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The Republic of Uganda

In the High Court of Uganda at Soroti

Civil Appeal No. 0091 of 2023

*(Arising from Divorce Cause No. 001 of 2023)*

10 Amongin Gertrude Ruth ..... Appellant

Versus

Ebenu Justine ..... Respondent

*(Appeal arises from the ruling in the Chief Magistrates Court of Soroti at Soroti delivered by Her  
15 Worship Tumuhimbise Nause Magistrate Grade One on the 24<sup>th</sup> day of August, 2023)*

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

1. Background.

20 Ebenu Justine, the respondent filed Divorce Cause No. 01 of 2023 in the Chief Magistrate Court of Soroti at Soroti against Amongin Gertrude Ruth, the appellant, seeking that their marriage be dissolved and he be granted custody of their two children.

The appellant in her answer to the petition amongst other denials and averments indicated that during the course of their marriage they had acquired properties in Kikulu Sonde  
25 Namungongo, 3 properties in Amen, Western Division of Soroti city and 15 acres of land in Abitbit, Obule, Tubur in Soroti district.

When the matter came up for mention Counsel for the appellant raised a preliminary point of law that the Magistrates Grade 1 Court lacked jurisdiction to try the matter given that the matter involved properties exceeding its pecuniary jurisdiction.



- 5 The trial Magistrate having considered the submissions by both parties on the preliminary point of law found that the trial court had jurisdiction to hear the matter.

The trial Magistrate further found that the fact that the properties involved had a value exceeding the trial court's jurisdiction did not take away court's powers bestowed upon it by Section 3 of the Divorce Act.

- 10 The preliminary point was thus over ruled and the trial court ordered that the case proceed for hearing on merit.

The appellant was dissatisfied with the ruling and thus appealed to this court on the following grounds;

- 15 a) That the Learned Trial Magistrate erred in law when she misdirected herself on the law relating to jurisdiction of courts thus occasioning a miscarriage of justice to the appellant.
- b) That the Learned Trial Magistrate erred in law when she found out that the Grade 1 Court is clothed with jurisdiction to entertain a divorce cause with property above its pecuniary and territorial jurisdiction thus occasioning a miscarriage of justice to the
- 20 c) That the Learned Trial Magistrate erred in law when she failed to evaluate the evidence as a whole thus arriving at an erroneous decision and occasioning a miscarriage of Justice to the Appellant.

3. Duty of the 1<sup>st</sup> appellate court.

- 25 This Honourable Court is the first appellate court in respect of the dispute between the parties herein and is obligated to re-hear the case which was before the lower trial court by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and to re-appraise the same before coming to its own conclusion as was held in ***Father Nanensio Begumisa and Three Others v. Eric Tiberaga scca 17 of 2000; [2004] KALR 236.***

- 30 The duty of the first appellate court was well stated by the Supreme Court of Uganda in its landmark decision of ***Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007*** where it held that;

5        "...the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it"

In rehearing afresh, a case which was before a lower trial court, this appellate court is required to make due allowance for the fact that it has neither seen nor heard the witnesses and where  
10 it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. See: *Lovinsa Nakya vs. Nsibambi [1980] HCB 81*.

In considering this appeal, the above legal provisions are taken into account.

4. Representation.

The appellant was represented by M/s Odokel Opolot & Co. Advocates while the respondent  
15 was represented by M/s Menya & Co. Advocates. This matter proceeded by way of written submissions and the same have been duly considered in its determination.

5. Determination.

a) Preliminary Objection.

Counsel for the respondent raised a preliminary point of the law as to the competence of this  
20 appeal before this honorable court for failure to seek leave of court before filing the appeal. Counsel submitted that this appeal is incompetent, unsustainable and prematurely brought before this court.

Counsel argued that it is trite law that an appeal is a creature of statute and a right to appeal is not inherent.

25 Specifically, that appeals from orders of Magistrates courts to the High court are not automatic. Counsel relied on *Alinyo V R (1974) EA 544*, Section 76(1) of the Civil Procedure Act, Order 44 Rule 1 of the Civil Procedure Rules and *Mayende V Akena & Anor CA No. 174 OF 2019*.

Counsel for the appellant in rejoinder submitted that an appeal is a creature of statute and  
30 Order 44 rule 1(a) of the Civil Procedure Rules for orders from which an appeal shall arise as of right.

Counsel submitted that this rule covers the ruling the trial Magistrate made in respect of jurisdiction of courts and as such this appeal is automatic.



5        b) Resolution on the preliminary objection.

