

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

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**PC. CIVIL APPEAL NO. 1 OF 2022**

**UPENDO KABENGA ..... APPELLANT**

**VERSUS**

**FRANK MWAMPASHI ..... RESPONDENT**

(Appeal from the Judgment and decree of the District Court of Sumbawanga at  
Sumbawanga)

(G. J. William, RM)

Dated 27<sup>th</sup> day of December 2021

In

(Civil Appeal No. 7 of 2021)

**JUDGMENT**

Date: 19/05 & 29/07/2022

**NKWABI, J.:**

The appellant instituted a matrimonial cause in the trial court for divorce, division of matrimonial properties, and maintenance of the issues of the hapless marriage. In an ex-parte judgment, the trial court decided in favour of the appellant in respect of all the reliefs the appellant was seeking.

It would appear that after the respondent became aware of the decree of the trial court, pursued to set aside the ex-parte judgment. The trial court

after hearing the application, dismissed it as it found that it had no merit.

The trial court had this to say, in its ruling:

*"Mahakama baada ya kuangalia maombi ya mleta maombi na majibu ya mjibu maombi, mahakama hii inaona kuwa mleta maombi alipelekewa wito wa kuitwa shaurini lakini hakupatikana na kupelekea Mahakama hii kusikiliza shauri hili kwa upande mmoja kwa mujibu wa kanuni ya 23 (1) ya kanuni za utaratibu wa madai katika mahakama za mwanzo. Hivo Mahakama hii inaona kuwa nafuu pekee aliyonayo mleta maombi ni kukata rufaa kwani bado yuko ndani ya muda ..."*

The respondent was dissatisfied with the ruling of the trial court. He appealed to the District Court which allowed his appeal in which the respondent had prayed for reversal of the decision of the trial court dated 14/09/2021 which dismissed his application for setting aside the ex-parte judgment, the District Court quashes the ex-parte judgment dated 19/08/2021, that the matrimonial cause be ordered for trial de novo before another magistrate and any other orders the trial court would deem fit to grant. In allowing the appeal, this is what the district court observed:

*"I have passed through the trial court records, and I had heard all the party, I'm of the settled mind that there is no evidence that the appellant was duly served, since there is no affidavit of the process server that being the case, the appeal is meritoriously and must not fall, it is hereby allowed without costs."*

The decision of the District Court aggrieved the appellant in this Court who filed in this Court a petition of appeal which has length grounds of appeal. However, her main complaints in the grounds of appeal, can be gleaned that:

1. The district court erred in ignoring documentary evidence which are Annex "A" and annex "B".
2. That the district court erred in not discussing every and each ground of appeal instead gave a collective judgment in respect of all grounds of appeal and stated that no evidence proved the respondent was served while the respondent had shouted, he would not attend at the trial court to Msua Ward office.
3. The district court erred to set aside the order of maintenance of the issues of the marriage.

4. The district court erred in joining the grounds of appeal in his decision deciding divorce and division of matrimonial assets.
5. The district court erred in not considering the neglect by the respondent to repay the loan, who left it to the respondent to repay the loan to prevent the house mortgaged from being sold by the bank

Then, the appellant prayed that:

1. The appeal be allowed.
2. The divorce decree of the primary court be upheld.
3. Division of the matrimonial assets order of the primary court be restored.
4. Divorce certificate be handed to the appellant.
5. Maintenance amount for the children be increased.
6. Loan money at T.shs 4,750,000/= be refunded to the appellant.
7. Any other relief(s) which this honourable High Court may deem fit and just to grant.

The respondent resisted the appeal, urging this Court to find it misconceived and dismiss it with costs and any other relief as this Court may deem fit to

grant. Indeed, in the reply, the respondent further stated that the district court correctly held that there was no any evidence that the respondent was duly served with the summons.

At the hearing, both parties appeared in person, unrepresented. The Appellant adopted her grounds of appeal as her submissions. She maintained that she paid the loan through business and agriculture and was also assisted by her relative. She then prayed for justice.

Answering the appeal, the Respondent stated that he had no objection to the divorce decree that was issued. He prayed that the division of the matrimonial property be fair. He then abandoned his preliminary objection and prayed for justice as well.

To beef up her submissions in chief, the Appellant, in her rejoinder, insisted on her appeal. She contended that the Bajaji was bought by themselves so it is their property. She reiterated her prayer for justice.

I have carefully considered this appeal. I think that when one looks at the grounds of appeal in light of the holding of the district court, one will agree with me that this appeal is misconceived. In essence, the district Court found the appeal to be merited for there was no proof by affidavit of process server, as to the claim that the respondent had for a long time travelled away from Msua street. That position of the district court is supported by this Court.

The above holding of this Court suffices to dispose of the appeal in favour of the respondent. But that is not all. The respondent was said to have travelled away from Msua street in Sumbwanga district. That could be true, but the form that was filled in by the applicant that instituted the matrimonial cause in the Primary Court of Sumbawanga District at Sumbawanga Urban indicates that the respondent was residing in Majimoto, that is in Mlele District within Katavi region. I take judicial notice that Katavi region borders Rukwa region, so it is not far from Sumbawanga and since the appellant was aware that the respondent was residing in Majimoto area, summons ought to have been sent there and not in Msua street.

Failure to serve summons in accordance with the law and failure to prove service of the summons, entails that the hearing of the matrimonial cause ex-parte curtailed the right to a hearing to the respondent. Failure to accord a right to the hearing to the respondent by the trial court vitiated the whole proceedings of the trial court as stated in **Musa Chande Jape v. Moza Mohammed Salim**, Civil Appeal No. 141 of 2018 CAT (unreported) where it was held:

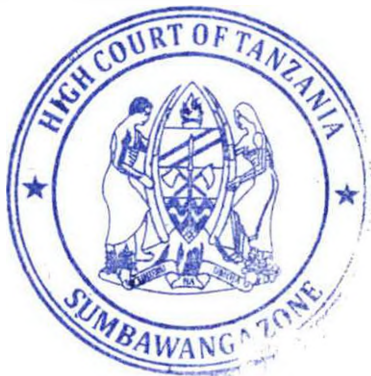
*"This Court has always emphasized that the right to be heard is a fundamental principle of law which courts of law must jealously guard against. See Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977. Therefore, a denial of the right to be heard in any proceedings would vitiate the entire proceedings."*

Since all the matters complained of by the appellant in her grounds of appeal could be determined in the hearing de novo which the district court gave as a relief, there is no need for me to discuss the grounds of appeal preferred by the appellant. All such controversies if any, shall be determined by the trial court in the course of hearing of this matter de novo.

In the upshot, I dismiss the appeal as it is wanting in merit. Given the circumstances of this case that the parties have to go back to the trial court for a trial de novo before another magistrate of competent jurisdiction and that they are still husband and wife, I order that each party to bear their own costs.

It is so ordered.

**DATED** at **SUMBAWANGA** this 29<sup>th</sup> day of July, 2022.



  
J. F. NKWABI  
**JUDGE**