

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

MATRIMONIAL APPEAL CAUSE NO. 5 OF 2019

(Arising from Tabora Resident Magistrate's Court,
matrimonial Cause No. 01/2018)

KAPALATA MOHAMED SALUM..... APPELLANT

VERSUS

EDNA GERVAS MALAMBWA..... RESPONDENT

JUDGMENT

Date of Last Order: 25/06/2021

Date of Delivery: 19/07/2021

AMOUR S. KHAMIS, J.

Kapalata Mohamed Salum, the appellant, and Edna Gervas Malambwa, the respondent respectively, were husband and wife. They were formally married 28th January, 2006 in the Roman Catholic Church at Tabora (ExhibitP1) a marriage certificate and a photo taken during their marriage ceremony, and were blessed with three children, to wit Rozalia Kapalata was born in 1998, Leonorah Kapalata was born in the day of December and Stainford Kapalata was born in 2008.

It appears their marriage went on well all along until the year 2018 when the relationship started to go sour, the respondent decided to file for a petition for divorce before the Resident Magistrate Court of Tabora.

On 11th June, 2018 the matter was before the Resident Magistrate for hearing. Then the trial Magistrate composed a judgment then the Magistrate proceed with issuing orders of divorce, matrimonial properties and custody of the children.

The trial magistrate orders one on Plot No. 236 Block PP at Alli Hassani Mwinyi area and one on Plot No. 613 Block "L" at Kanyenye area within Tabora Municipality and consequently, those two houses were distributed to the appellant and respondent *pari pasu* (each party was granted one house).

The trial magistrate also orders the children, who are still under seven years shall be under the custody of the petitioner until they reach the age of twelve. Since each part is capable of taking care of him or herself, no maintenance order is given but the respondent is ordered to maintain his children wherever they are.

The appellant was not happy with the decision of the trial Magistrate hence decided to file the instant appeal whereas the appeal is predicated on nine grounds of grievance namely:

1. That, the trial Court erred in not drawing issues at the outset.
2. That, the petition was wrongly admitted as it was not accompanied by a valid Certificate of Marriage. The certificate was false *ex facie*, on the face of it.
3. That, the Court erred in holding that the appellant, a Muslim could celebrate a marriage in church while there was no 21 days' notice prior to the celebration thereof.

4. That, failure to call the priest who celebrated the marriage renders at the respondent's evidence to be inadmissible hearsay.
5. That, there was no evidence to show that parties even cohabited in the two properties which the appellant claims to have acquired before the celebration of the marriage in 2006.
6. That the trial Court erred in refusing to admit the marriage certificate used in the earlier Muslim marriage ceremony.
7. There was no cause disbelieve the appellants Muslim wife who alleged to have started cohabitation with the appellant before the alleged marriage between the appellant and respondent.
8. That the certificate issued to witness for the alleged marriage could not be issued on two different dates upon the allegation that the forms were out of stock at St. Teresia Roman Catholic Cathedral.
9. That the alleged date of celebration was inadmissible as it was based on the bald statement of the Respondent and her witness especially as the certificate refers to the bride as Edna W Gervas while the petition was filed by Edina Gervas Malambwa.

Following the global outbreak of the worldwide COVID-19 pandemic, the hearing was conducted via video conference, the appellant appeared in person and the respondent had the legal service of Ms Flavia Francis, learned counsel.

The parties agreed, and the court ordered the appeal to proceed by way of written submissions.

It was the appellant who started to kick the ball rolling. He submitted that the judgment, decree and proceedings of the trial Court are legally vitiated and the same are nullities since no issues for determination of the case at hand were ever framed and recorded by the Court at the outset as the law enjoins.

He refers the provisions of Order XIV Rule 1(5) of the Civil Procedure Code, Chapter 33 of the RE, 2019 provides that,

"At the first hearing of the suit the Court shall after reading the plaint and Written Statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of facts or of law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend".

He continued to submit that it is a procedural requirement that parties are required to frame issues at the first hearing of the case, but at page 4, the trial Court started to record the testimonies of the Respondent's witnesses directly without consulting with the parties hereto on proper issues for determination of the case to be framed nor did the same record the same. Hence the omission was contrary to the afore cited provisions of the law.

The appellant did not end, he strongly argued in the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th grounds of appeal jointly that the Appellant and Respondent had been legally married and further that the said two houses on Plot No. 2.36 Block PP at Alli Hassan Mwinyi area and on Plot No. 613 Block 'L' at Kanyenye area within Tabora Municipality are matrimonial assets allegedly jointly acquired by the Appellant and Respondent during the alleged

marriage are erroneous.

It was submitted that the alleged Marriage Certificate (Exhibit "PI" on record) which was tendered by the Respondent to prove her alleged legal marriage with the Appellant was apparently a forged document. Hence the trial Court ought to have not accorded it any weight, since the same contradicted the Respondent's oral testimony on record regarding the marriage she alleged to have contracted with the Appellant in respect of the date when the marriage between the Appellant and Respondent was allegedly contracted. The Respondent's oral testimony alleges that the marriage was contracted on 20/01/2018 but the Marriage Certificate in dispute indicates that the marriage was allegedly contracted on 28/01/2006.