Section 76 of the Civil Procedure Act provides for orders from which an appeal lies, it states thus;

(1) An appeal shall lie from the following orders, and except as otherwise expressly provided in this Act or by any law for the time being in force from no other orders—

10        (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

15        (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court; (f) an order under section 65;

(g) an order under this Act imposing a fine or directing the arrest or detention in prison of any person, except where the arrest or detention is in execution of a decree;

20        (h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

Order 44 rule 1 of the Civil Procedure Rules further provides that;

(1) An appeal shall lie as of right from the following orders under section 76 of the Act—

25        (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;

(b) an order made under rule 23 of Order IX rejecting an application for an order to set aside the dismissal of a suit;

(c) an order under rule 27 of Order IX rejecting an application for an order to set aside a decree passed ex parte;

30        (d) an order made under rule 21 of Order X;

- 5 (e) an order under rule 10 of Order XVI for the attachment of property;
- (f) an order under rule 19 of Order XVI pronouncing judgment against a party;
- (g) an order under rule 31 of Order XXII on an objection to the draft of a document or of an endorsement;
- (h) an order under rule 67 of Order XXII setting aside or refusing to set aside a sale;
- 10 (i) an order that execution be levied made under rule 6 of Order XXIII;
- (j) an order under rule 8 of Order XXIV refusing to set aside the abatement or dismissal of a suit;
- (k) an order under rule 9 of Order XXIV giving or refusing to give leave;
- (l) an order under rule 6 of Order XXV recording or refusing to record an agreement, compromise, or satisfaction;
- 15 (m) an order under rule 2 of Order XXVI rejecting an application for an order to set aside the dismissal of a suit;
- (n) orders in interpleader suits under rule 3, 6 or 7 of Order XXXIV;
- (o) an order made upon the hearing of an originating summons under Order XXXVII;
- 20 (p) an order made under rule 2, 3 or 6 of Order XL;
- (q) an order made under rule 1, 2, 4 or 8 of Order XLI;
- (r) an order under rule 1 or 4 of Order XLII;
- (s) an order of refusal under rule 16 of Order XLIII to readmit or under rule 18 of that Order to rehear an appeal;
- 25 (t) an order under rule 4 of Order XLVI granting an application for review;
- (u) an order made in an interlocutory matter by a registrar.
- (2) An appeal under these Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.

5           (3) Applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.

I have reproduced section 76 of the Civil Procedure Act and Order 44 rule 1 of the Civil Procedure Rules to show as to which of the orders that can be appealed as of right.

10 In this instance the appellant raised a preliminary point as to the jurisdiction of the Grade 1 court to hear the divorce cause given the value and location of the property that the parties had accumulated in their marriage as stated in the appellants reply to the petition.

This objection was overruled by the trial magistrate and the appellant immediately filed this appeal without seeking leave from the trial court to do so.

15 Counsel for the appellant argued that it was not necessary for the appellant to seek leave to appeal because the order of the trial magistrate was in respect of jurisdiction of the court.

To justify this argument counsel further submitted that the respondent filed a petition for dissolution of marriage wherein he did not bring out the issue of matrimonial property yet it encompasses the major issue that a court of law should pronounce itself on being the outcome of dissolution of marriage and as such it constitutes a cause of action.

20 Counsel for the appellant based her argument on order 44 rule 1 (a) which per her deliberation gave the appellant the right to appeal the trial magistrate's ruling on the preliminary point of law.

Order 44 rule 1(a) as noted above provides for an appeal from an order under rule 10 of Order 7 returning a plaint to be presented to the proper court.

25 Order 7 rule 10 of the CPR provides thus;

(1) The plaint may at any stage of the suit be returned to be presented to the court in which the suit should have been instituted.

30 (2) On returning a plaint the judges shall endorse on it the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

This provision has no bearing on the ruling on the preliminary point of law from which this appeal arose.



5 The ruling was strictly on the jurisdiction of the Magistrate Grade 1 to hear Divorce Cause No. 01 of 2023 the property mentioned by the appellant in her reply to the petition notwithstanding, there was no mention of return of the petition therein to another court in the proceedings or submissions or ruling and as such counsel for the appellant cannot rely on Order 44 rule 1 (a) to justify their appeal to this court.

10 The order from which this appeal arose does not lie as of a right and proper perusal of section 76 of the CPA and order 44 of the CPR would have clarified this position to the appellant and caused her to first seek leave to file the same.

Having found that this appeal could only come to this court after the appellant had sought leave to do so and further finding that the appellant never sought this leave, this appeal is thus  
15 found to be incompetent before this court for failing to comply with section 76(2) of the CPA and Order 44 rule 2 of the CPR. The preliminary point of law thus succeeds.


