

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**SUMBAWANGA DISTRICT REGISTRY**  
**AT SUMBAWANGA**

**MISC. CIVIL APPEAL No. 02 OF 2021**

*(Originating from Matrimonial Appeal No. 02 of 2021 from Mpanda District Court,  
Original Matrimonial Cause No. 96 of 2021 from Mpanda Urban Court)*

**FATUMA P. KASHETELA..... APPELLANT**

**VERSUS**

**ABDALLAH J. SALUM.....RESPONDENT**

*Date of Last of Order: 19/10/2022*

*Date of Judgment: 21/02/2023*

**JUDGEMENT**

**NDUNGURU, J.**

The appellant named above was aggrieved with the decision of the 1<sup>st</sup> appellate court and thus filed this appeal to this court in the attempts of overturning the table. This matter originates from a matrimonial case at Mpanda's urban Primary Court, where the appellant had an application for divorce and the division of matrimonial properties, as she and the respondent were wife and husband respectively. Her application was successful, as divorce was issued and the division of the matrimonial properties to wit a house and two cars were divided equally on a 50/50 bases. The respondent was not satisfied and he appealed to the District

Court of Mpanda at Mpanda. The appeal did not arise from the decree of divorce per se, rather, from subsequent order for division of assets considered to have been acquired jointly during the substance of their marriage, hence matrimonial properties. The grievances of the respondent (who was the appellant in the first appellate court) was that; **One**, the court denied him the opportunity to call his witnesses such as land officer, advocate or any other who could testify on the ownership of the property. **Two**, inclusion of the property plot No. 1070 Block 'V' located at Misukumilo area as matrimonial property and therefore subject to division while it is registered in the name of Khamis Mabrouk who is his brother. **Three**, failure by the court to appreciate the exactly his name Abdullah Juma Salim and not Abdallah Juma Salum.

Having heard the parties, the first appellate court made some findings that: the trial primary court contravened Rule 46 of the Magistrates Courts Civil Procedure in Primary Courts Rules, **GN No. 310 of 1964** which mandates the evidence recorded be read to the witness and magistrate endorse on it. The other irregularity is on the admission of exhibits. That the trial court admitted exhibits (photo pictures) of the motor vehicles alleged to be matrimonial properties after the closure of the defence case. Basing on those findings, the learned appellate Magistrate nullified the entire proceedings, judgment and orders of the trial court as a

consequence thereof ordered a retrial by another magistrate and set of assessors.

The decision of the 1<sup>st</sup> appellate court made the appellant file this appeal which consists of three (3) grounds of appeal which are reproduced as herein below;

1. That, the 1<sup>st</sup> appellate court misdirected itself by holding that the trial court contravened Primary Court Rules governing Civil Cases while in actual fact the original court adhered with the procedural requirement pertaining.
2. That, the 1<sup>st</sup> appellate court erred at by holding that the trial court received exhibits after the Defence side had testified without providing/stating the Exhibit number of the wrongly admitted exhibit.
3. That, the 1<sup>st</sup> appellate court misdirected itself by ordering retrial while the trial court adhered with the procedure governing civil trials in Primary courts.

Through the above outlined grounds as filed by the appellant, she prayed for this court to enter judgement in her favour and that the decision of the trial court be upheld and maintained. Meanwhile, in his reply to the petition of appeal, the respondent had disputed all that had been drafted by the appellant and he too prayed that the decision of 1<sup>st</sup> appellate court be maintained and the costs of this appeal be upon the appellant.

On the hearing date, both parties had no legal representation. However, the appellant prayed to dispose this appeal by way of written submissions while the respondent prayed to make his submissions orally. For the interest of justice, this court gladly granted each side the mode it prayed for in disposing of this appeal to settle the controversy between the two.

The appellant started off by submitting with all due respect to the 1<sup>st</sup> appellate court that, the decision of ordering a retrial of the matter was made in contravention of the right to be heard as the irregularities pointed out by the 1<sup>st</sup> appellate court at page 3 and 4 of its judgement were raised sou moto without affording the parties the chance to address on the matter. That this irregularity has occasioned injustice hence the decision arrived at as a result of such illegality cannot stand, the appellant referred this court to the cases of **Mbeya Rukwa Auto Parts Ltd vs Jestina George Mwakyoma 2003 TLR 251, Kumbwandumi Ndemfoo Ndossi vs Mtei Bus Services Limited, Civil Appeal No. 257 of 2018** Cat, Arusha. (Unreported) available at TANZLII neutral citation 2021 TZCA 23(19 February, 2021).

The appellant added that, she believes that the trial court properly handled the matrimonial cause and reached to a fair decision that both parties were entitled to a 50% share of the matrimonial properties acquired

which resembles the decision in the case of **Helmina Nyoni vs Yeremiah Magoti Civil Appeal No. 61 of 2020 CAT, Tabora (Unreported)**

The appellant insisted that, even if there could be any minimal procedural error which occurred at the trial court during the trial, the same had not caused miscarriage of justice, that the stance of the law is that the same cannot be relied upon as it is stipulated under **Section 37(2) of the Magistrates' Court Act Cap 33 R.E. 2019**. In this regard, she added that the 1<sup>st</sup> appellate court erred in holding that the evidence was improperly taken and that the documentary evidence were improperly admitted without substantiating that how such errors are visible on the face of records and how the same has occasioned a failure of justice as intimated by the above cited section.

