

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 30 OF 2021**

(Originating from Application No. 5/2020 at Temeke District Court at Temeke)  
(Before K. T. Mushi SRM)

**THEODATA ATANAS.....APPELLANT**

**VERSUS**

**ALLY ABDALLAH KUPAWA.....RESPONDENT**

**JUDGMENT**

Date of Last Order - 21/9/2021

Date of Judgment - 22/12/2021

**N.R. MWASEBA, J.**

In this appeal, the appellant was aggrieved by the ruling in the application No. 5 of 2020 at Temeke District Court. Therefore, she has raised the following grounds of appeal to express her grievances:

1. *That the district court erred in law and fact because its decision is against equity and good conscience as the same is tainted with injustice and illegality.*
2. *That the district court erred in law and fact for failure to observe that the trial court relying on its decision on incurable irregularities in the proceedings and judgment accordingly.*
3. *That the district court failed to observe that the application No. 5 of 2020 is void ab initio nothing more.*
4. *That the district court misdirected itself in law and fact on the burden and standard of proof of the application of this nature.*

Briefly, the facts of the case are such that, the appellant and the respondent underwent a Christian marriage in 2008 and during the subsistence of their marriage they acquired several properties, but they were not blessed with any issue. In 2019 after their marriage turning sour, the appellant instituted a matrimonial case at Temeke District Court seeking an order for divorce and equal division of jointly acquired matrimonial assets. The district court determined the matter in her favour and the judgment was delivered on 28<sup>th</sup> October, 2019. The judgment and decree of the court did not please the respondent due to

several clerical errors and mistakes which resulted in miscarriage of justice. As such, he decided to file an application for review before the same court of which its decision led to this appeal.

Before this court, both parties were represented. The appellant was represented by Mr Dominicus Nkwera learned counsel while the respondent was represented by Ms Hadija Kinyaka, Ms Mariam Selemi and Ms Butogwa Mbuki all learned counsels. The matter was disposed of by way of written submissions.

I have carefully gone through the whole record, grounds of appeal and the submissions by both sides and found that the parties are not challenging the decision but rather the procedure used by the respondent to seek for the remedies which renders the application No. 5 of 2020 void *ab initio*. The counsel for the appellant states that the respondent was supposed to appeal against the decision of the district court and not to apply for review. Therefore, the following issues will be determined by this court:

1. Whether it was proper for the respondent to opt for review instead of an appeal.
2. If the above issue is answered in affirmative, whether there were sufficient grounds to entertain a review.

Starting with the first issue, which is all about the remedy exercised by the respondent due to the irregularities alleged to be observed, the appellant in her first, second and third grounds of appeal is challenging the procedure used in the application for review and termed the whole application No 5. of 2020 which is subject to this appeal to be void *ab initio*.

Mr Nkwera learned counsel for the appellant says in the judgment of matrimonial cause No. 16 of 2019 the court did not summarize the evidence of both sides. It went to the issues analysis then to conclusion. Therefore, he finds that there was no reasonable ground to ask the court to review its own judgment and ask for a retrial. The proper remedy to be exercised was to appeal. He says the application for review in application No. 5 of 2020 did not meet the requirement set out in **Order XLII rule (1) (b) of the Civil Procedure Code**, Cap 33 R.E 2019 as he had a right of appeal and nobody denied him to appeal.

Ms Kinyaka learned counsel for the respondent submitted that the respondent had the right to exercise his remedy by way of review as **per Order XLII Rule (1) (a) of the Civil Procedure Code**. She says **Section 78 (1) (a) of the Civil Procedure Code** allows a party to prefer a review even if the right to appeal exists provided that there

should not be an appeal that has been preferred. She says, so long as the respondent did not prefer an appeal, the application for review was proper. She replied as to her prayer of retrial that it was an alternative prayer because they wanted justice to be done to both parties.

Re-joining to the submission the appellant says the respondent wanted the court to review the whole evidence which is not the practice. So, he insisted that they were supposed to appeal and not to opt for review.

Going through the law, **Order XLII, Rule of the Civil Procedure Code** Cap. 33 R.E 2019 states that:

(1) Any person considering himself aggrieved-

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed*

*or order made against him, **may apply for a review of judgment to the court which passed the decree or made the order.**(Emphasis added)*

Also, **Section 78. -(1) of the Civil Procedure Code** (Supra) states that, subject to any conditions and limitations prescribed under Section 77, any person considering himself aggrieved-

*(a) by decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed by this Code, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

Reading between lines from the above provisions, it is evident that it is the right of the aggrieved party to seek for review in case there is no appeal which has been opted. In this case there was no appeal that was preferred thus it was proper for the respondent to ask for the review. Therefore, the first issue is answered in affirmative.

Coming to the second issue, whether there were sufficient grounds to entertain a review, it is alleged at ground No. 4 of the appeal that the criterion of burden of proof in this case was not met. The counsel for appellant says there were no sufficient grounds for the court to entertain the review as required by the law. He says that there must be a manifest error for the party to ask for review. He cited the cases of **Shadrack Balinago V. Fikiri Mohamed @ Hamza and others**, Civil Application No. 25/8 of 2019 (Unreported), **East African Development Bank V. Blue line Enterprises Tanzania Limited**, Civil Application No. 47 of 2010 (CA) (Unreported).

I have gone through the grounds for review and a three-page judgment dated 28/10/2019 and found that there was a manifest error which required a review of the said judgment. Looking at the said judgment it does not meet the requirements of **Order XX Rule 4 of the Civil Procedure Code** which says:

*"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."*

The judgment which was subject for review did not contain points for determination and did not indicate reasons for the decision. Both parties

brought a number of witnesses of which none were considered in the said judgment. Those are manifest errors which led to the miscarriage of justice as stated in the case of **East African Development Bank V. Blueline Enterprises Tanzania Limited (Supra)**. The errors observed in the said judgment are obvious and it is not the duty of the appellate court to rectify the same but the parties to apply for review as the respondent preferred.

Having foresaid, this appeal lacks merit and I dismiss it accordingly. The decision of the district court is upheld. No order as to costs.

It is so ordered.

**DATED at DAR ES SALAAM** this 22<sup>nd</sup> day of December, 2021.



*N.R. Mwaseba*  
**N.R.MWASEBA**

**JUDGE**

**22/12/2021**