

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY**

AT MUSOMA

(PC) CIVIL APPEAL NO. 41 OF 2022

*(Arising from decision of Serengeti District Court at Mugumu in
Consolidated Civil Appeals No. 1 of 2022)*

MUSSA NYAMAKO MAITARI 1ST APPELLANT

HADIJA NGUKURI MARO 2ND APPELLANT

VERSUS

QUEEN MUSA NYAMAKO MAITARI 1ST RESPONDENT

JEMINA MUSA NYAMAKO MAITARI 2ND RESPONDENT

JUDGMENT

A.A. MBAGWA, J.:

The respondents together with other three women who are not part of this appeal, sued the appellants in the Primary Court. According to the record of the trial court, the said five determined women claimed to have at different times, contracted customary marriages with the first appellant. It was alleged that, in the year 1994 the first appellant while using the profits collected after selling cows which were jointly acquired by him and

his alleged five wives, did purchase a plot for the purpose of constructing guest house and shops at Majimoto center. Again, it was alleged that, the said projects were constructed through joint efforts of the first appellant and his alleged five wives. The house which was constructed has 17 rooms, 12 being for guest house while five for commercial purposes.

Since 2006 the first appellant refused to share the income generated out of the said projects while it was jointly formed by him and his five wives. Things turned to be worse, when the first appellant through a written will bequeathed the disputed house or project to the second appellant.

The said five wives, lodged a civil suit at the Primary Court challenging the bequeath of the disputed house to the second appellant. They asked the trial court to declare the will void for contravening the Local Customary Order, 1963 GN. No. 436 of 1963. Secondly, they prayed for the court to order the second appellant to vacate from the house as it was acquired through their joint efforts. Thirdly, they requested the court to order the income generated from the said projects to equally be divided to them.

The trial however, due to the sickness of the third plaintiff, proceeded on her absence after the trial Court invoked the provisions of Rule 25 of the

Primary Court Civil Procedure Rules, 1964. Having heard the parties, the trial Court formed an opinion that, the plaintiffs (now the respondents and other two women who claimed to be the wives of the first appellant) failed to prove their claim and proceeded to dismiss the suit without costs.

Aggrieved with the decision of the trial Court, the respondents and the other two women lodged their petition of appeal to the District Court. Their petition of appeal had a total number of twelve grounds of appeal. In hearing the appeal, the learned magistrate condensed the twelve grounds of appeal to two grounds. But in disposing the appeal, the learned magistrate raised a single ground for determination to the effect that: whether the house was a matrimonial property acquired by the joint efforts. Having gone through the records of the trial Court together with the submissions, the learned magistrate held that there was enough proof of joint acquisition of the disputed house. He then proceeded to set aside the decision of the trial Court as there was no consent from the wives before the first appellant bequeathed the house which was a matrimonial property to the second appellant.

The first appellate court's decision did not please the appellants. They, thus lodged their petition of appeal to this court in an attempt to challenge the

first appellate court's decision. For obvious reasons, I will not reproduce the said grounds of appeal raised by the appellants.

It is worthwhile to note that, during hearing of this second appeal, the appellants were represented by Ms. Mary Joakim, learned counsel, while the respondents had service of Mr. Emmanuel Gervas, also learned counsel. It is also worth noting that, the petition of appeal to this court for unknown reasons had the names of only the two respondents instead of four as appeared in the lower courts. As this appeal is to be determined not on merits, I will not also summarize the submissions made by the learned counsel of the both parties.

Initially, after having heard the parties and their respective advocates, I adjourned the appeal for composing the judgment. In the course of scanning the record of appeal, I came across a notice of preliminary objection lodged by the appellants who were the respondents in the first appellate court. As it can be discerned from the record of the first appellate court, on the 25th February, 2022 the appellants who were the respondents in the first appeal, along with the reply to the petition of appeal, lodged a notice of preliminary objection. The said notice had the following grounds written in Swahili language:

- 1. Kwamba, rufaa hii imekiuka takwa la kisheria kwa kuwa kinyume na hukumu/nakala ya hukumu.**
- 2. Kwamba, rufaa imekiuwa matakwa ya kisheria kwa kutosainiwa na baadhi ya waomba rufaa**
- 3. Kwamba, rufaa haijakidhi vigezo vya kisheria kwa kujumuisha Ushahidi pamoja na maelezo (submission) kwenye rufaa badala ya sababu za rufaa.**

