IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

MATRIMONIAL APPEAL NO. 02 OF 2020

(From Matrimonial Appeal No. 03 of 2019 of Ilemela District Court and Matrimonial Cause No. 80 of 2017 of Ilemela Primary Court)

IDDI ATHUMAN KAWALE ..... APPELLANT

VERSUS

ZUREA DANIEL KAPIPI ..... RESPONDENT

JUDGEMENT

Date of last order: 30/06/2021

Date of Judgement: 13/07/2021

F. K. MANYANDA, J.

This is a matrimonial appeal in which the Appellant Iddi Athuman Kawale been aggrieved by the decision of the Ilemela District Court in its appellate jurisdiction, which annulled the judgement and proceedings of the Ilemela Primary Court, hereafter referred to as "the Trial Court" has come to this Court armed with the following grounds: -

1. *That the learned Magistrate erred in law to deviate from decision on the matter contended by the parties during hearing of the*

appeal and indulge on raising new issue not contended by the parties.

2. *That as the omission to register the exhibits did not prejudice rights of parties, the learned Magistrate erred in law to order the matter start de novo.*

3. *That the decision of the learned magistrate faulted to interfere the decision of the trial court which was reached on balance of probabilities as required by law.*

The brief background of this matter is that the Appellant and the Respondent were married couple, they married after each of them had divorced from prior marriage. Their marriage life got sour and the same was dissolved on 22/12/2017 by the trial court. During their marriage, the duo had amassed some matrimonial properties some of which the trial court divided some between them. The trial court gave a house at Kamachumu – Kirumba, Mwanza to the Respondent. The other properties listed by the Respondent namely, a house at Bujumbura, Plot at Buswelu and two motor vehicles were not divided on reasons that the same had no evidence of existence as matrimonial properties.

The Respondent was dissatisfied, hence appealed to the Appellate District Court which annulled both the judgement and proceedings of the trial court. The reasons for annulment were that the trial court's decision based on documents which were not tendered, admitted and tested in court, hence prejudiced rights of the parties. Hence, it ordered the matter be tried *de novo*. It was this order of the Appellate District Court that aggrieved the Appellant who chose to come to this Court.

At the hearing, the Appellant was represented by Mr. Mathias Mashauri, learned Advocate, and the Respondent enjoyed the services of Mr. Adam Robert, learned Advocate.

Mr. Mashauri submitted in support of the appeal on the grounds seriatim arguing in respect of ground one that it was wrong for the learned Magistrate to deviate from making a decision on the matters contended by the parties during hearing of the appeal and indulge on raising new issue not contended by the parties. He contended that among the grounds of appeal raised before the Appellate District Court, there was no anyone concerned with illegality of admission of evidence by the trial court and request for re-trial of the matter. It was his concern that the appeal before the Appellate District Court was about

division of matrimonial properties by the trial court. However, *suo moto*, the Appellate District Court went beyond the scope of the appeal and decided on irregularities on admission of exhibits which was not called for. He was of the view that the Appellate District Court was bound to decide the issues raised before it. He cited the case of **Michael Charles vs. Principal Secretary, President's Office and 2 Others,** Civil Appeal No. 05 of 2011 (unreported) where it was stress that an appellate court should address the contended grounds.

In respect of ground two, Mr. Mashauri argued that the exhibits were tendered in the trial court but were not registered. He was of the view that none registration of exhibits did not prejudice the parties. He cited a case decided by this Court at Arusha of **Ashraf Akber Khan vs. Ravji Govind Varsan,** Civil Appeal No. 05 of 2017 (unreported) where it held that failure of endorsing on exhibits has no effect if the rights of the parties were not prejudiced, the court may only expunge it.

In ground three, Mr. Mashauri submitted condemning the trial court to order trial de novo without evaluating the evidence which was tendered by the parties. In his views, trial de novo will afford time to the parties to amass new evidence which is prejudicial to the parties. It was supposed to apply the evidence tendered by the parties at the trial court

and divide the properties accordingly. He prayed the appeal to be allowed with costs.

