

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

PC. CIVIL APPEAL NO. 15 OF 2019

(Arising from Civil Appeal No. 15 of 2019 and Original Matrimonial

Case No. 12 of 2019 of Tabora Urban Primary Court)

HIMID HEMED KAWWE ----- APPELLANT

VERSUS

HALIMA JAMES ----- RESPONDENT

JUDGMENT

22/09 & 27/11/2020

BAHATI, J.:

This is the second appeal lodged by the appellant **HIMID HEMED KAWWE** against the impugned judgment of Tabora District Court dated 21/08/2019. The grounds giving rise to this appeal are that:-

- 1. The District Court Magistrate erred in law and fact to hold that the matrimonial house situated at Ipuli be divided equally without any proof of equal and joint distribution in its acquisition and/or maintenance.*
- 2. The District Court Magistrate erred in law and fact for failure to consider the appellant's evidence.*

3. *The District Magistrate erred in law and fact in holding for equal division of the properties acquired after divorce.*
4. *That, the District Court Magistrate erred in law in failing to hold that the land properties in Ipuli, Igunga, and Kahama were acquired after divorce of their marriage and there was no any joint efforts in its acquisition.*

Before I dwell on the substance of the contention in this appeal, it is apposite that a preface of the matter is given; the parties to the appeal were married and lived together as husband and wife until the year 2011 when their relationship reached a wall via Matrimonial Application No. 89 of 2011.

On 23/03/2019, eight years later the respondent Halima James filed a Matrimonial Application No. 12 of 2019 at Tabora Urban Primary Court seeking division of Matrimonial properties acquired during the subsistence of their marriage, the Primary Court finalized the case by ordering equal distribution of matrimonial assets among the parties.

This decision was not to the appellant's liking, he appealed to the District Court of Tabora analyzing several grounds for the appeal. The first appellate court found nothing faulty in the trial court's decision. It upheld it hence this second appeal.

When the case was due for hearing Mr. Kanani Chombala, learned counsel appeared for the appellant and the respondent appeared in person, unrepresented.

Submitting for the appellant, Mr. Kanani stated that, the Court did not observe the principle under section 114 of the Law of Marriage Act, Cap, 29 on the extent to which the parties have contributed in the acquisition of properties. He cited the case of **Bibie Maulid v. Mohamed Ibrahim [1989] TLR 162** where the High Court held that,

"There must be evidence to show the extent of contribution before making an order for division of matrimonial assets".

He submitted that the performance of domestic duties amounts to contribute towards such acquisition but not necessarily to 50/50. The respondent did not show how she contributed to a house located at Ipuli and neither of the parties mentioned the description of that property. That can bring upheaval when it comes to its implementation. He further went on to state that, the judgment of the lower court only mentioned the plot at Tabora which was surveyed, the respondent explained about the property but she did not state how much she contributed to the acquisition of such property.

As to the second ground of appeal, Mr. Kanani stated that some of the properties that are listed were disposed of when they were still

together and others were acquired after they ended their marriage and the court was supposed to evaluate the properties, although this was not done. He then submitted that for the interest of justice, the District Court was supposed to quash the decision of Primary Court and Order for a retrial.

On the third ground of appeal, Mr. Kanani submitted that the properties acquired at Igunga and Kahama were not supposed to be among the properties in the division of matrimonial assets, and the court did not go into detail when it came to deciding instead it passed its decision in totality which is not proper as it makes it difficult to implement and as a result, the parties will lose their rights.

Out of the grounds lodged, Mr. Kanani submitted that this Court should take judicial note that, this is a matrimonial case but at the District Court it came as a Civil Appeal instead of Matrimonial Appeal. It is his opinion that will affect substantive justice.

In reply, the respondent Halima James submitted that by the time she got married she found him with a plot, not a house. She used to sell bananas while the appellant was a driver. She added that the plot which was acquired at Igunga was her brother's property and after divorce, her husband used to come to his place and they used to go together where the properties at Kahama are located.

She further submitted that the magistrate did not err in his decision as she was given the plots at Igunga and Kahama and the appellant was given the one in Dar es salaam. Further, she submitted that it is not true that the four plots were sold before the divorce or even that she knew nothing of the plots.

