IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(PC) MATRIMONIAL APPEAL NO. 10 OF 2021

(Originating from Matrimonial Appeal No. 06 of 2021 of Kigoma District Court and Matrimonial Cause No. 01 of 2021 of Uvinza Primary Court)

IDD KHAMISI.....APPELLANT

VERSUS

MARIAM AHAMAD.....RESPONDENT

JUDGMENT

27th May, 2022 & 31st May, 2022

F. K. MANYANDA, J.

The Appellant, Idd Khamis is dissatisfied by the judgement and decree of the District Court of Kigoma dated 17/08/2021 in Matrimonial Appeal No. 06 of 2021 which originated from Uvinza Primary Court in Matrimonial Cause No. 01 of 2021. He has raised three grounds of appeal namely: -

1. *That the appellate court erred in law and in facts to divide a residential house given to the children without considering the welfare of the children;*
2. *That the appellate court erred in law and in facts to include and divide all properties mentioned in the trial primary court by the respondent to be matrimonial assets without considering that some properties do not belong to the parties; and*
3. *That the maintenance order against the appellant was issued in total disregard of his economic means.*

The brief background of this matter is that the appellant and the respondent, Mariam Ahamad, prior to divorce were a married couple and begot seven (7) issues. Moreover, during subsistence of their marriage they managed to acquire various matrimonial properties to mention a few include a house, two plots, 5 goats, one cattle and 15 acres of land, a bed and its mattress, to mention a few.

After their marriage relationship going sour, the Respondent successfully petitioned for divorce at the trial court which ordered matrimonial properties division, whereby the matrimonial house was ordered to remain intact for children, it also ordered the Appellant to

contribute Tshs. 60,000/= per month for two minor children maintenance.

These orders bemused the Respondent who appealed to the District Court which maintained the maintenance order, but ordered division of the matrimonial house between them. The Appellant is aggrieved by the District Court decision, hence this instant appeal.

Before hearing commenced, the Respondent raised a preliminary objection to the hearing of the appeal on two pints of law namely: -

i. *That the Appellant's appeal in respect of prayer is bad in law as it contravenes section 80(1) of the Law of Marriage Act, [Cap. 29 R. E. 2002], hence, this Honourable Court has no jurisdiction to grant the same;*

ii. *That the Appellant's appeal is bad in law for having been preferred in contravention of the mandatory provisions of Rule 37(1) of the Law of Marriage (Matrimonial Proceedings) Rules, GN No. 136 of 1971 for being preferred by way of petition of appeal instead of memorandum of appeal.*

With leave of the Court, hearing of both the preliminary objection and the appeal were argued by way of written submissions. Ms. Elizabeth Twakazi, learned Advocate, drafted and filed the submissions

for the Appellant and Mr. Silvester Damas Sogomba, learned Advocate, did for the Respondent. I directed the parties to submit their arguments on both the preliminary objection and the judgement.

However, it is trite law that where a court is seized with a preliminary objection, it has to dispose it first, if it is overruled, then the court will go on determining the main matter.

This was meticulously stated in **Shahida Abdul Hassanali Kassam Vs. Mahedi Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999 (unreported) when the Court considered the issue of jurisdiction of the trial court at the stage of revision. In dealing with the issue, the Court at page 3 of the ruling stated that:

> *"....the whole purpose of preliminary objection is to make the court consider the first stage much earlier before going into the merits of an application ..... so in a preliminary objection a party tells the court the existing circumstances do not give you jurisdiction. It cannot be gain said that the issue of jurisdiction has always to be determined first."*

It is in that respect, this Court in the case of **Bank of Tanzania**

Ltd v. Devram P. Valambhia, Civil Application No. 15 of 2002 (unreported) expressed its view in similar terms that: -

> *The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily."*

The above cases were also considered by the Court of Appeal in the case of **Thabit Ramadhan Maziku and Kisuku Salum Kaptula v. Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar,** Civil Appeal No. 98 of 2011 where the subsequent proceedings taken without first determining a preliminary objection were nullified. See also the case of **Khadi Abubakar Athumani vs. Daud Lyakugile t/a D.C. Aluminium**, Civil Appeal No. 86 of 2018 (unreported).

