

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MATRIMONIAL APPEAL NO. 11 OF 2021
(From Misc. Civil Application No. 39 Of 2020, Originating from
Matrimonial Case No. 10 of 2019 from Uyole Primary Court)**

GIFT FRED MLONGANILE.....APPELLANT

VERSUS

EMMANUEL LAZARO SHIZYA..... RESPONDENT

JUDGMENT

Dated: 16th June & 14th July, 2022

KARAYEMAHA, J

This is a first appeal. It emanates from the decision of the decision of the District Court of Mbeya in Misc. Civil Application No. 39 of 2020 in which the respondent applied for extension of time to file Matrimonial Appeal against the Uyole Primary Court (hereinafter the trial court) which issued a decree of divorce. The District Court granted the application and extended time for the respondent, namely, **Emmanuel Lazaro Shizya**, to file an appeal out of time within 14 days from the date of the ruling, the decision which has bred this appeal. The appellant, namely, **Gift Fred Mlonganile**, climbed a ladder to this court armed with the memorandum of appeal raising two grounds as follows:

1. The Hon District Court erred in law when granted application for extension of time while the applicant (now respondent) did not adduce sufficient cause.
2. That the Hon District Court erred when granted extension of time while the applicant (now the respondent) has filed matrimonial Appeal No. 17/2020 which was dismissed on 21 October, 2020. In extending time allowed the respondent to abuse court process.

When the appeal was placed for hearing before me on 16/06/2022, the appellant appeared and was represented by Mr. Baraka Mbwilo, learned counsel. The respondent was represented by Mr. Osiah Adam, learned Counsel.

Before dwelling deep in the parties contending arguments, it may perhaps be befitting, at this juncture, to set the factual background to this appeal which is, as good luck would have, not difficult to comprehend. It is this. The appellant and the respondent were husband and wife by 2019. On the grounds that the appellant was threatening to kill the respondent, insulting him with no apparent good reasons and was misconducting herself, the respondent filed a petition for divorce in the trial court via **Matrimonial Case No. 10 of 2019**. At the height of the trial, the trial court unanimously found that the marriage had broken beyond repair and issued a decree of

divorce on 25/02/2019. The trial court ordered further that the custody of children be under the appellant and distributed the matrimonial assets between parties. It is apparent on the record that after the judgment had been delivered a wrangle between parties continued in respect of access to children and division of matrimonial assets till 17/07/2020. In all times both parties were obediently appearing without a miss.

On 17/08/2020 the respondent felt as of right to challenge the trial court's decision. Being time barred, he preferred an application in the District Court of Mbeya which was baptized **Misc. Application No. 23 of 2020**, drawn by himself and paid filing fees as revealed by exchequer receipt number 21675293. He was moving the District Court to extend time within which he could lodge an appeal against the decision of the trial court in Matrimonial Case No. 10 of 2019. Hon. D.G. Luwungo-RM granted the application for extension of time on 19/10/2021.

While this application was on the adjudication process, on 28/08/2020, the respondent lodged a petition of appeal in the same Court which was named **Matrimonial Appeal No. 17 of 2020**, drawn and filed by the respondent himself and paid filing fees as per the exchequer receipt number 21675583. This appeal was assigned to Hon. P.D. Ntumo-PRM. The appeal could not last long as on 21/10/2020, it was dismissed for want of prosecution with costs.

The record on **Misc. Application No. 23 of 2020** reveal that on 29/08/2020 Mr. Mwanri rose up and addressed the District Court that the respondent was running two matters at the same time. He informed the District Court that while he was prosecuting the application, he had already filed **Matrimonial Appeal No. 17 of 2020** between same parties and it was before Hon. Ntumo - PRM. In his view, the District Court lacked jurisdiction to try that application. Mr. Mwanri's contention was found without substance and disregarded.

On 02/11/2020 again the respondent presented for filing **Misc. Application No. 39 of 2020** drawn by him paid fees as exhibited by exchequer receipt number 28611514. This application was again assigned to Hon. D.G. Luwungo - RM. The application was heard and a ruling handed down on 19/01/2021 whereby the trial Magistrate extended time for the applicant to file appeal to the District Court within 14 days from the date of the ruling.

This decision did not bed well with the appellant. She therefore, appealed to this court.

Submitting in support of the grounds of appeal, Mr. Mbwilo started with ground two. His submission relates to the background I have just given above. He, however, submitted that after the dismissal of Appeal No. 17 of 2020 the respondent was not allowed to file Misc. Application No. 39 of 2020

instead was supposed to go back to the same court apply for dismissal order to be set aside. He cited the case of **Mathias P Katoto vs. Sophia Kashamba**, Misc. Land Case No. 618 of 2017, HC Land Division DSM.

Responding to the 2nd ground Mr. Adam submitted that this appeal is against the decision of Misc. Application No. 39 of 2020 and that the argument that there were an appeal No. 17 of 2020 before Mtumo PRM was discussed by the trial Magistrate and respondent denied to have filed that appeal. By way of admission, Mr. Adam submitted that Misc. Civil Application No. 23 of 2020 was filed on 17/08/2020 while the appeal was filed on 28/08/2020. He held the view that since the appeal was not prosecuted, he could not submit on it. The learned counsel went on submitting that the District Court heard only Misc. Application No. 29 of 2020 whose decision was handed down on 29/01/2021 granting the prayers sought therein. He denied to have Misc. Civil Application No. 23 of 2020 to have been heard although there is a typed ruling and its decision was delivered on 19/10/2021 one year after Misc. Application No. 29 of 2020 was heard and determined. He said they do not recognize the latter application.

Mr. Adam rounded by remarking that a ruling from distinct Applications is not the respondent's fault. He shifted blames to the trial Magistrate who granted extension of time in two distinct applications and prayed that the respondent should not be condemned because after being granted extension

of time he filed an appeal which is now pending in the District Court. Having responded as such he implored this Court to dismiss the appeal.

Mr. Mbwilo's rejoinder was a reiteration of his submission in chief. On appeal No. 17 of 2020 he submitted that the magistrate did not rule out that the appeal was not filed by the respondent. He pressed that the filing of Misc. Application No. 23 of 2020 on 17/08/2020 and the appeal on 28/08/2020 did not remove the appeal from the registry. The learned counsel argued further that denying Misc. Civil Application No. 23 of 2020 was misleading because the respondent's counsel was to inform the court whether he filed it or not and what was its final verdict. On whether Misc. Application No. 23 of 2020 was heard or not, he submitted that proceedings indicate that it was heard in his presence and Mr. Mwanri. He concluded by terming the respondent's actions an abuse of the court process.

As I move on to dispose this appeal, I suggest to consider first the 2st ground of appeal because if answered in affirmative it has effect of disposing of the appeal hence there will be no need of discussing the 1st ground. In this ground the appellant argued that the Hon. District Court erred in law when it granted extension of time while the applicant had filed Matrimonial Appeal No. 17 of 2020 which was dismissed on 21/10/2020.

I have closely examined the record of the trial court. It is apparent that the respondent filed Misc. Application No. 23 of 2020 on 17/08/2020. The

record of the District Court is clear that this application was heard and determined. I disagree with both counsel's contention that it was not heard or that it was dismissed. Conversely, it was heard and ruling was delivered on 19/10/2021 extending time to lodge appeal to challenge the decision in Matrimonial Case No. 10 of 2019. The record is also very clear that while this application was pending, the respondent filed Matrimonial Appeal No. 17 of 2020 which was dismissed for want of prosecution with costs on 21/10/2020. This information gathered from the record settles dust on the hot debate by the counsel for both counsel. It is further gathered from the record that on 02/11/2020 the respondent filed another application for extension of time on the same matter via Misc. Application No. 39 of 2020 which was also granted on 29/01/2021. It is worthy noting that the 14 days granted in Misc. Application No. 23 of 2020 were not acted upon by filing the appeal. What is further astonishing, Misc. Application No. 39 of 2020 contains no paragraph referring to Misc. Application No. 23 of 2020. Therefore, the two applications were filed on different dates, in the same court and having similar prayers. The District Court was allured and fell in the trap of giving two similar orders. The trite position, in my view, is that once a party has delayed to file an appeal after the period has been enlarged, he has to file another application for extension of time giving reasons why he failed to file an appeal complying to the initial order which enlarged period. It is quite improper to file another

fresh application. Leaving that alone, the respondent filed a Matrimonial Appeal while the first application was pending. This was confusing as the respondent filed it before being granted the extension of time. Mr. Mbwilo's castigates the respondent's action, terming it an abuse of court process.

The law is settled in this respect. It is to the effect that, courts are enjoined to ensure that they protect themselves from any possible abuse of its powers or procedures in conduct of proceedings. They must as a matter of implicit obligation, guard against actions of unscrupulous parties who turn the courts into a theatre for endless, repetitive and frivolous litigations and actions which are known as abuse of court process. (See: **Zephrenus Clement Marushwa vs. The Attorney General & 4 others**, HC-Land Application No. 241 of 2018 (unreported) and Across jurisdictions, this term abuse has been a subject of judicial interpretation.

In **Uganda Land Commission vs. James Mark Kamoga and another S.C. CA 08/2004** quoted in the case of **Comform Uganda Ltd vs. Megha Industries (U) Ltd**, Misc. Application 1000 of 2014 held:

"Abuse of court process involves use of the process for improper purpose."

In the captivating decision in the Nigerian Case of **Amaefule & others vs. The State** (1998) 4 SCNJ 69 AT 387 Oputa J held:

"...abuse of process means abuse of legal procedure or improper use of the legal process."

It was further held that:

"... abuse of court process creates a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process."

From these excerpts, the critical issue to be resolved is whether it can be said that the respondent actions are abuse of court process. My scrupulous reading of the cited decisions and a review of the actions taken by the respondent convey a message that the act of filing Misc. Application No. 23 of 2020 and at the same time Matrimonial Appeal No. 17 of 2020 and later Misc. Application No. 39 of 2020 are acts which are considered to be an abuse of court process.

The issue for determination in Matrimonial Appeal No. 17 of 2020 stemmed from the Matrimonial case in the Uyole Primary Court. It was the proceedings of the same case that bred Misc. Application No. 23 of 2020. Therefore, the respondent was first to prosecute the application intended for extension of time and later file the Matrimonial Appeal upon being allowed to do so. Otherwise, the orders in Matrimonial Appeal would have been given in

vain. In the similar intention, the applicant improperly filed Application No. 39 of 2020 which concerned extension of time. There is no indication on what was done to the order of the District Court dated 19/10/2021 extending time for 14 days to file appeal out of time. Similarly, the dismissal order dated 21/10/2020 was never set aside. While all these were still pending, the applicant came with a new Misc. Application No. 39 of 2020 which again made the District Court to give a similar ruling extending time to file appeal to challenge the same decree.

It is indeed a settled law that a litigant has no right to pursue paripasua two processes which will have the same effect in court at the same time with a view of obtaining victory in one of the process or both. See **Tangerm Construction Co. Limited & Technocombine Construction Limited (a Joint Venture) vs. Tanzania Ports Authority**, Commercial Case No. 117 of 2015 (HC - Commercial Division DSM).

The respondent's actions were contrary to good order established by usage that is a complete departure from reasonable use. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In humble view, the two processes are in law not available to the respondent. He could not lawfully file Misc. Application No. 23 of 2020 and Misc. Application No. 39 of 2020 seeking similar reliefs relying on substantially the same grounds. The

pursuit of the second application amounts to abuse of court or legal process which as I introduced above courts are enjoined not to condone to. More-so the respondent could not lawfully file Matrimonial Appeal No. 17 of 2020 while waiting to be granted extension of time through Misc. Application No. 23 of 2020 which in my view was a calculation of pre-empting the decision.

The upshot of it all is that, this appeal has absolutely legal basis. I agree with Mr. Mbwilo that indeed, the respondent's actions were nothing but abuse of court process. Since the finding on the 2nd grounds suffices to dispose of the appeal, the need for considering the 1st ground of appeal does not arise. Appeal allowed.

It is so ordered.

DATED at **MBEYA** this **14th day of July, 2022**



A handwritten signature in black ink, appearing to be "J. M. Karayemaha", written over a horizontal line.

J. M. KARAYEMAHA
JUDGE