

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT TABORA**

PC. CIVIL APPEAL NO 17 OF 2019

*(Arising from Matrimonial Appeal No. 5 of 2019 of District Court Nzega
and Original Matrimonial Cause No. 16/2018 of Nyasa Primary Court)*

JOHN ELIJA ----- APPELLANT

VERSUS

HELENA PETRO ----- RESPONDENT

JUDGMENT

17/11 & 14/12/2020

BAHATI, J.:

This is an appeal against the decision of the District Court of Nzega upholding the decision of Nyasa Primary Court in Nzega District.

The brief facts of this case are that the appellant **JOHN ELIJA** and the respondent **HELENA PETRO** had cohabited together from 1994 until the year 2019 when their relationship came to an end. The respondent subsequently petitioned for divorce on 15/03/2019 under Matrimonial Cause No. 16 of 2019 at Nyasa Primary Court, Nzega District.

It is on record that, the application for divorce went together with the application for division of matrimonial properties which is permissible in the practice of the Primary Court Procedures. After a full hearing, the

trial Magistrate concluded that the parties had been living without being legally married to each other so it was ruled that the application for divorce is not maintainable to them, however, the trial Magistrate went on a division of Matrimonial properties under the guidance of Section 160 (2) of the Law of Marriage Act, Cap. 29 [R.E 2019].

Aggrieved with the decision of the Trial Court, the Appellant unsuccessfully appealed to the District Court of Nzega whereby the Court upheld the decision of the trial Primary Court and dismissed the appeal.

Being dissatisfied with the first appellate court's decision, the appellant filed this second appeal on the following grounds that:-

- 1. The learned Magistrate erred in law and facts when she grossly misapprehended the evidence on record including the actual contribution made by the appellant in the acquisition of the matrimonial properties before ordering their division, consequently leading to unfair division of matrimonial assets.*
- 2. That learned Magistrate erred in law and facts by reaching into a decision relying on extraneous matters without taking into account the stance of law that Court is bound to decide matters before them based on evidence and law, thereby causing injustice to the appellant.*

3. *That, the District Court erred in law by misdirecting itself against the weight of evidence, by approving the decision of the Primary Court which had ordered distribution of matrimonial assets basing on unknown ration and thereby have ended up giving 70% of the whole estate's value to the respondent against the proportion of her contribution.*
4. *That, the 1st appellate Court erred in law and facts by upholding the decision of the trial Court which departed from framed issues and ended up determining the case on new issues without affording the right to be heard to the appellant.*

When the matter was called for hearing, the appellant was present in person while enjoying the services of Mr. Kelvin Kayaga, learned advocate while the respondent appeared in person.

In his submission for the appellant, Mr. Kayaga prayed leave to the court to move the court under Rule 15 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N. No. 312 of 1964 and Order 39 Rule 2 of the Civil Procedure Code, Cap. 33 [R.E 2019] to add another ground in respect of jurisdiction.

With the leave of this court being granted, Mr. Kayaga submitted that the Primary Court had no jurisdiction to entertain this matter and

the first appellate court erred on upholding the decision of the Court which had no jurisdiction.

Further to that, page 2 of the Primary Court Proceedings shows that on 19/03/2019 the appellant stated that he was not married to the respondent but they lived together and the Court went on to state that the parties were under the presumption of marriage and also the District Court recognized that there was no marriage between the two.

Mr. Kayaga also contended that the two Courts erred because they had no jurisdiction to hear the matter. He cited the case of ***Wilson Andrew vs. Stanley John Lugwisha, Civil Appeal No. 226 of 2017*** that, he quoted;

"According to this settled principle, the Court has no jurisdiction where there is no marriage. Therefore from this stance, all proceedings and judgment given were wrongly decided and it is subject to be quashed."

After adding that ground to the list of grounds leveled in the petition of appeal Mr. Kayaga argued other grounds collectively. He submitted that the Court did not consider the contribution made between parties and led the respondent to get half of the properties than the appellant, the Primary Court and District Court did not believe the defence side who explained to the Court how he acquired the properties before he met the respondent.

Also, the respondent admitted to the court that she found the appellant doing business at the marketplace, and at that time he had two wives who also contributed to the acquisition of properties. The District Court and Primary Court did not give a convincing reason for not believing the evidence given. Mr. Kayaga went on and prayed to this Court that this appeal be allowed and subsequent that this Court quashes the decision of the lower court for not evaluating the evidence of the appellant.

In reply, the respondent submitted that the Primary Court was correct to decide in her favour. She contended that all parties were called before to give evidence since the appellant's evidence was not true that is why the primary court decided against him and the decision was fair.

She further submitted that in respect of other wives, she has been living with the appellant for 25 years and all the time the appellant was alone then he decided to marry another wife in 2002 after finding her barren, the second wife stayed with him for almost six (6) months and left, then the appellant married another woman whom they ended up in separation after they had only one issue. She then submitted that there is no contribution made by those wives that is why all courts ignored their evidence. She prayed that the decision of the two lower Courts be upheld and the appeal be dismissed.

