IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 208 OF 2018

RICHARD MAJENGA.....APPELLANT

VERSUS

SPECIOZA SYLIVESTER .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Makani, J)

dated the 17th day of August, 2018
in
(DC) Matrimonial Appeal No. 04 of 2017

JUDGMENT OF THE COURT

12th & 14th May, 2020

KEREFU, J.A.:

This is a second appeal by Richard Majenga, the appellant herein who was a losing party in the (DC) Matrimonial Appeal No. 04 of 2017 before the High Court of Tanzania at Shinyanga (Makani, J.) where both parties appealed against the decision of the District Court of Kahama in Matrimonial Cause No. 01 of 2016. In that case, the respondent vide her petition lodged on 4th November, 2016 alleged that she cohabited and lived together with the appellant as husband and wife from 2007 to 2015. That, out of the said relationship they were blessed with two issues namely,

Samson Richard Majenga and Samwel Richard Majenga born in 2008 and 2012 respectively. That, they also acquired several properties including a Primary School known as Jerusalem English Medium School (the School) two houses located at Mwime and Nyakato, one plot of land situated at Mwanza and five motor vehicles. The respondent alleged that the sources of income that enabled them to acquire those properties were from her shop and at one time they borrowed money from her uncle and father. She also stated that when cohabiting with the appellant she knew that he had two wives and six children. She thus prayed for the following reliefs:-

1. Division of Matrimonial Assets;

2. Custody of the two issues;

3. Maintenance of the children;

4. Costs of the petition and

5. Any other relief(s) as the court may deem fit and jus to grant.

On his part, the appellant did not dispute the fact that he cohabited with the respondent and blessed with the said two issues but he vehemently challenged that all properties were acquired by him from his own sources of income after he sold his plots of land in Mwanza which he acquired with the assistance of his other two wives. He also stated that he

married the respondent after she left her husband and already had three children.

The trial court, after hearing both parties and without determining the issue of presumption of marriage between the parties as provided for under section 160 (1) (2) of the Law of Marriage Act, [Cap. 29 R.E. 2002] (now R.E 2019) (the LMA), proceeded with the division of the alleged matrimonial assets whereby the respondent was granted 40% of the value of the School and 60% to the appellant. The trial court also granted the custody of the two children to the respondent and ordered the appellant to pay maintenance at the tune of TZS 400,000.00 monthly.

Aggrieved, the appellant unsuccessfully appealed to the High Court where he raised five (5) grounds of appeal mainly contending that the suit was wrongly handed as a matrimonial dispute. It is noteworthy that, the respondent was also dissatisfied with the decision of the trial court as she as well lodged a cross appeal comprised of three (3) grounds disputing the shares apportioned to the parties in the distribution of matrimonial assets.

After hearing the parties, the first appellate court applied the provisions of section 160 (1) and (2) of the LMA, dismissed the appellant's appeal and allowed the respondent's cross appeal by varying the order of

division of matrimonial properties to the extent of awarding the respondent 50% of the value of the School and declared the house located at Mwime to be the property of the respondent. The appellant was awarded the house located at Nyakato. The High Court also ordered for all motor vehicles to be sold at the market price and the proceeds of sale be equally divided between the parties. As for the custody and maintenance of the two children the court upheld the decision made by the trial court.

Still Aggrieved, the appellant lodged this second appeal. In the Memorandum of Appeal, the appellant has preferred four (4) grounds. However, for reasons which will be apparent herein, we do not intend to consider all the grounds of appeal raised by the appellant.

At the hearing of the appeal, the appellant was represented by Mr. Kamaliza Kamoga Kayaga, learned counsel while the respondent had the services of Mr. Erick Katemi, learned counsel. At the outset, Mr. Kayaga intimated that he will only argue the first ground of appeal, which according to him, if found to have merit, disposes of the appeal. In that ground of appeal, the appellant contended that:-

"The Petition by the respondent and subsequent proceedings were wrongly filed and determined as Matrimonial Proceeding."

In the course of arguing the above ground, the Court probed the learned counsel for the parties to expound on the issue of the propriety or otherwise of the petition lodged by the respondent at the trial court and specifically, whether the reliefs prayed therein were legally tenable.

Submitting in support of the above ground, Mr. Kayaga referred us to section 2 (1) of the LMA and Rule 2 of the Law of Marriage (Matrimonial Proceeding) Rules 1971 GN. 136 of 1971. He then argued that a matrimonial proceeding under section 2 of the LMA is defined as, *"any proceeding instituted under Parts II and VI of the Act or any comparable proceeding brought under any written law repealed by the Act, in any court."* He said, Parts II and VI of the LMA deal with formal contracted marriages and do not relate to the parties who have not contracted any form of marriage. Mr. Kayaga argued that, in the circumstances of this case, the respondent's petition does not fall under the said parts of the LMA and it was therefore wrong for the trial court to determine the matter as a matrimonial proceeding. He further argued that, even the orders granted by the trial court and partly upheld by the first appellate court

were improper and cannot be allowed to stand. According to him, having not contracted any formal marriage with the appellant, the respondent was required to resort to Part V of the Law of the Child Act No. 21 of 2009 which deals with issues of parenting, custody and maintenance. Based on his submissions, Mr. Kayaga invited us to allow the appeal and nullify the proceedings of the trial court and those of the first appellate court with subsequent orders thereto.

