

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

PC CIVIL APPEAL NO. 46 OF 2020

*(Appeal from the District Court of Arumeru, Misc. Civil Application No.7 of
2020, Originating from Maji ya Chai Primary Court, Matrimonial Cause No. 4 of
2020)*

ROSE KURUBONE APPELLANT

Versus

ANDREA JOSHUA KWAYU RESPONDENT

JUDGMENT

1st May & 9th July, 2021

MZUNA, J.

This appeal has been instituted by **Rose Kurubone** against **Andrea Joshua Kwayu**, the respondent. Apparently, the respondent petitioned for a decree for divorce against the appellant vide Matrimonial Cause No. 4 of 2020 at Maji ya Chai Primary court. Their marriage had been in existence since 2001. The matter proceeded ex parte allegedly that the appellant defaulted appearance in the trial court on 2/3/2020. That was so done at the time when the appellant had informed court that she has engaged an advocate and therefore sought for its transfer as the advocates are not allowed by law to appear in the Primary court. The ex parte judgment was delivered on 5/3/2020.

The appellant sought for transfer of that case at Arumeru District court (the District Court), vide Misc. Civil Application No. 7 of 2020, where she lost her application allegedly that the first course available was to file application to set aside the ex parte judgment. There and then she could file an appeal if dissatisfied.

It is from that judgment the appellant has preferred this appeal. The petition of appeal has a single ground of appeal: -

"That, the Trial Court erred in Law and Fact by failing to transfer to itself Matrimonial Cause No. 4 of 2020 pending at Maji ya Chai Primary Court, while there were other grounds and circumstances other than to hire an Advocate, which were sufficient to warrant the trial court to transfer the said matrimonial cause to itself for trial."

At the hearing of the appeal, the appellant was represented by Mr. Amani Jackson, learned advocate while the respondent was represented by Ms. Miriam Nitume, learned advocate. The appeal was argued *viva voce*.

The main issue is whether the issue of transfer of a case was the sole reason to dismiss the appellant's application?

In the petition of appeal, the appellant contended that the District Court failed to transfer the case to itself while there were other grounds and circumstances other than to engage an advocate. Those other grounds, however, were not made plausible in the appellant's submission let alone in the affidavit filed at the District court. According to Mr. Amani, circumstances that made the appellant feel that she couldn't

prosecute her case in the trial court are due to the nullification of the former Matrimonial Cause No. 4 of 2013 by this Court.

Submitting on the substance of the appeal, Mr. Amani contended that the right of a party to transfer a case from Primary Court to the District Court is provided under section 47(1)(b) of the Magistrate Courts Act, Cap 11 [R.E 2019], hereinafter referred to as the MCA. Among the reasons assigned by the appellant in her application to transfer the case to the District Court is to the effect that she engaged an advocate. The other reason is that there were circumstances which made her to believe that she cannot prosecute the case. Mr. Amani fortified that when Matrimonial Cause No. 4 of 2020 was mentioned on 19/2/2020 the appellant was present in the trial court. She notified the court about the transfer of her case because she had engaged an advocate who by law is barred to appear in the trial court. The case was adjourned to 3/3/2020 but the matter was heard ex-parte a day before, on 2/3/2020. He argued that it was not proper for the court to hear the case ex-parte because there was already notice of transferring the case. Therefore, the court ought to have adjourned the case once to know what was the outcome.

Mr. Amani amplified that the appellant prays that the court sets aside the order refusing her transferring the case because representation is a Constitutional right, therefore the appellant should be afforded that right. He maintained that jurisdiction of the court is the creature of statute, therefore engaging an advocate cannot confer jurisdiction. He cited section 76 of the Law

of Marriage Act, Cap 29 [R.E 2019], hereinafter referred to as the LMA, stating that original jurisdiction in matrimonial proceedings is vested in the High Court, Resident Magistrates' Court and Primary Court concurrently.

