

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 36 OF 2020

(C/F District Court of Arusha, Consolidated Civil Appeal No. 50/2019 and No. 4/2020
from Original Matrimonial Cause No. 51/2012 in Arusha Urban Primary Court)

JONAS YESSE..... APPELLANT

VERSUS

RAHEL JONAS.....RESPONDENT

JUDGMENT

24/5/2021 & 2/7/2021

ROBERT, J:-

Delivering its judgment in Consolidated Civil Appeal No. 50/2019 and Civil Appeal No. 4/2020, the District Court of Arusha in the exercise of its powers under section 21(1)(c) of the Magistrates' Courts Act, Cap. 11 (R.E.2019) quashed the proceedings and the two conflicting judgments dated 28/5/2012 and 29/10/2019 arising from Arusha Urban Primary Court in Matrimonial Cause No. 51/2012 and ordered trial *de novo* before another Magistrate with competent jurisdiction. Aggrieved, the Appellant herein filed this appeal challenging the decision of the District Court,

The details relevant to this appeal reveals that, the Appellant, Jonas Yesse, lodged matrimonial proceedings at Arusha Urban Primary Court against his then wife, Rahel Jonas who is the Respondent herein. The case proceeded ex-parte against the Respondent who allegedly defaulted appearance. The case ended up in a grant of divorce on 28/5/2012 before Hon. S. Kassim, PCM.

On 11th September, 2018, that is six years after the decision of ~~Arusha Urban Primary Court~~, the Respondent wrote a letter to the trial court complaining that she was not aware of the ex-parte proceedings and prayed for an order for division of matrimonial property since the ex-parte judgment was silent on that.

Prompted by the Respondent's complaint, on 15th October, 2018 the trial Court having failed to locate the original case file, decided to open a duplicate file in order to entertain the issues of division of matrimonial properties and custody of children. The proceedings of this matter were presided over by Hon. W.M. Mwijage, RM who delivered another Judgment on 29/10/2019 bearing the same case number with that of Hon. S. Kassim, PCM which is Matrimonial Cause No. 51 of 2012 whereby he divided matrimonial properties between the parties by awarding the

Respondent herein 20% of the matrimonial assets and 80% to the Appellant herein.

Aggrieved by the decision of the trial court, the Respondent herein filed an appeal to the District Court (Civil Appeal No. 50/2019) against the decision of the trial Court. Her appeal was met with a cross appeal filed by the Appellant herein (Civil Appeal No. 4 of 2020) against the decision of the trial Court. The two appeals were consolidated by the District Court.

In the judgment delivered on 22/4/2020, the District Court faulted the decision given by Hon. Mwijage, RM saying it was un-procedural for the trial Magistrate to reopen the proceedings in a matter where ex-parte judgment had already been delivered and proceed to hear the matter *inter parte*. The District Magistrate observed that the proper course open to the Respondent was to apply to set aside the ex-parte judgment. She decided that, Hon. Mwijage, RM had no jurisdiction to vary the decision in a case where judgment had already been given by the same court. Based on that, she nullified the proceedings commenced from 15/10/2018 and judgment delivered by Hon. Mwijage, RM on 29/10/2019.

Further to that, the District Court made a finding that the judgment delivered by Hon. Kassim, PCM on 28th May, 2012 was equally a nullity as the trial court denied the Respondent herein the right to be heard by

proceeding ex-parte against her while there is no record to prove that the Appellant was properly served but defaulted to enter appearance. Further to that, the District court observed that failure of the trial court to address issues of division of matrimonial property and custody of children was a fundamental omission which occasioned injustice to the Respondent herein.

Aggrieved with the decision of the District Court, the Appellant herein preferred this appeal armed with two grounds of appeal which I take liberty to reproduce as follows:

- 1. Having correctly observed that the proper course open to the Respondent was to apply for setting aside of the ex-parte judgment, the District Court grossly erred in law in nullifying trial Primary Court decision dated 28th may, 2012 [Hon. Kassim, PCM] because it had allegedly failed to address issues of custody and division of matrimonial assets.*
- 2. The district court grossly erred in law in finding that the trial primary court had proceeded ex-parte the respondent without there being proof the Respondent was properly served.*

When this matter came up for hearing before this court both parties were present in person without representation. The hearing proceeded by way of written submissions as desired by parties.

The Appellant decided to consolidate the two grounds of appeal and argue them together.

He submitted that, the District Court having made a finding that the Primary Court became *functus officio* after delivering its judgment in Matrimonial Cause No. 51/2012 on 28/5/2012 and decided that the Magistrate from the same Primary Court had no jurisdiction to correct the proceedings or judgment of another Magistrate as well as making an observation that the correct procedure to challenge the ex-parte decision of the primary court dated 28/5/2012 was for the Respondent herein to apply to set aside the ex-parte judgment pursuant to rule 30 of the Primary Court Rules, GN No. 310/1964, it should not have made a turnaround by nullifying the judgment of the Primary court delivered on 28/5/2012 for the reasons that the primary court (Hon. Kassim, PCM) did not decide on the issues of division of matrimonial assets and custody of children and further that there was no proof that the Respondent herein had been served and defaulted to appear in the proceedings of 2012.

He argued that, by nullifying the proceedings and judgment of the primary court delivered by Hon. Kassim, PCM on 28/5/2012, the District Court contradicted its own observation for the reasons that; one, the court had observed earlier that record of the proceedings conducted and

concluded in 2012 were missing in which case there were no material before it to conclusively determine that the Respondent herein had not been served to appear and that issues around custody and matrimonial assets had not featured in the proceedings and dealt with. Two, having correctly nullified proceedings and judgment of Hon. Mwijage, RM delivered in 2019 it was wrong for the same court to turn around and entertain an appeal commenced by the Respondent herein challenging that same decision. Three, Judgment by Hon. Kassim, PCM delivered on 28/5/2012 clearly shows that the Respondent herein was served and wilfully defaulted in entering appearance.

Based on the stated reasons, he prayed for the appeal to be allowed.

Opposing this appeal, the Respondent submitted that the District Court was right to nullify the judgment of Hon. Kassim, PCM delivered on 28/5/2012 because it was improper for the trial court to proceed with the ex-parte hearing for reasons that the Respondent had defaulted appearance while she was never served and further that the trial court did not give orders for maintenance of children. She argued that, the judgment delivered by Hon. Mwijage, RM in 2019 needs to be upheld as it divided the matrimonial assets at the ratio of fifty percent to both parties.

With regards to rule 30 of GN No.310/1964 on the fact that the trial court ought to advise the Respondent to apply to set aside ex-parte judgment, she argued that, it was upon the discretion of the court whether to entertain the matter or not.

She prayed for this appeal to be dismissed with costs for interest of justice.

Considering the submissions by both parties and the records of this matter, the question for determination is whether the District court was justified in nullifying the proceedings and judgment of the trial court (Hon. Kassim, PCM) dated 28 May, 2012 because the trial court had failed to address issues of custody of children and division of matrimonial assets and proceeded ex-parte without there being proof that the respondent was properly served.

Records indicate that both appeals filed before the District Court and consolidated as Civil Appeal No. 50/2019 and 4/2020 originated from Matrimonial Cause No. 51/ 2012 which had two contradictory Judgments delivered by two different magistrates one delivered by Hon. S. Kassim, PCM on 28/5/2012 and the other delivered by W.M. Mwijage, RM on 29/10/2019. Both appeals before the District Magistrate were challenging the decision of Hon. Mwijage, RM dated 29/10/2019. This Court agrees

with the finding made by the District magistrate that once the Primary Court had declared its decision in Matrimonial Cause No. 51/2012 on 28/5/2012 it became *functus officio* and therefore it could not interfere with its own decision. The principle of *functus officio* dictated finality of the matter by denying the Primary Court jurisdiction to undo or change any decision which had reached its ultimate conclusion in order to allow for potential challenges through other avenues or appellate courts. That said, the District Court was justified to nullify the subsequent proceedings and Judgment of the Primary court delivered by Hon. Mwijage, RM on 29/10/2019.

Given that the consolidated appeals before the District Magistrate did not challenge the ex-parte decision of Hon. Kassim, PCM which was delivered almost eight years prior to the filing of the said appeals and the records of proceedings conducted in 2012 were missing in court, and further that, the District Court having rightly observed that the appropriate way for the Respondent to challenge the ex-parte decision of Hon. Kassim, PCM dated 28/5/2012 was to apply at the trial court to set aside that decision pursuant to **rule 30 of the Primary Court Procedure Rules, GN No. 310 of 1964**, it was inappropriate for the District court to turn around and make a determination on the said ex-parte decision of the

primary court dated 28/5/2012. Consequently, this court finds and holds that the District Court was not justified in nullifying the proceedings and ex-parte judgment of the primary court dated 28/5/2012 for reasons that the primary court failed to address issues of custody of children and division of matrimonial assets or that there was no proof that the Respondent herein had defaulted service after being served.

In the result thereof, I uphold the decision of the District Court in respect of nullifying the subsequent proceedings of the primary court commenced from 15/10/2018 and the judgment delivered by Hon. Mwijage, RM on 29/10/2019. Further to this, I quash and set aside the judgment, decree and orders of the District Court in respect of nullifying the proceedings and judgment of the primary court delivered on 28/5/2012 by Hon. Kassim, PCM.

It is so ordered.




K.N. ROBERT
JUDGE
2/7/2021

1. The first part of the document is a list of the names of the members of the committee.

2. The second part of the document is a list of the names of the members of the committee.