

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**(PC) MATRIMONIAL APPEAL No. 21 OF 2022**

*(Arising from the District Court of Musoma at Musoma in  
Matrimonial Appeal No. 14 of 2021 & Civil Appeal No. 30 of 2006  
Originating from Musoma Urban Primary Court at Musoma in  
Matrimonial Cause No. 12 of 2006)*

**HADIJA ATHUMANI ..... APPELLANT**

*Versus*

**VIATORY NDEGE ..... RESPONDENT**

**JUDGMENT**

13.07.2022 & 18.07.2022

**Mtulya, J.:**

On 23<sup>rd</sup> September 2021, Hadija Athumani (the appellant) approached **Musoma Urban Primary Court located at Musoma** (the primary court) praying for an enlargement of time to file execution proceedings to enforce the decision of the **District Court of Musoma at Musoma** (the district court) in **Civil Appeal No. 30 of 2006** (the appeal) originating from primary court in **Matrimonial Cause No. 12 of 2006** (the cause). At the primary court, the applicant had registered one reason for the enlargement of time, *viz.* sickness.

On 23<sup>rd</sup> September 2021, the application for enlargement of time was scheduled for mention at the primary court and the appellant prayed for enlargement of time, but the primary court

ordered for another mention date, 1<sup>st</sup> October 2021. On that day, 1<sup>st</sup> October 2021, the applicant registered another prayer: *Naomba amri ya Mahakama itekelezwe kwa kuwa Mdaiwa amefika*. The Reply from the respondent was that: *Amri niliitekeleza tarehe 09/09/2006 kwa kumkabidhi Mdai Injini Mbili nilizoamriwa na Mahakama, lakini alizikataa*. From this contest, the application changed its course from whether the appellant had registered good reasons for enlargement of time to whether the respondent had given the appellant the two engines. It is unfortunate that from that date, 1<sup>st</sup> October 2021, the record is silent on materials necessary for consideration of enlargement of time in the proceedings of the primary court.

However, on 25<sup>th</sup> October 2021, the primary court declined the application and at page 3 of the decision it reasoned that: *kwa sababu zilizotolewa na Mleta Maombi za kuomba kufanya utekelezaji nje ya muda, Mahakama inaona hazina msingi kuweza kuruhusu utekelezaji ufanyike nje ya muda*.

The appellant was aggrieved by the decision hence approached the district court in **Matrimonial Appeal No. 14 of 2021** (the matrimonial appeal). In the matrimonial appeal, the district court raised two issues unrelated to enlargement of time and accordingly determined them. Finally, the district court

dismissed the appeal without costs and at page 5 of the judgment stated that: *the decision of the trial court was correct and this court affirm basing on the stated positions of the laws and explained reasons.*

The decision of the district court irritated the appellant and preferred second appeal in this court to protest the decision of the district court. In this court, the appellant preferred four (4) reasons of appeal. However, all complaints in the matrimonial appeal were levelled against the two issues raised and determined at the district court, which were unrelated to the reasons of enlargement of time, namely: whether the appellant claims new machines; and whether the appellant properly produced evidence in the primary court.

The parties were summoned in this court on 14<sup>th</sup> July 2022 to explain their dispute and reasons of appeal, and accordingly appeared themselves without cherishing any legal representation. As lay persons, they had brief submissions. According to the appellant she had informed the primary court on her sickness, but the court declined to grant enlargement of time. She also submitted that the respondent was awarded a house at Bunda, but declined to provide her with brand new machines. Replying the submission of the appellant, the respondent contended that the application before the primary court was brought after lapse of

fifteen (15) years without good reasons, and in any case the execution has already been enforced on 8<sup>th</sup> September 2006 by giving the appellant two (2) Suzuki Boat Engines of 9.9 and 25 horse powers in the presence of village leaders.

I have perused the record of this appeal and found that the issue which moved the appellant to approach the primary court in the application, was declined by both courts below. The appellant approached the primary court for enlargement of time to enforce the decision of the district court in the appeal. The record shows that the matter which brought the appellant to the primary court was not determined, although it was registered in documents and prayed during proceedings of the first day of the application, 23<sup>rd</sup> September 2021.

The practice in declining issues brought in courts for determination is discouraged by the Court of Appeal (the Court) and this court (see: **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi**, Civil Appeal No. 98 of 2018; and **Agripa Fares Nyakutonya v. Baraka Phares Nyakutonya**, Civil Appeal No. 40 of 2021). The Court in **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi** (Supra), at page 12 of the judgment stated that:

*It is settled position of the law that, a matter not decided by the High Court or subordinate courts*

*exercising extended jurisdiction cannot be decided by this court.*

The reasoning of the Court is found at page 13 & 14 of the judgment, that:

*It is clear that the jurisdiction of this court on appeal is to **consider and examine matters that have been considered and decided** upon by the High Court and subordinate courts with extended jurisdiction.*

(Emphasis supplied).

From the practice of courts in Common Law Community, once superior courts in judicial hierarchy provide directives or guidance, inferior courts in the same judicial hierarchy must follow the course. This country follows the Common Law Legal Tradition and we have in place a guidance in precedent of **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi** (supra). This court being inferior, followed the course without any reservations in the precedent of **Agripa Fares Nyakutonya v. Baraka Phares Nyakutonya** (supra). For the sake of following guidance of the Court and predictability of decisions from this court, and considering the present appeal is of similar issue, this appeal shall follow the suit.

As to what are the available remedies in the circumstances like the present appeal, the reply is found at page 14 in the judgment of **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi** (supra) is that: to allow the appeal and remit the record to the lower court which decided the matter to determine all issues raised before it. There is a bunch of precedents in support of the position (see: **Agripa Fares Nyakutonya v. Baraka Phares Nyakutonya** (supra); **Alnoor Sharif Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 and **Celestine Maagi v. Tanzania Elimu Supplies (TES) & Another**, Civil Revision No. 2 of 2014).

Having noted the fault and its available remedy, and considering the need of justice to the parties, and noting this court would love to determine issues which have been resolved by both primary and districts courts, I have decided to follow the course of the Court and hereby allow the appeal and quash the decision and proceedings of the district court and quash the decision of the primary court in the application and set aside proceedings of the primary court from 1<sup>st</sup> October 2021, when the primary court shifted the course to 25<sup>th</sup> October 2021, when the decision was pronounced.

In the end, I direct the primary court, under another learned magistrate to proceed and determine the application according to the issues brought in the application. The consideration and

determination of the issues should commence immediately and fresh and proper decision be delivered within three (3) months from the date of this judgment. Noting the present appeal originated from matrimonial contest and the parties are lay persons contesting their matrimonial rights, I decline to order any costs. Each party shall bear its costs.

Ordered accordingly.



F.H. Mtulya

**Judge**

18.07.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, Hadija Athumani and in the presence of the respondent, Viatory Ndege.

F.H. Mtulya

**Judge**

18.07.2022