Having carefully analyzed the evidence on record, submission of the parties, the issue for determination is whether the grounds of appeal have merits.

To commence with the first ground as argued by Mr. Kayaga, learned advocate on whether the trial Primary Court had jurisdiction to entertain the matter, I wish to borrow the wisdom of the then Justices of Appeal, Omar J, Mnzava J, and Mfalila J, in ***Hemed Tamim vs Renata Mashayo*** [1994] TLR 197, I quote:-

"Where the parties have lived together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under section 100 (i) of the Law of Marriage Act, the Courts have the power under section 160 (2) of the Act to make consequential order as in the dissolution of marriage or separation and division of matrimonial property acquired by the parties during their relationship in such order."

Blending the above decision of the Court of Appeal with the facts of the instant appeal I agree with the respondent that, the trial Magistrate was correct in her decision. Since the parties were not legally married it couldn't be a bar for ousting the Primary Court from entertaining the matter placed before it. I beg to differ with the learned

counsel for the appellant that the facts and decision of **Wilson Andrew's** case (supra) do not match the facts of the instant appeal for the reason that, Wilson's case was on whether the primary Court has jurisdiction to entertain claims of damages rooting out of adultery where no proof of marriage. The Court ruled out that, the presumption of marriage is not among the form of marriage listed in section 75 of the Law of Marriage Act, Cap.29 upon which damages for adultery may be claimed thus Primary Court cannot assume jurisdiction.

This position is not new in our jurisdiction, the same has earlier been decided by this court in **John Kahamila v Paschal Jonathan &Hilda Hosa [1986] TLR 104** that ;

" Under section 75 of the Law of Marriage Act, 1971, Primary Courts have no jurisdiction to entertain claims for adultery where the parties involved contracted a civil marriage or a Christian Marriage, the appellant in this case, therefore, took his claim to the wrong court".

It is my view that the learned advocate misconceived the decision in Wilson's case and applied it to this instant appeal without taking into account that, this case is on the division of matrimonial properties, not a claim of damages for adultery as it was held in Wilson's case.

On other grounds, the counsel for the appellant argued the remaining four grounds collectively. The appellant contended that the trial court never considered the appellant's contribution to the acquisition of matrimonial assets and the court did not believe his defence when he explained to the court how he acquired the properties before he started living with the respondent.

It is a settled principle of law that the division of matrimonial assets is that a party claiming must prove the extent of contribution to the said assets so that the court may account for the percentage of division basing on the contribution made. See the Case of ***Bi. Hawa Mohamed vs Ally Sefu [1983] TLR.***

Mr. Kayaga contended that the record of the trial court proved that the respondent found the appellant undertaking business at the market and the appellant's two other wives also contributed to the acquisition of properties. I have gone through the proceedings of the Primary Court it is unchallenged that the parties acquired the properties through joint farming and business activities whereby the respondent used to do farming and the appellant used to sell the proceeds at the market.

It is the appellant's testimony in the Primary Court that he carried on farming and business activities together with his wife Helena Petro

and in 1997 they finished their house and they started living therein while other wives remained in their family's house.

The only contest that stands out of the two arguments above is whether the appellant and the other two wives also require the division to the listed assets and extent of the contribution made by the respondent. The record of the Primary Court shows that the appellant separated with his two wives long ago living back the respondent and none of them has ever returned to him until when they were called to give evidence in court. It is quoted that SU3, Editha Musa (40) testimony on page 21 of Primary Court Proceedings;

"Mimi nilikuta nyumba zote zimekwisha kujengwa na wamenunua mashamba.

- Nilikaa na mdaiwa kwa muda wa mwaka mmoja tu"

On the other hand SU2, one Royce Achiel (51) testified that the appellant married her in 1987 and 1992 together with appellant they bought two pieces of land but she doesn't know their location and she doesn't know the person who sold them the two pieces of land, she left the appellant on 2004 until 2019 she was called to testify in court. On page 20 of the typed proceeding, she testified that:-

"Mashamba yalinunuliwa mwaka 2004, mashamba hayo yako Tazengwa"

It is my firm view that the trial magistrate was convinced by the testimonies of the alleged two wives that all the developments occurred when the first two wives of the appellant were away already separated from the appellant that is why she disregarded their testimonies. Another issue that I think the trial magistrate considered in her decision is that the alleged two wives of the appellant appeared in court as witnessed if they had an interest in the properties, they ought to have followed the procedure of the court and file an objection on the same since there was no any prayer made by them there is no way a trial court could award anything for their benefit since they were mere witnesses not a party to a suit.

As to the contribution, Section 114 (2) b of the Law of Marriage Act, Cap. 29 [R.E 2019] requires the court to have regard to the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets. I am convinced that the parties' source of income being farming and business made out of farming produce alone, I see no way one can make separate percentages on the extent each of them contributed to farming activities.