In response, Mr. Katemi conceded to the submission made by his learned friend and he also added that the respondent's petition before the trial court was wrongly crafted and handled. Upon being probed by the Court if the trial court had powers to divide the matrimonial properties without first granting decree for separation or divorce, Mr. Katemi said, the court did not have such powers because division of matrimonial assets can be granted after award of decree for separation or divorce. He conceded further that, since the trial court did not determine the issue of presumption of marriage between the parties, which was substantial, the first appellate court was required to note those defects, nullify the proceedings and remit the file back to the trial court to first determine that

issue as required by the law. In rejoinder, Mr. Kayaga did not have anything useful to add but only reiterated his previous prayers.

On our part, having considered the record of appeal and the submissions advanced by the learned counsel for the parties, we are in agreement with both counsel that it was not correct for the trial court to proceed with the matter as a matrimonial dispute and divide the alleged matrimonial properties without first considering the issue of presumption of marriage between the parties and whether the reliefs prayed by the respondent in the petition were legally maintainable.

It is on record that, the respondent's petition and its prayers focused only on division of matrimonial assets, custody and maintenance leaving aside issues of proof of presumption of marriage. Presumption of marriage is governed by section 160 (1) (2) of the LMA. The said section provides that:-

> 160 *(1)* ***Where it is proved that a man and woman have lived together for two years or more,*** *in such circumstances as to have acquired the reputation of being husband and wife,* ***there shall be a rebuttable presumption that they were duly married.***

(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and ***such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make order or orders for maintenance and, upon application made therefor either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation,*** *as the court may think fit, and the provisions of this Act which regulate and apply to proceeding for and orders of maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section." [Emphasis added].*

Following the above provisions, it is clear that the court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce. Therefore, though in this case both parties' pleadings were not disputing that they were cohabiting as husband and wife but since their relationship was based on presumption

of marriage, there was need for the trial court to satisfy itself if the said presumption was rebuttable or not. In the circumstances, we are in agreement with both learned counsel for the parties that it was improper for the trial court to resort into granting the subsequent reliefs prayed, before satisfying itself on the existence of the presumed marriage.

It is also unfortunate that, the first appellate court did not detect the said irregularity as it also fell into the same trap by bringing into aid the provisions of section 160 (1) and (2) of the LMA and proceeded to divide the alleged matrimonial properties between the parties without again there being any decree for separation or divorce. Worse still, the first appellate court introduced a new issue on the presumption of marriage which was not considered at all by the trial court. It is on record and as eloquently submitted by both learned counsel for the parties, that issue was not among the issues framed and determined by the trial court. Though parties were accorded right to be heard at the appellate level, the same being substantial and factual issue to be established by evidence, it ought to have been first resolved by the trial court prior to the granting of the said subsequent reliefs awarded thereto.

It is a settled principle of the law that at an appellate level the court only deals with matters that have been decided upon by the lower court. There is plethora of authorities by this Court on this point. See for instance the cases of **Hotel Travertine Limited and 2 Others v. National Bank of Commerce Limited** [2006] TLR 133 and **James Gwagilo v. The Attorney General**, Civil Appeal No. 67 of 2001 (unreported). Specifically, in **Hotel Travertine Limited and 2 Others** (supra) the Court stated that:-

> *"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."*

Similarly, in this case, the first appellate court was not supposed to introduce a new issue that was not canvassed by the trial court. In the circumstances, it was improper and a misdirection on the part of the first appellate court to proceed to consider and determine such an issue in the respondent's favour at an appellate stage. As such, we find the first ground of the appeal to have merit.

Since the determination of this ground suffice to dispose of the appeal, we are in agreement with the learned counsel for the appellant that the entire appeal has merit and it is hereby allowed.

In the event and having found that the proceedings before the trial court and the first appellate court were vitiated, we have no option other than to nullify the entire proceedings and quash the judgments of both lower courts and subsequent orders thereto. If the respondent is still interested to pursue the matter is at liberty to institute a fresh petition in accordance with the law. We make no order as to costs.

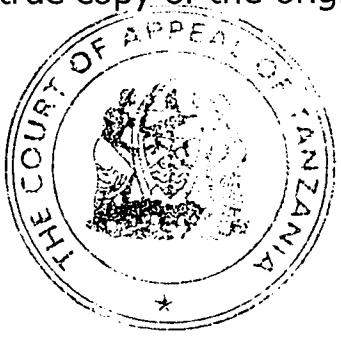
DATED at **TABORA** this 13th day of May, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 14th day of May, 2020 in the presence of Mr. Kamaliza Kamoga Kayaga, learned counsel for the appellant and Mr. Erick Katemi, learned counsel for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL