

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CIVIL APPEAL NO. 24 OF 2016

HAJI MRADI.....APPELLANT

VERSUS

LINDA SADIKI RUPIA.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Wambura, J.)

dated the 01st day of July, 2011

in

PC. Matrimonial Appeal No. 2 of 2010

JUDGMENT OF THE COURT

26th & 28th August, 2019

MUGASHA, J.A.:

The appellant, **HAJI MRADI**, having the second appeal before the High Court dismissed, seeks to assail that decision in this third appeal.

The background to this appeal is to the effect that, way back in 2007 the respondent, Linda Sadiki Rupia filed a petition for divorce against the appellant herein. Also, in the said petition, the respondent sought the distribution of the matrimonial assets which were acquired during the pendency of the marriage including two residential houses, one at Iyumwe

and the other one at Ilomba within Mbeya City. During the trial, the appellant herein contested that, the house at Ilomba where his mother resides, belonged to his sister one **NERMAN MRADI HAJI**. The trial Primary Court found in favour of the respondent having dissolved the marriage with an order that, the matrimonial assets be distributed among the parties including one house.

The appellant unsuccessfully appealed to the District Court of Mbeya challenging, among other things, the trial court's order in respect of the division of a house on Plot No. 120 Block "Y" Ilomba Area, Mbeya City on the ground that, it did not consider that the said house to belong to his sister. The District Court concluded that, the house in question was a matrimonial asset in which the respondent who was made to believe so, and had contributed to its being and as such, the allegations that appellant's complaint that it belonged to the appellant's sister was aimed at swindling the respondent who had contributed to the acquiring of the house in question.

Still undaunted, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed and the decisions of the subordinate

courts confirmed on the ground that, the respondent concerted her efforts having contributed to the house in question having acted on a belief that it was a family property owned by the spouses. In addition, the High Court made the following order which appears at page 135 to 136 of the record of appeal:

“The provisions of section 115 have not been complied with. The appellant chased the respondent from the matrimonial home and has not paid anything since the matter began, not even during the Iddat period for there is no evidence to that effect.

Thus, in view of the fact that since the divorce process began way back in 2007 to date the Respondent has not been able to enjoy her rights even through divorce has been granted I order that the Appellant pays her a maintenance allowance of Tshs. 50,000/= per month from the year 2007 which he ought to have been paying to date and Tshs. 100,000/= per month from the date of this judgment to either vacant possession or payment in full of the market price of the house at Ilomba”

Dissatisfied, the appellant has preferred the present appeal in a three point Memorandum with following complaints:

1. The learned High Court Judge erred on ordering unsolicited, the appellant to pay various sums of money to the Respondent without affording any opportunity to be heard and in the absence of any evidence as regards his income and other obligations.
2. The learned High Court Judge erred on making orders against the appellant's mother, who was not a party in the case before her and thus a stranger without giving her any opportunity to be heard.
3. The High Court as well as other Courts below it erred on granting ownership of house on Plot No. 120 Block "Y" Ilomba area, Mbeya City to the respondent while the same is registered in the names of another person who was not a party to

the case and such Registration evidencing ownership remains valid and effective.

The parties filed written submissions with arguments for and against the appeal. At the hearing, the parties were unrepresented as they fended for themselves.

Submitting on the first ground of appeal, the appellant reiterated his complaint that, he was not given opportunity to be heard by the High Court which condemned him to pay to the respondent, a sum of TZS. 50,000/= per month from 2007 to 1st July 2011 which is equivalent to TZS. 2,750,000 and TZS. 100,000 per month which is not possible as the appellant's income is TZS. 80,000 per month which caters only for his subsistence.

As to the second ground of appeal, it was the appellant's submission that, an order to issue vacant possession to the respondent was made against his mother who was condemned without being heard having not been called upon to explain reasons for residing in that house since 1999.

On the third ground, the appellant contended that, when the marriage was celebrated in 1984, the respondent found the appellant

owning a Plot No. 120 Block "Y" at Ilomba, which had a foundation thereon, and it was improved by constructing walls. However, the respondent had sold the structure to one Enginael Ngowe.

On the other hand, the respondent opposed the appeal. She submitted that, the house in question is a matrimonial asset which was acquired through joint efforts together with the appellant as found by the courts below. In this regard, she argued that, the appellant's complaint about his mother to be residing in the said house should not be the reason of taking away her rights in respect of the matrimonial assets acquired during the pendency of the marriage. After a brief dialogue with the Court, she conceded to the appellant's complaint on not being given opportunity to be heard by the High Court adding that, the sum ordered is immaterial considering that she has been fending for the four children without any assistance from the appellant.

