

TANZANIA / JUDGMENT

CONSOLIDATED CIVIL APPEALS NO 95 AND 113 OF 2021 RAPHAEL NKWABI VS NAOMI LUCAS MBUKI

COURT
TANZLIIDECIDED
1 January 2021

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CORAM; MWANDAMPO. J.A..
MASHAKA. J.A. And MDEMU, J.A.) CONSOLIDATED CIVIL APPEALS NO. 95 AND 113 OF 2021
RAPHAEL NKWABI..... APPELLANT VERSUS NAOMI
LUCAS MBUKI..... RESPONDENT (Appeal from the judgment of
the High Court of Tanzania at Mwanza) (Maevekw. 3.) dated the 30th day of November, 2020 in
Matrimonial Appeal No. 24 of 2020 and Matrimonial Cross -Appeal No. 30 of 2020 R U L I N G O F T
H E C O U R T 12* & 17th July, 2024 M W A N D A M B O . 3.A.: The High Court, sitting at Mwanza
dealt with two appeals; Matrimonial Appeal No. 24 of 2019 and Matrimonial Cross Appeal No. 30
of 2020 both arising from Matrimonial Cause No. 3 of 2019 between Raphael Nkwabi (petitioner)
and Naomi Lucas Mbuki (respondent). The two appeals before the High Court related to
dissatisfaction against the order of division of matrimonial assets following a decree of divorce
by the trial District Court. The appellant Raphael Nkwabi who was an i appellant in Matrimonial
Appeal No. 24 of 2020 and respondent in Matrimonial Cross Appeal No. 30 of 2020 was aggrieved
against the decisions of the first appellate court in both appeals made on 30 November, 2020. He
has appealed against both decisions through Civil Appeal No. 95 of 2021 emanating from
Matrimonial Cross Appeal No. 30 of 2020 and Civil Appeal No. 113 of 2021 arising from
Matrimonial Appeal No. 24 of 2019. To the extent necessary for the purpose of the disposal of the
two appeals which were consolidated in pursuance of rule 110 of the Tanzania Court of Appeal
Rules, 2009 (the Rules) will be set out in brief. The appellant and the respondent celebrated their
marriage in 2006 and led their life as husband and wife until 20 April, 2020 when their marriage
was formally terminated by a decree of divorce issued by the trial District Court of Ilelela, in
Mwanza at the appellant's petition. Following the grant of the decree of divorce, the trial court
made a division of matrimonial assets jointly acquired by the parties during subsistence of the
marriage. Both parties resented the division. Aggrieved the appellant instituted Matrimonial
Appeal No. 24 of 2020. Initially, the respondent lodged a reply to the appellants memorandum of
appeal but later on, she prayed to file a cross - appeal which she did on 30 October 2020. What
transpired thereafter is the very concern, subject of this ruling as shall come to light shortly.
When the appeals were called on for hearing, the appellant was represented by Messrs. Denis

Kahangwa and Errick Kahangwa, learned advocates. Mr. Edward John, learned advocate appeared for the respondent. Given the genesis and nature of the appeals by consent, the Court consolidated them in Civil Appeal No. 113 of 2021. After the consolidation, it became necessary to deal with yet another aspect in relation to the manner in which the appellant found himself instituting two separate appeals regardless of the fact that they arise from more or less identical judgments and decree. After a thoughtful process, Mr. Kahangwa urged that since, the respondent indicated to file a cross-appeal in Matrimonial Appeal No. 24 of 2020 which she indeed filed, it was irregular for the first appellate court to treat the cross-appeal separately regardless of the confusion by the registry giving a separate number upon its filing. Counsel urged that the first appellate judge ought to have invoked Order XXXIX rule 22 (1) of the Civil Procedure Code (the CPC) thereby avoiding the confusion that ensued subsequently; determining the cross-appeal separately from the appeal resulting in two judgments and decrees and ultimately two appeals before the Court. According to the learned advocate, the manner in which the first appellate court handled the matter resulted into some of the complaints in the appeal unattended which could have been avoided had the first appellate court have regard to the dictates of Order XXXIX rule 22 (1) of the CPC. Going forward, the learned advocate invited the Court to exercise its revisional power under section 4 (2) of the Appellate Jurisdiction Act (the AJA) by quashing all proceedings and judgment in Matrimonial Appeal No. 30 of 2020 and the proceedings and judgment in Matrimonial Appeal No. 24 of 2020 from the hearing of that appeal and judgment with an order for a fresh determination of the appeal with the cross-appeal in the manner provided by Order XXXIX rule 22 (1) of the CPC. Mr. John was in agreement with the submission made by the appellant's counsel. Our starting point will be to examine Order XXXIX rule 22 (1) and (2) of the CPC which provides: Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the court below, but take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Court within one month from the date of service on him or his advocate of notice of the day fixed for hearing the appeal, or within such further time as the Court may see fit to allow.