It is my considered view that in any African family whose wellbeing depends on farming alone their contribution to the farming business is equal to all contributing members to that business. All the listed properties in the instant appeal are the proceeds of joint farming

activities by parties, there is no way one can separate any of the properties from the hands of the parties that is why the trial magistrate's wisdom directed her to divide them into the parties equally as she did.

Having said that and done, I uphold the decision of the two lower courts and consequently, the appeal is dismissed. Since this is a matrimonial case I give no order as to costs.

Order accordingly.



A.A BAHATI

JUDGE

14/12/2020

Judgment delivered under my hand and seal of the court in the chamber, this 14th day December, 2020 in the presence of Respondent only.

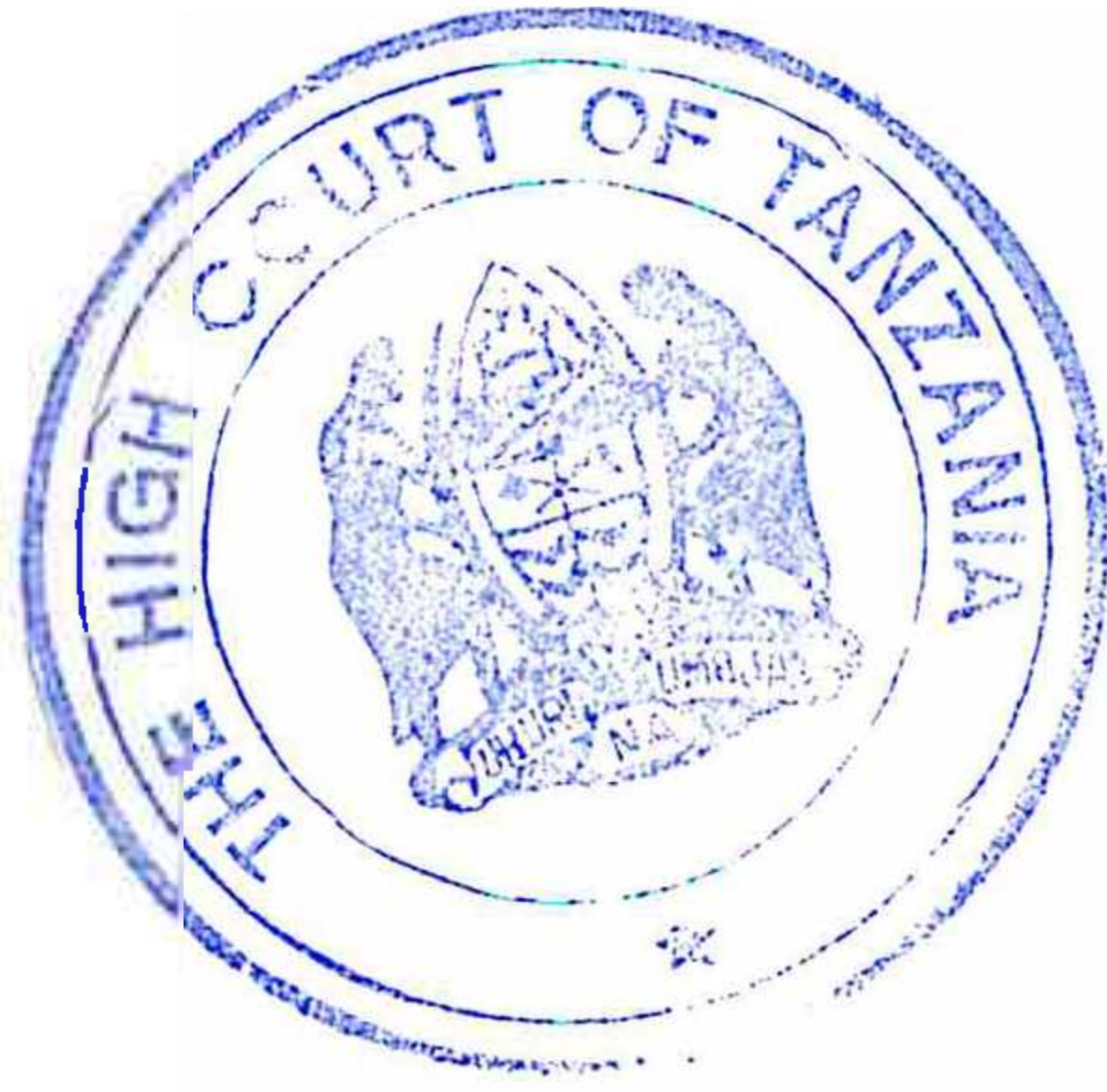


A. A. BAHATI

JUDGE

14/12/2020

Right of appeal is fully explained.



A. A. Bahati

A. A. BAHATI

JUDGE

14/12/2020