In rejoinder, Mr. Kanani learned counsel submitted that visiting a place does not necessarily mean that she acquired the same. He further contended that the respondent stated that the one at Igunga is the husband who did contribute. The properties are not known in terms of description. He prayed to this court to allow his appeal.

Having carefully considered the submission from both parties, the issue to be determined is whether the appeal has merit.

I agree with Mr. Kanani Chombala, the learned counsel that, this case ought to be a Matrimonial Appeal, not a Civil Appeal as it was registered in the District Court, the record shows that the case emanated from a Primary Court Matrimonial Application and it appears that, the error was committed by the Applicant when he lodged his Petition of Appeal at the District Court bearing the title PC Civil Appeal Case No. 15 Of 2019 instead of Matrimonial Appeal.

Due to that error, the first appeal ought to have received an instant struck out from the presiding magistrate so that the appellant could file

a proper petition for the case to be entered into a proper Matrimonial Case register.

Having set an eagle eye on the record of the court, I found there is some illegality on which this court cannot proceed to entertain this matter since it will prejudice justice. I opted not to go through other grounds as leveled by the appellant as it may prejudice the matter.

The judgment of the trial Court does not meet the requirements to be called a judgment as it is required by law. Section 7 (2) of the Magistrate Act, Cap 11 [R.E 2019] requires that:-

*(2) All matters in the primary court including a finding in any issue, the question of adjourning the hearing, a bail application, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award, and all questions and issues whatsoever shall, in the event of a difference between **a magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrates and assessors present** and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote.*

The record shows that on 15/05/2019 the magistrate recorded the opinion of assessors as follows, I quote:-

Maoni ya washauri

Mshauri 1

Wagawane mali kwani wamechuma pamoja

Sahihi _____

Mshauri 2

Kila mtu apate mgao wake kwani wamechuma pamoja mali

Sahihi _____

It is my observation that absence of a signature renders the judgment being null and void. To substantiate this argument the court in **Mohamed Bishoge V Mwatatu Bishoge, HC Bukoba, (PC) Civil Appeal No.1 of 1992 (unreported)** where it was held that;

"Rule 3 (1) GN 2/1988 that demands the signing of the court's judgment by all the members of the court."

Also in **Catherine Hamisi V Harith Heme(PC) Civil Appeal No. 133 of 1991 (unreported)** in which it was held that,

"The trial magistrate erred in noting the judgment signed by the assessors and the proceedings were void and a nullity."

In another case of **Hamis Athuman V Jumanne Makambi and Others(Civil Appeal No. 23 of 1999-unreported)** in this case, the judgment was not signed by the assessors, so it was declared null and void. All these cases discuss the requirement of the assessors as

members of the primary court to participate in the decision-making process and finally sign the judgment of the court.

It is a cardinal principle of law that assessors are members of the Primary Court and are required to participate in both the decision-making process and finally sign the judgment of the court. The case of **Neli Manase Foya v. Damian Mlinga [2005] TLR 167** supports this firm position too. This requirement cannot be dispensed with without causing injustice.

It is apparent in the instant appeal that, the assessors gave their opinion but it is not signed, it creates doubt as to whether the assessors were fully involved in the proceedings or it was the magistrate's creation since the opinion lacks the assessor's signatures.

However, section 7 (2) quoted above, requires the assessors to be involved in the assessment of the distribution of matrimonial assets but their opinion is too general, it does not go into detail as to how and to what extent those properties are to be distributed. Under this circumstance, it is the view that failure by the assessors to verify their opinion by putting their signature renders the decision to be of a magistrate alone.

In the premises, I thus invoke upon my revision power conferred on the Magistrates Courts Act, Cap. 11 to quash the decisions of the

lower courts. I further order the matter be remitted back to the trial court for re-trial expeditiously before another magistrate and a new pair of assessors. Since this is the matrimonial case every party to bear its costs.

It is so ordered.



A.A BAHATI,

JUDGE

27/11/2020

Judgment delivered under my hand and seal of the court in the chamber, this 27th day November 2020 in the presence of the Applicant and Respondent.