Without prejudice to the above finding on the preliminary point of law I will still go ahead and determine this appeal on merit in the interest of justice.

c) Grounds 1,2 and 3.

20 The sum of the appellants submissions is that section 207 1(a) and (b) of the Magistrates Courts Act Cap 16, confer upon a Grade 1 Magistrate jurisdiction where the value does not exceed twenty million shillings and the appellant in her answer to the petition under paragraph 5(a) clearly brought to the attention of the court that the couple had acquired properties in Namugongo, 3 plots of land in Soroti city and in their country home and attached ownership  
25 documents therein whose property value is way beyond the territorial and pecuniary jurisdiction of the grade 1 court with counsel setting this value at Ugx. 100,000,000/=.

Counsel further submitted that the respondent's affidavit in rejoinder under paragraph 4 affirmed the fact that the couple during the subsistence of their marriage acquired the said properties.

30 The essence of her submissions is that in light of Section 207 (1) (a) and (b) of the Magistrates Court Act Cap 16 which clearly shows that the trial court has no pecuniary jurisdiction over this matter, the main suit should be dismissed.

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- 5 Counsel for the respondent in reply conceded that the High Court has original and unlimited jurisdiction in all matters including this particular matter.

Counsel, however, strongly inclined to the position of the law in Section 3 of the Divorce Act Cap 249 which provides that where all parties to a proceeding under this Act being Africans or where a petition of damages only is lodged in accordance with Section 21, jurisdiction may be  
10 exercised by a court over which presides a magistrate Grade 1 or a chief magistrate.

He submitted that in this case, both the petitioner and the respondent are Africans and therefore the Magistrate Grade 1 has all the powers to entertain the matter.

Counsel relied extensively on the decision in *Fredrick Kato Vs Ann Njoki DC No. 10 of 2007* where Hon Justice FMS Egonda Ntende (as he then was) found *inter alia* that actions should be  
15 commenced in the lowest court having jurisdiction over the matter.

Counsel further argued that his understanding of the above decision and the reading of Sec 3(1) of the Divorce Act is that they both vest the jurisdiction in divorce cases on the Magistrate court unless there are any special circumstances pleaded by a party requiring the matter to be transferred to the High Court which special circumstances were not anywhere pleaded by the  
20 respondent save for merely alleging that the properties exceed the pecuniary jurisdiction of this court.

Regarding the property, counsel for the respondent submitted that divorce matters like this are purely concerning the status of marriage which the petitioner has found have irretrievably broken down and he now desires to have the said marriage dissolved by this court.

- 25 He added that the appellant has not cited any specific law which bars the magistrates' courts from entertaining divorce causes for want of jurisdiction.

That the property issue which the appellant is delving into and inviting this court to decide is not in contention.

That what is in contention is the marriage which the petitioner wants the trial court to annul  
30 with any property and its distribution in matters of divorce coming as a post-divorce issue just like custody of the children.



- 5 Once again counsel relied on **Fredrick Kato V Ann Njoki(supra)** wherein Justice FMS Egonda **Ntende** found that Magistrates courts have jurisdiction to try divorce petitions.

d) Court's findings.

- The main issue for determination here is whether the trial Magistrate was wrong to find that the Grade One Magistrate Court had jurisdiction to hear a divorce matter that involved  
10 property over her pecuniary and territorial jurisdiction.

The pecuniary jurisdiction of a Magistrate Grade one as provided under section 207 (1)(b) of the Magistrates Act is **twenty million Uganda shillings**. However, it should be noted that the jurisdiction of a magistrate is subject to section 207 of the Magistrates Act and any other written law.

- 15 The Divorce Act is the primary law a court considers when faced with a divorce petition as was the case in DC-001-2023 from which this appeal arises and this Act under section 3 provides for jurisdiction thus;

- (1) Where all parties to a proceeding under this Act are Africans or where a petition for damages only is lodged in accordance with section 21, jurisdiction may be exercised by a court over which presides a magistrate grade I or a chief magistrate. (emphasis mine.)  
20

(2) In all other cases jurisdiction shall be exercised by the High Court only.

(3).....

- The trial court in considering whether it had jurisdiction to hear DC-01-2023 needed to only consider if the parties were both Africans and there is no reference to pecuniary jurisdiction  
25 under section 3.

- My understanding of Section 3, its constitutionality notwithstanding, is that where both parties are African as was the case herein the jurisdiction to hear the matter lies with the magistrate grade 1 or the chief magistrate. However, under section 3(2) a matter shall be handled by the High Court in all other cases excluding those where all parties are Africans and where a petition  
30 is only for damages for adultery.

