivered.

The judgment also bears testimony that trial was never conducted. Although the learned magistrate cited rule 29 (2) of the Law of Marriage (Matrimonial P[roceedings) Rules 1971 and correctly observed that trial of petition for divorce is to proceed in a manner similar to a trial in civil suits, she wrongly found that the contents of the petition, the reply thereto and the certification from the Marriage Conciliatory Board that it failed to reconcile the parties sufficed as proof that the marriage between the parties has broken down irreparably and she proceeded to dissolve the marriage.

With respect, the procedure employed by the learned magistrate was seriously fault. As argued by Mr. Lugua trial of a matrimonial cause is conducted in a form similar to civil suit as stated under Rule 29(1) and (2) which provides that:

1. When all the pleadings in a matrimonial proceeding have been filed, the Registrar shall fix a date for the trial of the petition.
2. The court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code* and the provisions of that Code which relate to examination of parties, production, impounding, and return of documents, settlement of issues, summoning and attendance of witnesses, adjournments, hearing of the suits and examination of witness, affidavits, judgments and decree shall apply mutatis mutandis to a trial of a petition.”

Upon all the pleadings being filed, the learned magistrate was duty bound to conduct a trial in accordance with the procedure provided for under the Civil Procedure Code, Cap 33 re 2019 in which case the provision of the Order XVI on summoning and attendance of witnesses and Order XVIII on hearing of suit and examination of witnesses, ought to have been complied.

Moreover, as correctly submitted by the Mr. Lugua, under the provision of section 99 of the Law of Marriage Act, a declaration that a marriage has broken down irreparably can only issue if the court having examined the evidence rendered by the party petitioning for dissolution of marriage had lead sufficient evidence in proof that the marriage between them has broken down irreparably owing to cruelty, adultery, sexual perversion, desertion, separation or for other reasons provided for under section 107 (2) of the Act. The omission of hearing is not only in contravention of the above provision, but also amounts to an abdication of the duty vested in court by section 108

of the same Act. This section states that, the duty of the court in matrimonial proceedings, is to inquire into the fact alleged to consider whether, the evidence rendered by the parties sufficiently prove the facts pleaded as to the breakdown of the marriage. The omission constitutes a fatal irregularity which have rendered the proceedings a nullity.

Having found the proceeding to be a nullity, I will not proceed to the irregularities contained the judgment and the decree as both of them have been consequently rendered a nullity. Accordingly, I invoke the revisional powers vested in this court by section 44 (1) of the Magistrate Courts Act, Cap 11 RE 2019 quash and set aside the proceedings, judgment and decree of the trial court for being a nullity. Further, I direct that the file be remitted to the trial court to be assigned to another magistrate with jurisdiction for an expedited trial.

Since the matter is a matrimonial appeal, there are no orders as to costs.

DATED at DAR ES SALAAM this 18th day of February 2020.



J.L. MASABO

JUDGE

