

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL REFERENCE NO. 3 OF 2021

(Originating from Civil Appeal No. 16 of 2020 at Karatu District Court, Matrimonial
Case No. 5 of 2020 at Karatu Primary Court)

YASMIN MOHAMED..... APPLICANT

VERSUS

ABDULARAZAQ MOHAMED..... RESPONDENT

RULING

28.03.2022 & 21.04.2022

N.R. MWASEBA, J.

Before me is a record of Civil Appeal No. 16 of 2020 from Karatu District Court forwarded to this court by the district resident Magistrate-in-Charge seeking for directives of this court.

For proper appreciation of the circumstances in which the court was prompted to take up this course of action it is convenient to narrate the background of the matter, albeit briefly.



By a letter with REF. NO.KDC/DR/AR/C/VOL.I/103 dated 18/12/2020, Hon. I.B. Kuppa, District Resident Magistrate-in-Charge of Karatu District Court forwarded the record of Civil Appeal No. 16 of 2020 involving what he considered to be an uncertain and complex decision of Hon. Y.O. Kiseng'eria, RM hence not executable.

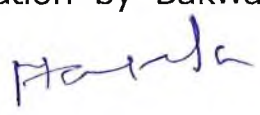
The record indicates that, the applicant herein filed a Matrimonial Cause No. 5 of 2020 at Karatu Primary Court against the respondent, Abdulrazaq Mohamed seeking for dissolution of their marriage, division of matrimonial property and maintenance of children. After a full trial before G.J. Shuma-RM it was ordered as follows:

1. Ndoa ya wadaawa imevunjika pasipo kurekebishika chini ya k/f 107 (3) cha sheria ya Ndoa na 5/1971, Toleo la 2002, Sura 29.
2. Wadaawa wapewe talaka mara baada ya siku arobaini na tano za rufaa.
3. Wadaawa wagawane mali ambazo ni nyumba moja iliyoko TFA kwa asilimia 30 % mdai na mdaiwa 70%.
4. Matunzo na ulinzi wa Watoto; Mohamed Abdulrazack na Ally Abdulrazack ni juu ya mdaiwa; matunzo ya Samira

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Abdulrazack ni juu ya mdai, mdaiwa atalipa ada peke yake
na atakuwa chini ya uangalizi wa mdai.

Aggrieved, the respondent filed a Civil Appeal No. 16 of 2020 at Karatu District Court armed with four (4) grounds of appeal which reads as follows:

1. That, the judgment of the court is bad in law for being bias on Appellant, since the trial magistrate did not consider the evidence of the appellant in his decision contrary to the requirement of the law.
2. That, the trial court arrived at erroneous decision as it made wrong reasoning and ordered sale of the appellant's house situated at TFA street, within Karatu township and the Respondent to benefit 30% of sale product without any justifiable cause.
3. That, the trial court erred in law and fact for failure to consider appellant's evidence tendered before the court showing respondent commitment that she has nothing to demand from the appellant subject to any property occupied. The copy of agreement to that effect is hereby attached and marked as annexure "A1" and letter of conciliation by Bakwata is hereby craved to make part of this appeal. 

4. That, the trial court judgment lacked reasons for divisions of matrimonial assets stipulated under the law for divisions of matrimonial property.

Thereafter, the appellant had the following prayers should his appeal be merited:

- a. That his appeal be allowed, and the orders of primary court be quashed and set aside.
- b. In the alternative to the prayer [a] above, the respondent further prayed that, the proceedings, decision and judgment of the trial court be nullified.
- c. Costs of the appeal and, the trial court be granted.
- d. Any other reliefs, the honourable court deems fit and just to grant.

In his judgment, the District Court (Hon. Kiseng'orian, RM) allowed the appeal to the extent prayed for and ordered the maintenance of the children to be left undisturbed.

After having the above decision, the applicant herein was informed by the counsel for the respondent (appellant in Civil Appeal No. 16 of 2020) that the said decision was uncertain hence rendering its enforcement complex. She therefore approached the District Resident Magistrate-in-

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Charge asking for clarification on the relief sought and granted in the said appeal. It was the observation of the District Resident Magistrate-in-Charge that there was a controversy in respect of the relief sought and the prayers granted due to the fact that the appellant prayed among other things for nullification of everything and his appeal was allowed. That controversy made him to forward this case to this court for directives.

