IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CIVIL APPLICATION NO. 36 OF 2020

YESSE MRISHO .... APPLICANT

VERSUS

SANIA ABDUL .... RESPONDENT

(Application for review of the Judgment of the Court of Appeal of Tanzania at Mwanza)
(Mwarija, Korosso And Kitusi, JJ.A)

Dated the 7th day of November, 2019
in
Civil Appeal No. 147 of 2016

....

RULING OF THE COURT

27th April & 3rd May, 2023

NDIKA, J.A.:

The applicant, Yesse Mrisho, pursues a review of the judgment of the Court dated 7th November, 2019 in Civil Appeal No. 147 of 2016. Essentially, he faults the said judgment pursuant to rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") on the ground that it is based on two manifest errors on the face of the record resulting in miscarriage of justice. To elaborate the said ground, he swore an affidavit and lodged detailed written submissions. The respondent, Sania Abdul, vigorously opposes the application through her written submissions in reply.

To appreciate the setting in which this matter has arisen, we provide a brief background as succinctly summarized in the assailed judgment.

The parties to this dispute had their matrimonial union dissolved by the Ilemela Primary Court ("the trial court") in 2013 in a matrimonial cause instituted by the respondent. Following the said dissolution, the respondent reapproached the trial court seeking division of matrimonial property, but the effort went unrewarded. To be sure, the court dismissed that quest on the ground that she failed to prove her contribution towards acquisition of the matrimonial home in issue.

On the respondent's appeal to the District Court of Nyamagana at Mwanza ("the District Court"), the dispute took a different turn; the said court allowed the appeal and, consequently, vacated the trial court's decision. The District Court found it established that the respondent contributed to the acquisition of the matrimonial home located at Kangae, Mwanza by rendering domestic services as well as assisting in the running of a family photography business. On that basis, the first appellate court ordered that their matrimonial home be sold and the proceeds thereof split between the parties equally. As for the welfare of the divorced couple's three children, the court granted their custody to the applicant.

Resenting the change of fortune, the applicant took the matter to the High Court of Tanzania at Mwanza on appeal. As it were, his pursuit ended in vain; for, the court (Mwangesi, J., as he then was) dismissed it wholly having upheld the District Court's order for division of the matrimonial home. The learned judge mainly reasoned, citing **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R. 32, that:

> "... ***once it has been established that, there was marriage between the two and that what is being disputed is matrimonial property, the question of establishing as [to] who contributed what in its acquisition is immaterial,*** *as the parties to a marriage perform different tasks some of which cannot be easily converted into monetary terms but all the same contributed to what is acquired in the matrimonial home."* [Emphasis added]

It is striking that the High Court also vacated an ancillary order made by the trial court by which the respondent was required to vacate the matrimonial home on the ground that it was unsafe for her and her divorced spouse continuing to live under the same roof in view of the existing hostilities between them. Instead, the learned judge ordered that the

respondent be allowed to return and continue staying in the home pending its sale and division of the proceeds thereof as had been ordered.

Still undeterred, the applicant further appealed to this Court. Although he raised four grounds of complaint challenging the order for division of the matrimonial home by auctioning it off and splitting the proceeds thereof, the Court focused on the following main issue:

> *"Whether once the issue of existence of marriage is established, the question of establishing joint contribution to the acquisition of matrimonial property does not arise."*

In determining the above point of law, the Court referred to sections 60 and 114 of the Law of Marriage Act, Cap. 29 ("the LMA") on presumptions as to the ownership of the property acquired during marriage as well as the power of the court and the criteria for division of matrimonial assets. It found that section 114 requires the courts considering division of matrimonial property to ensure that the extent of the contribution of each party was the overriding consideration. The Court then revisited its earlier decisions in **Bi Hawa Mohamed** (*supra*) and **Robert Aranjo v. Zena Juma** [1986] T.L.R. 207 and concluded as follows:

"From the stated provisions and the cases cited above, ... proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acqulsition of matrimonial assets. Therefore, with due respect, we are of the view that, the assertion by the second appellate judge that once marriage is established between the parties and there is dispute on matrimonial property then the question of establishing contribution of each of the parties to the matrimonial property is not an issue is misconceived...." [Emphasis added]

Applying the above position to the facts of the case, the Court, at the forefront, considered the concurrent finding by the District Court and the High Court that the respondent contributed to the acquisition of the matrimonial home in issue by rendering domestic services and helping with the running of the family photo shooting business. In the premises, the Court upheld the finding that the property was jointly acquired by the divorced spouses and that each of them was entitled to an equal share of the property. Consequently, the Court directed that the value of the property be

assessed and that each party be accorded the option to buy out the other. Eventually, the appeal was dismissed with each party being ordered to bear its own costs.