Submitting for the 2<sup>nd</sup> ground of appeal, the appellant argued that the trial court adhered to the principle of admitting exhibits by admitting the exhibit during the trial. She argued further that, it is no wonder the respondent failed to point out the exhibits which were admitted after the defence side had testified. She proceeded that, it is a cherished principle of law that judgement must be supported by the evidence on record and in that she referred this court to the case of **Amirali Ismail vs Regina 1 TLR 370**.

In conclusion, basing in all the above deliberations, the appellant was of the strong view that the appellant acquisition of the matrimonial properties which were subject to division and that the decision of the trial court is also justified and the same cannot be faulted, in that she prayed that the decision of the 1<sup>st</sup> appellate court be vacated and the decision of the trial court be upheld and maintained.

In response, the respondent submitted that it is true that the trial court erred in law as the evidence was not read in court after being recorded and that the exhibits were admitted after the prosecution case was closed, as it was the 1<sup>st</sup> appellate court revealed those irregularities and thus ordered a retrial.

Submitting on the 2<sup>nd</sup> ground of appeal, the respondent submitted that they(parties) are not lawyers therefore the court had the right to direct itself and give a just decision.

The respondent submitted further on the 3<sup>rd</sup> ground that, at the earliest stage he denied to own the properties, thus division of 50% each was impossible. He then submitted that, he does not own any property subject to division and all the cases cited by the appellant are distinguishable, that the appellant is trying to misdirect the court.

In winding up, the respondent submitted that Section 37(2) of MCA was complied and that the 1<sup>st</sup> appellate court adhered to it and arrived to a just decision, and so he prays for the appeal to be dismissed.

After hearing the rival submission of the parties and going through the records and judgment of the 1<sup>st</sup> appellate court in the light of the grounds of appeal set forth, the point for determination is whether the appeal before me is meritorious. As it was submitted by the appellant in her submission in chief, the first appellate court judgment speaks itself. The learned District Magistrate in the judgment raised issues of irregularity *suo motto* which she believed goes to the root of the case. In that, the appellate magistrate proceeded to nullify the entire proceedings of the trial court and setting aside the decision thereof, ordering a retrial without affording parties the right to address on the same.

It is trite that when the court raises an issue which is likely to affect the decision and the more so the right of the parties *suo motto* the parties must be afforded an opportunity to be heard on the raised issues. As the matter of fact, I am fortified that it was not proper for the 1<sup>st</sup> appellate court to raise the issue of irregularities in procedure *suo motto* in its the judgment and proceeded to determine the same without giving the parties the opportunity to be heard on the issue raised, in other words, it can be said that the 1<sup>st</sup> appellate court denied the parties the right of hearing their concern on the issue raised.

As it was held in the **Mbeya Rukwa Auto Parts'** Case (Supra) as cited by the appellant in her submission in chief, that: -

*"In the instant case, it is evident that the parties were not accorded the right to be heard and address the court on the new issue on the applicability of the principle of vicarious liability which was raised by the learned High Court Judge when composing the judgement. Therefore, the learned High Court Judge arrived at its finding in contravention of the right to be heard. Such omission amounted to a fundamental procedural error which occasioned a miscarriage of justice to the parties. Consistent with the settled law, the resultant effect is that, such a finding cannot be allowed to stand. It was a nullity"*

In addition to the cited case above, is the decision made in the case of **EXB.8356 S/Sgt Sylvesteer S. Nyanda vs The Inspector General of Police & The Attorney General, Civil Appeal No. 64 Of 2014 (Unreported)**, where the Court of Appeal held that: -

*"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motu which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of*



*determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."*

In the above cited case, the Court of Appeal went on to quash the proceedings of the High Court and order a retrial.

Moreover, in similar vein again the Court of Appeal in the case of **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo, Civil Appeal No. 161 of 2016, (Unreported)**, it had a similar stand that:-

*"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so."*

In the above cited decisions of the Court of Appeal it is settled that where the Court or Tribunal raises an issue *suo motto* and proceed to determine it without affording the parties an opportunity to be heard, the entire proceedings and the decision of the Court becomes a nullity.

Back to the case at hand the first appellate court did not state on how a mere not reading the recorded evidence affected or prejudiced rights of the parties. Further, the law is settled that when the appellate court in its appellate jurisdiction finds the exhibits were not properly tendered and admitted the remedy is to expunge it from the record and proceed to determine the matter on the light of the remained evidence and not to order for retrial as ordering retrial might be used as an opportunity to either party to fill in the evidential gaps. That is not the spirit of the law in ordering retrial. But again, looking at the grounds of appeal preferred to the first appellate court and the decision thereupon, this was a fit case for the respondent to file a cross appeal instead of agreeing with the decision. Unless he has hidden interests which can only be attained when the matter is retried.

In that manner, I am inclined to declare that the proceedings and the Judgment of the 1<sup>st</sup> appellate court is a nullity and I hereby quash it. In view of the above, I proceed to uphold the decision and order of Mpanda Urban Primary Court. As the appeal arises from matrimonial proceedings, I decline to make any order for costs

It is so ordered.



*D. B. Ndunguru*  
**D. B. NDUNGURU**

**JUDGE**

**26/01/2023**

**Court:** Judgment delivered today in the presence of the appellant and respondent through virtual court while they are at Mpanda District Court, this 21<sup>st</sup> day of February 2023.

Right of Appeal explained.



  
**D. B. NDUNGURU**

**JUDGE**

**21/02/2023**

ORIGINAL