KWA HIYO, wajibu rufaa wanaiomba mahakama hii tukufu kufanya mambo yafuatayo: -

- A. Rufaa hii itupiliwe mbali kwa kukiuka utaratibu wa kisheria**
- B. Gharama za uendeshaji wa rufaa hii yawe juu ya waleta rufaa**
- C. Nafuu nyingine yoyote ambayo baraza linaweza toa kwa mleta pingamizi.**

Having noted the said notice of preliminary objection, I painstakingly perused the proceedings of the District Court (first appellate court) to see whether it was either determined or withdrawn but in vain. The records are silent. What is seen within the record of the first appellate court is that, the first appellate court (A.C. Mzalifu-RM), on 6th April, 2022 proceeded with the hearing of the appeal without, first determining the preliminary objection.

Being aware with the salutary rule that, once the preliminary objection is raised, it has to be disposed of first before going into determination of the merits of the case (See the case of **Deonesia Onesmo Muyoga & 4 Others vs Emmanuel Jumanne Luhahula**, Civil Appeal No. 219 of 2020 CAT at Tabora), I re-opened the proceedings. On 8th day of June, 2023, I summoned the parties and asked them to address the court on what happened before the first appellate court after the notice of preliminary objection being filed and the legal consequence of not to attend it.

Both counsel Ms Mary Joakim and Emmanuel Gervas opined that the anomaly was fatal whose effect is to vitiate the hearing proceedings and the obtaining judgment.

As alluded to, since the notice of preliminary objection was not withdrawn, it was incumbent for the first appellate court to determine it before determine the appeal on merits.

In **Thabit Ramadhan Maziku & Another vs Amina Khamis Tyela & Another** (Civil Appeal No. 98 of 2011) [2011] TZCA 223 (7 December 2011) TanzLII, the appellants in their Written Statement of Defence raised a preliminary objection. The learned Resident Magistrate with Extended

Jurisdiction heard the said preliminary objection and reserved the ruling. It was noted that the said ruling was never delivered, instead the learned magistrate proceeded with the determination of the case on merits. The Court of Appeal never spared the omission. It categorically held:

*"...The law is well established that a Court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it. In **Bank of Tanzania Ltd V, Devran P. Valambia**, Civil Application No 15 of 2002 (CAT) (unreported) the Court observed:*

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily."

With respect, therefore, the failure by the learned Resident Magistrate with extended jurisdiction to deliver the ruling on the preliminary objection which he scheduled on 16/9/2009 constituted a colossal procedural flaw that went to the root of the trial. It matters not, whether it was inadvertent or not. The trial court was duty bound to dispose of it fully, by pronouncement of the Ruling before dealing with the merits of the suit. This it did not do. The result is to render all the subsequent proceedings a nullity..."

The above binding position tells it all. Failure on the part of the first appellate court to determine the preliminary objection constituted material error that went to the root of the appeal. The first appellate court had no jurisdiction to proceed with determination of appeal on merits in presence of notice of preliminary objection.

That said and done, I am compelled to exercise my revisional powers bestowed under the provisions of section 31(1) of the Magistrate Courts' Act [Cap. 11 R.E. 2019] to nullify and quash all the first appellate court's proceedings and orders which transpired after filing of the notice of preliminary objection, that is with effect from 25th February, 2022. Accordingly, the first appellate court's judgment and decree are quashed and set aside. I direct the case file to be remitted to the District Court (first appellate Court) so that, the preliminary objection can be heard expeditiously. For clarity, should the District Court find the preliminary objection meritless, it is directed to hear and determine the appeal on merits. Considering that the matter is matrimonial in nature and the disposition of the appeal was based on a point raised by the court *suo motu*, I make no order as to costs.

It is so ordered

Right to appeal is fully explained.



**A. A. MBAGWA
JUDGE**

08/06/2023

Court: Judgment has been delivered in the presence of Mary Joakim, learned counsel for the appellants and Emmanuel Gervas, learned counsel for the respondents this 8th day of June, 2023.

**A.A. Mbagwa
JUDGE**

08/06/2023