

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

PC. CIVIL APPEAL NO. 6 OF 2020

*(Arising from Urambo District Court Matrimonial Appeal No. 3 of 2019
and Original Matrimonial Case No. 12 of 2019 of Urambo Primary
Court.)*

MAGANGA RAMADHANI ----- APPELLANT

VERSUS

ASHA ZUBERI ----- RESPONDENT

JUDGMENT

03/11&15/12/2020

BAHATI, J.

This is an appeal from the judgment of the District Court of Urambo dated 15/11/2019 wherein the appellant's appeal was partly allowed.

The background to the matter in dispute as can be gathered from the record can be summarized as follows. The appellant Maganga Ramadhani and the respondent Asha Zuberi contracted Islamic marriage in 2008 and they were blessed with three issues of marriage and one fully furnished house.

In the year 2014, their marriage went into a serious quarrel that led to their separation until 15/01/2019 when the appellant Maganga Ramadhani approached the primary Court seeking an order for divorce through Matrimonial Cause No. 12 of 2019.

The Primary Court having heard the application it was satisfied that, the parties had together acquired several matrimonial properties during the subsistence of their marriage which is subject to division between parties. The Court held that since the in-house utensils were not in dispute the only property that had to be distributed between parties is the house.

In the order of division of properties the Magistrate concluded that the appellant should remain in the house with one bed and solar power system while the respondent should go with one bed, one cupboard, all curtains, table, bed sheet, TV, one set of Couch, Wall Clock and should receive monetary payment from appellant TZS: 2,000,000/= (two million) within four months as her contribution to the acquisition of the house.

The Court further ordered that the respondent to compensate her business money TZS 100,000/= and further that she should remain in the house until the money is paid whereas the appellant should continue to provide food, shelter, and medical services until the money is paid.

On custody of Children, the trial court ordered that two children who are above seven years should go with their father while the other one below seven will remain under the care of her mother and the appellant will continue to provide for her until he reaches seven years.

Dissatisfied with the decision the appellant appeal to the District Court and after a full hearing on the appeal, the Court upheld the decision of the trial Court but reduced the amount to be compensated to the respondent from TZS. 2,000,000/= to TZS.1,000,000/=.

Still dissatisfied the appellant lodged this second appeal armed with four grounds as follows:-

- 1. That, the trial district Magistrate erred in law and fact by awarding the Respondent compensation to the tune of Tsh. 1,000,000 when the house in dispute concerns their persons.*
- 2. That, the trial Magistrate misdirected himself by giving inadequate time to the Appellant to compensate the Respondent while knowing that the Appellant is economically incapacitated.*
- 3. That, the trial Magistrate misdirected himself in the distribution of matrimonial property without considering the fact that the property concerns three parties.*
- 4. That, the trial Magistrate erred in law and fact by entertaining evidence adduced by witness number three.*

5. *That, the trial Magistrate erred in law and fact by overlooking the fact that, the names of the respondent were changed from ASHA ZUBERI to a nonexistent matter in the case one ASHA HEMED JUMA*
6. *That, the trial Magistrate misdirected himself by writing in his Judgment that the only disputed property is the estate.*
7. *That, the trial Magistrate Court erred in fact by refuting the point of the Appellant the(sic) his point of seeking to divorce his ex-wife due to the fact she was HIV Positive irrelevant or immaterial*
8. *That, the trial Primary Court Magistrate misdirected itself by holding in pg 3 para 2 of the judgment that, the plaintiffs prayer for divorce is immaterial but did not grant the same*

He, therefore, prayed this honorable Court that this appeal be allowed, quash and set aside order 2 of the District Court and Primary because it did include other properties and retain orders 1, 3 and 4 and of the District Court and leave the decision of Primary Court to stand and order the Primary Court to issue divorce division of matrimonial property to follow.

When the appeal was called for hearing the appellant appeared in person unrepresented whereas the respondent enjoyed the services of Mr. Kelvin Kayaga, learned counsel.

The appellant buttressed that, compensation is very high, he added further that before he married the respondent, Asha Zuberi he had a family of other two wives with whom he got the house worth two million. The amount is not relevant to the contribution made by each party. He prayed to this court the compensation amount be reduced to 500,000.

On the second ground he submitted that the court gave him the inadequate time of four months to compensate the respondent, he prayed this court to rule in his favor that he should pay the respondent Tsh. 150,000 annually for four years.

On the third ground, the appellant argued that the issue of divorce was not discussed in trial Court but he was granted divorce and division of matrimonial assets was unfair.

On the other hand, Mr. Kelvin Kayaga supported the applicant's petition by submitting that, it is true that the court erred in changing the award from 2 million to 1 million because in District Court there was no any reason adduced as to why the court arrived at such decision.

That, the appellant stated that the house is worth 2 million, this should be disregarded because no evidence was produced to support such it and the statement has not been stated anywhere so this court should not take it from the vacuum.

That, the appellant stated that three people contributed to the building of the house but on page 4 of the trial Court's proceedings he stated that the respondent contributed to building the house. Also on page 13, his witness SM5 affirmed that the house was built by the appellant and respondent.