5 Hon. Justice FMS Egonda Ntende (as he then was) in *Fredrick Kato Vs Ann Njoki DC No. 10 of 2020* in construing section 3 of the Divorce Act found that the High Court is a court of unlimited jurisdiction with supervisory powers over magistrates' courts.

No doubt the High Court has jurisdiction to determine divorce causes of any nature of parties regardless of race.

10 Nevertheless, the High Court has powers under Section 18 of the Civil Procedure Act to withdraw cases from magistrates' courts and try them or to transfer cases to magistrates' courts for trial in those courts.

He further found that;

15 *"Given the need for the rational distribution of business in the courts so as not overwhelm one section of the court system with any particular class or category of cases and to ensure that the largest number of people have access to courts that are closest to the population it would be unwise in my view to conclude that all divorce cases must now be filed in the High Court.....In my view, barring exceptional circumstances, actions should be commenced in the lowest court having jurisdiction over the matter."*

20 Regarding matrimonial assets, the learned judge found that;

*"In the interim, pending reform of the Divorce Act, and perhaps for the guidance of the public, where in a divorce cause, the matrimonial assets in contention exceed the upper limit of the pecuniary civil jurisdiction of a magistrates' court that may amount to an exceptional circumstance to allow the filing of such a matter directly in the High Court. The current upper limit is Shs. 50,000,000.00. Where the matrimonial assets exceed this amount such a matter may be filed in the High Court." (Emphasis Mine)*

25

The learned judge correctly uses the word MAY meaning that the High Court could exercise its original and unlimited powers and jurisdiction to hear a divorce matter such as this instance but so does the magistrate grade one.

30 In the instant matter, the only reason the appellant disputes the jurisdiction of a magistrates' court is the existence of matrimonial property which per the appellant's submissions is over Ugshs. 100,000,000/= (One hundred million Uganda shillings).



5 The respondent, petitioner in DC-001-2023 made no mention of property in his petition, it is  
the appellant in her answer to the petition that under paragraph 5 (a) introduces the issue of  
matrimonial property and while she lists these properties as Kikulu Sonde Namungongo, 3  
properties in Amen western division in Soroti city and 15 acres of land in Abitbit, Obule, Tubur  
in Soroti district, however, there is no value attached to the same that would help the court  
10 assess its jurisdiction as is required by section 207(3) of the Magistrates Courts Act.

Counsel for the appellant tried to create special circumstances that would necessitate this  
court to hear the divorce petition instead of the trial court but all that argument is simply  
submissions from the bar.

While I agree that in exceptional circumstances a divorce cause must be heard by the High  
15 Court, I find that this no such case.

First the provision as to jurisdiction by the Divorce Act is so wide and does not make mention  
of pecuniary limits and Second should a magistrate court find that it cannot hear a divorce  
petition it would ordinarily hear it under section 3(1) this must be upon acute judicial  
consideration of exceptional circumstances that in the court's opinion would best be resolved  
20 by the High Court.

In all, courts should not lose sight on the essence of divorce causes, as rightly found by the trial  
magistrate, the purpose of the suit before her is dissolution of marriage between the petitioner  
and the respondent and not determination of their properties.

The essence of a divorce petition is dissolution of marriage on the ground(s) provided for under  
25 the Act, if a court focuses first on custody of children or division of matrimonial property in a  
suit for divorce, it may lose sight of the purpose of the petition before it by focusing on  
consequences of the action rather than the action from which they arise.

In the absence of any amendment to the Divorce Act to the effect as to removing jurisdiction  
from a magistrates' court by virtue of its fiscal disability, I would thus find that the question of  
30 pecuniary jurisdiction cannot arise except in special circumstances where the property sought  
to be divided is in dispute and has been proved to be of high pecuniary value and in a location  
the magistrate has no jurisdiction over.



5 In the final result I find that the trial magistrate was right to find that she had the jurisdiction to hear the matter in light with the provision of section 3 (1) of the Divorce Act. The trial magistrate thus did not err when she overruled the appellants preliminary point of law.

6. Conclusion:

10 This appeal is found to lack merits accordingly dismissed with each party ordered to bear their own costs.

I also order that Divorce Cause No. 01 of 2023 be transmitted with haste by the Registrar of this Honourable Court back to the trial magistrates court to enable the hearing and the conclusion of the same as soon as possible, accordingly.

I so order.

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.....  
Hon. Justice Dr Henry Peter Adonyo

Judge

3<sup>rd</sup> July 2024