

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 72 OF 2021

(Arising from the judgment and decree of the District Court of Kinondoni at Kinondoni in Matrimonial Appeal No.18 of 2018 before Hon. Mwingira, RM, dated 05th of May,2021, Original Matrimonial Cause No. 37 of 2018 before the Primary Court of Magomeni)

SAKINA HUSSEIN MWASA.....APPELLANT

VERSUS

SADICK MFAUME..... RESPONDENT

JUDGMENT

Date of last order: 29/03/2022

Date of judgment: 22/04/2022

KAKOLAKI, J.

This is a second appeal by Sakina Hussein Mwasa who is dissatisfied with the decision of the District Court of Kinondoni at Kinondoni in Matrimonial Appeal No. 18 of 2018, following dismissal of her appeal against the decision of the Primary Court of Magomeni in Matrimonial Cause No. 37 of 2018, which was entered not in her favour. Before the trial court the Respondent, a resident of Majohe ward within Ilala District petitioned for divorce decree, division of matrimonial properties and custody of four issues of marriage.

The matter could not go to full trial as the respondent admitted the claims as a result the consent judgment was entered by the trial court declaring parties marriage broken down irreparably as per section 110 of the Law of Marriage Act, Act No. 5 of 1971 and placed the custody of children to the respondent. Further to that, it divided the matrimonial properties to the parties in accordance with their agreement. Aggrieved with the said decision, the appellant appealed to the District Court of Kinondoni in her petition of appeal carrying two grounds of appeal, one of which centered on the jurisdiction of the trial court to entertain the matter the cause of action having arose from Majohe ward in another district. The appellate court found the appeal unmerited and dismissed it reasoning among others that the trial court had jurisdiction to entertain the matter as it could not force the parties to live together and that consent judgment could not be appealed against. Undaunted the appellant is before this court challenging the decision armed with three grounds one of which was dropped with leave of the court during hearing of this appeal. The remaining two grounds go thus:

1. That the Hon. Resident Magistrate of the first appellate Court erred in law and fact by declaring that since the appellant/applicant consented to the matter and the Court entered Judgment on consent, then the

issue of certificate from the Marriage Reconciliation Board was immaterial as the Respondent was barred from producing any further proof.

2. That the Hon. Resident Magistrate of the first appellate Court erred in law and fact by dismissing the issue of jurisdiction of the Magomeni Primary Court to entertain matrimonial case of the parties whose matrimonial home was/is at Majohe-Ilala District in Dar es salaam Region and at Donge Tanga Region.

Basing on those grounds the appellant is inviting this court to find the appeal is meritorious and proceed to quash the proceedings and set aside the decision of both lower courts.

Hearing of the appeal proceeded by way of written submissions as the appellant appeared represented by Mr. Charles G. Lugaila learned advocate while the Respondent enjoyed the legal aid of the Legal and Human Rights Centre who prepared the reply submission for him gratis. The submissions were filed in accordance with the scheduled orders save for the rejoinder submission in which the appellant found no need on doing.

Having perused both parties' fighting submissions as well as the record of appeal and considering the fact that there is an issue of jurisdiction of the trial court raised in the second of appeal and for the reasons to be apparent in the course of this judgment, I have found it just to start addressing first the issue of jurisdiction. It is submitted by Mr. Lugaila on this issue that, both parties being residents and having their matrimonial home at Majohe Ward within Ilala district where the cause of action arose, the Primary Court of Magomeni lacked territorial jurisdiction to entertain matter. He argued the Primary Court and its territorial jurisdiction is established under section 3 (1) and (2) of the Magistrates Courts Act, [Cap. 11 R.E 2019], that it is designated to exercise its powers within the district it is established. He said in Ilala District there are five primary courts in which Magomeni is not one of them for being in Kinondoni District hence lacked territorial jurisdiction to entertain their matter. He fortified his submission with the case of **Commercial Bank of Africa Tanzania Ltd Vs. Renatus Mtani**, Consolidated Labour Revision No. 909 and 911 of 2018 (HC-unreported) where this court quashed the proceedings and decision of CMA for Kinondoni District for entertaining the complaint arising from Ilala district. On the strength of that submission Mr. Lugaila invited this court to find the

proceeding were marred with illegality hence null and void, thus the same should be quashed and set aside all consequential orders thereto.

In rebuttal the respondent resisted the submission by the appellant contending that, the trial court was clothed with jurisdiction to entertain the matter derived from the provisions of section 18(1)(b) of the MCA, that gives power to the Primary Court to determine matrimonial proceedings. He submitted further that apart from that provision section 76 of the Law of Marriage Act, vests concurrent jurisdiction in matrimonial proceedings to the Primary, District and High Courts, hence no doubt that the primary Court of Magomeni when entertaining the parties matrimonial dispute had jurisdiction to so do. He thus implored the Court to find the appeal is without merit and dismiss it.

The term "Jurisdiction" is defined in Hulsbury's Laws of England, Vol. 10 paragraph 134 to mean:

"...the authority which as court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision."

It is trite law that, all courts in this land are creatures of statutes and their jurisdiction is purely statutory. This position was stated in the case of **Shyam**

Thanki and Others Vs. New Palace Hotel (1971) EA 199 where the erstwhile East African Court of Appeal held at page 202 thus:

"All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."

In light of the above position of the law every court must satisfy itself that it is clothed with jurisdiction to try the matter before the same proceeds to full trial. The jurisdiction can be either territorial, pecuniary or appellate jurisdiction depending on the subject matter. In this appeal the jurisdictional issue raised is whether the Primary Court of Magomeni had territorial jurisdiction to entertain parties' matrimonial dispute which cause of action arose from Majohe ward within Ilala District. As rightly submitted by Mr. Lugaila the Primary Court is established under section 3(1) and (2) of MCA which provides thus:

3.-(1) There are hereby established in every district primary courts which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the respective districts in which they are established.

(2) The designation of a primary court shall be the primary court of the district in which it is established.

In terms of section 3(1) of MCA a primary court is established in every district. As to the territorial jurisdiction subsection (2) of section 3 of the Act provides that, it exercises jurisdiction only within the district in which it is established and not outside the district. While I am in agreement with respondent's propositions that section 18(1)(b) of the MCA cloths the Primary Court with jurisdiction to entertain matrimonial proceedings I, distance myself from his submission that it is the same section which conferred the Primary Court of Magomeni with powers to hear and determine the matter arising outside the district of Kinondoni in which it is established. I so do as section 3(2) of MCA bars the primary court to hear and determine any matter arising outside the district from which it is established. It is from that understanding I find the Primary Court of Magomeni being the court designated to operate within Kinondoni district was not clothed to hear and determine the parties' matrimonial dispute from Ilala district. It follows therefore that the proceeding before it was tainted with nullity as well as its judgment and subsequent orders thereto. In similar vein since the its decision appealed to the District Court of Ilala resulted from a nullity there was not proper appeal before it hence the proceedings and judgment thereto were marred with nullity as well.

The above being the position this court is left without option than to invoke its revisional powers provided under section 44(1)(b) of MCA and proceed to quash both proceedings of the trial and appellate courts and set aside the judgments and orders thereto. The appeal is therefore allowed. The respondent is hereby advised to prefer a fresh petition guided by the law if he so wishes.

No order as to costs.

It is so ordered.

DATED at Dar es salaam this 22nd day of April, 2022.

E. E. KAKOLAKI

JUDGE

22/04/2022.

The Ruling has been delivered at Dar es Salaam today on 22nd day of April, 2022 in the presence of the Respondent in person and Ms. Asha Livanga, Court clerk and in the absence of the appellant.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

22/04/2022