On the second and eighth ground, Mr. Kayaga submitted that the issues raised on those grounds were not raised in the District Court so he prayed ground 2 and 8 be dismissed as are improperly raised at this stage. He cited the case of ***Melita Naikiminjal & Another vs Sailevo Loibanguti [1998] TLR 120*** where the court held that:- *“an issue not raised before the 1st appellate court cannot for the first time be raised and entertained by the second appellate Court”* hence the two grounds cannot be dealt with as it was not in the 1st appeal. According to the appeal of the District Court, three grounds were raised and they were interrelated.

Before I dwell into the inner core of this appeal, I wish to state that, the appellant's Petition of appeal is very confusing and hard to understand what the appellant is seeking in this Court. Also, it is full of

new grounds that were not matters of discussion in the first appellate Court.

At the first ground of appeal, the appellant is asserting that the 1st appellate magistrate erred by awarding the respondent compensation to the tune of TZS 1,000,000 and in his submission, he prayed the same to be reduced to TZS 500,000/= but in the same petition at the last paragraph on prayers the appellant prays this Court to retain order 4 of the District Court which reads, I quote:-

"This Court is quashing and set aside the order of payment of TZS 2,000,000/= as a compensation/contribution made by the respondent in acquiring the said house and order the appellant to pay TZS 1,000,000/= to respondent as the compensation to the effort she contributes (sic) in acquiring the said house"

As to the second and eighth grounds of appeal, I agree with the respondent that those are the new issues that were not discussed in the 1st Appellate Court, the decision in **Melita Naike's case** (supra) has it all that an issue not raised in the first appellate court cannot be raised and entertained by the second appellate Court.

In **Juma Manjano v. Republic Criminal Appeal No. 211 of 2009** the Court held that;

“As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate Court”

Also in **Abdul Athmani vs R [2004] TLR 151** the issue on whether the court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. As to the instant case, I will borrow the wisdom of the judges in the above cases and continue to strike out ground 2 and 8.

As to the third ground the appellant buttressed that the issue for determination in the primary Court was divorce but instead the trial magistrate misdirected herself into the distribution of matrimonial assets which were not the subject of the application. To dispose of this ground I beg to refer to the proceedings of the trial Court on page 2, I quote:-

“Tarehe: 25/02/2019

Mbele ya O.I.Nicodemo-H/Mkazi

Wajumbe: 1. M. Chande

2. A. Amosi

Karani: Mwajuma Mazinge

Mdai: Yupo

Mdaiwa: Yupo

Dai: Talaka, mgawanyo wa mali na matunzo ya watoto.

Mahakama: Dai limesomwa na kufafanuliwa mbele ya mdaiwa kwa lugha anayoifahamu ameulizwa kujibu naye amejiibu kuwa:

Mdaiwa: Siyo kweli”

Basing on the above quoted part of proceedings it is apparent that, the matter that was tabled before the trial Primary Court for determination is Divorce, Division of Matrimonial properties and Custody of children. When the same was read to the respondent the appellant who is now opposing was present in court and he never opposed what was read to the respondent, it is thus exposed that the ground by the appellant is baseless.

The thing that I found strange in the decision of the primary court is that the court had pronounced the order of divorce between the parties it went further on ordering maintenance of divorced wife by the appellant but it did not state the reasons why the appellant should continue to maintain the respondent. I quote part of the judgment on page 6 which runs as follows:-

“Mdaiwa akae kwenye nyumba hiyo hadi atakapofidiwa na wakati wote ahudumiwe na mdai malazi na chakula na matibabu.”

Section 115 (1) of the Law of Marriage at the first proviso states that,

"Provided that, where the marriage has been dissolved, the wife shall not, unless the court for a special reason so directs, be entitled to maintenance for herself for any period following the date when the dissolution takes effect. "

Since no reason was stated by the trial magistrate to substantiate his decision on maintenance of the divorced wife as the district court did I also set aside that order on the maintenance of the respondent.

I find it confusing that the appellant is alleging that the primary court never determined the issue of divorce but the same person in the petition of appeal is praying this court to retain 1st order of the district court which reads:-

"The order of decree of divorce pronounced by the primary court is adhered and shall remain intact"

It is my view that the intention of the appellant in this court is not to drive us into justice but rather to circumvent the respondent's rights.

Since most of the issues raised by the appellant in the petition of appeal are new and never had been raised in the first appellate court, if I agree with him on those issues, it would be unfair to the respondent. In the circumstance, I find that the appeal has no merit thereby I uphold the decision of the District Court.

In view of the aforesaid, I find the entire appeal to be devoid of merit and it is hereby dismissed.

Order accordingly.



A.A.BAHATI

JUDGE

15/12/2020

A. A. BAHATI

JUDGE

15/12/2020

Judgment delivered under my hand and seal of the court in the chamber, this 15th day December, 2020 in the presence of both parties.



A. A. BAHATI

JUDGE

15/12/2020

The right of appeal is explained.



A. A. BAHATI

JUDGE

15/12/2020