

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO.24 OF 2021

(Arising from Masasi District Court at Masasi in Matrimonial Appeal No.4 of 2021 before Hon. B.K Kashusha, RM and originating from Primary Court of Lisekese in Matrimonial Case No.88 of 2020 before Hon. B.S. Nyaki, PCM)

TUMAINI SAIDI MWIKONI.....APPELLANT

VERSUS

ASHRAF ABDUL AYUB.....RESPONDENT

JUDGEMENT

23/6/2022 & 18/10/2022

LALTAIKA, J.:

The appellant, **TUMAINI SAIDI MWIKONI**, filed a civil suit against the respondent at Lisekese Primary Court vide Civil Case No.88 of 2020. The appellant claimed against the respondent the sum of money TZS 2,200,000 which were borrowed by the respondent on different occasions on small amounts for tomato farming purposes. After a full trial, the trial court was convinced with the case of the appellant and ordered the respondent to pay the appellant Tshs. 2,200,000/= immediately but without costs.

Dissatisfied, the respondent appealed to the District Court of Masasi vide Matrimonial (sic) Appeal No.4 of 2021. However, before the first appeal was registered the respondent made an application to the same seeking an extension of time to lodge his appeal out of time. The respondent's application was granted. Thus, the respondent appealed to the first appellate court. After hearing the parties, the District Court delivered its judgment in favour of the respondent. Aggrieved with the decision of the first appellate court, the appellant has lodged her appeal to this court by way of petition of appeal comprising a total of five grounds of appeal as follows: -

- 1. That, the honourable court erred in law and fact by setting aside the whole decision of the Lisekese Primary Court by holding that the Appellant gave the Respondent the said amount of money to wit 2,200,000/=Tshs (Two Million and two hundred thousand) under love and affection and hence wrongly applied the principles held in Balfour vs. Balfour [1919] 2 KB 571.*
- 2. That, the honourable court erred in law and fact by setting aside the whole decision of the Lisekese Primary Court by disregarding the oral contract entered between the appellant and the respondent which proved that the respondent borrowed money from the appellant for the purpose of running his garden (farming), simply because there was no written contract to that effect while the law recognizes the oral agreement.*
- 3. That, the honourable court erred in law and fact by setting aside the whole decision of the Lisekese Primary Court while the appellant proved her case on balance of probabilities.*
- 4. That, the honourable court erred in law and fact by setting aside the whole decision of the Lisekese Primary Court which was on pure Civil Case but without any reasons it changed from pure civil case to Matrimonial Appeal.*

5. That, the honourable court erred in law and fact by setting aside the whole decision of the Lisekese Primary Court without evaluating properly the evidence of the appellant and his witness namely Hashimu Saidi Mkapa (VEO) to whom the admission of the said debt by the respondent was made.

On 24/2/2022 this court ordered the matter to proceed ex parte after being convinced that the appellant has made several attempts to secure the attendance of the respondent but in vain.

On 23/6/2022 this matter came for ex parte hearing. The appellant appeared in person and unrepresented. Arguing for her appeal, she submitted that it was the decision of this court that the matter would proceed ex parte because the respondent deliberately avoid entering appearance. The appellant further submitted that the decision of the Primary Court be uphold. The appellant went further and argued that the appeal before the first appellate court was filed out of time. The appellant stressed that the respondent lied that he was taking care his sick father while it was not the case because respondent's father died much earlier. The appellant contended that her case was changed from Civil Appeal No. 88 of 2020 to Matrimonial Appeal No. 88 of 2020.

Having gone through the appellant's submission, the records of the lower courts and the grounds of appeal, I am inclined to determine the appeal. Firstly, I will start the determination of this matter with the fourth ground of appeal where the appellant asserts that the first appellate court

erred in law and fact by setting aside the whole decision of the Lisekese Primary Court which was a pure Civil Case to Matrimonial Appeal without assigning any reasons.