The learned advocate for the appellant insisted that the District Court could have dealt with the matter, since refusing such prayer denied the appellant the right to representation. To support his argument, he cited the following decisions: **Simbambili Gabba Vs. David Samson Gabba**, Civil Appeal No. 26 of 2008 and **Ally Iddy Hapi Vs. Kilonzo Godfrey Kalage**, PC Civil Appeal No. 21 of 2019 (both unreported). In the two cited cases, the court emphasized need for right of representation and fair hearing. Basing on his submission, Mr. Amani prayed that the appeal be allowed and an order transferring the to the District Court be issued.

Ms. Nitume had the view that after the appellant had noted that the matter proceeded ex-parte, it was prudent for her to apply and set aside the ex-parte order. Contesting the appeal, Ms Nitume submitted that on 19/2/2020 when the case was fixed for mention, the appellant showed her intention to transfer the case because she engaged an advocate. The trial court ordered that if the appellant had intention to transfer the case she had to do so before 2/3/2020, when the case was fixed for necessary orders. On that date, the appellant defaulted appearance without any notice. According to Ms Nitume, the court could not know if the appellant still had the intention to transfer the case or not due to such non-appearance. In the event, the court decided to proceed with the

matter ex-parte and the judgment was to be delivered on 5/3/2020, but it couldn't be delivered because the file was called by the District Court.

Further, the allegation of denial of the right to representation does not arise because engaging an advocate itself does not amount to good and sufficient cause to transfer the case from the Primary Court to the District court. She cited the case of **Abubakari Mohamed Mlenda Vs. Juma Mfaume** [1989] TLR 149, which supports her submission. According to Ms Nitume, the appellant did not adduce any other reasons apart from engaging an advocate. She insisted that the case of **Agness S. Gabba** (supra) is distinguishable since in that case the transfer was made after the party had engaged an advocate unlike the case at hand where there was no proof that the appellant had engaged an advocate. Ms. Nitume concluded her submission by imploring the court to dismiss the appeal with costs.

Rejoining to his submission in chief, Mr Amani fortified that the argument that it was prudent for the appellant to apply for setting aside the ex-parte order is unfounded since it is against section 47 of the MCA. He insisted that the application was proper because it was made prior to delivery of the judgment, therefore the application to set aside the ex-parte judgment couldn't assist since the judgment was yet to be delivered on 5/3/2020. Mr. Amani maintained that the cited case of **Gabba** (supra) fits the circumstances of the case at hand, maintaining that had the trial court been fair enough, it ought to

have adjourned the case to another date instead of proceeding on the same date. He reiterated her earlier prayers.

I have considered the record of the lower Courts, the ground of appeal as well as the submissions by the parties' advocates. From the record of the District Court, the sole reason relied on by the appellant in transferring the case from the trial court was that she had engaged an advocate and that the matter involved some complex issues. That was stated in the affidavit in support of the application in the District Court particularly paragraphs 3, 4, 5 and 6. In this appeal, Mr. Amani submitted that the ground for transferring the case to the District Court is that she engaged an advocate guaranteeing her right to representation.

In the petition of appeal, the appellant contended that the District Court failed to transfer the case to itself while there were other grounds and circumstances other than to engage an advocate. According to Mr. Amani, circumstances that made the appellant feel that she couldn't prosecute her case in the trial court are due to the nullification of the former Matrimonial Cause No. 4 of 2013 by this Court.

I do not grasp any connection between nullification of the proceedings and judgment of the former petition and prosecution of Matrimonial Cause No. 4 of 2020. It is on record that the former case was nullified for non-compliance with the law by the respondent for failure to attach certificate from the

effort to set aside the ex-parte order against her. That would be one of the grounds to be held at the Primary court.

The District court never denied the appellant the right for representation as alleged, instead found that the ex parte judgment should be set aside first. There and then if not granted, the aggrieved party should file appeal. This appeal was filed prematurely. So the submissions on the right of representation, with due respect are misplaced.

In the circumstances, the appeal is bound to fail. The decision of the District Court remains unaltered. The appellant should approach the trial court, apply for setting aside the ex-parte order so that the case proceeds interparty.

That said and done, this appeal is dismissed with no order as to costs.




M. G. MZUNA,
JUDGE.
09/07/2021.