IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

MATRIMONIAL APPEAL NO. 01 OF 2022

(Arising from Matrimonial Cause No. 03 of 2021 of Kigoma District Court)

ROSEMARY LUCAS.....APPELLANT

VERSUS

HAMISI CHARLES LUHENDE.....RESPONDENT

JUDGMENT

02/08/2022 & 30/01/2023

MANYANDA, J.

Rosemary Lucas, the Appellant, is aggrieved by a ruling of the District Court of Kigoma, hereafter referred to as the trial court, in Matrimonial Cause No. 03 of 2021 dated 28/02/2022 which sustained a preliminary objection to the hearing of the case on one point of law that the trial

court lacked territorial jurisdiction. She has raised three grounds of appeal namely,

1. *That, the District Court of Kigoma grossly erred in law and facts when it upheld the preliminary objection raised by the Respondent that the same has no jurisdiction to determine the Matrimonial Cause No. 03 of 2021 without considering the life style of the parties;*
2. *That, the District Court of Kigoma grossly erred in law and facts when it held in favour of the Respondent while the same had been failed to specify the law which had been contravened by the Appellant for instituting the said case at the District Court;*
3. *That, the District Court of Kigoma misdirected itself when it conceded that the Matrimonial Cause is governed by the Law of Marriage Act, [Cap 29 R. E. 2019], but erred in law and fact when it determined the preliminary objection by relying on section 18 of the Civil Procedure Code, [Cap 33 R. E. 2022].*

Hearing of the appeal was conducted by way of written submissions, whereas the submissions by the Appellant were drawn and filed by Mr. Sylvester Damas Sogomba, learned Advocate and those for the

Respondent were drawn and filed by Mr. Samwel L. Ndanga, learned Advocate.

Mr. Sogomba argued the three grounds of appeal jointly submitting that the District Court had no jurisdiction to try the petition because the parties contracted their marriage at Tunduru in Ruvuma Region on 28/07/2013. That, thereafter, the husband being a military officer working with the Tanzania Peoples Defence Force (TPDF), the couple shifted and lived in various places such as Tabora, Musoma and Mwanza. That, while in Mwanza, the Respondent was transferred to Dar es Salaam whereas he abandoned the petitioner alone with no material means to support her life at Mwanza. Being unsupported by her husband, the Appellant had to go back to her parents in Kigoma for survival.

As she could not survive either in Mwanza nor at Dar es Salaam, while she was in Kigoma opted at lodging, in a court of law, a petition for divorce in trial court.

On his part, the Counsel for the Respondent, Mr. Ndanga submitted that the appeal is incompetent for emanating from an interlocutory order because the appellant's petition was struck out not dismissed, she can

refile the same, hence, the right of the parties was not finally determined.

Then he went on submitting in alternative on the legal issue he raised arguing that the trial court lacked territorial jurisdiction to try the petition because the Respondent resides in Dar es Salaam, the cause of action arose in Mwanza and the subject matter, a matrimonial house is located in Mwanza and Tabora Region.

That, since the Law of Marriage Act (supra) and its Rules namely, Law of Marriage (Matrimonial Proceedings) Rules, GN No. 136 of 1971, do not provide for the territorial jurisdiction, then a recourse has to be made the Civil Procedure Code. Under section 18 which require a suit to be instituted in a court whose local limits the defendant resides; the subject matter is located or the cause of action arose.

In rejoinder, the Appellant's Counsel avoided to make a reply to the legal issue raised by the Respondent about propriety or otherwise of the appeal which was raised by the Respondent. Instead, he too raised a new ground of appeal which concern another legal issue about propriety of the preliminary objection which was raised by the Respondent in the trial court, that gave rise to the consequential ruling a subject of this appeal.

I will start with the legal issue raised by the Appellant in rejoinder complaining about a style used by the Respondent to raise the preliminary objection before the trial court.

Frankly speaking, the Appellant has raised this new ground of appeal in rejoinder. By so doing, the Appellant is questioning the procedure used by the Respondent to raise the preliminary objection, this legal issue was not raised before the trial court although she was represented, now she is doing so in this appeal at rejoinder stage. The style she has used is strange to our civil procedure.

