IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISRTY

AT DAR ES SALAAM

CIVIL REVIEW NO. 30 OF 2018

WILSON NYINGE.....APPLICANT

VERSUS

IRENE SHAO.....RESPONDENT

[Application from the Decision of High Court of Tanzania at Dar es Salaam.]

(Hon. I.P. Kitusi, J.)

dated the 24th day of May, 2018
in
Civil Appeal No. 56 of 2017

RULING

28th April, 2020 & 20th July, 2022.

S.M. KULITA, J.

This is a civil application for review. It has been filed by the Applicant under Order XLII Rule 3 of the Civil Procedure Code [Cap. 33 RE 2002]. In a nut shell, the information as can be gathered from the records is that, the Respondent herein had instituted a Matrimonial Cause No. 11 of 2016 at Kibaha District Court against the Applicant herein. The same was

decided on 25th November, 2016. Both parties were aggrieved with that decision. Hence, both appealed to the High Court of Tanzania.

As there were two appeals on the same decision, they were thus consolidated. Following that consolidation, the two appeals were consolidated into the Civil Appeal No. 56 of 2017 which was filed by Irene Shao, the Respondent herein.

Further, the records show that, the Applicant herein had also raised a preliminary objection on the Respondent's appeal. The preliminary objection was to the effect that, the Respondent's appeal has been filed in contravention of sections 80(2) and 80(3) of the Law of Marriage Act. That is, the Respondent's appeal was lodged directly at the High Court instead of being lodged at the trial court.

In disposing of the appeal, the High Court decided to order hearing of both the preliminary objection and the appeal to take place at the same time. The same was done orally.

Following that hearing, finally the High Court sustained the preliminary objection as raised by the Applicant herein. On that account, the High Court then, proceeded to struck out the consolidated appeal.

That decision too aggrieved the Applicant herein, hence made application for review before this court on seven grounds which can be summarized into five as follows, **one,** it was wrong to dismiss the consolidated appeal while the sustained preliminary objection was raised by the Applicant herein against the Respondent's appeal, **two,** it was wrong for the appellate court to confuse calling the Applicant as Appellant and sometimes Applicant being referred to as Respondent, **three,** it was wrong to award costs in a matrimonial case, **four,** it was wrong to struck out the Applicant's appeal without assigning reasons for doing so and, **five**, it was wrong for the appellate court not to state that it consolidated appeals of both parties.

On 3th September, 2019, the matter was scheduled for hearing through written submissions. Both parties complied with it. Mr. Saiwelo Kumwenda, Advocate represented the Applicant, whereas the Women's Legal Aid Centre represented the Respondent.

Submitting in support of the first and fourth grounds Mr. Saiwelo stated that, it was the Applicant who raised a preliminary objection against the Respondent's appeal. He added that, he was surprised that his appeal too was dismissed while the sustained preliminary objection was against the Respondent's appeal. Mr. Saiwelo formed an opinion that, as the

Applicant's appeal was not considered, then it was not proper to struck it out on account of the preliminary objection which was raised against the Respondent.

Concerning ground number two, Mr. Saiwelo submitted that, when the parties' appeals were consolidated, they acquired number 56 of 2017. He added that, in that appeal number 56 of 2017, Irene Shao was the Appellant and Wilson Nyinge was the Respondent. In this ground Mr. Saiwelo stated that, the decision in the appeal No. 56 of 2017 the Respondent was sometimes referred as the Appellant and vice versa. To him this was an error. He added that, the same error has invalidated the sanctity and quality of the judgment.

On ground number three, Mr. Saiwelo submitted that, as the appeal No. 56 of 2017 was dismissed on account of the sustained preliminary objection, then he formed an opinion that, it was not proper to condemn the Applicant to pay costs.

On ground number five Mr. Saiwelo submitted that, there is nowhere in the decision of Appeal No. 57 of 2017 stating that the said case number carries a consolidation of appeals. To him this was an error.

In reply thereto the Respondent submitted that, it is true that in the High Court, both parties' appeals were struck out for being lodged directly in the High Court, rather than, in the trial court. Concerning the Applicant's application, the Respondent condemned it for being a delaying tactic.

