

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 54 OF 2020

GIDEON MWAKALONGE.....APPELLANT

VERSUS

NIENDIWE SAFIEL MDUMA.....1ST RESPONDENT

FOSTER AUCTIONEERS AND

GENERAL TRADERS.....2ND RESPONDENT

Date of last order: 21/07/2020

Date of Ruling: 12/03/2021

J U D G M E N T

MGONYA, J.

Being aggrieved by the Ruling of **Pc Civil Appeal No. 58 of 2014** of Ilala District Court decided by Hon. Mpaze, RM the Appellant lodge four grounds of appeal before this Honourable Court as hereunder:

- 1. That, the District Court erred in law and fact by not considering the order of the High Court by Hon. E. M. E. Mushi, Judge (as he then was) as per his Judgment dated 14/06/2012 in reference to PC Civil Appeal No. 96 of 2010;***
- 2. That, the District Court erred in law by ordering distribution of the matrimonial assets***

while other properties of the Respondent have not been listed, located or evaluated thus making division of assets based on belonging of one part (Appellant's party) only;

- 3. That, the District Court of Ilala based on the same out dated forged and altered evaluation report of July 2015 which was set aside hon. Mujaya RM IN Civil Appeal No.58 of 2014; and***
- 4. That, the trial Court erred in law in transferring the implementation from Primary Court on 08/12/2017 (against Judge Mushi PC Civil No. 96 of 2020 and F. Mujaya RM in Civil Appeal No. 58 of 2014) to District Court for its implementation although the transferer is known party to the matrimonial suit.***

When the matter came for hearing before this Honourable Court, Counsel for the Appellant prayed that the matter be disposed by way of Written Submissions and the same was granted hence this decision.

It was the Appellant's submission that it is undisputed that the Respondent had appealed to the High Court and that a decision was delivered by Hon. Mushi directing the matter be remitted back to the Primary Court for the distribution of the properties that the parties are battling upon.

It is further the Appellant's submission that when the matter was reverted to the Primary Court for retrial. The 1st Respondent transferred her case by way of mere letter to the District Court of Ilala for the redistribution and execution of matrimonial properties contrary to the order of the order of the Court before Hon. Mushi, J. that was outright noncompliance with the order of Higher Court which should not be condoned.

Moreover, it is trite law that the decision of the High Court is binding to the Court Subordinate to it including the District Court. Therefore it was wrong for the District Magistrate to dissent from the decision of the High Court by pronouncing judgement basing on his own opinion instead of adhering to the directives accorded by the High Court Judge.

The Appellant further averred that the District Court before Hon. Mpaze, RM ordered the 2nd Respondent to execute the matter by giving the 1st Respondent (the decree holder) three (3) houses and the Appellant four houses among the seven and the farm be divided equally.

It is the Appellant's contention that it was equivocal where the decision and order of giving the 1st Respondent three houses among the seven and the farm be equally divided emanates from. While the orders of the High Court were specific and clear in regard to equal division to be done by the Primary Court, not the District Court.

On the second ground of appeal the Appellant submitted that as per the order of the High Court when it came to listing of the properties the same was regurgitated by Hon. Mujaya Resident Magistrate in his judgement dated **23/3/2017**. It is further stated that during locating and listing the properties there was lack of cooperation from the 1st Respondent. It was also discovered that some properties had already been sold by both parties; worse enough the 1st Respondent had sold all her properties.

With regards to third ground of appeal it was the Appellant's claim that as a matter of law, any division of matrimonial property before distribution between the parties needs to be evaluated and after, that is when the division takes place. The matter before the District Court was decided by relying on an outdated evaluation report despite the fact that the High Court had already given directives as to what has to be done being the Primary Court to conduct a new valuation of the matrimonial property before dividing the same to the parties.

Finally, on the last ground of appeal, the Appellant submitted that the high Court was clear that the properties ascertained by to matrimonial properties were to be collected by the Primary Court and divided equally with an exception of those that had already been sold. The matter was entertained

by the Primary Court and a ruling delivered where by an appeal against the Ruling was sort before Hon. Mujaya, Resident Magistrate who quashed the Ruling of the Primary Court on the ground that the executing Court should adhere to the directives of the High Court.

Moreover, the complaint letter that was written seeking for a transfer was signed by one **NIENDIWE MSAFIRI MDUMA** a person unknown in the case and a stranger to the suit for the same was neither the Appellant nor the Respondent. The Appellant herein went further in providing on the act of the transferring.

In reply to the appeal, the 1st Appellant's submission is that there is no objection that there was an appeal before the High Court that was determined to the direction that the matters of the parties be located, properly listed and equally distributed. It was well adhered to and the matter was again referred to the Primary Court and later transferred to the District Court of Ilala where the same was determined accordingly and decision was made thereof which is the subject to this appeal.

