

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL APPEL No. 46 OF 2019

(Original Civil Case No .131 of 2014, Delivered on the 10th January 2019, in The
Resident Magistrate Court of Dar es Salaam at Kisutu, Before Hon. Mashauri P.R.M)

JANE MWANGO ROBERT MASABALA.....APPELLANT

Versus

ELENA DONALD MAX.....RESPONDENT

JUDGEMENT

30th November - 11TH December, 2019

J. A. DE- MELLO J;

This is a first Appeal emanating from a Trial that, the Kisutu Resident Magistrates Court heard, analyzed and evaluated evidence adduced by Parties and, their witnesses, ending up determining in favor of the Respondent. In his twenty eight pages (28) judgment, the Trial Magistrate arrived to that conclusion by addressing the three (3) issues that, had been framed namely;

- 1. Whether the Plaintiff was lawful married to the 2nd Defendant on 20/4/1991?**
- 2. Whether the 1st Defendant was lawfully married to 2nd Defendant?**
- 3. What Reliefs are the Parties entitled to? »»**

learned advocate, and both opted for written submissions, duly granted and both are in compliance with the scheduling orders.

Counsel Bendera for the Appellant submitted that, it was wrong to entertain the dispute as a Civil one, considering it was for Annulment of Marriage as **77(3) & 81(A)** of the **Law of Marriage Act Cap. 29 R.E 2002** and, **Rule 77(3) & (b)** of the **Law of Marriage Matrimonial Proceedings Rules Cap. 29 R.E 2002**. This being the case, the proceedings for Declaratory Decree or for Decree of Annulment of a Marriage ought to be instituted by way of a **Petition** bearing a distinct register as a Matrimonial Cause. He prayed this Court to quash the **Civil Case No. 131 of 2014** that, decided against her. With regard to the second ground, the Marriage Certificate allegedly to have taken place in **Russia** had contravened **section 96 (2) 36 and 37** of **Cap. 29 R.E 2002** for noncompliance with section **36 or 37** regarding Marriages contracted outside Tanzania. The percepts of the **Family Code of the Russian Federation No. 223-fz of 29th December, 1995** are incompatible with the **Law of Marriage Act** of Tanzania, for determining validity and understanding of **Private International Law**. Citing the case of **Hasmat Chhaganlal vs. Bashir Hussein Gulamali & Another [1983] TLR 320, Ramadhani C.J of Zanzibar** (as he then was) addressed the applicability of the law when two laws are at logger heads, by citing the **Book On the English Conflict of Laws at page 316** approving what the case of **RE An Application by Barbara Simpson Howison [1959] E.A 569** which laid down two principles;

- (i) **the incident pertaining to the form of marriage satisfy the *Lex cerebation is and***
- (ii) **the incident pertaining to the essential of the marriage satisfy the *lex domicile*.**

According to him, in the absence of **Certificate of No impediment** from Tanzania and by the **Registrar General of Marriages and, Divorces** under **section 45 (1), 45 (3)** for recognition under **section 36 (a)** for validation of a Foreign registered marriage. This is even more conflicting when the **Russian Certificate** does not bear the names of the witnesses hence in conflict with the requirement of section **27(1) & 38 (1)** of **Cap.29 R.E 2002** requiring for at least two (2) witnesses. Submitting on the **3rd** limb of **Appeal, Counsel** questions the Annulment of the Marriage notwithstanding it is non existence as a result of the death of the late **Donald Max**, three years and, six months after his demise. He referred section **9(1)** and, **12(1) (a)** of **Cap. 29 R.E 2002**, providing for instances where either spouse has passed on and hence ending its duration. That the marriage between the **1st** and **2nd** Defendant was a Civil one contracted before **Ilala District Assistant Registrar General of Marriages**. The **Certificate** was clear that, the **2nd Defendant "Hajaoa"**, hence in conflict with the Russian one, not in form with the demands of the laws in Tanzania. Not proved, the Magistrate observed the **1st and 2nd Defendant** to have "lied" in quest of ensuring money is safely collected from the Parliament, which was illegal. The Trial Magistrate went further awarding **Damages** as a result of **Adultery** by the **1st Defendant** as opposed to the **2nd**

Defendant, the deceased. Be it voidable it is valid until when annulled, he concluded as he prayed for Judgment and, Decree with costs.

