

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

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**MATRIMONIAL APPEAL NO. 09 OF 2021**

*(Arising from Misc. Civil Application No. 20 of 2019 at the High Court of Tanzania, Civil Appeal No. 6 of 2019 of Muleba District Court and Original Matrimonial Cause No. 7 of 2018 of Mubunda Primary Court)*

**GEORGINA JAMES.....APPELLANT**

**VERSUS**

**JAMES CLEMENCE.....RESPONDENT**

**RULING**

17 /03/ 2022 &25/03/2022

**NGIGWANA, J.**

This matter originated from Mubunda Primary Court within Muleba District in Matrimonial Cause No. 7 of 2018. In that case the appellant herein, petitioned to the trial court claiming for reliefs of divorce, division of matrimonial properties, custody and maintenance of the issue of marriage.

The brief facts giving rise to this appeal as per available records can be summarized as follows; The appellant alleged that she was married to the respondent in 1993 and both went on living a happy life until 2014, when misunderstanding in their marriage life started. She further claimed that in their marriage life time, they managed to acquire different properties but also were blessed with one child. The respondent resisted the petition alleging that the marriage had not broken down irreparably. He also disputed the existence of the properties acquired by joint effort.

At the end of the trial, the trial court was convinced that the marriage between the parties had broken down irreparably, hence the decree of divorce was granted. The trial court was also satisfied that the existence of properties acquired by joint effort was established, hence proceeded to order for division of matrimonial assets where by the banana farm, trees farm both located at Bisheke within Muleba District, One house located at Mubunda Centre within Muleba District, one plot located at Mubunda Centre within Muleba District, one bed, three (3) cows and three (3) hens were awarded to the appellant as it was alleged that she had already taken other properties such as cash Tshs. 7,000,000/=, one mattress, bed sheets and harvested crops.

On the other hand, the respondent was awarded one house located at Bisheke within Muleba District, three (3) beds, one motorcycle, two sheep, ten (10) cows, building bricks, one motor vehicle with page T. 167 CGR make Hiace. The rest of the properties were found to belong to the respondent because he acquired them before marriage. The prayer for custody and maintenance of the issue of marriage was dismissed by the trial court.

Aggrieved by the decision of the trial court, the appellant appealed to the District Court of Muleba vide Matrimonial Civil appeal No. 6 of 2019, armed with four (4) grounds a which were coached as follows: -

- 1. That, the trial court erred to state that the appellant had stolen some matrimonial properties from matrimonial house without proof to the Criminal Offence from authenticated authorities (Court of Law).*

2. *That the trial court erred in fact by making unequal and dissatisfied distribution of Matrimonial properties of which both parties in this appeal worked together to accumulated them.*
3. *That the trial court erred in law by not allowing or giving a chance to the Appellant to present or bring to the fateful court witnesses of the appellant.*
4. *That the trial court erred in law and fact to hear and determine suit by not writing in a judgment, all necessary and important facts what were stated by both parties during the hearing and some of which have been written are partly false.*

The District Court in its **"judgment"** dated 9/04/2019 dismissed the appeal with no costs.

Aggrieved by the decision of the District Court, the appellant has now come to this court armed with for (4) grounds of appeal which were coached as follows;

1. *That, the appellate court erred in law and fact for failure to answer the first raised ground of appeal, that; the trial court erred in law and fact to hold that the appellant stole some of matrimonial properties from matrimonial home and thus, those properties must form part of her distribution in favor of the Respondent, without first verifying itself with authentic proof of criminal judgment of the said offence against the appellant or any other related criminal offence from any relevant court.*

- 2. That, the appellate court erred in law and fact to give its decision basing on unreliable evidence adduced by the Respondent's side in trial court concerning ownership of matrimonial properties and proceed to bless unequal distribution.*
- 3. That, the appellate court erred in law and fact by making unequal distribution of matrimonial properties of which both parties got by their joint efforts.*
- 4. That, the appellate court erred in law and fact for deciding against the weight of evidence.*

Wherefore the appellant prays that this Hon. Court to allow this appeal with costs by quashing and setting aside the judgments of the lower courts. When the matter came for hearing, the appellant was present in person and represented by Mr. Gildon Mambo, learned advocate while the respondent was represented by Mr. Aaron Kabunga, learned advocate.

At the outset, before venturing in the submissions in support and against the appeal, Mr. Aaron Kabunga sought and was granted leave to address the court on the gross irregularity committed by the District Court of Muleba, allegedly discerned when he was preparing to appear for hearing.

Mr. Kabunga submitted that upon scrutiny of the proceedings of the District Court as found in the record of appeal, the said appeal was never heard by the District Court as the 1<sup>st</sup> appellate court.

Amplifying on this contention, Mr. Kabunga stated that, on 14/03/2019 when the appeal came for hearing before the District Court, the appellant

and the respondent were present, and when the appellant asked whether she was ready for hearing, she replied that she was not ready because her advocate was absent.

It is Mr. Kabunga's submission that, on the other hand, the respondent was ready for the hearing whereas the Magistrate ordered the hearing to proceed whereas the respondent was invited to take the floor, he adopted his reply to petition of appeal and urged the court to dismiss the appeal with costs. That from there, the matter was reserved for judgment.

Mr. Kabunga stressed that it is apparent that the appellant was not given the right to be heard. He added that, under the circumstances of the case, the Magistrate had only two options; **one, to adjourn the hearing due to absence of the appellant's advocate or two, to dismiss the matter for want of prosecution.** Mr. Kabunga ended his submission urging the court to issue the proper order for the interest of justice.

