

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB - REGISTRY)

AT IRINGA

MATRIMONIAL APPEAL NO.03 OF 2023

*(Arising from the District Court of Njombe at Njombe
in Matrimonial Cause No. 02 of 2022)*

YOKOBETH SIMON SANGA APPELLANT
VERSUS
YOHANA SANGA RESPONDENT

JUDGMENT

21st & 28th March 2024

LALTAIKA, J.

The appellant herein **YOKOBETH SIMON SANGA** is dissatisfied with the decision of the District Court of Njombe at Njombe in Matrimonial Cause No. 02 of 2022. She appealed to this court by way of a Memorandum of Appeal containing 3 grounds. I take the liberty to paraphrase them as hereunder.

- 1. That the trial court erred in law and fact in dismissing the Matrimonial Cause No 2 of 2022 allegedly for being time barred without considering relevant factors.*
- 2. That the trial court erred in law and fact for failure to consider that the appellant could not take any action while the respondent had lodged a notice of appeal.*
- 3. That the trial court erred in law and fact in dishonouring the sound decisions of the three High Court judges that the person to blame in this matter is the respondent and not the appellant for the alleged "delay" to start execution proceedings.*

When the appeal was called for mention on 15/02/2024 the Appellant appeared through **Mr. Edrick Mwinuka**, learned Advocate, holding brief for **Mr. Victor Mkumbe** learned Advocate. The Respondent on the other hand, enjoyed the legal services of **Mr. Innocent Kibadu, learned Advocate**. Parties prayed that the matter be disposed of by way of written submissions. With a nod of approval by this Court, the following schedule was jointly agreed: (i) Appellant's written submission: 29th February 2024, (ii) Respondent's reply: 14th March 2024 (iii) Appellant's rejoinder (if any): 21st March 2024 (iv) Mention for necessary orders to ascertain compliance with the order and fix the date of judgment: 21st March 2024.

I take this opportunity to register my appreciation to the learned Counsel for both parties for spotlessly complying with the court order. The next part of this judgement is a summary of the submissions.

Mr. Mkumbe argued in support of the first ground that the Senior Resident Magistrate failed to consider two significant factors in dismissing the appeal as time barred. These factors were outlined as follows: Firstly, he noted that between September 30, 2010, when the **late Justice Uzia ordered in Matrimonial Appeal No. 1 of 2010** for the division of matrimonial property on a 50/50 basis, and October 18, 2022, when the appellant filed Matrimonial Cause No. 2 of 2022 for the division of matrimonial property, the respondent allegedly engaged in unnecessary delaying tactics, which hindered the appellant from timely applying for execution.

Secondly, Mr. Mkumbe emphasized that three Honourable High Court judges at Iringa had previously determined that the respondent employed unnecessary tactics to delay the division of matrimonial property. These judges were:

- (i) *Hon. Lady Justice Shangali in Misc. Matrimonial Application No. 3 of 2016*
- (ii) *Hon. Mr. Justice Matogolo in Misc. Civil Application No. 9 of 2019, and*
- (iii) *Hon. Mr. Justice Kente in Misc. Civil Application No. 21 of 2020.*

Moving on to the second ground, Mr. Mkumbe asserted that despite being mentioned in the plaintiff's claim, the first trial at the Njombe District Court failed to acknowledge or explain the fact that the appellant could not proceed with execution steps due to the respondent already filing a Notice of Appeal to the Court of Appeal of Tanzania.

On the third ground, Mr. Mkumbe alleged that the first trial at the Njombe District Court erred in both law and fact by disregarding the decisions of the three High Court judges mentioned earlier. These judges had previously determined that the blame in this matter rested with the respondent, not the appellant, for any alleged delay in commencing execution proceedings.

Counsel for the Respondent Mr. Kibadu, countered the grounds of appeal by stating that the argument made by the Appellant regarding the Respondent applying delaying tactics that hindered the filing of execution in time is misplaced in this case. He emphasized that the focus of the case at hand is whether the trial court correctly ruled out that the suit subject to

the appeal was time-barred. Mr. Kibadu noted with regret that the Appellant did not address this issue in her submission.

Regarding the Appellant's argument in the second paragraph, Mr. Kibadu suggested that it might be relevant in the referred applications but is irrelevant in the present appeal. He pointed out that in the former case, the cause of action was the division of landed property **built on Plot No 15 Block "C" located at Congo Street within Njombe** as a matrimonial property. However, in the current case, the cause of action is the share of allegedly rent at Plot No 15 Block "C," which was not raised in Matrimonial Cause No 01 of 2007 or Matrimonial Appeal No 01 of 2010 between the same parties. Thus, Mr. Kibadu concluded that this ground is non-meritorious.

Moving on to **the second ground**, Mr. Kibadu averred that the submission made by the Appellant is misplaced. He clarified that the trial court was addressing the issue of the time limitation of the suit under appeal, not the execution of the decided case, specifically Matrimonial Appeal No 01 of 2010. Consequently, Mr. Kibadu concluded that the ground lacks merit.

Regarding **the third ground of appeal**, Mr. Kibadu insisted the falsity of allegations that the Respondent is responsible for the delay in execution. He argued that the three decisions referenced by the Appellant are irrelevant to the present appeal, as the causes of action in the former and present appeals are distinct, as he previously submitted in addressing the first ground of appeal.

Mr. Kibadu emphasized that the Appellant did not substantiate the extent to which the suit subject to the appeal was filed within the time limit. He concluded by affirming that the trial court rightfully dismissed the suit as it was time-barred and requested that the appeal be dismissed with costs.

In rejoinder, Mr. Mkumbe reiterated points made in his written submission, emphasizing that three High Court judges had independently determined that the respondent had been employing unnecessary delaying tactics against him. He stated that he had attached copies of three High Court rulings to support this assertion.

Addressing the respondent's counsel's insinuation that the alleged delaying tactics were instigated by him, Mr. Mkumbe noted that the mention of "21 good years" and "13 good years" in the cited paragraph seemed intended to portray his pursuit of rights as careless or inefficient. However, he argued that the facts clearly demonstrated that it was the respondent who was responsible for prolonging the matter over the alleged "21 good years."

Mr. Mkumbe provided details of various legal proceedings to support his argument. Firstly, he mentioned that the Court of Appeal of Tanzania dismissed a Notice of Appeal filed by the respondent in 2013, which hindered the execution of the division of matrimonial property. Secondly, he highlighted a Misc. Matrimonial Application filed by the respondent in 2016, which further delayed the execution process. Thirdly, he mentioned his initiation of execution proceedings at the Njombe District Court, which

were contested by the respondent in the High Court at Iringa. Lastly, he noted another application filed by the respondent in 2020, which was dismissed by the court.

In conclusion, Mr. Mkumbe asserted that he had remained actively engaged in the matter throughout, while the respondent had failed to address the serious criticisms levelled by the judges regarding the use of delaying tactics. He emphasized that asserting that the matter was time-barred would require the court to overturn the decisions of the three High Court judges.

I have dispassionately considered the rival submissions. I have also carefully examined the lower court records. I do not want to beat around the bush. Let me be very honest, the delay and the misery suffered by the Appellant for more than 20 years can be attributed to the kind of lawyering exhibited by the learned Advocates for the Respondent. It is extremely saddening. It is my considered view that the learned counsel who have advocated for the Respondent all these years were exceedingly concerned with the wishes of their client (the Respondent) to the extent of jettisoning their role as officers of the Court. This is totally unbecoming.

In our adversarial system, it is expected that an Advocate will always try to strike the right balance between his responsibility to his client and his role as an officer of the Court. In the persuasive case of **RONDEL VS. WORSLEY** [1969] 1 AC. 191, 227 Lord Reid made the following observations in relation to the duty owed by a Lawyer to the Court:

*"It is well-established that, as an officer of the court, Advocate's paramount duty is to the court as part of the duty to the proper Administration of Justice. The oath or the affirmation that Advocates take means they have this additional level of responsibility and that **they may not be driven by their client's wishes alone, but with their professionalism.** This duty to the Court by a legal practitioner arises because of the position entrusted on as an officer of the court and an integral participant in the administration of justice. The practitioner's role is not merely to push his or her client's interests in the adversarial process, rather the practitioner has a duty to assist the court too in the doing of justice according to law. The duty often requires that the legal practitioner act honestly, with candour and competence. Importantly, **Advocates should not and must not mislead the Court and must be frank in their responses and disclosures**". [Emphasis added].*

I have chosen to start my analysis this way because, I think, it is high time we hold the bull by the horn. To that end, a brief historical backdrop to the matter is imperative. Parties in this appeal who are senior citizens were once married in accordance with Christian rites. **Their marriage lasted until 14/02/2002 when it was dissolved by Lupalilo Primary Court** located in Makete District, Njombe Region. Since no party sought for division of matrimonial property then, they duo parted ways.

