

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB - REGISTRY OF MWANZA
AT MWANZA
PC CIVIL APPEAL NO. 30 OF 2023**

*[Arising from Misc. Civil Appl. No. 65 of 2022 of the Nyamagana District Court.
Original Matrimonial Cause No. 1 of 2016 of the Mwanza Urban Primary Court.]*

ABDULLAKHIM ALLY SAID-----APPELLANT

VERSUS

JAMIRA KASAMBARA -----1STRESPONDENT

OMBENI SHILEENDWA SWAI-----2ND RESPONDENT

ROCK CITY TAKERS LTD-----3RD RESPONDENT

JUDGEMENT

July 25th & August 18th, 2023

Morris, J

The applicant, Abdullakhim Ally Said, is aggrieved by the ruling of the Nyamagana District Court in Misc. Civil Application No. 65 of 2022. He has appealed to this court on two grounds. He presents that the District Court erred to dismiss his application on the reason that the appellant did not exhaust available remedies. He also faults the said court for dismissing his application basing on the raised preliminary objection.



Pursuant to record, the appellant and the 1st respondent above had a legal matrimony. Through Mwanza Urban Primary Court's matrimonial cause No. 1 of 2016, their marriage was dissolved. The trial court also ordered division of matrimonial property, excluding a house situate Plot No. 87 Block 'R' Uhuru Street (elsewhere, "the suit property") which it did not consider as being subject of matrimonial division. Dissatisfied, the 1st respondent appealed to the District Court (Matrimonial Appeal No.03 of 2018). The appeal was heard by Hon. Ruboroga, SRM who remitted the file back for the trial primary court. He ordered the latter court to receive additional evidence in respect of the suit property.

In the subsequent proceedings, the trial Primary Court (Hon. Jagadi, RM) ordered division of the suit property on 15% by 85% ratios to the 1st respondent and appellant respectively. Such division disgruntled the appellant. He appealed to the District Court [Misc. Civil Appeal (sic) No. 29 of 2019]. The District Court (Hon. Sumaye SRM) altered the trial court's division pattern. The appellant was, this time, ordered to compensate the 1st respondent with Tshs. 12,000,000/= in lieu of her share in the suit property. It was not over yet. The 1st respondent



appealed to this Court (PC Matrimonial Appeal No. 21 of 2020). Ultimately, 80% of the suit property was awarded to the appellant and 20% to the 1st respondent. The decision was handed down on 15/10/2020.

The record reveals further that, on 2/3/2022, the 1st respondent filed execution proceedings before the trial Primary Court. The execution proceeded *ex-parte* following appellant's alleged refusal of service. The executing Primary Court, on 12/4/2022, ordered distribution of home appliances (per its judgement of 31/01/2018) and the suit property (pursuant to the judgement of this Court dated 15/10/2020). Subsequently, the 3rd respondent was appointed for the task. At the instance of the 1st respondent, the suit property was evaluated at Tshs. 344,000,000/-. The 2nd defendant purchased it at Tshs. 400,000,000/- through a public auction on 26/08/2022.

After the sale, parties to the original matrimonial cause were summoned to appear on 7/10/2022 before the Primary Court. Reportedly, the appellant also refused to sign the summons and did not appear. Consequently, sale was confirmed and the certificate of sale was issued



to the 2nd respondent. Later, the 3rd respondent's bill of Tshs. 19,000,000/- was approved. The executing court ordered the remaining Tshs. 381,000,000/- to be paid to the appellant and the 1st respondent at 80% and 20% proportions respectively.

Now, I resume to the application subject of this appeal. Having realized that execution had been carried out as accounted above, the appellant above filed an application for revision before Nyamagana District Court against the respondents herein. His application faced a preliminary objection (PO). The respondents presented that the application for revision was prematurely filed; and that it was not proper to include the 2nd and 3rd respondents in the subject application. The District Court sustained the PO. This appeal germinates from such decision.

I ordered the appeal be argued by way of written submissions. The scheduling order was complied with. Advocate Anthony K. Nasimire represented the appellant. Messrs. Akram Adam and Silas John, learned advocates, represented the 1st and 2nd respondents respectively. The 3rd respondent never filed his submissions.



For the first ground of appeal, Advocate Nasimire submitted that the District Court erred for not considering to exceptions which compelled the appellant to resort to revision. He referred to the case of ***Hamoud Mohamed Sumry v Musa Shaibu Msangi et al***, Civil Application No. 255 of 2015 (unreported). He maintained that, pursuant to the cited case, a party may resort to revision when he has no right of appeal; or where the said right has been blocked by judicial process; or where exceptional circumstances warrant it that way.

To him, in this matter, the appellant's right to appeal was blocked by judicial process. He argued that the sale was conducted in appellant's *absentia* such that by the time he became aware of the same; time had had ran out. Consequently, he retained no other remedy except to pursue the revision. Moreover, he stated that by that time, the trial-cum-executing court had already distributed the proceeds of sale. So, interests of the 2nd and 3rd respondents could only be addressed in revision instead of appeal.

He further submitted that the Primary Court had no jurisdiction to execute the decree of this Court. I was also referred to ***Mihayo Maziku***



Misana (administrator of the estate of the late Maziku Misana) v Abdallah Mashimba Nzigula, Land Revision No. 03 of 2023; and **John Chimile Rubambe vs. Pendo Yona Majigile (administrator of the estates of the late Mariam Hamis Yona)**, Misc. Land Application No. 67 of 2022 (both unreported). Basing on the cited cases, the appellant argued that the notice of appeal against the judgement of this Court was lodged on 05/11/2020. Thus, in the pendency of such notice, the executing court had no power to order execution.

Regarding the second ground of appeal, it was submitted that the 2nd and 3rd respondents were necessary parties. He cited section 23 (3) of **the Magistrates Courts Act**, Cap. 11 R.E 2019 (**MCA**) which enjoins the court not to decide on matters affecting rights of parties without affording them the right to be heard. Finally, he prayed for the appeal.

In reply Advocate Adam submitted that, if the appellant was out of time to file an appeal he had right to apply for extension of time. Further, to the 1st respondent, under Rule 85 (1) (a) and (b) of **the Magistrates Courts (Civil Procedure in Primary Courts) Rules**, GN. No. 310 of 1964 (hereinafter "**the Rules**") the appellant could set aside the sale.



Regarding the second ground of appeal, he submitted that the 2nd and 3rd respondents were not party to Matrimonial Cause No. 1 of 2016. He argued that parties who did not take part in previous proceedings cannot be joined in the next upward stage.

On his part, Mr. Silas – advocate for the 2nd respondent, was at all fours with the 1st respondent. He argued that the proper remedy for the appellant was appeal after securing extension of time instead of evoking revision. He stated further that the appellant had the right to set aside *ex-parte* order which remedy is in the exclusive mandate the executing court. Reference was made to ***Pangea Mineral Ltd v Petroleum (T) Ltd and 2 others***, Civil Appeal No. 96 of 2015 (unreported). He reiterated that the appellant, being part of the original proceedings, had no right to revision which recourse is only exercisable under exceptional circumstances: not as an alternative to appeal. According to him, the matter at hand does not exhibit exceptional circumstances. Both respondents craved for dismissal of the appeal with costs.

As I delve to determine this application, the inaction by the 3rd respondent to file his submissions comes to the fore. A settled principle of



law is that failure to file written submissions amounts to non-appearance. See, for example, ***Salumu Ahmada Kuangaika v Mohamed Mussa Salum***, Civil Reference No. 4 of 2011; ***Mariam Suleiman v Suleiman Ahmed***, Civil Appeal No. 27 of 2010; and ***Said Abdallah Kinyanyite v Fatuma Hassan and Another***, Civil Appeal No. 87 of 2003 (all unreported). So, the 3rd respondent did not contest this appeal.