Opposing the 1st ground **Counsel Bundala**, condoned the lodging of the matter in a Civil manner to pave a wider ground for Reliefs even ones not provided for under the **LMA Cap. 29. Sections 96 of Cap. 29** is not covered by **Rule 2** of the **Matrimonial Proceedings Rules, GN No. 136 of 1971** as amended by **GN No. 246 of 1997**. The filing of the matter in Civil forum was appropriate, he firmly asserts. This also paved way for refund of money fraudulently taken by the **1st Defendant** from the Parliament purporting to be a legal wife. The presentation of a suit in form of a **Plaint** and, not a **Petition** in terms of **section 72 (1) of Cap. 29** read together with **section 22 of Cap. 33** was proper to even accommodate damages for **Adultery**. Taking an objection at this Appeal is improper Counsel states, with no room of entertaining technicalities and lenience from the Court. **Section 19 of Cap. 33** requires objections be raised at the outset prior to hearing and, in the event the Court finds it irregular, then the **Oxygen Principle** should apply. The case of **Haiderali Lakhoo Zaver vs. Rex (1952) 19 EACA 244** as was cited in the case of **Robert s/o Madololyo vs. R, Criminal Appeal No. 486 of 2015** (Unreported) for non reliance to technicalities. Also the case of **Yakobo Magoiga Gichere vs. Peninal Yusuph, Civil Appeal No.5 5 of 2007**, for overriding principle test. He cemented his arguments by citing section **3A** of the **Civil Procedure Act Cap. 33 R.E 2002** as amended by **Act No. 8 of 2018** for embracing Overriding Objective Principal, unless it is certain that by doing so injustice would be occasioned. To buttress his argument on un validated Russian

Marriage and by he citing the case of **S.S Makorongo vs. Severino Consiglio, Civil Appeal No. 6 of 2003, Court Of Appeal Of Tanzania (Unreported)** as cited in the case of **Bidco Oil and Soap Ltd vs Commissioner General Tanzania Revenue Authority, Civil Appeal No. 89 of 2009, Counsel Kalolo** averred that, the marriage of the Respondent and, the late **Donald Max**, was contracted in **1991**, therefore the said marriage could not be governed by the **Family Code of Russia of 1995** considering the principal of no retrospective rule on application of the law. the same was what the case of **Yew Bon Tw vs. Kndraaan Bas Mar (1983) 1 AC 553**, and, that of **Municipality of Mombasa vs. Nyali ltd (1963) E.A 371 where Newbold J.A** held that, the law should not act retrospectively to affect the substantive rights of individual, neither was therefore a need for registration of the **Russian Marriage** to the **Registrar General**. With regard to the **3rd ground, Counsel Bundala** contends that Annulment was lawful, considering the fact that in presence of the alleged second marriage there existed in place, a lawful previous one, yet to be dissolved by either jurisdiction. At the filing of this suit the 2nd Defendant was still alive, with the two ladies all alleging to be lawful wives of the 2nd Defendant. Responding while combining **grounds 4th and 5th** of the Appeal, Counsel asserts that, the exhibit P-4 that, the 2nd Defendant used to lure the Parliament as the legal wife was **Fraud** but, also proof for **Adultery**, which the Trial Magistrate right awarded damages as well is refund of the money illegally obtained. The second marriage if at all, is prohibited under sections **15 (1)** and **38 (1)** of the **Law of Marriage Act**, restricting spouses to contract another marriage and, if so, then it is null and, void. The

affected or rather victim must be compensated as was held in the case of **Musa Mwalugala vs. Ndeshe Hota (1998) TLR1** that, damages for **Adultery** are always compensatory, neither punitive nor exemplary, awarded for actual value, the part lost to his partner, for injury of his feelings, to his honors and to his family.

In rejoinder, Counsel had nothing much other than reiterating his submissions in Chief, while distinguishing the laws and cases cited, not applicable in this instant Appeal. Unless and, until the Russian Marriage was proper in the Tanzanian jurisdiction the marriage was void, it is observed.

Having considered the rival and, quite lengthy submissions by Counsels for the parties, on the 1st ground of the Appeal, I think need not be detained much in determining whether or not the irregularity renders the original Civil Case No. 131 of 2014 incompetent. I am on notice that, the time this matter was lodged at the **Kisutu Court** in year **2014** the **2nd Defendant** was alive but, ailing. Corams all throughout, indicates his **ABSENCE** until the 24th February, 2017 when it emerged, and, brought about in form of Preliminary Points of Objection by **Counsel Bendera** on behalf of the Appellant then, that;

The Honorable Court be pleased to order the Abatement the suit against the 2nd Defendant due to his death, the Plaintiff lost the right to sue the 2nd Defendant.

Disappointed, **Hon. W. Lema** one in conduct of the Trial then, dismissed the objection based on the following position;

“Before I pen off, there is mis-application mis-use of Law in handling this matter which has resulted to undue delay in disposing off this matter.

That been said the Notice of Preliminary objection filed by Counsel Bendera is incompetently/improper as it serve no useful purpose as far as this matter is concerned.

Whereas he is seeking for abatement order the best way is to first in Court during hearing date, the proper information/whereabouts, about the defendant, supporting with relevant documents. There after the Court will examine it, and give necessary order.

The Notice of Preliminary objection dated the 24/3/2016 is hereby dismissed...”.

The **2nd Defendant’s** persistent absence till his demise, was owing to long illness as reported. The Respondent then the Plaintiff had sued the two Defendants essentially based on the **illegal marriage** between the two, but more so and, in that spirit, **illegal collection of monies** from **Parliament** as subsistence and, upkeep of the **1st Defendant** now the Appellant, on that allegedly illegal pretext. It is even for alleged **Adultery** that the Court awarded **TShs. 10,000,00/=** together with costs. With all these, can one cannot avoid to fully agree that the suit was purely a Matrimonial one as opposed to Civil.