It appears that the appellant returned to the same court after a few years and petitioned for division of the matrimonial properties. After several legal wrangling that I consider irrelevant, on 30th 2010, this Court Uzia J. as he then was, ordered that the properties be divided on 50/50 basis. That is when the meddling by the learned Advocates started. I will go deeper on this.

Mr. Frank Ngafumika learned Advocate appeared for the current Respondent in **Msc. Matrimonial Application No 3 of 2016**. He was seeking for the decision of this Court on the proper Court for the purpose of executing a decree passed by this Court in its appellate jurisdiction. Mr. Ngafumika made some groundbreaking arguments for the application while Mr. Mhagama, learned Advocate also delivered an equally impressive counter argument. In the end Hon. Shangali J. as she then was, ruled in favour of the Applicant. She ordered that the court of first instance (District Court of Njombe) to execute the decree.

As strange as it sounds, three years later, the current Respondent, still enjoying the legal services of Mr. Ngafumika returned to this Court. Vide **Misc. Civil Application No. 9 of 2019** the then Applicant (the Respondent herein) prayed among other things:

"That this Court be pleased to call for the record of the Njombe District Court in execution of Matrimonial Appeal No. 1 of 2007 to revise the same and satisfy itself and give directives as to whether Njombe District Court had jurisdiction to hear and determine the petition of

matrimonial properties subsequent to the grant of divorce decree by Lupalilo Primary Court, in Makete District."

Having acquainted himself with the big picture of the matter, **His Lordship Matogolo J.** (as he then was) indicated his dissatisfaction with the way the learned Advocates for the Respondent were handling the same. I am inclined to reproduce a part of the Ruling of my brother Matogolo J. as I hereby do:

*"Mr. Ngafumika has been in conduct of this case for quite a long time. If he had any observation regarding the jurisdiction of the District Court of Njombe to hear and determine the petition for division of matrimonial assets, he would have raised it earlier. But he did not do so until the matter reached this court on appeal. **The present application further appealed to the Court of Appeal, but he did not prosecute his appeal which was later struck out...I am of the firm view that justice would not be triumphed by the courts of law engaging themselves in technicalities instead of dispensing substantive justice...**"* (See page 11 emphasis added)

It is unfortunate that the learned trial Magistrate was not made aware of the above history and the wealth of insights generated by the Honourable Justices of this Court as they pondered how to balance between procedural technicalities and substantive justice. Had he taken some time to research on the uniqueness of the matter he would have opted for substantive justice and ensuring that litigation comes to finality.

As alluded earlier, Mr. Mkumbe drew my attention to the criticisms leveled against the learned Counsel for Respondent by the learned judges, highlighting the misuse of court processes to prolong the resolution of the matter. Let me add that such conduct is not only detrimental to the administration of justice but also undermines the integrity of the judicial system. It may be interpreted as an attempt to **circumvent or even disobey court orders.**

At this juncture let me remind the learned Advocates and any other party of the importance or rather necessity to obey court orders. In the words of Romer L.J. in **HADKINSON V. HADKINSON**[1952] 2 All ER 567

*"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. **The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.**"* (Emphasis added)

In **SUBRATA ROY SAHARA V. UNION OF INDIA (2014)** 8 SCC 470, the Supreme Court of India stated:

"Disobedience of orders of a court strikes at the very root of the rule of law which the judicial system rests. Judicial orders are bound to be obeyed at all costs. Howsoever grave the effect may be, is no answer for noncompliance of a judicial order. Judicial orders cannot be permitted to be circumvented."

I have gone through the three rulings referenced by the Appellant which unequivocally highlighted the Respondent's conduct in prolonging the resolution of the matter. I entertain no doubt that the Appellant has diligently pointed out the various instances where the Respondent employed delaying tactics, which significantly impacted the progress of the case.

In light of the foregoing, I allow the appeal. I hereby order that the Matrimonial Cause No 2 of 2022 proceeds on its merits without further delay.

It is so ordered.



E.I. LALTAIKA

JUDGE

28.03.2024

Court:

Judgement delivered under my hand and the seal of this Court this 28th day of March 2024 in the presence of **Mr. Edrick Mwinuka** holding brief for **Mr. Victor Mkumbe learned Advocate** for the Appellant and in the absence of the Respondent.



E.I. LALTAIKA

JUDGE

28.03.2024

Court:

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




E.I. LALTAIKA

JUDGE

28.03.2024