

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 111 OF 2021

*(Arising from Kinondoni District Court Matrimonial Appeal No. 52 of 2020 Originating
from Kimara Primary Court Matrimonial Cause No. 14 of 2019)*

ASIA WILSON NGULWA.....

APPELLANT

VERSUS

BURTON WALONDE NYEREMA.....

RESPONDENT

JUDGMENT

13th & 24th October, 2022

BANZI, J.:

This appeal traces its origin from Kimara Primary Court in Matrimonial Cause No. 14 of 2019 where the Appellant Asia Wilson Ngulwa petitioned for divorce, maintenance of children and division of matrimonial assets basing on customary marriage contracted in 2003. After hearing the evidence of both parties, the trial Court declined to issue divorce as there was no valid marriage due to pre-existing marriage between the Respondent and another woman. However, the Respondent was ordered to pay Tshs.150,000/= per month as maintenance of their two children. Aggrieved with that decision, the Appellant appealed to Kinondoni District Court vide Matrimonial Appeal No 52 of 2020 where her appeal was dismissed for want of prosecution after she failed to file her written submission as per scheduled order. Still

aggrieved, she appealed to this Court with one ground praying to quash and set aside the dismissal order of the District Court.

When this appeal was called for hearing, the Appellant appeared in person and unrepresented while the Respondent was represented by Mr. Nikolus Kashililika, learned Advocate. The appeal was argued orally.

The submission of the Appellant was very brief. It was her contention that, upon appearance before the District Court, she prayed to argue the appeal orally but counsel for the Respondent insisted to argue by way of written submission. Consequently, she conceded to argue by way of written submission. Thereafter, she went to TAWLA office as she was under legal aid services but she was informed that, the lawyer who assists her has gone on safari. After receiving such information, she went back to inform the Court and was directed by presiding Magistrate to write a letter. Following that, she wrote two letters on 8/9/2020 and on 21/9/2020 expressing her interest to argue the appeal orally. Likewise, on the date fixed for mention, she informed the presiding Magistrate about her prayer but the appeal was dismissed. On her view, it was not proper to dismiss her appeal under those circumstances and thus, she prayed for her appeal to be allowed.

On his part, Mr. Kashililika, learned counsel for the Respondent submitted that, according to the scheduling order made on 2/9/2020, the

Appellant was supposed to file her submission on or before 9/9/2020; the Respondent's reply on or before 16/9/2020 and rejoinder (if any) on or before 23 /9/2020 while on 24/9/2020 the case was scheduled for mention. However, the Appellant failed to comply with the scheduled order despite the fact that, she was receiving the legal aid services from TAWLA. It was further his argument that, scheduling order must be complied with and failure to file chief submission amounts to failure to prosecute the appeal. He supported his argument by citing the case of **Godfrey Kimbe v. Peter Ngonyani**, Civil Appeal No 41 of 2014 CAT at Dar es Salaam (unreported). Although he conceded about the Appellant informing the Court through two letters and on the mentioned date about absenteeism of her lawyer from TAWLA and her wishes to argue orally, but to his view, what she did was not the proper procedure considering that, she did not produce any evidence to support her claim. In that regard, he prayed for this appeal to be dismissed with costs.

Having carefully considered the records of the lower courts, the petition of appeal and submissions of both sides, the main issue for determination is whether it was proper for first appellate Court to dismiss the appeal under the prevailed circumstances.

It is common knowledge that, an appeal or application can be argued orally or by way of written submission. Equally, as a matter of practice when the appeal or application is argued by written submission, depending on circumstances of each case, after filing a rejoinder, the matter is normally scheduled for mention with a view of fixing judgment/ruling date after satisfying that submissions were filed within time. It is also the practice of Court that, on the date of mention, it is when scheduling order is vacated following a prayer from either party by granting extension of time if the submission was not filed within time. Likewise, it is a settled law that, failure to lodge written submissions after being so ordered by the Court is tantamount to failure to prosecute or defend one's case. Refer to unreported decisions of the Court of Appeal of Tanzania in the cases of **Godfrey Kimbe v. Peter Ngonyani** (*supra*) and **Patson Matonya v. The Registrar Industrial Court of Tanzania and Another**, Civil Application No. 90 of 2011

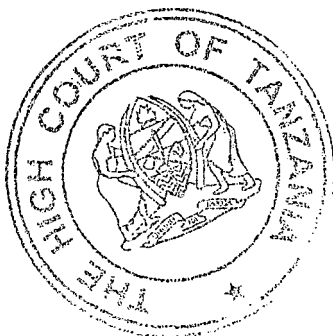
In the instant matter, it is undisputed that according to the record of the first appellate Court, on 2/9/2020 after both parties agreed to dispose the appeal by way of written submission, the Court ordered that, the Appellant to file her submission on or before 9/9/2020, the Respondent on or before 16/9/2020 whereas, rejoinder (if any) on or before 23 /9/2020 and

the case was scheduled for mention on 24/9/2020. It is also undisputed that, on 8/9/2020 one day before the deadline, the Appellant through a letter informed the Court that her lawyer from TAWLA who assists her to draft the submission is on safari and she prayed to make her submission orally. On 21/9/2020, the Appellant wrote another letter expressing her failure to file her submission within time and requested the Court to argue her appeal orally. According to the record, both letters were received by the first appellate Court.

Apart from that, on 24/9/2020 when the appeal was called for mention, the Appellant assigned the reason for failure to file her submission and she prayed to argue her appeal orally. However, the first appellate Court proceeded to dismiss the appeal for want of prosecution on the ground that, the Appellant intentionally disrespect the court order for unknown reason. As stated herein above, I am very much aware with the principle of the law that, failure to file submission after being ordered by Court is as good as failure to prosecute or defend a matter. See also the case of **National Insurance Corporation (T) Ltd and another v. Shengena Limited**, Civil Application No. 20 of 2007 CAT (unreported). But it is clear that, in the case at hand, the Appellant made some efforts to inform the Court her inability to file written submission and requested to be allowed to submit her

appeal orally. Apart from those efforts which she made through letters, on the date of mention, the Appellant assigned the reason for her failure to file written submission and prayed to argue orally. That in itself would be a sufficient reason for presiding Magistrate to vacate the scheduling order considering that, the Appellant was unrepresented. Thus, the conclusion by the first appellate Court that, the Appellant intentionally disrespect the Court order for unknown reason is unfounded considering the fact that, the Appellant had assigned reason orally before the Court as well as through her two letters.

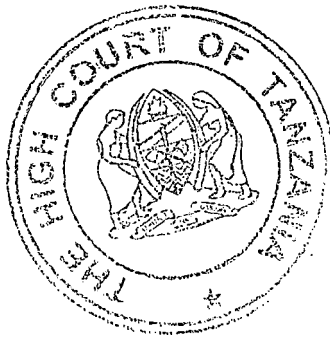
That being said, I find the appeal merited and I allow it by quashing the ruling of the first appellate Court dated 24th September, 2020 and order Matrimonial Appeal No. 52 of 2020 to be heard orally before another Magistrate with competent jurisdiction. Owing to the nature of the matter, each party shall bear its own costs.



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I. K. BANZI
JUDGE
24/10/2022

Delivered this 24th October, 2022 in the presence of the Appellant in person and Mr. Nikolus Kashililika, learned counsel for the Respondent.



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I. K. BANZI
JUDGE
24/10/2022