

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**PC MATRIMONIAL APPEAL NO.13 OF 2021**

*(Arising from the District Court of Masasi at Masasi in Matrimonial Appeal No.6 of 2020, originating from Lisekese Primary Court in Matrimonial Cause No.8 of 2020)*

**STEVEN M. PUNDILE..... APPELLANT**

**VERSUS**

**EVODIA KALIBWANI.....RESPONDENT**

**RULING**

*10/5/2022 & 6/10/2022*

**LALTAIKA, J.:**

In 2019 parties herein, having lived as husband and wife since 1990 parted ways. Consequently, the respondent went to the trial court to seek for her rights over assets jointly acquired with the appellant during the lifetime of their relationship.

After a full trial, the trial court (Lisekese Primary Court) ordered for division of matrimonial assets in percentage basis. Dissatisfied, the respondent herein appealed to the District Court of Masasi vide Matrimonial Appeal No. 6 of 2020. The first appellate court ordered a new division premised on incorporation of assets hitherto excluded by the trial court.

Dissatisfied, the appellant has appealed to this court on four grounds as reproduced hereunder:

1. *That the appellate court erred in law and fact by failure to decide the appeal in respect of the grounds of appeal formulated and filed by the respondent.*
2. *That the appellate court erred in law and fact by departing from the decision of the trial court without any substantive reason.*
3. *That the appellate court erred in law and fact by dividing the properties without assessing the contribution of the parties to the acquisition of the said properties.*
4. *That the appellate court erred in law and fact by dealing with an appeal like the fresh (sic!) case.*

When the matter was called on for hearing on 24/2/2022 the appellant was represented by Mr. Alex Msalenge assisted by Ms. Acrala Blanket, learned advocates from Phoenix Advocates, a law firm with its offices in down Mtwara. The respondent, on the other hand, appeared in person, unrepresented. Mr. Msalenge proposed that the hearing of the appeal proceeds by way of written submissions. The respondent agreed, but she raised an objection that the appeal was time barred.

It is elementary law that in our jurisdiction, whenever a preliminary objection on a point of law is raised the same must be disposed of first (See **Meet Sigh Bachu vs Singh Bachu**, Civil Appeal No 144/02 of 2018, **Godfrey Nzowa Vs. Selemani Kova and Tanzania Building Agency**, Civil Appeal No. 3 of 2014 and **Yazidi Kassim t/a Yazidi Auto Electric Repairs Vs. The Attorney General**, Civil Application No. 552/04 of 2018) among other decisions of the Court of Appeal of Tanzania.

In the light of the above, the following schedule was ordered; (i) Written Statement 10/3/2022 (ii) Reply 24/3/2022 (iii) Rejoinder if any 31/3/2022 (iv) Mention for necessary orders 5/4/2022.

In a rather strange move, Mr. Msalenge and Ms. Blanket, learned counsels for the appellant, instead of assisting this court to dispense its

function of administering justice, manipulated the above court order to meet their desired end. The learned counsels cunningly made it appear as if this court had ordered hearing of both the Preliminary Objection and the appeal to run concurrently.

Apparently, the learned counsels took advantage of the ignorance of the unrepresented rival party to submit what they termed "Appellant's Written Statement Supporting an Appeal". They purported to reply to the preliminary objection and argue the grounds of appeal all at once in such a laughable manner.

It is noteworthy that although the drafter of the so called "Written Statement of Appeal" not sanctioned by this court is Ms. Acrala Abdallah Blanket (Advocate), this court is alive to the fact that Mr. Msalenge was and still is on the steering wheel. He is continuously mentioned here because he is the one who addressed the court on the prayer to proceed by way of written submissions and, for all practical purposes, is the senior counsel who was "assisted" by Ms. Blanket as it appears in the court proceedings.

Coming back to the matter at hand, the respondent, (who was initially unrepresented), upon receipt of the "document" described above, managed to access legal services of Advocate Fred Geoffrey Mmasi, of Level Up Attorneys, a Dar-es-Salaam based law firm. Logically, Mr. Mmasi had no other option but to reply to the so called "Statement of Appeal". However, as I will explain later, the same was not only a waste of time, but also an exercise in futility.

It is also noteworthy that according to the court records, parties herein appeared before the Hon. L.R. Kasebele Acting Deputy Registrar on 12/5/2022. The court made two orders: "1. For Judgement on

28/6/2022. 2. Parties to appear.” No sooner had I received a notification through my digital planner that the matter at hand was coming for judgement on 28/6/2022 than I knew that something was wrong. I had not made any order for judgement and nor was I anticipating any as far as the matter at hand is concerned as it was still on the preliminary objection stage. Since then, I have thoroughly studied the matter for informed determination as I hereby do.

The purpose of filing written submissions as proffered by the Court of Appeal of Tanzania in **National Bank of Tanzania (NBC) Ltd vs Sao Ligo Holding and Another**, Civil Application No 267 of 2015 is to “speed up administration of substantive justice.”

In the instant matter, although this court intended to speed up administration of justice, parties ended up exchanging documents not ordered by the court. It does not take much thought to realize that the act of exchanging documents not sanctioned by the court is an exercise in futility.

The way forward is equally straightforward, since the order of the court has not been complied with by either party, the same is logically, tantamount to nonappearance. It goes without saying therefore that, **Order IX Rule 2 of the Civil Procedure Code Cap 33 RE 2022** comes to our rescue. For avoidance of doubt, the provision is reproduced bellow:

***"Where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed."***

The above provision of the law is, in my opinion, unambiguous. It does not need any further explanation. Although this is a matrimonial matter that does not normally attract an order for costs, I do not entertain any doubt in my mind that counsels for the appellant, having acted both

unscrupulously and negligently, are liable, in their own capacity for costs. This does not rule out other disciplinary procedures under the Advocates Act Cap 341. All said, this appeal is hereby dismissed with costs.

It is so ordered.



**COURT:**

**E.I. LALTAIKA**

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over a horizontal line.

**JUDGE**

**6.10.2022**

This ruling is delivered under my hand and the seal of this Court on this 6<sup>th</sup> day of October 2022 in the presence of the Ms. Clara Blanket, learned advocate for the appellant and Mr. Fred Geoffrey Mmasi, learned Advocate for the respondent.



**E.I. LALTAIKA**

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over a horizontal line.

**JUDGE**

**6.10.2022**