I will start with the second point, the objection is that the appeal is bad in law for been titled "petition" instead of "memorandum" thereby contraveningg the mandatory provisions of Rule 37(1) of the Law of Marriage (Matrimonial Proceedings) Rules, GN No. 136 of 1971.

Arguing in support Mr. Sogomba submitted that in the light of the said Rule 37(1), the appeal is supposed to be titled "memorandum" and

that the rule uses a word "shall" which connotes the act is mandatory. He cited a case of **Damari Watson Bijina vs. Innocent Sengano**, (PC) Matrimonial Appeal No. 5 of 2021 in which this Court, Hon. Mlacha, J. nullified an appeal which was wrongly titled, just like in this appeal. He stated as follows: -

> *"I think to 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.'***
>
> *The words used are clear and unambiguous, that the appeal shall be filed by presentation of a memorandum of appeal... one cannot avoid the very clear dictates of the law and seek protection from the oxygen principle.... It follows that an appeal which was presented in any other format other than that of a memorandum of appeal is improperly before the court. It can not be left to stand."* (emphasis added)

Replying, the Counsel for the Appellant submitted that the difference between the words "memorandum" and "petition" is simply a

matter of semantics and that the error does not go to root of the appeal, it is curable under the oxygen principle. She cited the case of **Basil Masare vs. Petro Michael** [1996] TLR 227 where this Court, Hon. Mroso, J. as he then was, stated as follows: -

> *"If an appellant used the word `memorandum' instead of `petition' in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent since that would be `making a mountain out of a mouse mound".*

She prayed the Court to overrule this objection.

As it can be seen, in this objection, basically, as it is so glary from the records that the appeal has been brought as a "petition" not as a "memorandum". Both Counsel are at par on this fact. It follows therefore that the appeal is in contravention of Rule 37(1) of the Law of Marriage (Matrimonial Proceedings) Rules, GN No. 136 of 1971 which mandatorily require the appeal to be titled "memorandum". Therefore, it is defective. The learned minds lock horn on the consequences of mistitling an appeal.

As to the effect of mistitling an appeal of this nature, there are two schools on the position of the law.

The first school belongs to the case cited by the Counsel for the Respondent, the case of **Damari Watson Bijina (supra)** which held that mistitling of the appeal renders the same incompetent and cannot be salvaged by the oxygen principle.

There are many other cases on this school which include **Naigise Likimbalunye vs. Naibele Loibuke** Civil Appeal No. 65 of 1993 (unreported) where this Court, Hon. Munuo, J. as she then was, dealt with this problem when was interpreting Section 25(3) of the Magistrates' Courts Act, [Cap. 11 R. E. 2019] held that grounds of appeal in cases originating in the primary court which bear a heading "Memorandum of Appeal" instead of the words "Petition of Appeal", which words are found in Section 25(3) of Cap. 11, renders the appeal incompetent and must be struck out.

In **Amidu Damian Likiliwike** ***(Administrator of the Estate of the Late Damian Boimanda Likiliwike)*** **vs. Steven Temba**, Land Appeal No. 03 of 2020, Hon. Matogolo, J. stated as follows: -

> *"There is therefore a mandatory requirement for the appeal to be in a form of "memorandum of appeal" due to the word "shall" used which has mandatory requirement."*

Further in the case of **Edward Otesoi vs. Maingwa Mario**, Miscellaneous Land Appeal No. 36 of 2019, Hon. Robert Kassim, J had this to say: -

> *"Since section 38(2) of the Land Disputes Courts Act, Cap. 216 R.E 2002 is couched in mandatory terms, the Appellant was required to conform with the requirement of this provision by filing his appeal by way of petition of appeal not memorandum of appeal."*

Also Hon. Mkasimongwa, J. as he then was, stated in **Michael Otom Amolo vs. Washngton Benesiu**, Civil Appeal No. 36 of 2020 as follows: -

> *"As it has been indicated earlier, this Appeal is brought against the Judgment and Decree in Civil Case No. 5 of 2019 of Musoma District Court. The Court there sat as the Court of first instance in which case, the appeal to this Court was governed by the provisions of Order XXXIX Rule 1 (1) of the Civil Procedure Code [Cap 33 R.E 2019]. The Subrule reads as follows:*
>
> > *'1(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the*

memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded.'

Here the law dictates that an appeal to this Court under the Rule must be preferred in a form of a Memorandum of Appeal. In this Appeal, the Appellant did not file the "Memorandum of Appeal" but the "Petition of Appeal".

At what point one has to file a Memorandum of Appeal or Petition of Appeal that is determined by the law. Going by the provision of the Civil Procedure Code above, a Petition of Appeal is not known to the law.

Where, therefore, the Applicant instituted the Appeal by way of a Petition of Appeal, in fact, he was wrong for a Petition of Appeal is not a document instituting appeal to the High Court from the subordinate Court under, the Civil Procedure Code."

In the case of **Lucas Philipo vs. The Registered Trustees of Kanisa La Pentekoste Tanzania** [2011] T.L.R. 220 Hon Temba, J. as she then was, said as follows: -

"Whether the appeal should be presented as a petition or memorandum is a question of what the law says.

Section 20 of the Written Laws (Miscellaneous Amendments) Act No. 2 of 2010 provides that where the

Regulations governing the Tribunal are inadequate, then the Civil Procedure Code comes in to play. Order XXXIX of the Civil Procedure Code deals with appeals from original decrees.

The Rule provides: Every appeal shall be preferred in the form of a memorandum signed by the Appellant or his advocate and presented to the High Court (emphasis added).

It is common ground that the appeal is against the original decree passed by the trial District Land and Housing Tribunal. According to Order XXXIX Rule 1 of the CPC cited above, the appeal should be in the form of a memorandum and not a petition."

As it can be seen this school is based on strict interpretation of the word "shall" used in the statute which per section 53(2) of the Interpretation of the Laws Act, [Cap. 1 R. E. 2019].

Previously courts have been taking a relaxed approach on the use of the word "shall". But the position changed since the coming into force of the interpretation of Laws Act and the definition introduced by Section 53(2) which provides: -

"(2) where in any Written Law the word shall is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed".

Therefore, where the word "shall" is used connotes mandatory. Basing on this interpretation the position of this school is that mistitling an appeal as a petition while it is supposed to be "memorandum" is an incurable defect under the oxygen principle.

The second school is that under **Basil Masare's case (supra)** which holds that such a defect is curable. This school has a number of decisions also which include the case of **Felician Mchuruza vs. Zindunza Mnaku** [2013] T.L.R. 210 where Hon. Mwambegere, J. as he then was stated as follows: -

> *"Whether one uses Petition of Appeal or Memorandum of Appeal in the documents does not matter. They just are different names meaning one and the same thing intended to serve the same purpose. The use of the title "Memorandum of Appeal" instead of "Petition of Appeal" as provided for by cannot ipso facto render the appeal incompetent."*

In the case of **Yoram Numa vs. Zakaria Numaland,** Appeal No. 71 of 2019 Hon. Gwae, J. guided by the principle in **Basil Masare's case (supra)**

"More so, even if the Act provides to that effect, it my

considered view that substantive justice does not demand courts to dismiss cases merely relying on difference on a title of an appeal file in the court between the words "Petition" and "Memorandum of Appeal" as the same does not go to the root of the matter."

Hon. Mongella, J. in the case of **Ibrahimu Yohana Katanzi vs. Helena Erenest Sakawa**, Matrimonial Appeal No. 11 of 2019 said as follows: -

"Rule 37(1) of the Law of Marriage (Matrimonial Proceedings) Rules) provides: -

> *'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 passed the decision, order or decree appealed against.'*

The provision as it reads is couched in mandatory terms and thus had to be adhered to .... However, in terms of section 37 (4) as I have pointed out earlier, the appeal cannot be struck out on basis of the said defect."

In yet another case of **Rustica Mwalyosi vs. Raphael Mwalyosi,** Civil Appeal No. 261 of 2020 (Matrimonial Cause), Hon. Rwizile, J. satetd as follows: -

"As much as I agree with the learned advocate that this appeal ought to have been entitled Memorandum of

Appeal and not Petition of Appeal, as per Rule 37 of GN No. 246 of 1971, it is my considered view that, this defect is cured by overriding objective rule under section 3A and 3B of the Civil Procedure Code, which this court is enjoined to apply. It is as the appellant's lawyer put it, defect that does not go to the root of the appeal. whether brought under the head- petition or memorandum, still it remains an appeal in the meaning of the law."