At the hearing of the matter before us, the parties were self-represented. As hinted earlier, the applicant contends that the judgment sought to be reviewed contains two manifest errors, namely:

1. *The Court omitted to consider and effectively deal with or determine the evidence regarding the matrimonial house at Nyarugusu Geita, which was left by the [applicant] in the hands of the respondent.*
2. *The Court omitted to consider and effectively deal with the [applicant's] complaint that the respondent committed matrimonial misconduct which reduced to nothing her contribution towards the acquisition of the matrimonial house in Mwanza.*

Through his lengthy written submissions, the applicant made considerable argument that it was an error on the face of the record that the Court did not consider the evidence that the respondent squandered and sold off the matrimonial property in Nyarugusu, Geita and, therefore, she was guilty of matrimonial misconduct. It is argued further that the respondent misconducted herself by deserting the applicant, stealing a document of title to a certain landed property located in Mwanza with intent to wrestle title to the said property. In support of this argument, several

decisions were cited. Certainly, we find no pressing need to reproduce the authorities relied upon.

In rebuttal, the respondent counters that the issues raised in the grounds cited for the instant application were not discussed by the Court on the appeal because they were not part of the point of law raised in the appeal. Apart from denying having built or owned a house in Nyarugusu, Geita jointly with her divorced husband, she refutes ever having committed the acts of misconduct alleged by him.

As a starting point, it is logical and convenient, to state that the Court is empowered under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 to review its decisions to correct errors. The power is exercisable only upon any one of the five grounds stipulated by rule 66 (1) of the Rules. The instant case, as stated earlier, is predicated on the claim under rule 66 (1) (a) of the Rules that the questioned judgment is manifestly based on two errors resulting in injustice.

What does the phrase *"a manifest error on the face of record resulting in miscarriage of justice"* mean? We have dealt with this issue more times than we can count. In **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 at 225, we examined several authorities on the matter and

adopted from **Mulla on the Code of Civil Procedure** (14 Ed), at pages 2335 – 2336, the following abridged description of that phrase:

> *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is,* ***an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions:*** *State of Gujarat v. Consumer Education and Research Centre (1981) AIR GUJ 223] ...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v. Athanasius (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review: Utsaba v. Kandhuni (1973) AIR Orl. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin.* ***It can be said of an error***

> ***that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established*** *[Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372].* [Emphasis added]

See also **Mashaka Henry v. Republic,** Criminal Application No. 2 of 2012; **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General,** Criminal Application No. 5 of 2011; and **Jayantkumar Chandubhai Patel and 3 Others v. The Attorney General and 2 Others**, Civil Application No. 160 of 2016 (all unreported).

In resolving the matter before us, we wish to stress that the only issue before the Court for decision in the appeal was a narrow one, challenging the High Court's view on determination of contribution to the acquisition of matrimonial property. It was the question *"whether once the issue of existence of marriage is established, the question of establishing joint contribution to the acquisition of matrimonial property does not arise."* The Court answered the issue in the negative and, consequently, reversed the learned judge's position by stating, based on sections 60 and 114 of the LMA as construed and applied in the cited caselaw, that in determining the division of matrimonial property courts must assess the contribution or

efforts of each party to the marriage in acquisition of matrimonial assets concerned. Having so resolved the point of law in issue, the Court rightly decided the case upon the concurrent finding by the District Court and the High Court that the respondent contributed to the acquisition of the matrimonial home in issue entitling her to an equal share of it. Sitting on a third appeal, it was not within the Court's jurisdiction to re-calibrate or re-appreciate the evidence on record in the circumstances of this matter.

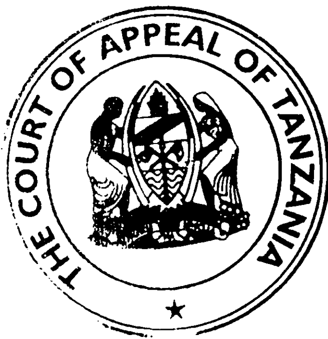
As rightly argued by the respondent, the Court did not consider and determine any of the two issues now raised by the applicant in this application. Besides not being part of the point of law placed before the Court for decision, the said issues were, for argument's sake, not raised for the Court's consideration and determination. In fairness, the issues now raised are essentially factual and could not be fronted and considered in the appeal. We have no doubt that the instant application is completely misguided for it is an attempt to fault the Court over matters it did not consider or decide. We repeat, as we must, that the Court did not have to deal with the alleged issues and cannot be faulted for not doing so. As a result, we do not find any errors on the face of the queried judgment, let alone ones that caused injustice to the applicant justifying a review of the judgment.

In the final analysis, we dismiss the application. Considering the nature of this matter, we make no order as to costs.

It is so ordered.

DATED at **MWANZA** this 2nd day of May, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL



W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 3rd day of May, 2023 in the presence of Mr. Yesse Mrisho the Applicant and Ms. Sania Abdul the Respondent, is hereby certified as a true copy of the original.

A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL