IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC MATRIMONIAL CASE APPEAL No. 8 OF 2022

(Arising from the District Court of Tarime at Tarime in Matrimonial Appeal No. 7 of 2021 & originating from Nyamongo Primary Court at Nyamongo in Matrimonial Cause No. 4 of 2021)

SIMON SILAS KISIGIRO ..... **APPELLANT**

Versus

CHAUSIKU MWITA SAIMON ..... **RESPONDENT**

JUDGMENT

11.05.2022 & 11.05.2022

Mtulya, J.:

Two (2) issues transpired in this court today morning, namely: first, a claim of illegality of the decision of **Nyamwongo Primary Court** (the primary court) in **Matrimonial Cause No. 1 of 2021** (the case); and second, re-emergence of love and affection of wife and husband, Bibi Chahusiku Mwita Saimon (the respondent) and Bwana Simon Silas Kisigiro (the appellant).

In the first issue, the appellant claims that in the primary court, the learned magistrate did not consult assessors before giving his judgment. In order to persuade this court in that argument, the appellant hired legal services of Mr. Tuthuru Cosmas to argue the point of illegality and display the return of love and affection between the appellant and respondent. In persuading this court to understand the

point of illegality, Mr. Tuthuru submitted that the learned magistrate who sat in the case determined the matter without involving assessors hence the proceedings and judgment are nullity as they breached the law regulating hearing of civil cases in primary courts.

In order to bolster his argument Mr. Tuthuru cited the authority of section 7(2) of the **Magistrates' Courts Act** [Cap. 11 R.E. 2019] (the Magistrates Act) and Rule 3 (1) of the **Magistrates' Courts (Primary Courts - Judgment of Courts) Rules**, G.N No. 2 of 1988 (the Rules), which require consultation and consideration of assessors opinions, and the precedent of the Court of Appeal in **Agnes Severini v. Mussa Mdoe** [1989] TLR 164. With available remedies, Mr. Tuthuru submitted that the practice shows that the judgment with such fault is normally quashed and the case file is remitted back to the primary court for invitation and consideration of assessors' opinions.

However, Mr. Tuthuru, as an officer of this court under section 66 of the **Advocates Act** [Cap. 341 R.E. 2019] (the Advocates Act), prayed for this court to quash the proceedings and judgment in favour of the second issue of re-emergence and re-union of love and affection of the parties in re-establishing their family as the wind of evil which declined their love as wife and husband has just ended. In his opinion, the parties are currently in love and affection and wish to stay together

as wife and husband, and any order of return to assessors' opinions will not be meaningful to the re-union of the family. The submission of Mr. Tuthuru was received well with the respondent who conceded before this court that she resumed her love to his former husband and may wish to stay together as wife and husband under the same roof in order to raise good children in their family.

I have perused the record of the present appeal and found that the case at primary court was scheduled for hearing on 21st May 2021 and after completion of the hearing, the primary court ordered reading of judgment on 27th May 2021. However, the learned magistrate was silent on invitation or consideration of the views of assessors. On 27th May 2021, the judgment was not delivered and it was set for delivery on 1st June 2021, and it was accordingly delivered. Record of the appeal shows further that neither the proceedings nor judgment of 1st June 2021 which displays assessors gave their views.

The law regulating proceedings of this nature in primary courts are enacted in Rule 3 (1) of the Rules, which provides in brief that: *where in any proceedings the primary court has heard all the evidence or matters pertaining to the issues to be determine, the magistrate shall consult assessors in view of reading a decision of the primary court*. It is fortunate that both enactment in section 7(1) & (2) of the

Magistrates' Act and Rule 3 (1) of the Rules have received precedents of this court and Court of Appeal. This court in the decisions of **Adelaida Kemilembe Masilingi v. Advela K. Rugalabamu**, PC Civil Appeal No. 16 of 2019 and **Ramadhani Selemani Nuru v. Godfrey Protase**, PC Civil Appeal No. 4 of 2021, interpreted Rule 3(1) of the Rules and the Court of Appeal in **Agnes Severin v. Mussa Mdoe** (supra) interpreted section 7(1) of the Magistrates' Act and stated, at page 168 of the decision, that:

> *We think that it was mandatory for assessor to give his opinion on the final issue in the suit... the omission to do so was necessary fatal and it rendered the purported decision null and void.*

All said and done by the Court of Appeal. I take the same course in the present appeal. The present decision of the primary court is null and void. Having said so, I now turn to the appropriate remedy in the present appeal, and considering both parties appeared in this court today praying for nullification of the judgment and proceedings as they are currently in love and affection and intend to stay in one roof as wife and husband to raise their children in good manners.

The law with regard to future course in such a circumstances after nullification of the judgment, is to remit the record to the primary court

for assessors to give their opinions. However, the present case has two (2) challenges, namely: first, the parties are in love and affection again and prefer live in one roof as wife and husband and second; there is an enactment in **Written Laws (Misc. Amendment) Act No. 3 of 2021**, which its section 52 repealed section 7 of the Magistrates' Courts Act, to make sitting of assessors optional, until when necessary for interest of justice.

Following the new enactment and noting the uncertainty of availability of the two assessors by only single names of Joseph and Amina, and being aware of the difficulties involved in ordering *trial de novo* to other learned magistrate, and understanding the parties said in this court today they are back in their love as wife and husband, and in fact sat together happily during the hearing of the present appeal, I think, I will prefer a new course with the aim of compacting the source of human life and humanity, family.

Finally, I have decided to quash both proceedings and decisions of the primary and district courts for want of proper application of section 7 (1) & (2) of the Magistrates' Courts Act and 3(1) of the Rules in favour family development. I do so without any order as to costs. The reason of doing so, it obvious that this is a matrimonial cause and the parties are going back home to enjoy their love and affection happily

and together. There is no need to introduce costs to the family of one human person.

It is so ordered.

F. H. Mtulya

Judge

11.05.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, Mr. Simon Silas Kisigiro and his learned counsel Mr. Cosmas Tuthuru and in the presence of the respondent, Ms. Chahusiku Mwita Simon.

F. H. Mtulya

Judge

10.05.2022