Further, the Respondent was of firm views that, for the best interest of the child, it was proper for her being given custody of the last child. He went ahead contending that, it was proper too for the applicant being ordered to pay for the maintenance of the child at the tune of Tshs. 200,000/=. She added further that, it was also proper when the trial court ordered the division of the matrimonial landed property.

Rejoining the same, Mr. Saiwelo submitted on the issue of playing delaying tactic that, the Applicant has legal right to utilize the available remedies when aggrieved with any decision.

Concerning custody of the issues of marriage, Mr. Saiwelo started by putting it clear that, the trial court placed under custody of the Respondent only one issue of marriage. He added that due to the fact that the Respondent is married to another man who does not want to live with his daughter, then the Respondent has left the child with her old aunt. He further added that, as the said issue of marriage is now of above

7 years of age, the Applicant prayed the same to be placed under his custody.

Concerning the division of the landed property Mr. Saiwelo submitted that, the Respondent provided no exhibit to prove that she contributed in the making of the divided landed property. He added that, even the domestic works at their home were used to be done by the House Girls who were paid by the Applicant. With this, he was of the considered opinion that, it was wrong to declare the house in question as a matrimonial property.

That was the end of both parties' submissions.

I have earnestly passed through the available records and taken into consideration the parties' submissions. The issue for consideration is whether the applicant's application is meritorious.

The law on applications for review is now well settled. The Court of Appeal of East Africa in **Lakhamshi Brothers Ltd vs R. Raja - Civil Application No. 6 of 1966)** did observe that; -

> *"In a review the court should not sit on appeal against its own judgment in the same proceedings. In a review, the court has inherent jurisdiction to recall its judgment*

in order to give effect to its manifest intention on to what clearly would have been the intention of the court had some matter not been inadvertently omitted."

Further, in the case of **Karima Kiara v. Republic, Criminal Application No. 4 of 2007 CAT Dodoma** (unreported) it was observed that;

The principle underlying review is that the court would have not acted as it had if all the circumstances had been known. Therefore, review would be carried out when and where it is apparent that-

"First, there is a manifest error on the face of the record which resulted in a miscarriage of justice. The applicant would therefore be required to prove very clearly that there is a manifest error apparent on the face of the record. He will have to prove further, that such an error resulted in injustice (see Dr. Aman Walid Kabourou vs The Attorney General and Another – Civil Application No. 70 of 1999 - unreported).

Second, the decision was obtained by fraud.

Third, the applicant was wrongly deprived the opportunity to be heard.

*Fourth, the court acted without jurisdiction (**see C.J. Patel vs Republic – Criminal Application No. 80 of 2002**).*

Taking into consideration the principles of law on the applications for review as quoted above, the issue is whether this current application fits in. In determining this issue, I am determined to deal with the grounds for review one after the other while picking them randomly.

Concerning the first, third and fourth grounds for review, I have earnestly read between the lines the entire decision of the high court titled Civil Appeal No. 56 of 2017 dated 24th May, 2018. As alluded above that, that decision concerns two consolidated appeals of the parties herein. Again, it is not in dispute that, the Applicant herein is the one who raised preliminary objection as against the Respondent's appeal.

Further, it is apparently seen on the face of records that, the preliminary objection sustained and the entire appeals were struck out. It is further apparently seen that; the Applicant's appeal was also affected as it was struck out after the preliminary objection sustained. Worse

enough, the Applicant's appeal was struck out without any reason for doing so. It was thus not attended at all.

Furthermore, as costs do follow the course, then it was not proper to condemn the Applicant herein to pay costs while it was the Respondent's appeal that has failed following the preliminary objection raised by the Applicant herein.

I am settled in my mind that, these grounds for review as they are apparent on the face of records, a find them to be meritorious. On the question of what should be done on the unattended Applicant's appeal, I will come to it later on.

Concerning the second ground for review, all most throughout the entire judgment, if I were to quote it, then I would quote the whole of it. Let it suffice to say that, throughout the entire judgment, it is apparently seen that, the Applicant herein was confused for being called Appellant and the Respondent herein has been confused for being called the Applicant. This ground too is meritorious as, it is apparently seen on the face of record and that said error brings confusion as well.

With regard to the last ground for review, the same is also apparent on the face of it that, the title of the case is "CIVIL APPEAL NO. 56 OF

2017". But the same, talks of two consolidated appeals. It ought to have been titled showing the two numbers of the appeals which were consolidated. As this too is apparently seen on the face of records, I find this ground for review too meritorious.

Back now to the issue of the un-attended appeal of the Applicant herein. As the Applicant's appeal ought to have been determined in the decision in question, then this is the right place to determine it now as I hereby do.

The Appellant's appeal was centered on the division of the matrimonial properties, particularly the house in question and the custody of one issue of marriage, namely Mercy.

Concerning the house in question, the lower court's records are clear that, the Applicant herein when cross-examined by the Respondent, he admitted that, the Respondent is entitled to a share from the said house. He rightly gave the reason being that, it was built during the subsistence of their marriage. Taking into consideration of only one thing that, the house in question was built during the subsistence of their marriage, even if it was to be taken that the same was built by the Applicant's money solely, yet the Respondent's duty of bearing those two issues of marriage, rearing them and making home comfortable for the

Applicant, those acts amount to the Respondent's contribution towards the acquisition of the house in question. See, **Eliester Philemony Lipangahela v. Daudi Makuhuna, Civil Appeal No. 139 of 2002**. See also, Section 114-(1) which provides that the court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale. The provision further states at Subsection (2)(b) that in exercising the power conferred by subsection (1) the court shall have to regard the extent of the contributions made by each party in money, property or work towards the acquiring of the assets.

On that account, I see no point to fault the trial Magistrate for deciding that, the same is a matrimonial property, hence subject to division. On that note again, upon considering the rate of contribution in the acquisition of the said property, I find the Applicant herein entitled to 60% while the Respondent deserves 40% of the share of the house.

Concerning the issue of custody of the issue of marriage, Mercy, the Applicant lamented that, the child is now above the age of 7 years and that, the Respondent is married to another man who shows no interest to

live with the child, as a result, she has been deserted to the Respondent's aunt who is old. He went further warning the court that, if the court forces the Respondent to live with the child, her husband might mistreat the child. To prove the said child's age and that the Respondent is married to another man, the Applicant provided the court with the birth certificate of Mercy and the marriage certificate of the Respondent with that other man.

On her part the Respondent just prayed that Mercy continues to be under her custody for the reason that, it is where the best interest of the child stems.

The lower court's records show that, the Respondent testified that Mercy was born on 2013. Thus, to date, she is of 9 years old. On the other hand the Applicant tendered a birth certificate which shows that Mercy was born in 2011, thus she is of 11 years to date. For whatever year we may take to be that Mercy was born, yet the conclusion will remain that, she is by now above 7 years of age. Thus, under section 125(1) of the Law of Marriage Act, the court may place custody of Mercy to live with either parent.

> *125.-(1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances*

making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare.

On that account therefore, when taking into consideration of the same best interest of the child, I have taken reliance on the Law of Child Act under section 39(1)(e) which includes the best interest of the child to be, the desirability of keeping siblings together and, to keep a child to the one who is capable of meeting the best interests of that child as per section 26(1)(b).

"39(1) (e) that it is desirable to keep siblings together;"

"26(2) (b) live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child"; and

Further, I have also taken into consideration the dictates of the law in Rule 73(c), (f) and (g) of The Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 which provides other things to be considered in ordering custody of the child being; -

"(c) the child's physical, emotional and educational needs".

"(f) capable each parent and any other person in relation to whom the court considers the question relevant is of meeting the child's needs".

"(g) any harm the child has suffered or is likely to suffer".

With the above quoted principles of law, when taking into consideration that the Applicant is a government employee, it can easily be taken that he is thus capable of consistently meeting the child's best needs. Further, when taking into consideration that, there is evidence that the Respondent has kept the child with her aunt, thus she is likely to miss love of her parents. On that account, I find it proper that, Mercy also should be under the custody of the Applicant herein. The mother, one Irene Shao to have access to greet and play with her children. On that account, the order for maintenance stops.

In upshot the Review is successful to that extent. Every party to bear his/her own costs.

S.M. KULITA
JUDGE
20/07/2022

DATED at **Dar es Salaam** this 20th day of July, 2022.

S.M. KULITA
JUDGE
20/07/2022