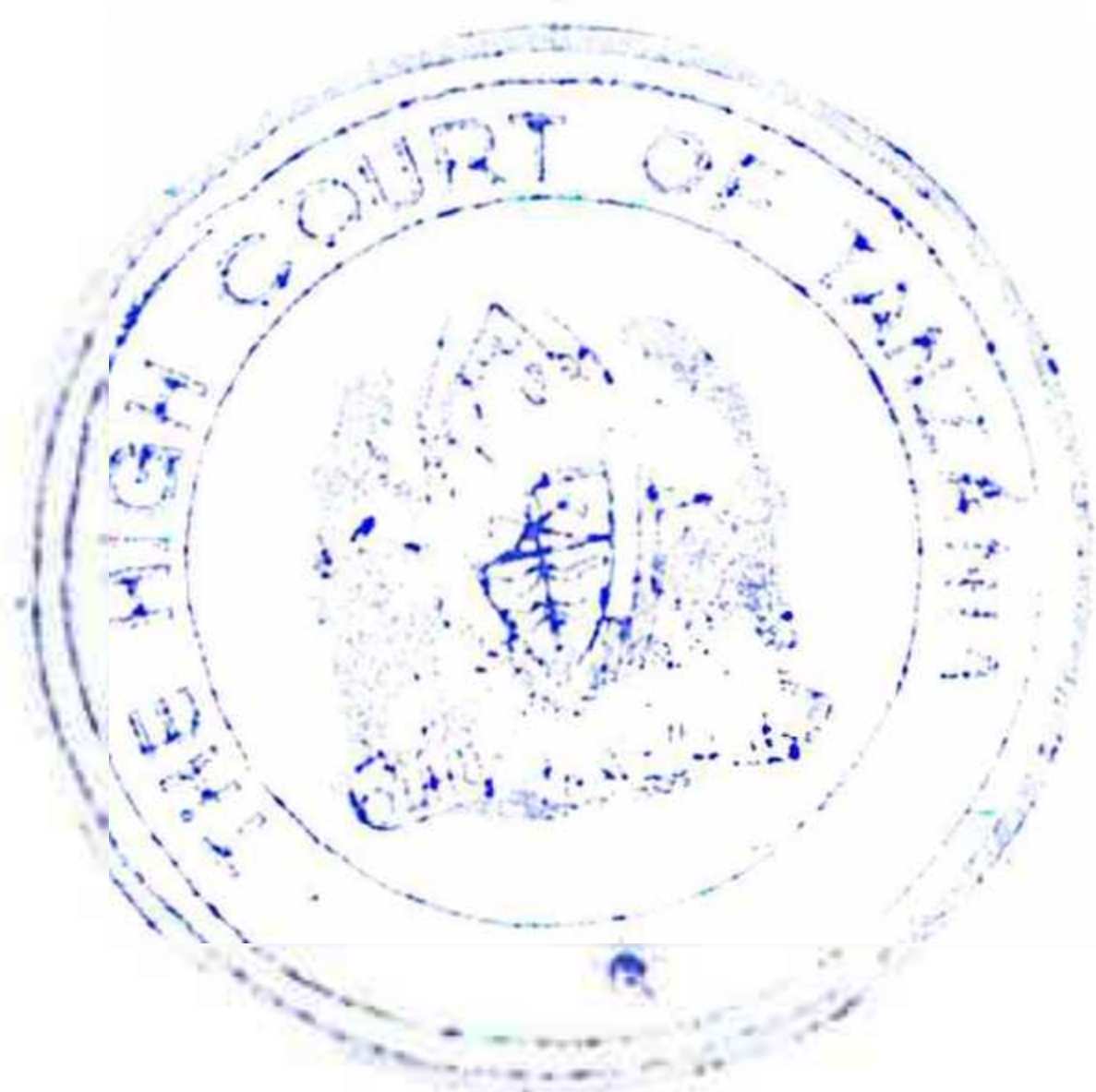


A. A. BAHATI

JUDGE

27/11/2020

Right of Appeal is explained.



A. A. BAHATI

JUDGE

27/11/2020