IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 52 OF 2019

(Originating from the decision of the District Court of Ilala dated 06 December 2018 in Matrimonial Appeal No. 109 of 2018 originating from Kariakoo Primary Court Matrimonial Cause No. 31/2017)

ASHA MOHAMED ALLY.....APPELLANT

VERSUS

HASSAN MWICHANDE CHANDE..... RESPONDENT

Date of last Order: 28/02/2020
Date of Ruling: 06/03/2020

J U D G E M E N T

MGONYA, J.

Aggrieved by the decision of **Ilala District Court** at Ilala in **Civil Appeal No. 109 of 2018,** the Appellant filed an appeal before this Honorable Court with 6 grounds of appeal against the decision of Ilala District Court as herein below:

1. That, the Appellate Court erred in law and facts by failing to evaluate each ground of appeal and give

specific reason for allowing or rejecting each ground of appeal;

2. ***That, the Appellate Court erred in law and fact for not considering the issue of the third issue of the marriage bearing in mind that the said issue is unfit;***
3. ***That, the Appellate Court erred in law and facts by ordering the division of the personal properties which were given to the Appellant;***
4. ***That, the Appellate Court erred in law and fact for failing to consider that there were nonexistence properties which were given to the Appellant;***
5. ***That, the Appellate Court erred in law and fact in upholding the division of matrimonial properties without ascertaining the extent of contribution by the parties to their acquisition and development; and***
6. ***That; both lower courts' judgments are problematic and incapable of support.***

When the matter came for hearing the Appellant and the Respondent both appeared represented before this Honorable Court. Ms. Kombo learned Advocate for the Respondent prayed that the Appeal be heard by way of written submissions. Mr. Sanga learned Advocate for the Appellant had no objection hence

the matter was disposed by way of written submission, hence this Judgment.

The Appellant in her respective written submission avers that the first Appellate Court dismissed all 8 grounds of Appeal generally without analyzing each ground and stating or analyzing the reasons for such dismissal, basing on the Appellant's submission and proceedings of the trial Court.

It is the Appellant's submission therefore that the Court ought to have clearly evaluated and analyzed each ground of appeal. This averments was supported by the decision of ***STANSLAUS RUBAGA KASUSURA & ATTORNEY GENERAL VS PHARES KABUYE [1982] TLR 338.***

While submitting on the 2nd ground of appeal, the Appellant stated that, the Appellate and trial Courts having been made aware of the issues to the parties to the marriage, failed to state how much exactly is the maintenance to be given by the Respondent especially to Mohamed Hassan Chande who is in the custody of the Appellant and regarded unfit health wise. The Appellant went further in referring to **Section 16(1) of the Persons with disability Act No.9 of 2010.**

It is the concern of the Appellant that on the 3rd ground of appeal that both appellate and trial Courts erred in the reaching at the decision they reached on the property situated at Kipungi for it solely belongs to the Appellant alone and the same was stated before the Courts. And that the same property lacks any contribution by the Respondent.

Further, it is from the record of the trial Court proceedings that the parties had two houses. One at Ocean Road and another at Mbezi Beach. Therefore treating the house at Kipungi as a matrimonial property was an error since the same was proved by the Appellant to be her own property.

Upon the 4th ground of appeal, the Appellant contended that there were none existing properties that the Court failed to take note of. And the same were granted upon division to the Appellant while existing properties were upon division granted to the Respondent. The Appellant referred this to total discrimination and unfair division of properties. Whereby, the court is of knowledge that the properties which were given to the Appellant are non-existence due to the fact that they have been disposed. Under those circumstances the Appellant prays if the same are believed to exist let them be given to the Respondent with that, an exception of the car make Mark II.

Further on the 5th ground of Appeal it is the Appellant's assertion that the Court failed to have accounted for the contribution of each party to the acquisition of the matrimonial properties as presented by parties in their respective submission since parties got married in 1990 and had lived together for 24 years. Further, both parties were employees of Muhimbili National Hospital and thus jointly acquired and developed properties at the time of their subsisting marriage until when 2014 when problems sailed to their lives after the Respondent married another wife.

The Appellant referred the court to the provisions of **Section 114 (1), (2) and (3) of the Law of Marriage Act** to support her submission. The Appellant states that the provision above was not adhered to by the Court and the cases of ***MOHAMED ABDALLA VS HALIMA LISANGWE (1988) TLR 197, ANNA KANUGHA VS ANDREA KANUGHA (1996) TLR 195, BIBIE MAURIDI VS MOHAMED IBRAHIM (1989) TLR 162 HC*** were cited to support the Appellant's contention upon division of matrimonial properties.

In the last ground of appeal the Appellant addresses this Court on the aspect that the judgments of both Courts are problematic and incapable of support. The Appellant states that the trial Court judgment has many problems and the first Appellate Court has

blessed the same. The Courts' judgments features lack of signature by the assessors, undetermined issues in the controversy, no evaluation and analysis of evidence of each witness on records, unproved debts as matrimonial properties and unresolved issues in the judgment. The Appellant in submission also stated on the unproved debts that were regarded as matrimonial properties.