It was further the Respondent's averments upon the first ground of appeal that the order of Honourable Mushi, J. was well complied with and the Appellant has misconceived himself

by accusing the District Court for non-compliance with the said direction.

However, the Respondent states that the Appellant has mislead this Court by submitting on extraneous matter and general provision of the law while referring to supervisory powers of the Subordinate Courts by the High Court while **section 30 (1) and 44 (1) (a) of the Magistrate's Court Act, (MCA)** was well adhered to.

Basing on the second ground of the appeal, it was the Respondent's assertion that the Appellant again misleads the Court since the District Court allowed the parties to evaluate and distribute the assets as per the law. Further that the records are clear on what transpired, and that the Appellant's allegations are an afterthought and this Honourable Court should not drag itself to allegations which are purely baseless. Further that the same is a new fact which cannot be entertained at the instant stage since it was not entertained in the lower Court and hence cannot form part of the grounds of appeal. In stating the above, it was the 1st Respondent's prayer that the appeal be dismissed.

Having gone through the rival submission of the parties of both sides, it is from here I am determining the appeal before this Honourable Court. As it appears on the face of records, the

1st and 4th ground of appeal are consolidated and will be determined together as hereunder;

Firstly, as the **1st** and the **4th grounds** of appeal have been consolidated the two grounds both challenge the validity of the actions of the District Court in involving itself in the distribution of matrimonial assets of the properties in existence of the judgement of the High Court by Hon. Mushi, J. It is from that decision of the District Court that the Appellant was aggrieved hence this appeal.

In the decision by Hon. Mushi, J. after having gone through the submission of the parties, it was well founded that upon the matrimonial properties the same ought to be located, and properly listed thereafter be valued followed by an equal distribution. I quote the above from the decision for ease of reference:

"In concluding this appeal, it is the finding of this Court that, all the assets held by each spouse do form part of the matrimonial assets. In order to have a fair distribution of these sets, first, all of them should be located and properly listed, thereafter their evaluation should be determined. These tasks should be done by the Primary Court, which heard the Petition or divorce. Having done so, the Primary Court should make an order for

equal distribution of the assets, excluding the value of the properties which have been disposed of."

According to the records before this Court is the decision that gave directives as to how the matrimonial properties to the parties ought to have been divided. The task was in the judgement assigned to the Primary Court which was the Court of first instance to this case. I have noted a series of actions which were undertaken against the execution process at the Primary Court.

A party that ought to have been aggrieved by the decision of Hon. Mushi, J. had a chance to appeal to the Court of Appeal against the above quoted decision but the same was not the case. An application for execution sort to the District Court on execution of the matrimonial asserts of the parties herein was against the directions of Hon. Mushi, J. (as he then was). Therefore, the order of the District Court in **Civil Appeal No. 58/2014 is hereby quashed and dismissed. It is from the above that I find the 1st and 4th grounds of appeal holds water and are meritorious.**

On the **2nd ground** of appeal that the District Court erred by ordering distribution of matrimonial assets while other properties of the Respondent had not been listed, located or evaluated thus making division of asserts based on one part

being the Appellant. From the records I have seen that the list of properties made on **12/04/2013** before Hon. Komba, Resident Magistrate is the list to be complied with, since obtaining the same was as per the directives or order of the Judgment by Hon. Mushi J. Moreover, if the Appellant noted that there were properties of the Respondent that were not listed in the above-named list by the Court, he ought to have objected before the same Court and prove the same.

It is trite law that whoever alleges must prove. Failing to have proved this claim within time is an afterthought and a way of delaying or incapacitating the execution process as ordered by the Primary Court after adhering the order of the High Court, whereby the action of the District Court in this respect is also a misconception. **I find this ground of appeal baseless and is dismissed in its entirety.**

In determining the **3rd ground** of appeal, the same will not detain much of my time since the ground of appeal in accordance to the Ruling mentioned to have set aside an evaluation report is a mere allegation. Having gone through the said Ruling it does not in any way state on any evaluation report. **This ground is therefore meritless and dismissed.**

In the event therefore, this appeal is partly allowed in the extent stated above.

Having said all the above this matter is to be remitted to the first trial Court to proceed with the directives of the Judgment by Hon. Mushi J; upon distribution of the matrimonial properties as listed on **12/04/2013**.

It is so ordered.

Right of Appeal Explained.



L. E. MGONYA
JUDGE
12/03/2021



Court: Judgement delivered in my chambers in the presence of Mr. Mrutu, Advocate for the 1st Respondent, the Appellant in person and Ms. Msuya RMA, this 12th day of March, 2021.



L. E. MGONYA
JUDGE
12/03/2021