On his side, Mr. Gildon Mambo conceded that the district court had committed a gross irregularity. He submitted that there was no need to force the appellant to proceed with the hearing, taking into account the hearing of the said was never adjourned. He stressed that, constitutionally, the appellant had the right to legal representation, and since there was no hearing conducted by the District Court, it is in the interest of justice that this court vacate from addressing the grounds of appeal, and concentrate on the aforesaid irregularities and proceed to nullify and set aside the judgment and orders thereto, and order that Matrimonial Civil Appeal No. Appeal No.6 of 2029 be heard as per the law.

After careful consideration of the submissions and examination of the record of appeal especially the proceedings and the judgment of the 1<sup>st</sup> appellate court, as it relates to the point of law raised and under scrutiny, that is denial of the right to be heard and the imposition of improper orders, it is apparent that the 1<sup>st</sup> appellate court had committed gross irregularities capable of vitiating the proceedings, the purported judgment and orders thereto.

The records of the District Court revealed that on 26/02/2019 when the matter came for mention, the appellant informed the court of her intention to engage an advocate whose office is at Bukoba, as a result, the matter was adjourned and the hearing date was fixed to wit; 14/03/2019. In order to appreciate what transpired in the 1<sup>st</sup> appellate court, let the record speak for itself: -

***"Date: 14/03/2019***

***Corum: B. B.Nkomola-RM***

***Appellant: Present***

***Respondent: Present***

***Court: Appeal is for hearing***

***Appellant: Your Honour, my advocate is at Bukoba***

***Respondent: I am ready for hearing***

***Court: It is unfortunate that on 26/02/2019, the appellant informed this court that her advocate is at Bukoba. Even today when this appeal is for hearing the appellant once again informed this court that her advocate is at Bukoba. I have gone through the records; I have never seen correspondence from the advocate informing this court in one way or another in relation to the present matter. It is sufficient to say that the***

*appellant's contention amount to delay of this case. In this regard this court entertains no doubt to proceed with the matter in hearing.*

***B. B. Nkomola -RM***

***14/3/2019***

*Appellant's case starts*

***Appellant: (stands mute)***

***Respondent:*** *Your Honour, the matter is for hearing. I have nothing to add, however, I pray this court to read and consider the reply to the petition of appeal. I pray this court to consider the decision of the trial court. I pray this court to dismiss the appeal with costs.*

***B. B. Nkomola- RM***

***14/03/2019***

***Court: Judgment on 8/04/2019"***

It is trite that the right to legal representation is a fundamental ingredient of a right to a fair trial. Where a party to a case shows his/her intention to engage an advocate of his/her own choice, the court is duty bound to give him or her a reasonable opportunity to exercise this right. However, a refusal of further unnecessary and unjustifiable adjournments will certainly be justified and the hearing can then proceed without the party being legally represented, and if the plaintiff or the appellant refuses to proceed with the hearing, the matter will definitely be dismissed for want of prosecution, and if the defendant or the respondent refuses to proceed with the hearing, the matter will definitely proceed ex-parte. Needless to say, reasonable opportunity for the party to exercise the said right will depend on the circumstances of each case.

In the circumstances of the present matter, the appellant was denied a reasonable opportunity to secure the presence of her legal representative and that amounted to denial of the right to be heard, the irregularity which rendered the trial unfair. Taking into account what transpired in the 1<sup>st</sup> appellate court, it is apparent that the decision was reached arbitrarily and contrary to rules of justice. The Court of Appeal of Tanzania in the case of **Rukwa Auto Parts and Transport Ltd Versus Jestina George Mwakyoma**, [2003] TLR 251 had this to say;

*"In this country, natural justice is not merely a principal of common law; it has become a fundamental constitutional right Article 13 (b) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part;*

**(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."**

In another case, **Abbas Sherally and Another Versus Abdul Fazalboy, Civil Application No. 33 of 2002**, the Court of Appeal emphasized the importance of the right to be heard as follows:-

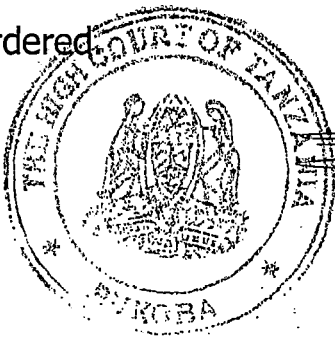
*"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice". See also **Danny Shasha***



**versus Samson Masoro and 11 Others**, Civil Appeal No.298 of 2020  
CAT at Musoma. (Unreported)

Now, being guided by the herein above cited authorities, it is apparent that the decision of Muleba District Court giving rise to this appeal cannot be allowed to stand on account of being arrived at in violation of the constitutional right to be heard. This suffices to nullify and put to rest the impugned decision and, for that matter, I refrain from taking any stand with respect to any of the four grounds of appeal raised by the appellant.

In the upshot, I hereby invoke revisional powers of this court to nullify the proceedings of the District Court of Muleba in Civil Appeal No.6 of 2019 conducted on **14<sup>th</sup> day of March 2019**, quash and set aside judgment and orders thereto. Having done so, the case file is remitted to the District Court of Muleba to be assigned to another Magistrate for him or her to proceed with the hearing of the appeal according to law. Given to the fact that the anomaly was caused by the 1<sup>st</sup> appellate court, and the matter being a matrimonial one, each party shall bear its own costs. It is so ordered.



E.L. NGIGWANA  
JUDGE

25/03/2022

Ruling delivered this 25 the day of March 2022 in the presence of the Appellant and her advocate Mr. Gildon Mambo, Respondent and his

advocate, Mr. Frank Karoli for Kabunga Associates Advocates, Mr. E .M. Kamaleki, Judges Law Assistant, and Ms.Tumaini Hamidu, B/C.



  
E.L. NGIGWANA

JUDGE

25/03/2022.