- (2) The cross-objection shall be in the form of a memorandum and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto." Save for minor aspects, that rule is identical to rule 22 (1) and (2) of the Code of Civil Procedure of India, Act V of 1908. Our reading from page 1588 of the works of Mulla on the Code of Civil Procedure, 13th Edition by T.L. Venkatarama Aiyar, Bombay, N.M. Tripath Private Ltd, 1967 reveals that a cross objection referred in both codes has been interpreted to be a cross- appeal. It is glaring from the record of appeal at page 150 in Civil Appeal No. 113 of 2021 that, on 20 October 2022, the respondent's counsel prayed to lodge a cross-appeal electronically and the first appellate court granted that prayer. It accordingly adjourned the hearing to 3 November, 2020. However, the record is scanty on what transpired in court on 3 November, 2020 except for an order for the hearing to 18 November, 2020. As shown at page 151 of the record of appeal in Civil Appeal No. 113 of 2021, Matrimonial Appeal No. 24 of 2020 proceeded to hearing on 18 November, 2020. However, there is no indication that the

hearing took into account the cross- appeal ordered to be filed on 20 October, 2020. Instead, page 146 of the record in Civil Appeal No. 95 of 2021 reveals proceedings in the cross-appeal which continued for hearing on 18 November, 2020, on the same date Matrimonial Appeal was heard by the same Judge. Eventually, the learned first appellate Judge handed down two judgments on 30 November, 2020 which aggrieved the appellant, hence the instant appeals. Upon our examination of the two judgments, closely related as they are, we note a few disquieting features which should have been avoided had the first appellate court have regard to the law. In particular, whereas the appellant had no complaint against the division of the houses at Nyamhongolo and Kakola, the first appellate court indulged in the determination of that aspect which was made in his favour by the trial court. On the other hand, the appellant's complaint in the second ground in relation to the income for the acquisition of shops by the parties was left undetermined. That can only be explained by the first appellate Judge overlooking her order made on 20 October, 2020 and perhaps lack of appreciation of the dictates of Order XXXIX rule 22 (1) and (2) of the CPC. That state of affairs resulted into 2 appeals before the Court which were, in our view, wholly unnecessary had the first appellate court have regard to the law. It is for this reason we agree with the learned advocates that what transpired before the High Court giving rise to two appeals before the Court from identical decrees was not an innocuous irregularity and hence, the same must be corrected by way of revision. Consequently, in pursuance of section 4 (2) of the AJA, we quash all proceedings in Matrimonial Cross -Appeal No. 30 of 2020, set aside the resultant judgment and decree. On the other hand, we quash all the proceedings in Matrimonial Appeal No. 24 of 2020 from 18 November, 2020 and set aside judgment and the resultant decree. Going forward, we direct that the record in from which Matrimonial Appeal No. 24 of 2020 emanated shall be expeditiously remitted to the High Court with a view to a hearing of that appeal afresh upon the respondent re- filing her cross-appeal in that file not later than 30 days from the date of this

ruling.

Given the nature of the dispute from which consolidated appeals have emanated, we make no order as to costs. Order accordingly. D A T E D at M W A N Z A this 16th day of July, 2024. L. J. S. MWANDAMBO J U S T I C E O F A P P E A L L. L. MASHAKA J U S T I C E O F A P P E A L G. J. MDEM U J U S T I C E O F A P P E A L Ruling delivered this 17th day of July, 2024 in the presence of Mr. Denis Kahangwa, learned counsel for the Appellant and Mr. Edward John, learned counsel for the Respondent, is hereby certified as a true copy of 8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/313985/source_file/25edfdbfb418f4a6/CONSOLIDATED_CIVIL_APPEALS_NO_95_AND_113_OF_2021_RAPHAEL_NKWABI_VS_NAOMI_LUCAS_MBUKI.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/raphael-nkwabi-v-naomi-lucas-mbuki-matrimonialpropertydivision-tanzlii-2021--6a3ea52a3b1caa9129823635>

Prepared on 14 October 2026 · Esheria