

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CIVIL APPEAL NO.4 OF 2023**

*(Originating from Masasi District Court in Civil Case No.2 of 2022)*

**MWAJUMA SELEMANI.....APPELLANT**

**VERSUS**

**MUSSA LAZIMA NJOWELE..... RESPONDENT**

**JUDGEMENT**

*7 & 28/11/2023*

**LALTAIKA, J.**

The appellant herein, **MWAJUMA SELEMANI**, was sued by the respondent at the District Court of Masasi (the trial court) vide Civil Case No. 2 of 2022. The suit was instituted in the form of Summary Procedure under Order XXXV of the Civil Procedure Code [Cap.33 R.E. 2019]. Furthermore, the respondent claimed against the appellant the sum of TZS. 35,000,000/= being retained amount for the confiscated assets namely one house, forty bags of cassava flour, two plots, tables, coaches, thirty iron sheets, four

radios, gas stove, TV, home utensils, used tractor and construction equipments. After litigating the parties, the trial court decided in favour of the respondent. Dissatisfied the appellant has lodged a memorandum of appeal comprising four grounds of appeal which I take liberty to reproduce herein under:-

- 1. That, the trial court erred in law and in fact for entertaining the matter ought to have been filed as Matrimonial Cause and not Civil Case.*
- 2. That in abuse of court processes by the respondent, the trial court erred in law and in fact for entertaining the matter which was already filed and determined as Matrimonial Cause 66 of 2017 of Lisekese Primary Court.*
- 3. That the trial Magistrate erred in law and facts in giving the judgement without giving the reasons of that decision.*
- 4. That, the trial court erred in law and in fact for entertaining the matter which was ought to be filed in Primary Court which is competent and it has pecuniary jurisdiction to try it.*

When this appeal was called for hearing on 7/11/2023 both parties appeared in person and unrepresented. However, the respondent was accompanied by Mr. Abdallah Bakari Sadiki, next of kin.

On the part of the appellant started her submission with the first ground of appeal. She contended that she disagrees with the decision of the District Court because it is a repetition. The appellant emphasized that the demands are the same as those that they had in a matrimonial case decided in this court. However, property was not divided because of this case. The appellant averred that she do not know if the property is still there. She maintained further that she is surprised that the respondent started in the District Court instead of Primary Court. Moreover, the appellant contended that there was an appeal to the Court of Appeal on the matrimonial case and also this case. The appellant submitted that the judgement surprised her because she was ordered give him a motorcycle and 40 sacks of cassava flour. She stressed

that the motorcycle is a part of the matrimonial property awaiting division. Additionally, the appellant submitted that the day the judgment was read is when respondent was stopped from coming to the house.

Submitting on the second ground, the appellant contended that I think there was an abuse of the court. She insisted that the motorcycle is not a real motorcycle. The appellant maintained that she could also see the abuse of the court process.

Regarding the third ground of appeal the appellant submitted that the issue of ordering her to pay 40 sacks of cassava flour was not accompanied by any reason. The appellant averred that the magistrate said "SITAKI MAELEZO WALA MASWALI." However, she contended that the respondent was the one who had no witness but ended up winning the case.

On the fourth ground, the appellant submitted that it is normal for a case to start in the Primary Court. The appellant contended that she was surprised to be summoned in the District Court. The appellant averred that these are items the respondent had taken from her house. The respondent claimed that he locked the tractor in her bedroom. The appellant argued that she was not there when the respondent moved out the tractor.

Furthermore, she submitted that the respondent is a troublemaker trying to come back and take away what she has collected for herself so far. The appellant submitted that she do not know anything about the flour. The appellant submitted that if the respondent has become bankrupt and probably trying to turn her into a resource. The appellant submitted that she

is about to retire from civil service and the respondent is trying to confuse her. I am incurring a lot of costs. The fair is 40,000/= two way.

In response, the respondent submitted on the first ground that this case can take up to 40 cases. In supporting his argument, the respondent contended that in the Primary Court, the items were listed. He submitted further that the appellant had filed a REVISION at the District Court. However, the problem started with Review at the District Court. The respondent averred that that is why the Judge said the appeal had failed and she was ordered to go back to the Primary Court and pray for extension of time. The respondent submitted that she never got a copy of the judgment. In addition, the respondent submitted that what she did was to ask for the court to order the house to be opened so she could take her properties. Finally, the respondent submitted that the magistrates are the ones who started this case because she has nothing to do with the kind of the case that was instituted.

Regarding the second ground, the respondent contended that the District Court simply misdirected itself. It only needed to order that the house is opened. The appellant contended that he demanded 17.5 million. However, it was changed to 35,000,000/=.

Moving to the third ground, the respondent submitted that what the appellant is saying that she was not given the reason is true. The respondent submitted that it was no longer his case. What he was required was not what was decided. The respondent averred that he decided to be quiet. The

appellant insisted that the magistrate was even dosing when he was reading the judgment.

Concluding his reply on the fourth ground of appeal, he contended that the appellant is the one who instituted the case in the first place. The respondent stress that the appellant is changing. He submitted further that the appellant has forgotten good things he did for her. The respondent maintained that this is not a case in the first place. Additionally, the respondent contended that the review in the District Court was attacked by Hon. Dyansobera J.

I have dispassionately considered the lower courts records, grounds of appeal and rival submissions by both parties. At the outset I should state that it is of utmost important to have the background of the matter thereafter I will be able to decide the matter on merit or otherwise.