Maybe and for the sake of refreshing our memories, the need to bring on board the rationale for legislation. ~~The~~ The Academics Legal Dictionary defines

Legislation to mean; **"The making of law and passing of acts, decrees etc. Legislation is of two kinds. Primary Legislation; the making of Statutes or Acts or laws."**

Act: Means a law that has been officially accepted

The Oxford Dictionary of Law 7th Edition defines Legislation as;

"The whole or any part of the country's written law...broadest sense it also includes law made under powers conferred by Act of Parliament.

Act: A document that sets out legal rules and has (normally) been passed by both Parliament and agreed by the President

Generally and, simply, Acts of Parliament are Statutes known variously as legislations, regulations or rules. They are edicts of legislation used to govern society. Basically they are rules that have been codified to govern various situations. Examples the Penal Code, Criminal Procedure Act, Probate and Administration of Estate Act, Economic and Organized Crime Act, let alone the Law of Marriage Act, one in context at stake here.

Now for the **Law of Marriage Act Cap. 29**, is definitely one piece of legislation that has been **specifically enacted** for **specific matters** relating to **Marriages**. In relation to this matter, it is **PART II on Marriages, sections 34 (Marriages in Tanzania Embassies Abroad), section 35 (Issue of certificates of no impediment), section 36 (Recognition of marriages contracted abroad) section 37 (Recognition of marriages contracted in Embassies), section 38**

(Void ceremonies), PART III section 45 (Registration of Marriages contracted abroad), section 55 (Evidence of Marriages), PART V section 72 (Rights to damages for adultery) PART VI section 76 (Jurisdiction of Courts), section 77 (Right to invoke jurisdiction), section 79 (Power of Magistrate to state case), section 80 (Appeals), section 81 (Form of Proceedings), (b) Declaratory Decrees, section 94 (Powers to grant Declaratory decrees), section 95 (Effect declaratory decrees).

It is quite vivid and, apparent that, the matter in the lower Trial Court and being pure Matrimonial one was wrongly filed as a Civil Registry as opposed to Matrimonial Cause. This then brings this Court to the observation held by **Counsel Bendera** as alleged in ground 1 of the Appeal that;

- 1. That the Trial Magistrate erred in law and facts for conducting the marriage dispute as a normal Civil case outside of the Court's Matrimonial Cause Registry.**

I am saying so drawing my contention for jurisdiction exclusive that, Courts are bestowed on, when adjudicating matters. Jurisdiction has been basic as it goes to the root of the Authority in adjudicating upon cases of different nature. It has and, will remain so for Courts on the face of it to be certain of and assured of their jurisdictional mandate at the commencement of any trial. It not only encompass the Territorial, Pecuniary or Exclusive but goes to Registries in which they fall. This was settled in the case of **Fanuel Mantiri Ng'unda vs. Herman Ng'unda & Others [CAT] Civil Appeal No. 8 of 1995**. But on a higher note and quite practical and relevant to our

situation here if the special forum availed with a specific legislation for a case of such different nature, of the like of Matrimonial as was observed in the case of **AG vs. Lohay Akonaay & Another, 1995 TLR 80** stating that;

"...courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the Court that no appropriate remedy is available in the special forum".

The contention by **Counsel Bundala** for not been raised at an earliest stage prior to commencement of Trial, is in this instance misconceived owing to facts that it being a matter of jurisdiction, can be raised at any stage even at appeal and at time **"Suo Motu"**. Both the cases of **Richard Julius Rukambura vs. Isaack N. Mwakajila & Another Civil Appeal No. 3 of 2004** and **Baig & Batt Construction Ltd. vs. Hasmati Ali Baig, Civil Appeal No. 9 of 1992**. And this is exactly what this Court is doing, in ensuring that proceedings and decisions arising from a Court below it is competent. I am confidently stating so based on the case of **Tanzania Revenue Authority vs. Kotra Co. Ltd Civil Appeal No. 12 of 2009** holding that;

"...before an Appeal is determined on merits ...it must first be certain that the proceedings giving rise to the Appeal were competently before that or those Courts. This is so judgment in an Appeal from proceedings which were a nullity is also a nullity".

This first ground of Appeal raises a novel point of law and fact which the Law of Marriage Act (supra) specifically caters and provides for Marriage Disputes

and remedies and whose location is based within the Matrimonial Cause Registry and by way of **PETITION**. The contention by Counsel Bundala that they opted for Civil Registry in view of attaining a wider ground for reliefs that the **Law of Marriage Act** does not provide is highly misconceived.

What more can I say here other than conclude that, the proceedings and judgment that, this Appeal lies is a **Nullity** and which my hands are tied not to entertain, lest I also fall prey in that trap. Matrimonial Cause purely this was and still is, and, whose remedy(ies) is drawn from none other than the **Law of Marriage Act (supra)** alone as opposed to Civil law. The Appeal is on this only one ground merited and, is allowed.

It is so ordered.


J. A. DE-MELLO

JUDGE

11/12/2019