Before this court both parties appeared in person and addressed the court on how they understood the said verdict. The applicant told this court that she understood that the decision of the primary court was upheld and she was satisfied with it. But the respondent told her that the district court ordered that the house belongs to him.

The respondent argues that he understood well the judgment but the applicant did not understand it. He avers that they went to the District Resident Magistrate in charge for the execution of decree and they were informed that the matter would be forwarded to the High Court for further directives. So, the respondent states that he does not know what the issue was.

I have gone through the record to find out whether there is any controversy of the decision made by the first appellate court.

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Apparently, the decision of the Hon Magistrate is marred with a few irregularities which I am going to point out hereunder.

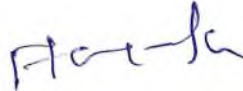
First, I have revisited the four grounds of appeal that were filed by the respondent, none of them were determined by the district court.

In the case of **Simon Edson @ Makundi Vs Republic**, Criminal Appeal No. 5 Of 2017 the Court of Appeal sitting at Arusha had this to say:

"The appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal. It is also necessary for the first appellate court to re-evaluate the evidence on record before reaching to its conclusion. With respect, the impugned judgment fell far below the required standard and for that reason, it was not a judgment known in law. It was a nullity"

In the case at hand, the first appellate magistrate did not bother to address any of the grounds of appeal which basically on the first ground the appellant was challenging the non-consideration of his evidence by the trial court hence the court being biased. And the second, third and fourth grounds of appeal the appellant was challenging the division of

the matrimonial assets to be unjustifiable. Leaving those grounds undetermined the appellate magistrate went direct evaluating the evidence brought at the trial court which led to dissolution of the marriage between the parties. He observed that there were no reasons advanced to justify the grant of divorce. However, basing on the principle that the court cannot compel a wife to live with her husband he decided as follows:

*"While I am alive of above enunciated principle, I take a consideration of section 140 of the Law of Marriage Act Cap 29 R.E 2019, which does not empower any court to compel a wife to live with her husband or husband with her wife. **I find that this appeal has merits and I don't think it will be in the interest of justice to deny the prayers. In the upshot I allow this appeal to the extent prayed for. Order of maintenance should be leave [sic] undisturbed and rather the appellant as the father is put in strict (?) to ensure that the welfare of the child and the best interest of the child prevail (Emphasis is mine).*** 

Being guided by the decision of the case of **Simon Edson @ Makundi Vs Republic (Supra)** I find this judgment a nullity for failure to determine the grounds of appeal.

Coming to the controversy pointed out by the District Resident Magistrate in charge I join hands with him. This is due to the fact that the first prayer of the respondent (appellant by then) was the appeal to be allowed and the orders of the primary court to be quashed and set aside. In the alternative to the first prayer, he prayed for nullification of the proceedings, decision and judgment of the trial court. Therefore, the act of Hon. Magistrate to allow the appeal to the extent prayed for it means all the proceedings of the trial court were quashed and set aside or nullified including the order for divorce, maintenance and custody of the children. It was wrong for the Hon. Magistrate to depart from his decision and order the respondent (appellant by then) to provide maintenance and security to his children. The said decision, made the execution of the impugned judgment to be uncertain, that is why the present reference was preferred.

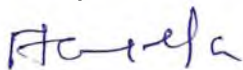
I am aware that the appeal was disposed of by way of written submissions. For the reasons forestated, I nullify the judgment of the

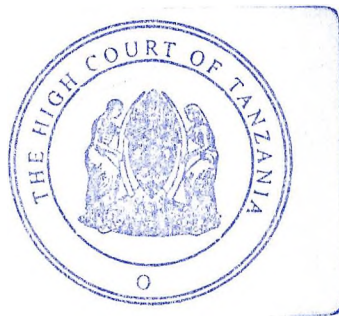
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district court. Consequently, I order the record to be remitted back to the district court of Karatu before the same magistrate to compose a fresh judgment. No order as to costs.

It is so ordered.

DATED at **ARUSHA** this 21st day of April, 2022.


N.R. MWASEBA



JUDGE

21.04.2022