He further submitted that the names of the Respondent in her petition and consequently in this appeal are at variance with the names as they are contained in Exhibit PI. In her oral evidence, the Respondent alleged (at page 10 of the typed Record of proceedings) that it was one father "Kulwa" who presided over the relevant marriage ceremony while in exhibit "PI" on record, the priest who allegedly presided over the alleged marriage ceremony is indicated to be Fr. Thomas Mambo.

Further to that he submitted that the Respondent (PW1) indicates that she contracted Christian Marriage with the Appellant on 20/01/2018 but the alleged Marriage Certificate in Exhibit "PI" was allegedly issued on 20/07/2006. Much is hence left to be desired if the alleged Marriage Certificate was not forged so as to serve the Respondents interest.

Since it is very apparent on record that the Appellant is a Muslim by his faith as the Respondent (PW1) admitted at page 10 of the typed record of proceedings and that the Appellant had not been baptized, it was legally improbable that the Appellant and Respondent could legally contract a Christian marriage to the extent that the Court could grant a decree for divorce and division of the matrimonial assets.

The Appellant's evidence on record, which was not rebutted by the Respondent, is to the extent that the same had Islamic marriage with another woman known as Mwanaisha Athumani.

Further that, Christian rite could not have enabled him to marry two wives. Hence to that extent the alleged marriage between him and the Respondent was null and void. The Appellant tendered the Marriage Certificate between him and his said wife (Mwanaisha Athuman) celebrated under the Islamic rites as exhibit DI.

DW2 testified to be legally married to the Appellant since on 3/6/2002, Further that, the suit houses at Sikonge road and at "Mwinyi" was acquired during her marriage with the Appellant.

He prays to submit that the trial Court's decisions that the Appellant and Respondent had a legal marriage and that the same had acquired the alleged two houses through equal and joint efforts are legally erroneous since the same reached such decisions without thoroughly scrutinizing and considering the Appellant's said rebuttal evidence on record as herein above demonstrated.

On the strength of the above argumentation, the Appellant beckoned upon this court to allow the appeal with costs.

In reply, the appellant submitted that there is no forged document tendered before the court, she further submitted that the appellant and respondent had entered a legal marriage in which the evidence was admitted.

She further argued that the two houses have been jointly acquired, thus why the trial court decided to distribute equally.

Moreover, the respondent argued that on the issue of names the name which is appear in the certificate of marriage and petition are the same person.

She also added that father Kulwa is one who presided the marriage ceremony and the time of signed it, father Thomas Mambo signed it.

In conclusion, she argued that she contracted in 2006 and not 2018, and the appellant argued he married Mwanaisha Athuman in 2002, it cooked fact in order to injure the right of the respondent.

Having considered the appellant petition of appeal, reply to petition of appeal and the record of appeal the question to determine is whether the present appeal has merit.

Coming to the first ground of appeal, that the trial Court erred in not drawing issues at the outset.

In the light of the appellant's submissions, I had to peruse the trial Court Original proceedings and noted that the trial Magistrate proceeded with hearing the petitioner and respondent without flaming issues for determination as required by the law.

The record of proceedings at page 4, the trial Magistrate started to record the testimonies of the respondent's witnesses directly without consulting with the parties, in this case the trial Magistrate purported to frame his own issues without examining the parties hereto and that was done when he was writing the impugned judgment as it is reflected in the relevant judgment at page six (6).

Order XIV, rule 1(5) of the Civil Procedure Code (supra), The rationale of framing of issues by the Court with the assistance of the parties is to enable the court to direct its mind to the issues that are at controversy between parties. In others words, the evidence by the trial Court was not well evaluated to arrive at a just decision, briefly stated, there were procedural irregularities.

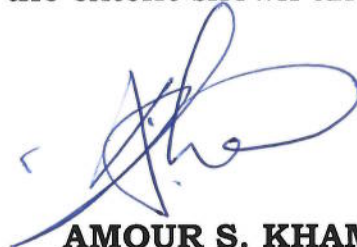
Applying the above provision of law, the trial Court was required to frame and record issues for determination. In the instant case, the trial Court did not frame issues for determination instead it proceeded with hearing the petitioner and the defence case.

In the case of **ZALKHA BINT MOHAMED V JUMA MAZIGE (1970) HCD 132** the Court of Appeal of Tanzania observed that non- framing of issues by the trial Court led to the parties not knowing what exactly was for the trial and decision.

In the case of **STANSLAUS RUGABA KASUSURA V THE ATTORNEY GENERAL AND PHARES KABUYA (1982) TLR 338**, the Court of Appeal of Tanzania nullified the judgment and proceedings of the High Court for failure to frame issues for determination.

In the end result, the appeal is allowed. The proceedings of Resident Magistrate Court of Tabora in Matrimonial Cause No. 01 of 2018 are hereby quashed and the judgment and decree are set aside. The case file is to be remitted back to the trial Court for retrial before another magistrate of competent jurisdiction.

In view of the outcome as regards to the aforestated position, I shall not consider the remaining grounds of appeal. Instead I allow the appeal to the extent shown and make no order for costs. It is so ordered.



AMOUR S. KHAMIS

JUDGE

19/07/2021

Judgment delivered in open Court in presence of the appellant in person and absence of the respondent. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

19/7/2021