

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 48 OF 2023

*(Appeal from the decision of District Court of Temeke, One Stop Judicial Centre at Temeke
in Matrimonial Cause No. 147 of 2022)*

LILIAN J. MWAMBELEKO..... APPELLANT

VERSUS

JOSHUA R. GWAKISA..... RESPONDENT

JUDGMENT

29th January & 18th March, 2024

BARTHY, J.

The appellant, dissatisfied with the ruling of the District Court of Temeke, One Stop Judicial Centre at Temeke (hereinafter referred to as "the trial court") in Matrimonial Cause No. 147 of 2023, has lodged an appeal before this court. This appeal consists of nine grounds, which, for reasons to be elucidated later, will not be reproduced here.

Understanding the background of this matter is essential to grasp the nuances of the case. Initially, the respondent filed a petition for a decree of divorce against the appellant before the trial court. In response, the appellant submitted her answer to the petition, leading to

the commencement of hearing of the case. During the trial, after the petitioner (then respondent) presented their case. Then the court proceeded to call upon the appellant to present her defence. At this juncture, the respondent's counsel raised a preliminary objection, contending that the appellant's answer contained evasive denials amounting to an admission of the petition and argued against the inclusion of certain attached documents in the proceedings.

The trial court conducted a hearing on the preliminary objections through written submissions, ultimately upholding the objection and subsequently issuing a decree of divorce, finding that the marriage between the parties had irretrievably broken down.

Upon examination of the lower court's records, this court identified procedural irregularities. Specifically, it noted that after the petitioner's case was heard, the respondent's advocate raised preliminary objections regarding the appellant's defence, primarily focusing on the evasive denials and the inclusion of documents. The trial court ordered these objections to be addressed through written submissions, leading to the subsequent issuance of the divorce decree based on these objections.

In light of these irregularities, this court deemed it necessary to reopen the proceedings and allow both parties to address the propriety

of the trial court's decision on the preliminary objections, which ultimately led to the issuance of the divorce decree.

The appellant, who represented herself throughout the trial, informed this court that while preliminary objections were indeed raised and addressed through written submissions, she was denied the opportunity to present her defence before the trial court proceeded to make its findings.

On the respondent's side, represented by Mr. Mshana assisted by Mr. Roctus Asenga, it was argued that the trial court's decision to grant the divorce decree was justified based on the preliminary objections raised. They contended that the appellant's evasive denial amounted to an admission and invoked procedural rules to support their stance. Additionally, they emphasized the importance of expeditious case disposal, citing relevant legal provisions and precedents.

Alternatively, the respondent's counsels suggested that if deemed necessary, this court could enter judgment on admission. However, they maintained that such action was unnecessary, reiterating their belief in the propriety of the trial court's decision.

In summary, the appellant challenges the denial of her right to present a defence, while the respondent justifies the trial court's decision based on procedural grounds and expediency. The matter now

rests with this court to adjudicate upon the fairness and legality of the trial court's proceedings and decision.

In this matter, it is evident from the arguments and submissions of both sides that there were preliminary objections raised before the trial court, leading to the suspension of the matter's hearing.

Subsequently, the court proceeded to request the involvement of the parties to address these objections, culminating in its ruling based on the findings.

It is now firmly established as a legal principle that once a preliminary objection is raised; the court must first address it before proceeding with the substantive hearing of the matter. This was emphasized in the case of in the case of **Deonesia Onesmo Muyoga & 4 others v. Emmanuel Jumanne Luhahula**, Civil Appeal No. 219 of 2020 (all unreported), the Court of Appeal held that;

*It is settled law that, once **a preliminary objection is raised, it must be determined first before the substantive case is heard and determined.** This is pertinent because the whole purpose of a preliminary objection is to make the court consider the first stage much earlier... [Emphasis is supplied].*

Addressing preliminary objections before the substantive case ensures that procedural matters are properly resolved before delving into the merits of the case. This promotes fairness and the proper administration of justice by adhering to established legal procedures.

In the present matter, it was crucial for the trial court to ascertain whether the preliminary objections raised possessed sufficient merit to warrant further consideration, or if they should be dismissed, allowing the substantive hearing to proceed.

However, the trial court, having determined the preliminary objections raised on their merits, proceeded with a similar ruling to adjudicate the substantive matter and pronounced that the marriage between the parties was irreparably broken, granting the decree of divorce accordingly.

Clearly, it was improper for the trial court to grant the decree of divorce solely based on its ruling regarding the preliminary objections. As a way forward and an alternative to resolving this issue, the respondent's counsel suggested the court may compose a judgment on admission. They further argued that such action, however, is deemed unnecessary as the trial court's decision was justified to ensure the timely disposal of the case. Moreover, it was advocated to avoid unnecessary technicalities, as Section 3A of the Civil Procedure Code

[Cap 33 R.E. 2019] (hereinafter referred to as the CPC) allows for such discretion.

Mindful of the principle of law that rules of procedure are handmaidens of justice and must be strictly followed, I am aware of the existence of the principle of the overriding objective as laid down in the Constitution of the United Republic of Tanzania, 1977 (as amended), and sections 3A and 3B of the CPC. Nonetheless, this should not be regarded as a blanket to cover and encourage the habit of not adhering to procedural laws.

The importance of adhering to laws of procedures was lucidly stated in the case of in the case of **Mondorosi Village Council & 2 others v. TBL and 4 others**, Civil Appeal No. 66 of 2017, Court of Appeal of Tanzania, at Arusha, the court held that;

"...Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."

That being said, in the present matter, it is clear that the procedure of entertaining the petition for divorce whether on admission or otherwise was not properly followed by the trial court.

In light of the anomalies discovered in the procedures of the trial court, I hereby exercise the revisional powers vested in this court under section 31(2) of the Magistrates' Courts Act, Cap 11 R.E. 2022. Consequently, I nullify and quash the proceedings of the trial court, along with the subsequent order issued after the hearing of the preliminary objection. As a result, I order a retrial from that stage promptly.

Given the aforementioned reasons, I deem it unnecessary to delve into the grounds of appeal raised, as they arose due to the impropriety of the procedures. Analysing them would only serve to perpetuate the same errors. Regarding the relationship between the parties, I give no order as to costs.

It is so ordered.

Dated at Dar es Salaam this 18th March, 2024.




G.N. BARTHY
JUDGE

Delivered in the presence of the Appellant in person, Mr. Amin Mshana
Learned Advocate for the Respondent and in the absence of the
Respondent.