From the said cases I have cited above, it is obvious that according to this school, the words memorandum of appeal and petition of appeal may be used interchangeably provided no prejudice is occasioned to the parties and the word "shall" is degraded to mean not mandatory. This means, there is no difference between the words "memorandum" and "petition" as used by the legislature.

All were decided by the High Court. I could not manage to trace one from the Court of Appeal. In the circumstances, all the cases are persuasive, therefore, this Court is left to follow any of the two schools.

The Counsel for the Appellant submitted that the difference in the two words is a matter of semantics, they mean the same thing. I have asked myself if this is true, then why the legislature chose to apply the use of those words with specification in statutes. I strongly believe that there is a difference in the purpose of each of them, otherwise the legislature

would just have used one of them. It should be noted that procedural law are enacted for a purpose, that is to make sure that dispensation of justice is done smoothly.

I am convinced by the findings by Hon. Mkasimongwa J. as he then was, on the differences of the two words. He stated in **Michael Otom Amolo vs. Washington Benesiu (supra)**, that: -

> *"In law, although the Memorandum of Appeal and Petition of Appeal serve the same purpose, which is institution of appeal the "Memorandum of Appeal" is quite different from "Petition of Appeal". A Memorandum of Appeal under the Civil Procedure Code initiates the first Appeal in which case, the judgment of the court can be faulted for errors of law and fact. In such a situation the Appellate Court can with no exceptions to consider and re-valuate the evidence where the court of first instance failed to properly do so. On the other hand, a Petition actually outlines the legal reason for a Court order. A Petition of Appeal, as such outlines the legal reasons why a verdict should be renewed by an Appellate Court. Normally a Petition of Appeal is filed in cases where the Appellate Court is not seized with power to adjudicate on factual issues but the legal issues."*

Having found that the words memorandum of appeal and petition of appeal have different purposes, then I am of increasingly firm opinion that the two phrases cannot be used interchangeably.

As to the curability of the defect, I also of firm opinion that the oxygen principle is inapplicable because the genesis of the defect is, with due respect, negligence by Counsel.

In this appeal the defect was caused by a learned Counsel, the position would be different had this error was committed by a lay person not conversant with legal procedures. This court in the case of **Martha Daniel vs. Peter Nko** (1992) TLR 359, Mroso, J. as he then was at page 363 has this to say: -

> *"A lawyer is trained on how and where to look for the law. It is easy for a court to reject his plea that he did not realize that a certain legal procedure for filing an appeal existed. But a lay person who has been acting with due diligence may be easily be misled by a wrong practice".*

To add more, in my understanding, procedural laws are there with a purpose, that is to make sure that dispensation of justice is done smoothly, then mandatory rules cannot be circumvented in the umbrella of the oxygen principle.

This is the position expounded by the Court of Appeal and has been restated now and then in cases without number, the famous ones include the case of **Mondorosi Village Council and 2 Others vs. Tanzania Breweries Limited and 4 Others** Civil Appeal No. 66 of 2017, the Court of Appeal held *inter alia* that: -

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case...".*

See also the case of **Njake Enterprises Limited vs. Blue Rock Limited and Another** Civil Appeal No. 69 of 2017 (unreported).

In the result I agree with the first school lead by Hon. Munuo, J. in **Naigise Likimbalunye vs. Naibele Loibuke (supra)** and recently followed by Hon. Mlacha, J. in **Damari Watson Bijina vs. Innocent Sengano** and sustain the second point of objection, the purported appeal is wrongly presented before this Court without the requisite memorandum of appeal which initiates an appeal, hence it is improper and unmaintainable. It is prone to be struck out.

In the circumstances, having sustained the second point of the preliminary objection, then I don't find any need of proceeding to make

a finding in respect of the first point of objection as well as the purported appeal.

Consequently, I do hereby strike out the purported appeal. This been a matrimonial matter and there being no special circumstances of condemning the Appellant, I make no order as to costs, each party will bear its own costs. Order accordingly.

F. K. NANYANDA

JUDGE

31/05/2022