As I alluded to earlier in the introductory part of this judgment, I clearly indicated that the appellant filed a civil suit against the respondent claiming the sum of money Tshs.2,200,000/= being money taken on different occasions by the respondent from the appellant for tomato farming. To prove that, I would like to reproduce an extract of the claim via J/PCF.52 which is as follows: -

"Mdai anadai fedha Tshs.2,200,000/= fedha ambazo mdaiwa alikuwa anamkopa mdai kwa ajili ya kuanzisha mradi was shamba la nyanya,hivyo alikuwa anachukua fedha kwa mdai kila anapohitaji huduma la shamba alikuwa anachukua fedha kidogo kidogo hadi kufikia kiasi cha Tshs.2,200,000/= anachodaiwa huyo hadi leo mdaiwa hajarejesha fedha hizo."

Apparently, the trial court adjudged in favour of the appellant by ordering the respondent to pay the appellant Tshs.2,200,000/= without costs. When the respondent herein appealed to the first appellate court filed his Petition of Appeal was described as:

"Matrimonial Appeal No.....of 2021, originating from the decision of Chikundi (sic) Primary Court in Matrimonial Case No.88 of 2020 delivered on 22/12/2020 by Hon. Nyaki B.S. PCM".

The first appellate court registered the matter with the erroneous appeal type, incorrect name of the originating court and incorrect original

case type. The matter at the first appellate court appeared as Matrimonial Appeal No.4 of 2021 and originating from decision of Primary Court of Masasi at Lisekese in Matrimonial Cause No.88/2020 by Hon. Nyaki B.S.-RM (sic). In view of the above observation, I am of the settled position that the appeal at the first appellate court was erroneously registered because the original matter at the trial court was registered as "shauri la madai Na. 88/2020" and not "Shauri ya Madai ya Ndoa".

Now, the act of changing the matter type from the normal civil case to matrimonial appeal is fatal because it has affected the nature of the claim brought by the appellant at the court of the first instance. It has also affected the intention and perception of the party who brought the matter at the trial court. Furthermore, it has affected the way the matter was supposed to be properly registered in a proper register of the first appellate court.

The mere statement of the respondent herein that the appellant was his fiancée and was given money based on their love affairs does not entitle the respondent and the first appellate court to change the matter type from normal civil case to matrimonial cause/appeal. To this end, I count this act as lack of due diligence and incompetence shown and done by our judicial staffs and officer from the beginning of registering the appeal to the moment of delivering the impugned judgment.

I am inclined to hold that anything done in Matrimonial Appeal No.4 of 2021 by the first appellate court which originated from Matrimonial Cause No.88 of 2020 of the Primary Court of Masasi at Lisekese was illegal. The reason being that the first appellate court had dealt with the original case which was not brought it and by the proper parties. It is undisputable that Matrimonial Cause No.88 of 2020 from the Primary Court of Masasi at Lisekese does not feature the parties who were before the first appellate court and who are now present before this court.

Based on that observation, I proceed to nullify proceedings, judgment and orders of the District Court of Masasi emanated from Matrimonial Appeal No. 4 of 2021 the same being originated from the Primary Court of Masasi at Lisekese in Matrimonial Cause No.88 of 2020 before Hon. B.S. Nyaki, PCM.

Having done so, there is nothing which exist from the first appellate court which can be entertained by this court thus. I cannot proceed with the determination of the rest of the grounds of appeal brought by the appellant. To this end, I hereby declare that the decision of the Primary Court of Masasi at Lisekese in Civil Case No.88 of 2020 decided by Hon. B.S. Nyaki, PCM is a valid decision up to now and which, if desired by the appellant herein, is subject to execution.

In addition, I should put the record clearer that Civil Case No.88 of 2020 from the trial court has never been challenged by either party in any court since it was delivered on 22/12/2020. For the interest of justice, I order no costs to the appellant since the matter at the appellate level appears to be a matrimonial appeal.

It so ordered.



Court:

E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

**JUDGE
18.10.2022**

This Judgment is delivered under my hand and the seal of this Court on this 18th day of October 2022 in the presence of Tumaini Saidi Mwikoni, the appellant and in the absence of the respondent.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

**JUDGE
18.10.2022**