The inaction of the 3rd respondent notwithstanding, I will determine the grounds of appeal on the basis of the filed submissions. In the first ground, the appellant is faulting the District Court for dismissing the application on the reason that the appellant did not exhaust remedies available to him.

Trite is the law that, when an aggrieved party has a right to appeal, he cannot invoke revisional powers of the court. Hereof, I have guidance of ***Baghayo Gwadu v Michael Ginyau***, CoA Civil Application No. 568/17 of 2017; ***AG v Oysterbay Villas Limited and Kinondoni Municipal Council***, Civil Application No. 168/16 of 2017; and ***Simon Hamis Sanga v Stephen Mafimbo Madwary***, Civil Application No. 193/01 of 2021;



and ***Bank of Tanzania vs. Devran P. Valambia***, Civil Reference No. 4 of 2003 (all unreported).

The above position aside, I am alive to the principle that revision can be resorted to in lieu of appeal only in special circumstances [***Hallais Pro-Chemie v Wella AG*** [1996] TLR 269; and ***Felix Lendita v. Michael Long'idu***, Civil Application No. 312 of 2017 (unreported)]. Nevertheless, there is a justifiable philosophy behind limiting such approach. Among other factors, is "to minimize the usurping of the revisionary powers as a substitute to appeal" [***Modest Joseph Temba v Bakari Selemani Simba and Others***, CoA Civil Revision No. 223/17 of 2019(unreported)]. Further, in my view, the appellate remedy is both a party's constitutionally and statutorily reserved right; it should, thus, be jealously protected.

Navigating both affidavit and submissions of the appellant, five reasons form his basis of resorting to revision instead of appeal. **One**, he was out of time to seek any other recourse(s). **Two**, the proceeds of sale from the suit property had already been allocated by the Primary Court. **Three**, the 2nd and 3rd respondents' rights could not have been addressed



on appeal to which they were not parties. **Four**, the Primary Court lacked jurisdiction to execute the decree of the High Court; and **five**, there was a pending notice of appeal in the Court of Appeal against the High Court decision whose decree was executed in the Primary Court.

I set myself to interrogate whether a person who is late to take a legal recourse (say appeal) may shield himself with an argument of being blocked by legal process. The envisaged blockage, to me, involves processes that place insurmountable huddles against the litigant. That is, if the law expressly lays remedial measures at the litigant's disposal; he cannot take a diversion towards an alternative route out of his convenience. Lest, the court becomes susceptible to being taken for a litigant-hosted picnic. That is, to allow such unhealthy luxury would be dangerous to the legal system. Consequently, parties would pick and choose remedies at their whims thereby hinder delivery of justice and certainty of law.

In the light of above discussion, seriatim reasons advanced by the appellant should be put in perspectives. As correctly submitted by the 1st and 2nd respondents, the appellant had the right to apply for both



extension of time within which to appeal; and/or set aside sale that resulted from execution. Obviously, in the latter application, the interest of all parties affected by sale would be considered. Rule 85 of ***the Rules*** provides that;

"85 (1) On application made within thirty days by any person affected or of its own motion, the court may set aside a sale of immovable property if it is satisfied—

(a) that there has been fraud or material irregularity in the proceedings leading up to, or in the conduct of, the sale;

or

(b) that the judgment debtor had no saleable interest in the property sold:

*Provided that no sale shall be set aside unless the **judgment-creditor, the judgment debtor, the purchaser and any other person affected have been given an opportunity to be heard and produce evidence.***

(2) For the purpose of satisfying itself as to any matter for the purposes of this rule, the court may summon and examine any person and require him to produce any document in his possession relating thereto.