This appeal originates from the Primary Court. As such, from the outset it is pertinent to point out that, the mandate of the Court to determine the appeals of this nature is governed by section 5(2) (c) of the Appellate Jurisdiction Act (Cap 14) RE: 2002] (the AJA) which stipulates:

"Notwithstanding the provisions of subsection (1), no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrate's Courts Act unless the High Court certifies that a point of law is involved in the decision or order."

In this regard, it is crucial on what comes by way of an appeal to be certified as points of law and not fact. We say so because the factual matters require evidence and are dealt with conclusively by the courts below. Thus, a point of law should be free from the need to ascertain it by evidence. There can be no pure point of law where there are facts that require proof by evidence. See- **HEZRON M. NYACHIYA VS TANZANIA UNION OF INDUSTRIAL AND COMMERCIAL WORKERS AND ANOTHER**, Civil Appeal No. 79 of 2001 (unreported).

We shall thus be guided by the stated position of the law in disposing the appeal before us.

In the matter at hand, the High Court had certified three points of law to be determined by the Court as reflected at page 224 of this record. It is the complaint of the appellant in the first ground of appeal that, he

was not given opportunity to be heard before the High Court condemned him to pay compensation to the respondent. A violation of the right to be heard is not only a breach of natural justice but also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6) (a) of the Constitution. See - **MBEYA RUKWA AUTO PARTS AND TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA**, Civil Appeal No. 45 of 2000 (Unreported).

It is evident that, the High Court Judge at page 218 of this record, *suo motu*, raised and resolved the concern that the respondent needs to be compensated and without hearing the parties, she ordered that, the appellant was obliged to compensate the respondent. In this regard, not hearing the parties on the merits or otherwise of the compensation order was a serious irregularity constituting a point of law due to a violation of the rule of natural justice requiring the court to adjudicate over a matter by according the parties full hearing before deciding a dispute. See: **NATIONAL HOUSING CORPORATION VS TANZANIA SHOES AND OTHERS** (1995) TLR 251; and **ABBAS SHERALLY & ANOTHER VS ABDUL S. H. M.**

FAZALBOY, Civil Application No. 33 of 2002 (unreported) where the Court said:

"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasised by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

In view of the settled position of the law, we are satisfied that since none of the parties was availed an opportunity to be heard this vitiated the compensation order and we hereby quash and set it aside. On that account the first ground of appeal is merited.

As to the second and third grounds of the complaint, these need not detain us. We say so because though, the High Court certified them as points of law; in our serious considered view they do not qualify as such because they constitute factual issues which require proof by adducing evidence. The second point certified by the High Court requires evidence to

prove that, the appellant's mother who was not a party be it at the trial or the appellate court below was condemned without a hearing. Similarly, for the third point, evidence is required to establish whether or not a Plot No. 120 Block "Y" Ilomba Area, Mbeya City is registered in the name of other person who was not a party to the matter under consideration. Besides and without prejudice to what we have already stated, since in the present appeal the appellant seems to be canvassing complaints which relate to strangers who are not parties in the matter under scrutiny; he lacks *locus standi* to pursue those matters.

Given the nature and substance of the points certified by the High Court, it is clear that, only one point of law was certified which constitutes the first ground of appeal. Thus, for reasons stated, the certificate is not valid in respect of the second and third grounds of appeal. In this regard, before the Court, there was nothing placed for determination in respect of the second and third grounds of appeal which were lodged in clear violation of the provisions of section 5 (2) (c) of the AJA which requires an appeal originating from the Primary Court to be upon a certified point of law.

In view of what we have endeavoured to discuss, we allow the first ground of appeal and strike out the second and third grounds of appeal. Given the relationship of the parties, we make no order as to costs.

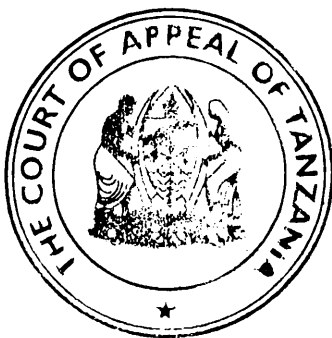
DATED at **MBEYA** this 28th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 28th day of August, 2019 in the presence of the appellant in person and the respondent in person is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL