

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

**AT KIGOMA**

**(APPELLATE JURISDICTION)**

**PC. MATRIMONIAL APPEAL CAUSE NO. 5 OF 2021**

(Arising from Matrimonial Appeal Cause No. 5/2021 of the Kigoma District Court, Original from Matrimonial Cause No. 5/2021 of Ujiji Ward Tribunal)

**DAMARI WATSON BIJINJA ..... APPELLANT**

**VERSUS**

**INNOCENT SANGANO ..... RESPONDENT**

**RULING**

10/11/2021 & 12/11/2021

**L.M. MLACHA, J.**

The appellant, Damas Watson Bijinja filed an appeal against the decision of the decision of the District Court of Kigoma made in Matrimonial Appeal No. 5 of 2021 (original Matrimonial cause No. 5 of 2021 of the primary court at Ujiji). The respondent in the appeal is Innocent Sangano.

The background to the dispute is that the two were wife and husband living happily before their marriage moved into difficulties. The appellant went to the primary court to file a matrimonial cause seeking divorce, division of matrimonial assets and maintenance to the child. The primary court heard them and made a decision which dissolved the

marriage and ordered the child to remain with the appellant. It also proceeded to divide the matrimonial assets.

The appellant was not happy with what was said to be her share of the matrimonial assets. She appealed to the district which ordered the case to return to the primary court for a fresh assessment and division of matrimonial assets. The appellant was aggrieved hence an appeal to this court.

When the appeal was placed before me for hearing, Mr. Sadiki who appeared for the respondent raised two points of preliminary objections which can be put thus;

- 1. That, the appeal is bad in law for contravening section 80 (1) of the Law of Marriage Act, Cap 29 R.E. 2019 because it was preferred against the decisions of the District and Primary Courts.*
- 2. That, the appeal is bad in law for contravening rule 37 (1) of the Law of Marriage (Matrimonial Proceedings) Rules, GN. No. 136 of 1971 for being preferred by way of Petition instead of Memorandum of Appeal.*

It was the submission of Mr. Sadick Alike that the appeal was supposed to be brought to challenge the decision of the district court only under section 80 (1) of the Act but the present appeal challenge the decision of the primary court as well. He referred the court to the introductory part which reads; *'The appellant above having been*

*aggrieved by the judgments of the trial courts of Kigoma district court and Ujiji primary court appeals to this Honourable court ...'* and grounds of appeal to see the problem. He also referred the court to paragraph (iii) of the reliefs which invited the court to reverse the decisions of the primary court and the district court. Counsel submitted that the court has no direct power to challenge the decision of the primary court. It can only deal with the decision of the district court. He asked the court to be guided by its decision made in **Mariam Athumañi and another v. Chausiku Hamisi**, Miscellaneous Land Appeal No. 12 of 2021 pages 7-8.

Referring to rule 37 of GN 136/1971, counsel submitted that it is mandatory to bring Matrimonial Appeals by way of Memorandum not Petitions. He stressed that bringing the appeal by way of Petition was wrong and made the appeal improperly before the court. In total, he argued the court to struck out the appeal.

Submitting in reply, Mr. Silvester Damas Sogomba told the court that the counsel for the applicant has misinterpreted section 80 (1) of the Act. Giving details, he said that section 80 (1) mentions all the courts. It was thus correct to bring his appeal against the decisions of the two courts as he did. He, proceeded to say that the facts of the case which was cited by Mr. Sadiki are different from the facts of this case making it

distinguishable. He ended by saying that if the court will find that it was wrong to challenge the decision of the primary court, it can simply ignore the ground, not the whole appeal. He proceeded to say that the word 'shall' used in rule 37 should not be interpreted to be mandatory for 'shall' is not always mandatory as was said in **Basili Masare v. Petro Michael**, [1996] TLR 226. He went on to say that if the appellant used the word Petition instead of Memorandum, that alone cannot render the appeal incompetent. He invited the court to apply the oxygen principle to cure the irregularity.

Mr. Sadiki made a rejoinder submission and joined issues with Mr. Sogomba. He stressed that the appeal is improperly before the court and has to be dismissed. He added that the oxygen principle cannot cure the defect.

I think I should start with rule 37 (1). It reads thus;

*"An appeal to the High Court under section 80 of the Act shall be commenced by a **Memorandum of Appeal** filed in the subordinate court which made or passes the decision, order or decree appealed against."*(emphasis added)

The words used are clear and unambiguous that, the appeal shall be filed by presentation of a Memorandum of Appeal. If the law says that the appeal shall come by presentation of a Memorandum of Appeal, one

cannot avoid the clear dictates of the law and seek protection from the oxygen principle. That principle was not developed to protect people who have avoided to follow the law. Neither can failure to present a Memorandum be said to be a technicality. It is rather negligence on the part of the applicant and or his counsel. The oxygen principle is not there to protect negligent people. It follows that an appeal which was presented in any format other than a Memorandum of Appeal is improperly before the court. It cannot be left to stand.

Next is interpretation of section 80 (1) of the Act. It reads;

***"80 (1) Any person aggrieved by any decision or order of a magistrate's court in a matrimonial proceeding may appeal therefrom to the High Court."***

In Tanzania mainland, when we talk of magistrate's courts whose appeal lie to the High Court we mean the District and Resident Magistrates Courts. It does not refer to the Primary Court because it has no direct link with the High Court. Before coming to the High Court one has to pass through the district court. He has to follow the ladder. He cannot come straight. In other words, a decision of the primary court has to be tested in the district court before being referred to the High Court. That is the procedure and I think the learned counsel are well aware of it.

Further, it is a matter of principle and the law that something which was not tested in the district court cannot be a subject of discussions in the High Court. Otherwise there could be no need of fixing the appellate ladder. Jumping across is not allowed. It is therefore important to check if the matter at issue has been discussed and decided by the district court before raising it in this court.

Going through the document which was filed in court, one can find that grounds 3 and 4 seek to challenge the findings of the primary court and are therefore misconceived and improperly before the court. That also apply to relief (iii) which takes us to the primary court. I proceed to struck them out.

In fine total, the appeal is found to be improperly before the court and struck out. This case being matrimonial and which appear to be in a continual process, I will make no order for costs.



  
L.M. Mlacha

**JUDGE**

**12/11/2021**

**Court:** Ruling delivered in chamber in the presence of both parties. Right of appeal explained.



L.M. Mlacha

**JUDGE**

**12/11/2021**



ORIGINAL