On the other hand, Mr. Robert for the Respondent argued in opposition of the appeal joining grounds one and two that the Appellate District Court acted correctly in law for ordering re-trial. He contended that the Appellate District Court dealt with grounds 1, 6 and 7 because the other grounds were repeating. He argued further that after discovering irregularities in admission of evidence, the Appellate Magistrate rightly found that some documentary evidences were just mentioned but not tendered at all in the trial court. The Appellate Magistrate equally rightly held that the same prejudiced the parties, hence, the irregularities rendered the proceedings and the judgement of the trial court a nullity.

In support of the course taken by the District Court he cited section 21(1)(c) of the **Magistrates' Courts Act**, [Cap. 11 R. E. 2019] as allowing parties to start afresh. He also cited the case of **Mohamed Issa vs. John Machela,** Civil Appeal No. 55 of 2013 (unreported) where proceedings were held to be a nullity because the exhibits were not tendered, thereby occasioning miscarriage of justice.

As regards to ground three, Mr. Robert submitted basically reiterating his arguments in grounds one and two by justifying the order of the Appellate District Court for ordering re-trial because the evidence in this matter is vital for determination of matrimonial properties.

In rejoinder, Mr. Mashauri repeating his argument in chief that, even if the Appellate District Court may be said to have evaluated the evidence, there was no complaint on irregularities in all the grounds. He insisted that exhibits are part of the evidence which the Appellate District Court ought to have acted on, not to nullifying the proceedings. Moreover, he argued that section 21(1)(c) of the **Magistrates' Courts Act** applies in criminal trials, it is inapplicable to civil cases.

After dispassionately considering the rival submissions by the parties and other information gleaned from the court file, the major issue is whether the appeal has merit.

Let me start with the complaint in the first ground that it was wrong for the learned Magistrate to deviate from making a decision on the matters contended by the parties during hearing of the appeal and indulge on raising new issue not contended by the parties. I have perused the

impugned judgement and found that the Appellate District Court when ordering trial de novo said at page 11 as follows: -

> *"Having noted all that, therefore, the appeal at hand succeeds as per reasons given. The court proceedings are quashed and set aside and the decision thereon is overruled. The parties should be heard afresh before another magistrate and with a new set of assessors. In so doing it will be noted whether the parties were married or not, whether matrimonial properties existed and what maintenance should be provided by the Respondent to their children."*

Before reaching at this decision, the Appellate District Court analysed the evidence which was tendered before the trial court and found that there was an issue concerning evidence. That there was evidence tendered by the parties before the trial court each one establishing that there are matrimonial properties which need to be divided between them.

The Appellate District Court found that there were some documents which were not tendered, admitted in evidence and tested in court in accordance with the law. Such documents include Exhibit ZKI, IA1, IA2 and IA3 which the Appellate District Court held that they formed basis of the decision of the trial court. Hence, it went on nullifying both, the proceedings and judgement of the trial court.

A question then becomes was the Appellate District Court justified in nullifying the proceedings and the judgement of the trial court basing on illegality in admission of documents in the circumstances of this case. The Counsel for the Appellant argued that the Appellate District Court could not because it could have expunged the same and proceed on to decide the case basing on the remaining evidence. The Counsel for the Respondent said it could do so because the trial court used illegal evidence to found its decision, hence prejudiced the parties.

I associate myself with the Respondent's contention because, the Appellate District Court having found the alleged illegality was correct in nullifying the proceedings and the judgement. However, it ought to summon the parties and afford them opportunity to address him. Then, depending on the extent of prejudicial, he could either expunged the said illegally admitted evidence and act on the remaining one or go on nullifying the proceedings and decision and order a retrial as he did. By failing to hear the parties about the illegality or otherwise of the purported documentary evidence, the Appellate District Court went astray.

Our Superior Court, the Court of Appeal of Tanzania has consistently held that right to be heard is paramount, it is inherent and constitutional which cannot be ignored. For example, in the case of **Michael Charles (supra)** the Court of Appeal of Tanzania referring to its another case of **Equipment vs. Devran P. Valambia** [1998] TLR 89 held, inter alia, that:

"On numerous occasions the Court has stressed the importance of not condemning the parties unheard .... The right to hearing is fundamental and the courts should not decide on a matter affecting the rights of parties without giving them an opportunity to express their views before a decision is made by the court."

