

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA
AT MUSOMA

MATRIMONIAL APPEAL NO. 8 OF 2021

ASIA STEVEN APPELLANT

VERSUS

STEVEN MTONGORI RESPONDENT

***(Appeal from the decision of the District Court of Tarime at
Tarime in Matrimonial Appeal No. 9 of 2020)***

JUDGMENT

6th and 6th December, 2021

KISANYA, J.:

Before the Tarime Urban Primary Court, the respondent, Steven Mtongori petitioned for his divorce after 42 years of marriage with the appellant, Asia Steven. The trial court was satisfied that their marriage had been broken down irreparably. Apart from granting the divorce, the trial court ordered for division of matrimonial property whereby, the appellant was granted one shamba and 30 % share of the house on Plot No. 94, Block "A", Tarime Urban Area.

The trial court's decision in respect of the said house did not amuse the respondent. He successfully filed an application for revision in the District Court of Tarime. It was the District Court's decision that the above mentioned house was not a matrimonial property. Therefore, the trial court's order on division of the above stated house was quashed and set aside.

Aggrieved, the appellant has lodged the present appeal to challenge the decision of the District Court.

When the matter came up for hearing today, the appellant appeared in person while Mr. Onyango Otieno, learned advocate appeared for the respondent.

At the outset, the Court wished to satisfy itself on whether there was a decision given by the primary court due to the fact that the judgment was not signed by assessors who sat with the learned trial magistrate.

The appellant was of the view that the decision of the primary court was given according to the law. On the other hand, Mr. Otieno conceded to the irregularity pointed out by the Court in respect of the decision of the trial court. He therefore, urged me to nullify the proceedings of both lower courts, quash and set aside the judgment and orders thereon.

Upon hearing the parties, it is clear that the pertinent issue is whether there is a decision made by the Tarime Urban Primary Court.

In terms of the record, the matter before the trial court was determined before the commencement of Written Law (Miscellaneous Amendments) (No. 3) Act, 2021. Therefore, the primary court was required to be constituted by a magistrate and two assessors. Pursuant to section 7 of the Magistrates' Courts Act [Cap. 11, R.E. 2019] (the MCA), it was a legal requirement for the assessors who sat with the trial magistrate to take part in the decision making. In so

doing, the assessors were also required to sign the decision of the primary court as provided for under rule 3 of the Magistrates' Courts' (Primary Courts) (Judgment of Courts) Rules (supra). The rule provides:-

*"3. (1). Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, **the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.***

*(2) If all the members of the court agree on one decision, **the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.***

(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, be entitled to sum up to the other members of the court."[Emphasize supplied].

The above provision is couched in a mandatory terms. Therefore, a decision that is not signed by the assessors who heard the matter cannot be termed as decision of the primary court.

In the present appeal, the trial magistrate sat with two assessors. However, the judgment of the primary court was signed by the learned trial magistrate only. None of the assessors signed the judgment. In circumstances, I agree with Mr. Otieno, the omission to sign the judgment of the trial court

renders the said judgment a nullity. In other words, no decision was given by the trial court on the matter which gave rise to this appeal.

Given the fact that the decision of the District Court was based on the judgment of the trial court which never existed, the present appeal could not arise. This position was stated in the case of **Patrick Boniphace vs R**, Criminal Appeal No. 2/2017 (unreported), when the Court of Appeal held as follows:-

"In the matter at hand, since the judgment of the trial court was not signed and dated by the trial magistrate who conducted the trial, there was no judgment to be appeal against before the High Court."

In view of the above, the application for revision of judgment of the primary court was incompetent. Likewise, the present appeal is incompetent because it is premised on the decisions of the District Court and trial court which are a nullity. Considering that this issue is sufficient to dispose of this appeal, the Court will not address the grounds of appeal.

In the circumstances, this appeal is hereby struck out for it being incompetent. The Court exercises its revisionary powers under section 31 and 32 of the MCA and orders as follows:

1. The purported judgment of the trial court is hereby quashed and set aside.

2. The proceedings of the District Court of Tarime at Tarime in Matrimonial Appeal No. 9 of 2020 are hereby nullified while, the judgment and decree emanated therefrom are quashed and set aside.
3. The record of the Primary court is remitted back to Tarime Urban Primary Court in order the trial magistrate and the assessors who heard the matter to give decision according to the law.

Lastly, the order as to costs is not granted because this is a matrimonial matter.


It is so ordered.

DATED at MUSOMA this 6th day of December, 2021.




E.S. Kisanya
JUDGE

Court: Judgment delivered this 6th day of December, 2021 in the presence of the appellant and in the absence of the respondent.


E.S. Kisanya
JUDGE
06/12/2021