It is from the reasons above, the Appellant prays her appeal be allowed and set aside decisions of both lower courts with deserved costs.

In reply to the Appellant's grounds of appeal, the Respondent states that, the Court analyzed and evaluated each ground of appeal and gave specific reasons for allowing and rejecting each ground of appeal. And that it should be noted that it was undisputed that the marriage had broken down and the remaining issue was upon matrimonial properties, custody and maintenance of children which were well dealt with at the trial Court.

Upon the 2nd ground of appeal, the Respondent contends that in the matter concerning the issues to the marriage specifically the one considered unfit; The Persons with Disability Act No. 9 of

2010 was cited to stress on the direction that every relation to a disabled person has the obligation to provide for social support to such person. It is the Respondent's argument that the same was considered at page 3 of the judgment and that the Court directed its self to the same law and supported the provision of the law in aspect of the unfit child.

Submitting on the 3rd ground on division of matrimonial properties the Respondent averred that the division of the properties done was not on personal properties of the Appellant. The house referred to is situated at Kipunguni and was the Respondents property. Further, it was not however given to the Appellant as a gift neither did the Appellant prove to the Court of ownership upon the premises. That is the reason as to why the same was included in matrimonial properties.

It is the Respondent's contention on the 4th ground opposing the Appellant's submission that all properties given to the Appellant don't exist. The Respondent in his submission listed all the properties distributed to the Appellant and states that all properties do exist. It is the Respondent's averment that the Appellant is misleading the court by stating that the house at Kipunguni was given to her and yet again categorizes it as none existing.

On the 5th ground, the Respondent states that, the Court considered the contribution of each party in acquiring the matrimonial properties before the distribution. The Respondent informed the Court that, being a Principal Senior Medical Specialist he contributed more to the acquisition of the matrimonial properties as compared to the Appellant who is a Pharmaceutical Technician and that what the Appellant was given is according to her contribution.

The Respondent further submitted that, ***Section 114 of the Law of Marriage Act Cap. 29 [R. E. 2002]***, does not provide for equal division but to the extent of one's contribution in acquiring such properties. Further, it should be noted that the Mbezi Beach house was a matrimonial property given to the Respondent and the Appellant was given her share.

Lastly, upon the 6th ground of appeal, it is the Respondent's averment that one cannot call a judgment is problematic and incapable of support while all issues were addressed by the judgment. Further, the Respondent averred that, he has other issues and a wife too who are also entitled to the same properties. Howevever, the Appellant is alleging to be the heir hence entitled to all that she claims, while that is not the position.

The Respondent claims that the judgment not being signed by Assessors and not stating the names of the alleged Assessors is not a problem. The Respondent submits that, in matrimonial cases there is no Assessors and thus the cited case by the Appellant to this fact is irrelevant.

It is from this submission, the Respondent prayed the decision of the Primary Court be upheld and appeal be dismissed with costs.

Having gone through the submissions by the parties, I am of a fair view that it is sensible to address the grounds of appeal as they appear before this Honorable. However the 3rd, 4th and 5th ground will be determined collectively.

On the **1st ground** of appeal, the first appellate Court in its decision has addressed a bundle of matters as it appears in its judgment; some of which are not issues raised in the trial Court; and judgment. The Court in dealing with the first ground of appeal stated that the Appellant and her witnesses' testimonies were not considered and the Respondent had failed to counter on that ground. Further, the Respondent argued that the Court gave its decision based on the evidence in record and not otherwise.

The Court went further adding that, it is not mandatory to reproduce all the witnesses' testimony in the judgment.

From the above assertion, this Court took trouble to go through the trial Court's decision and finds that the Courts decision bares in it no evidence as adduced by the Appellant and her witnesses but rather the Judgment of the trial Court carries in it the names of the witnesses and unfinished statements that do not suffice or rather are not enough to sound as testimony of a witness. It is a fact that the decision of the Court does not have to bear all the testimonies of the witnesses but at least a Court judgment being a public document ought to and is required to carry concise statements upon the evidence of the witnesses or carry a narration of the evidence of the parties. A judgment of the court is required to communicate to the parties. It is a fact that judgment writing has no specific formula. It is an art but the same should not be abused and that the judgment should be judiciously.

Judgment has a numerous definitions but, I pick the definition by ***B.D. CHIPETA, MAGISTRATES MANUAL at pg. 204 to mean;***

"A written document prepared by the Court which resolves the issues in the suit and finally determines the rights and liabilities of the parties to the suit".

Moreover a few lines below in the same book states contents of a judgment to be "***a concise statement of the case, the points of determination, the decision thereon, and the reasons for such decision".*** In the judgment of the trial Court which has been upheld by the first Appellate Court, I find it hard to connect the contents of the same to make this Court believe that the judgment that the first Appellate Court upheld its decision is truly a Judgment of the Court.

The decision of the trial court that the first Appellate Court upheld, contains in it one point of determination and does not bare the evidence analysis as to how the court came up with the decision to that point of determination. The decision further decides on matters issues that were not raised in the judgment by the Court and the same lacks evidence analysis upon how the Court reached to its decision.