I agree with Mr. Robert's contention to the extent that it was wrong for the Appellate District Court could deviate from the issues on the matters contested by the parties during hearing of the appeal only after summoning them to address it on the legal issues. He could not *suo moto* raise a new issue of admissibility of exhibits which was not contested by the parties.

The Appellate District Court was bound to summon and hear the parties before unleashing its devastating order of nullifying the whole proceedings and judgement and order retrial. The Counsel for the Appellant contended that the Appellate District Court ought to proceed on acting on the remaining evidence after expunging the illegally admitted evidence instead of nullifying the proceedings and judgement. On reasons I have given above I don't associate with him. There is no merit in the first ground.

To this end, I could have ended here. However, the trial court's proceedings and judgement also suffer a serious ailment which is demonstrated hereunder.

Mr. Mashauri argued, as ground two, that the exhibits used by the trial court were not tendered and registered. He was of the view that none tendering and registration of exhibits did not prejudice the parties. He relied on a case decided by this Court at Arusha of **Ashraf Akber Khan vs. Ravji Govind Varsan,** Civil Appeal No. 05 of 2017 (unreported) where it held that failure of endorsing on exhibits has no effect if the rights of the parties were not prejudiced, the court may only expunge it.

Mr. Robert for the Respondent contended that the Appellate District Court upon discovering irregularities in admission of evidence that some documentary evidences that were acted upon by the trial court in its decision were not at all tendered, admitted and tested in court, rightly found the same to be prejudicial to the parties. According to him the irregularities were serious and rendered the proceedings and the judgement of the trial court a nullity.

I have gone through the impugned judgement and the proceedings of the trial court and found that there is substance in this argument. At page 7 the Appellate District Court mentioned four documents which were used by the trial court to reach its decision, but the same were not tendered at all, such documents include Exhibit ZKI allegedly tendered by the Respondent and IA1, IA2 and IA3 by the Appellant.

My navigation of the court file landed me to some documents labelled as follows: -

i. Kielelezo ZK1 '*Mauziano ya Shamba Lililo mTaa wa Kabushiro tarehe 06/09/2000*'.

ii. Kielelezo IA1 '*Muhtasari wa Baraza Kuu la Waislam (BAKWATA) Ilemela*'.

iii. Kielelezo AI2 '*Mauziano ya Shamba tarehe 10/05/2010 kati ya Hashimu Rashidi na Masurura Iddi Athumani Kawale*'; and

iv. Kielelezo AI3 '*Mkataba wa Mauziano ya Shamba kati ya Athumani Idd na Stephano Mathias tarehe 01/09/2013*'.

I have pondered, how did the said documents get into the court file and be labelled but yet not admitted in evidence? The record is silent and found that the record shows that truly there is nowhere indicating that the said exhibits were tendered, admitted and tested as such in the court. In its judgement at page 3, the trial court referred to Exhibit IA1, AI2 and AI3 at page 2 and ZK1. Moreover, the same trial court condemned the Respondent as having no documentary exhibit, at the same time acted on exhibits ZK1, IA1, AI2 and AI3.

It is my considered views that the trial court went astray when it used documents as exhibits while the same were not tendered, admitted in evidence and tested by the parties in court.

The Court of Appeal of Tanzania discussed in detail the position of the law in a situation like this in the case of **Mohamed Issa vs. John Machela, (supra)**. In that case a Ward Tribunal used documents which were not tendered, admitted in evidence and tested to reach at its decision but were listed after closure of the parties' evidence. The Court of Appeal observed as follows: -

> *"From the record, it is clear that the impugned documents were received by the trial Tribunal subsequent to the*

closure of the parties respective cases. It is also clear that the parties were not accorded an opportunity to comment on them. There is also nothing on record suggesting or showing that either of the parties in the dispute was given a chance to test the documents received by way of, for instance, cross examination. Yet these documents formed the basis of the decisions of both the trial and appellate tribunals."

As to what are the consequences of a court or tribunal relying on improperly admitted evidence to make a decision, the Court of Appeal referred to its decision in an earlier case of **Shemsa Khalifa and Two Others vs. Suleiman Hamed Abdallah,** Civil Appeal No. 82 of 2012 where it said: -

"At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgements, the said document which was not tendered and admitted in court. We out-rightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to a grave miscarriage of justice."

The case of **Mohamed Issa vs. John Machela, (supra),** dealt with a case from a ward tribunal whereas by then no Regulations were made by the Minister to regulate trial procedures before land tribunals. In the instant matter, the procedure is provided under the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964 as amended by GN No. 19 of 1983. Rule 41 subjects the procedure for production of documents to provisions applicable to witnesses. The same reads: -

> *"41. Where any party to a proceeding is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable."*

In the result I am satisfied that the trial court went astray by basing its decision on documentary evidence of which documents were not tendered, admitted and tested in court as required by the law, hence both the proceedings and its judgement are a nullity.

The way forward, is another question. Mr. Mashauri submitted in respect of ground three condemning the trial court to order trial *de novo* without evaluating the evidence which was tendered by the parties and

erroneously ordered re-trial. To him the way forward is to have the proceedings of the Appellate District Court proceedings and judgement quashed and up hold the trial court's decision because trial de novo will afford time to the parties to amass new evidence which is prejudicial to the parties.

Mr. Robert was in support of the course taken by the Appellate District Court because the proceedings and the judgement of the trial court were a nullity. Moreover, the same is supported by section 21(1)(c) of the Magistrates' Courts Act, [Cap. 11 R. E. 2019] which empowers the Appellate District Court to order a re-trial. In his rejoinder, Mr. Mashauri contended that section 21(1)(c) of the Magistrates' Courts Act applies to criminal cases, not civil cases.

I have gone through the said law and find that it provides for powers of district courts on appeal and applies to both civil and criminal cases. The same reads: -

> *"21(1) In the exercise of its appellate jurisdiction, a district court shall have power–*
> *(a) NA*
> *(b) NA*
> *(c) to quash any proceeding (including proceedings which terminated in an acquittal)*

and, where it is considered desirable, to order the case to be heard de novo either before the court of first instance or some other primary court, or any district court, having jurisdiction; and

(d) NA"

It is my firm opinion that, by using the words "to quash any proceeding" the drafters of the law meant proceeding of either civil or criminal nature hence the use of the word "any". The bracketed words *(including proceedings which terminated in an acquittal)* do not make the whole section applicable to criminal cases, rather, the same are just inclusionary amplification in criminal acquittals.

In the end result I am of the considered opinion that since the Appellate District Court decision based on proceedings of the trial court which I have held to be nothing but a nullity; then, by following the authority in **Mohamed Issa vs. John Machela, (supra),** the proceedings of the Appellate District Court are also a nullity. The appeal in grounds two and three has no merit.

Mr. Mashauri was of the views that retrial is not appropriate approach because it may give way to the parties to amass new evidence.

Mr. Robert was at his guns that it is a proper way because both of the proceedings in the lower courts are a nullity. As explained above, the proceedings of both lower courts have been held to be a nullity. In such a situation parties are at liberty to start afresh. The courts are for determination of justice, not timing of justice.

In the upshot and for reasons stated above, I dismiss the appeal for want of merit.

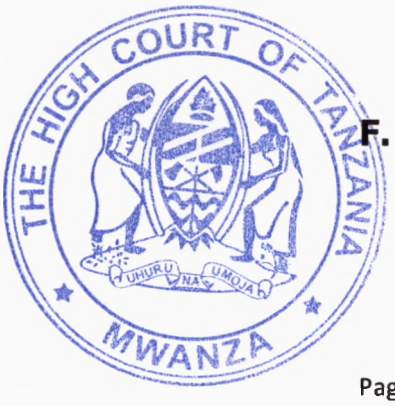
Consequently, in the exercise of powers vested into this Court under section 29(b) of the Magistrates' Courts Act, I do hereby make the following orders: -

i. I hereby quash both the trial court and Appellate District Court proceedings and decisions.

ii. I do hereby order trial de novo; and

iii. Each party to bear its own costs.

Order accordingly.



F. K. MANYANDA
JUDGE
13/07/2021