This matter traces its origin from Lisekese Primary Court in Matrimonial Cause No. 66 of 2017 instituted by appellant. The appellant had petitioned for a decree of divorce and division of matrimonial assets jointly acquired during the subsistence of their marriage. The Primary Court granted the decree of divorce and proceeded to divide the Matrimonial assets of the parties. Dissatisfied with the decision of the Primary Court the respondent appealed to the District Court of Masasi vide Matrimonial Appeal No.6 of 2018. The grounds of appeal filed at the district court touched only the division of the matrimonial assets. Thus, at last the district court revised the order of the trial court on division of the matrimonial assets of the parties.

Again, the appellant was aggrieved with the decision of the district court thus; she lodged Misc. Civil Application No.15 of 2019 at the district court of Masasi. In that application the appellant prayed the district court to review its decision in Matrimonial Appeal No. 6 of 2018. Furthermore, in that application the appellant sought the district court to include some of the forgotten properties in the division of matrimonial assets. On 29/11/2019 the district court delivered its decision whereby it partly granted the application. Dissatisfied, the appellant appealed to this court against decision of the district court in Misc. Civil Application No. 15 of 2015. On 26/8/2021 this court allowed the appeal and proceeded to nullify the judgement in Misc. Civil Application No.15 of 2019. This court went further to quash and set aside the orders emanating from that matter.

On 3/3/2022 the respondent lodged a Complaint under the Summary Procedure against the appellant. The respondent claimed that the appellant had confiscated his assets which he was divided by the Primary Court of Lisekese in Matrimonial Cause No.66 of 2017.

Now, the issue is whether Civil Case No.02 of 2022 falls within the ambit of Order XXXV of the Civil Procedure Code [Cap.33 R.E. 2019]. Before I determine the above issue, I take liberty to reproduce the provisions of the law as herein below:-

*"1. This Order shall, where the plaintiff desires to proceed in accordance with the Order, apply to-*  
*(a) suits upon bills of exchange (including cheques) or promissory notes;*  
*(b) suits for the recovery of income tax; and*  
*(c) suits arising out of mortgages, whether legal or equitable, for-*

- (i) payment of monies secured by mortgage;*
  - (ii) delivery of possession of the mortgaged property to the mortgagee by the mortgagor or by any other person in or alleged to be in possession of the mortgaged property;*
  - (iii) redemption; or*
  - (iv) retransfer or discharge;*
  - (d) suits by the Tanzania Electric Supply Company Limited for the recovery of meter rents, charges for the supply of electricity and other charges (including any tax) connected with or incidental to the supply of electricity to any consumer;*
  - (e) suits for the recovery of rent, interest or other debts due to the Republic, the Government or any local government authority;*
  - (f) suits for the recovery of possession of any immovable property including any building or other premises where the right of the person seeking to recover such possession is not restricted by the provisions of the Land Act, and suit for the recovery of rent, mesne profits or damages for unlawful occupation in respect of such immovable property, building or premises; and*
  - (g) suits for the recovery of possession of any immovable property from a lessee under a financial lease agreement where under such agreement the lessee has no right of ownership over the property leased to him.*
- 2.-(1) Suits to which this Order applies shall be instituted by presenting a plaint in the usual form but endorsed "Order XXXV: Summary Procedure" and the summons shall inform the defendant that unless he obtains leave from the court to defend the suit, a decision may be given against him and shall also inform him of the manner in which application may be made for leave to defend."*

More so, paragraph 3 of the Plaint of the respondent provides for the claim which states:-

*"That, the plaintiff claim against the defendant is for the sum of Tanzania shillings Thirty Five Millions only (35,000,000/=) being retained amount for the*

*confiscated plaintiff's assets namely one house, forty bags of cassava flour, two plots, tables, coaches, thirty iron sheets, four radios, gas stove, TV, home utensils, used tractors and construction equipments all amounting thirty five millions."*

Looking at what the provisions of the law provide plus the contents of paragraph 3 of the Plaintiff's Complaint, it is aptly clear that the claim by the respondent did not fall within the scope of Order XXXV Rule 1 of the Civil Procedure Code. More importantly, the record of the trial court depicts that the appellant notified the learned Magistrate that she won the Misc. Application which was before this court. Therefore, the appellant prayed Civil Case No.02 of 2022 to be dismissed as they were similar. However, the respondent told the trial court that the case is quite different from the dismissed one. Indeed, the claim instituted by the respondent is purely a matrimonial issue which was already resolved by this court vide PC Civil Appeal No.10 of 2020. To this end, I am fortified that the respondent's claim at the trial court could not be determined under the Summary Procedure.

Based on the above observation, what the respondent did was actually the abuse of court process. Worse enough even the learned Magistrate was made part of such abuse of court process. It was duty of the learned Magistrate to exercise his due diligence especially when he received a complaint from the appellant about the nature of the claim of the respondent. Indeed, what the respondent did was using the court process for a purpose or in a way which was significantly different from the ordinary and proper use of the court process. See, **Dhirajlal Walji Ladwa & 2 Others vs Jitesh Jayantilal Ladwa & Another** (Misc. Commercial Application 62 of 2020) [2023] TZHCCoM D 63 (8 March 2023), Tanzlii.



Said and done, I allow the appeal since the suit by the respondent was misplaced and misconceived. Consequently, I order no order as to costs.

It is so ordered.



Handwritten signature of E.I. Laltaika in blue ink.

**E.I. LALTAIKA  
JUDGE  
28.11.2023**

**Court:** Judgment delivered this 28<sup>th</sup> day of November 2023 in the presence of both parties who have appeared in person and unrepresented.



Handwritten signature of E.I. Laltaika in blue ink.

**E.I. LALTAIKA  
JUDGE  
28.11.2023**

**Court**

The right to appeal to the Court of Appeal of Tanzania is fully explained.



Handwritten signature of E.I. Laltaika in blue ink.

**E.I. LALTAIKA  
JUDGE  
28.11.2023**