*(3) Where a sale has been set aside under this rule, **the purchaser shall be entitled to receive back any moneys paid by him** (emphasis added).*



On the basis that the appeal could be pursued subject to extension of time; and the sale of the suit property capable of being set aside after hearing all interested parties, I find reasons **one** to **three** above indefensible. Regarding the 4th reason, it was argued by the appellant that the Primary Court had no jurisdiction to execute the decree of the High Court. To the appellant, such mandate is upon the registrar of this Court. Ironically, the respondents did not submit anything in reply to this respect.

Nonetheless, I have gone through the record of the Primary Court. Therein, are two judgements of the same court. Both relate to division of matrimonial properties in Matrimonial Cause No. 1 of 2016. The first is dated 31/1/2018 (Hon. Kubingwa RM) in which the appellant and 1st respondent secured a 50:50 division of all domestic appliances. This division remained unchallenged. Another judgement is of 31/1/2019 (Hon. Jagadi RM). In the latter, court ordered division of the suit property to the appellant and 1st respondent at the ratio of 85% by 15% respectively. It is this second division which escalated the dispute of parties up to this Court by way of appeal. Indeed, this Court ordered division of the suit property at 50 by 20 percents respectively. Therefore, the 1st respondent



applied to and did not only execute the decree of this Court but also the Primary Court's decree dated 31/1/2018.

However, whether the foregoing approach by the 1st respondent and the Primary Court determination thereof were valid or otherwise; the dissatisfied party could have challenged it in the self-abandoned appeal and/or application for setting aside the sale. That is, pursuant to rule 18(1)(a) of *the Rules*, "fraud or material irregularity in the proceedings leading up to, or in the conduct of, the sale" constitute sufficient grounds for challenging the proceedings thereof. As this option was not suitably pursued by him, the appellant cannot be expected to sidestep the expressly available legal remedy for his indignancy.

As for the last reason, the appellant is faulting the District Court for not considering existence of the notice of appeal to the Court of Appeal. I am far from being inclined to agree with this reason. A couple of factors justifies my loatheness. **Firstly**, this reason could have been pursued in the envisaged appeal and/or application to set aside sale. **Secondly**, such reason came as an afterthought in the present proceedings. It was not raised or pursued at the District Court. Evidently, availability or existence



of the pending notice of appeal is a matter of fact. It needs evidence. This Court cannot, therefore, fault the lower court on matters not decided by it. **Thirdly**, the record does not have it as evidence any deposition or ground that the appellant herein applied for and obtained stay of execution howsoever.

In law, the second appellate court only determines matters of fact which were raised and determined in lower courts. See unreported cases of ***Richard Majenga v Specioza Sylivester***, Civil Appeal No. 208 of 2018; ***Remigious Muganga v Barrick Bulyanhulu Gold Mine***, Civil Appeal No. 47 of 2017; ***Halid Maulid v R***, Criminal Appeal No. 94 of 2021; and ***Robert s/o Nyakie @ Nati vs R***, Criminal Appeal No. 393 of 2018.

The upshot of discussion, reasons and analysis rendered above; settles this Court at a firm finding that the District Court was justified to hold, as it did, that the appellant had untapped remedies of appeal and setting aside sale proceedings. Accordingly, he could not be allowed to pursue his expediently picked course of revision instead. It, therefore, calls for no words-mincing to reaffirm that his application was incompetent



before the District Court. His current appeal is on no better legal footing either. It is barren of merit. On the basis that the above findings of the court suffice to dispose this appeal, I find no justification to venture into the second ground of appeal.

I proceed to dismiss the entire appeal for want of merit. As these proceedings germinate from the matrimonial cause, I spare the parties of the order to costs. It is so ordered. Right of appeal is fully explained to the parties.



C.K.K. Morris

Judge

August 18th, 2023

Judgement is delivered this 18th day of August 2023 in the presence of Ms. Susan Gisabu, learned Advocate, holding brief of Advocates Anthony Nasimire and Silas John for the appellant and 2nd respondent respectively.



C.K.K. Morris

Judge

August 18th, 2023