Secondly on the **2nd ground** of appeal, the Appellant addresses the Court being aggrieved by the decision that does not state on how the unfit child is to be maintained. The decision

by the lower courts state that the child is to be maintained by the parties. The same decision was reached by referring the ***Persons with Disabilities Act No. of 2010, under Section 16 (1) and (3)*** of the said Act. It is not stated as to why the parties neither the Courts sort redress from such law since the matter at hand was not brought under such act. The matter at hand is a Matrimonial Cause managed by the ***Law of Marriage Act [Cap 29 R.E. 2002].*** This law provides for maintenance of an issue to marriage. The law above is self-satisfactory upon maintenance. An issue to a marriage is an issue regardless of their unique features and has the right to be maintained as stated under the **Law of Marriage Act (Supra).** Referring maintenance of the unfit child to the law of Persons with disabilities is a misconception and bad in law in the circumstances of the matter at hand.

Section 129 (1) to (2) of the Law of Marriage Act (Supra) provides for maintenance of the issues to a marriage. It is not stated as to why the parties and the Court both decided to refer to the **Law of Persons with disabilities Act,** in a matter brought under the **Law of Marriage Act.**

In regards to the **3rd, 4th and 5th** grounds of appeal, (CONCLUSION) on the ground they are all concerning on the

division of matrimonial properties of the parties. Matrimonial properties being a sensitive aspect in matrimonial cases, I took time to go through the records of the first Appellate Court and the trial Court to ascertain on the bases of the decision by both Courts to have reached into their decisions regarding division of matrimonial properties.

At the first Appellate Court, the Court upheld the decision of the Primary Court. That means that what was decided by the trial court is also the decision of the first Appellate Court. I ventured again through the judgment of the trial court to find the reasons as to the decision on matrimonial properties. It is again from the same judgment that evidence of the ascertained matrimonial properties is not in the judgment neither was it a point of determination. There lacks sufficient analysis on how the parties had acquired the properties and contribution of each party in acquiring the said properties but rather the decision states on how the properties have been distributed.

Section 114 (1) law **of Marriage Act [Cap. 29 R.E. 2002],** has widely and clearly stated on the division of matrimonial properties and main ingredient being the contribution of each party in acquiring properties to be distributed. This position has been celebrated in a number of cases in this land, a

landmark case to this effect is in the case of ***BI HAWA MOHAMED vs ALLY SEIF [1983] TZCA TLR 32,*** in this case ***NYALALI C. J*** emphasized that:

> ***"Assets envisaged thereafter must first be matrimonial assets and secondly must they must have been acquired by them during the marriage by their joint efforts".***

It is from the above decision and law that in the records I find that the issue of distribution of matrimonial properties let alone not been properly addressed but also lacks sufficient evidence on the same. In the event therefore, the 3rd, 4th and 5th grounds of Appeal have merits.

Moreover the last ground of appeal has been argued on various aspects the same will not detain me in addressing all aspect but rather the fact that the judgment of the Court was not signed by the Court Assessors. Page 4 of the judgment after the distribution of matrimonial properties to the Respondent it reads;

" Washauri : Benny

: Mwanaasha

Mwakasonda - Hakimu
03/11/2017."

The **MAGISTRATE'S COUTRS (PRIMARY COURT)(JUDGMENT OF COURT) RULES, 1987**, under rule, 3 (1) stated:

> **3(i)** ***where in any proceedings the Court has heard all the evidence or matters pertaining to the issues to be determined by the court, the magistrate shall proceed to consult with assessors present, with the view of reaching a decision of the court".***
>
> ***(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all members.***

It is from provision above that the judgment of the trial Court that was upheld by the first appellate Court is being on controversy. The case of ***MOHAMED S. AMIRI vs. SAID NGAPWELA [1992], TZHC 37 TLR 342*** it was held that:

> ***"The trial Magistrate erred when he purported to sum up to the assessors in what he called "Hukumu" and also erred when he failed to record the unanimous***

decision of the court and call upon the assessors to sign it, for such reason, I declare the trial a nullity and order the case be tried denovo before another magistrate and set of assessors."

A similar decision of the kind in absence of a signature in a Primary Court judgment was made in the case of ***AGNES MALODA vs. RICHARD MHANDO [1995], TZHC 10 TLR 137.***

Bearing the reasons above, **I hereby quash all the proceedings and decisions of the two courts below and order that the case be tried de novo in the Primary Court of Kariakoo before another competent Magistrate and new set of Assessors.**

Each party to bear their own costs.

Order accordingly.

L. E. MGONYA
JUDGE
06/03/2020

THE HIGH COURT OF TANZANIA

Court: Judgment delivered before Hon. R. B. Massam, Deputy Registrar in chambers in the presence of Mr. Mumi Sadok, Advocate for the Appellant, Mr. Frank Mahena, Advocate for the Respondent and Ms. Veronica RMA, this 06th day of March, 2020.

L. E. MGONYA
JUDGE
06/03/2020