In my view, the Appellant has raised this issue as an afterthought. I say so because, the Appellant was present in the trial court and represented. She is also represented in this Court, she ought to have raise it as a ground of appeal or supplementary ground of appeal so as to give opportunity to the Respondent to reply.

It is on this ground, and the fact that this been not a jurisdiction issue which can be raised at any time, that I don't see any possibility of dealing with it without violating the principle of natural justice that a party should not be condemned without been heard.

Moreover, as submitted by the Appellant herself, matrimonial causes are governed by the Law of Marriage and its Rules, GN No. 136 of 1971. In

the said Rules, the case concerning matrimonial dispute is initiated by filing of a petition, the adverse party responds by filing a reply to the petition. The rules do not provide any requirement on how a preliminary objection should be raised.

Therefore, in my considered opinion, in a petition under the Law of Marriage Act, a legal point may be raised by the Respondent either by notice or within the Statement of Reply. I don't see any evil in the Respondent raising the objection questioning jurisdiction of the trial court by way of a "notice of objection", after all, the law allows such an issue to be raised at any time, even on appeal.

The Respondent also raised another legal issue in his submissions questioning propriety or otherwise of this appeal arguing that the same emanates from an interlocutory order which struck out the petition, therefore, it does not bar the Appellant from filing a fresh petition in accordance with the law. As I said the Appellant did not say anything on this point.

I have pondered this issue. In law an interlocutory order is an order which does not decide the rights of parties. This was stated in the case of **University of Dar -es-salaam vs Sylvester Cyprian and 210 others** [1998] TLR 175, where it was held that: -

"Interlocutory proceeding that do not decide the right of parties but save to keep thing in status quo pending determination of those right or enable the Court to give direction as to have the cause is to be conducted or what is to be done in the progress of the cause so as to enable the Court ultimately to decide on the right of the parties appeal against interlocutory order not finally determine the suit".

Basically, in law an interlocutory order is unappealable nor revisable. In the case of **Managing Director Souza Motors Ltd vs Riaz Gulamani and Another** [2001] TLR 405 where it was held that: -

"A decision or order of preliminary or interlocutory nature is not appealable unless it has the effect of finally determining the suit."

It follows therefore that in some circumstances an interlocutory order is appealable where it is established that it has extinguished the rights of the parties. A question is now whether the impugned ruling extinguished the rights of the parties.

In our jurisdiction, a most common test applied to determine whether an order is interlocutory or otherwise is 'the nature of order test'. The Court of Appeal applied the test in the case of **JUNACO (T) and Another vs Harel Mallac Tanzania Ltd,** Civil Application No. 373/12 of 2016

(unreported). It considered circumstance under which an interlocutory order may have a final and conclusive effect by making reference to its position in the case of **Tanzania Motor Services Ltd and Another vs Mehar Sing t/a Thaker Singh,** Civil Appeal No. 115 of 2005 (CAT unreported) where it quoted Lord Alverston in **Bozson vs Altrinchman Urban District Council** [1903] 1 KB 574 at 548, as follows: -

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order"*

The Court of Appeal, then concluded in JUNACO (T) that: -

> *"In view of the above authorities it is therefore apparent that in order to know whether the order is interlocutory or not one has to apply "the nature of the order test'. That is, to ask oneself whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*

Further still, the Court of Appeal had another opportunity to consider whether given order is interlocutory or otherwise in the **Republic v**

Harry Msamire Kitilya and Two Other, Criminal Appeal No. 126 of 2016 (CAT Unreported). In that case, the trial court struck out the eighth count of money laundering from the charge sheet. The Director of Public Prosecutions appealed to High Court. The High Court struck out the appeal on the ground that the trial courts order was interlocutory and thus, not subject of appeal. The Court of Appeal applying "the nature of order test" stated as follows: -

> *"..... the appropriate test for determining whether the impugned order was final or interlocutory is patently discernible from the language of the extract provisions. Thus, in the matter under consideration, the test is whether or not the impugned order had the effect of finally determining the criminal charge..... Thus,* ***to the extent that the trial court's order extinguished the criminal charge of money laundering, we are of he settled view that the same was not an interlocutory order****." (emphasis supplied).*

Moreover, the defunct Court of Appeal for East Africa in **Ngoni-Matengo Coorperative Marketing Union Limited vs. Alimohamed Osman** [1959] EA 577 held that: -

> *"It is the substance of the matter that must be looked, rather than the words used".*

Therefore, when determining the meaning and applicability of the words "strike out" or "dismiss" it is the substance of the order that has to be looked, not the word itself.

The ruling by the trial court under consideration struck out the petition of the Appellant hence, brought to an end the petition. It was not meant for keeping things in *status quo* till the rights of the parties can be can be decided later on. It had the effect of dismissing the petition. It extinguished the rights of the parties. It is on this reason that I find the ruling as appealable.

Having disposed the legal issues raised by the Counsel for both sides in their submissions, now I turn into the main legal complaint by the Appellant, that is, it was wrong for the trial court to struck out the petition on ground that it lacked territorial jurisdiction.

I agree with the submissions by both Counsel that matrimonial disputes are governed by the Law of Marriage Act and the Rules thereof. The said law do not provide for territorial limits of courts at which one can petition for divorce. Section 76 of the Law of Marriage Act concurrently vests original jurisdiction in matrimonial proceedings to the High Court, a Court of a Resident Magistrate, a District Court and a Primary Court.

Under section 77(1) any person may petition the court for a declaratory decree if he or she is a resident and domiciled in Tanzania by presenting a petition as per section 81.

In my understanding, and just as rightly submitted by the counsel for both parties, there is no territorial limit provided by these provisions. However, this does not mean that any person can file a petition at any court according to his or her desire. I say so because if these provisions are so interpreted, then by design one can file a case at a distant court just for the sake of causing hardships to the other. There must be a control, hence recourse is to be made, as rightly found by the trial court, to the provisions of section 18 Civil Procedure Code.

The provision reads as follows: -

> *"18. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-*
>
> > *(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;*
> >
> > *(b) any of the defendants, where there are more than one, at the time of the commencement of the*

suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given or the defendants who do not reside or carry-on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) ***the cause of action, wholly or part, arises."***

(Emphasis added)

As it can be seen, it is a statutory requirement that a case be instituted at a court within which territorial jurisdiction where the defendant resides or works for gain or the cause of action wholly or partly arose.

In the appeal at hand, it is said that the Appellant resides at Kigoma while the Respondent resides at Dar es Salaam. The Appellant pleaded that they acquired some matrimonial properties including a house at Mwanza. Further, it was pleaded by the Appellant that the Respondent left the Appellant at Mwanza without means of subsistence. In such circumstances she was forced to surrender herself back to her parents at Kigoma.

In legal words, he deserted her, an act amounting to a cause of action that led to her seek for divorce by filing a petition in the trial court. Further it is not in dispute that their marriage is still subsisting, the Respondent has full knowledge that their marriage is still subsisting but he is still deserting her by living away in Dar es Salaam leaving her alone at Kigoma without provision of any means of survival.

The circumstances of this case, in my view, depict clearly that desertion is still going on to date. It started while the couple were in Mwanza, then

it is continuing to date when the Appellant is living in Kigoma and the Respondent is living in Dar es Salaam. Moreover, with full knowledge of where the Appellant is living, the Respondent has deliberately refrained from joining her or providing means of survival. In other words, the cause of action partly arose in Mwanza and it is partly still arising and going on in Kigoma.

This brings into play the provisions of section 18(c) of the Civil Procedure Code.

The trial court wrongly ruled that the trial court has no territorial jurisdiction because the Respondent does not live and work for gain in Kigoma. It did not examine the provisions of sub-section 3 to section 18 of the CPC which allows institution of cases where a cause of action partly occurred.

It is on this reason that I find the appeal has merit.

Consequently, I allow the appeal, quash the ruling of the trial court, and order the trial court to continue hearing the petition as it has jurisdiction to do so. This been a matrimonial case, I make no order as to costs. It is so ordered.

Dated at Kigoma this 30th day of January, 2023

F. K. MANYANDA

JUDGE