

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 136 OF 2023**

*(Arising from Miscellaneous Civil Application No 31 of 2021)*

**DEVOTHA JOSEPH MAKOA ..... APPELLANT**

**VERSUS**

**ROBERT LAZARO MAGUGA..... RESPONDENT**

**JUDGEMENT**

*24<sup>th</sup> February 2022 & 16 March 2023*

**MWANGA, J.**

The Appellant, DEVOTHA JOSEPH MAKOA appealed against the decision of the District Court of Ilala at Kinyerezi in Miscellaneous Civil Application No.31 of 2021 dated 17<sup>th</sup> August, 2022. In that application the appellant applied for extension of time to correct clerical errors with regard to variation of dates and non-inclusion of one plot in the distribution of matrimonial properties occurred in the judgement of the trial court dated 26<sup>th</sup> October, 2017. In his decision, the trial magistrate ruled out that:-

***"I don't buy idea advanced by the applicant concerning the issue of property claimed to be left out in the distribution if it falls in the category of being called a clerical error for this court to correct. This is for the reasons that it goes to the merits of the case to decide who will get what out of it."***

The appellant was aggrieved by such decision and therefore appealed on the following grounds: -

1. That, the trial Honourable Magistrate erred both in law and fact by holding that *'I don't buy idea advanced by the applicant concerning the issue of the property claimed to be left in the distribution if it falls in the category of being called a clerical error for this court to correct'*.
2. That, the trial Honourable Magistrate erred both in law and fact by discussing an issue of distribution of property and whether the left plot is a clerical error or not.

3. That, the trial Honourable Magistrate erred in law by discussing the issue which is not before the court and or pre- mature issues.
4. That, the trial Honourable Magistrate erred both in law and facts by granting prayer sought by applicant with regard only to the variance of dates.

The facts giving rise to this appeal are that; the appellant instituted a Matrimonial Cause No. 15 of 2012 in District Court of Ilala at Kinyerezi against the respondent claiming divorce, distribution of matrimonial properties and maintenance of children. Following the aforementioned petition judgment was delivered on 26<sup>th</sup> October 2017 upon which the court granted a share of 70% of matrimonial properties to the respondent and 30% of matrimonial properties to the appellant.

After four good years the appellant filed a petition in Miscellaneous Civil Application No. 31 of 2021 for extension of time within which to correct what is termed as clerical errors said to be discovered in the judgement in Matrimonial Cause No. 15 of 2012 delivered on 26<sup>th</sup> October 2017. That is to say; the listed matrimonial properties which were subjected to distribution are three houses in a single plot and two

undeveloped plots at Tabata Kinyerezi which makes total of three (3) plots. These plots were numbered by the respondent as Plot No. 454, 453 and 451. In its Judgement the trial court declared that the matrimonial properties were three houses and Plot No. 453 sold by the appellant which the court considered such sale and charged the appellant less 10% from her distribution, hence the court left plot No. 451 to be included in the distribution.

The errors said to have occurred moved the appellant to file Miscellaneous Civil Application No. 31 of 2021 in which the appeal was partly allowed as the appellant was given permission to amend clerical errors and omission in respect of variation of dates only.

The appellant and the respondent appeared in person and prays to this honourable court that this appeal be allowed by granting the order of extension to have the clerical error in respect non-inclusion of the plot No. 451. With leave of the court, parties argued their appeal by way of written submissions.

Submitting in support of the first ground of appeal, the appellant argued that there is no even a sentence in the judgement of the trial court

which describe why the plot was left undistributed while it was mentioned in the petition for divorce, submission and in the judgement. It was her believe that the same was left undistributed due to slip of the pen and not intentional.

The appellant argued grounds of appeal No. 2 and No. 3 together sating that, the issue whether the plot was left out or not was an error to be discussed in the subsequent application of correction of clerical errors in the Judgment and not in the application of extension of time. She added that, in the application for extension of time in Misc. Application No 31 of 2021 the court was supposed discuss only the reasons as to whether the extension of time have reasonable or sufficient cause as required under section 14(1) of the Law of Limitation Act, Cap. 89 R.E 2019 and not whether the undistributed plot was part of clerical error or not. In support of argument the appellant cited the case of **Lyamuya construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010(Unreported), which lays down the key conditions to granting extension of time.

In respect of the fourth ground of appeal, the appellant stated that the court erred to allow the application only on variance of dates because the application intended to extend time to correct errors in the judgement, hence it was incorrect to separate the two at the stage of application for extension of time.

On the other hand, the respondent called the grounds of appeal as baseless as the trial magistrate did not discuss the issue of property distribution and whether the left plot is clerical error or not at all, rather that he does not buy the idea advanced by the applicant concerning the issue of property claimed to be left out in the distribution if it falls in the category of being called a clerical error for this court to correct.

The respondent invited the court to refer paragraphs 5,6 and 10 of applicant's application whereby the appellant mentioned the said plot and claims that there was an error of omission of the above-mentioned plot No.451 Block A located at Kinyerezi, hence the court was right to determine the same because it was brought before the court by the appellant. He concluded that, the trial magistrate was right to grant prayers sought by the applicant with regards only to the variation of dates because the issue of plot goes to the roots of case.

In rejoinder, the appellant protested the fact argued by respondent that the matter in issue was supposed to be appealed against rather than applying for rectification of errors.

I have seriously gone through the grounds of appeal and submission of the parties herein. In the present Appeal, the central issue is whether the trial magistrate erred in law and fact to grant extension of time partly as the amendment of clerical errors in respect of variations of dates and not omission of one plot in the distribution of matrimonial properties.

It should be recalled that the application before the trial court was for extension of time to file an application for review in respect of clerical errors. To my view, what the trial magistrate was supposed to resolve was the issue as to whether there were sufficient grounds warranting extension of time and no more. The issue whether variation of dates or non-inclusion of the plot occurred in the judgement dated 26<sup>th</sup> October, 2017 ought to be discussed and resolved in the main application of such review, in case it will be preferred. Subsequent to that, the issue whether the appellant herein ought to go for review or an appeal would be also be an issue to be discussed in the main application as well.

Under the circumstances and pursuant to the ruling of the Court in Misc. Civil Application No.31 of 2021, the trial magistrate erroneously misdirected himself on the matter in question. Hence this appeal is allowed. The ruling of the District Court of Ilala at Kinyerezi in Misc. Civil Application.No.31 of 2021 is quashed and set aside. The Appellant is entitled to extension of time to correct the so-called clerical errors (if any) in the Judgement of 26<sup>th</sup> October, 2017 and the same shall be filed within 21 days. Being a matrimonial cause, I issue no order as to costs.

Order accordingly.



**H. R. MWANGA**

**JUDGE**

**16/03/2023**

**ORDER:** Judgment delivered in Chambers this 16<sup>th</sup> day of March, 2023 in the presence of both the appellant and respondent in persons.





**H. R. MWANGA**

**JUDGE**

**16/03/2023**