IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 207 of 2020

PETER WANA MRIGO.....APPELLANT

VERSUS

WAKULU OMARY MHOSI..... RESPONDENT

(From the decision of the District Court of Temeke)

(Rwekiti- Esq, RM.)

dated 27th July 2020

in

Matrimonial Cause No. 21 of 2019

JUDGEMENT

9th February & 15th April 2021

Rwizile, J

In this appeal, parties were husband and wife living under one roof from the year 2008, under what the respondent called customary marriage. They lived happily and were blessed with two children. Not until 2015 when the conflict elapsed. The appellant is alleged to start assaulting her in the presence of their children. Ultimately, he started chasing the respondent out of their matrimonial house. Despite trying to resolve their misunderstanding through their family members still nothing was gained.

In 2017, the appellant left his matrimonial home and only to start living somewhere else. Consequently, in 2019 the respondent decided to file a Matrimonial Cause No. 21 of 2019 at Temeke district court. She petitioned for divorce, equal division of matrimonial properties, custody, maintenance of their two children, compensation to the tune of 30,000,000/=, and the order that the properties sold by the appellant be returned for equal benefit.

The case was heard, marriage between the parties was dissolved, custody of the children was given to the respondent, while the appellant was ordered to pay 300,000 per month for maintenance. Their matrimonial house was divided into shares, the appellant was given 65% and the respondent got 35%. However, the appellant's shares were reverted back to the respondent as her shares for the motor vehicles which were alleged to be sold by the appellant. The appellant felt aggrieved by the decision, he has therefore appealed before this court advancing seven grounds that;

i. *That the trial magistrate erred in law and fact for condemning the appellant unheard contrary to the law*
ii. *That the trial magistrate erred in law and fact to treat, hear and determine the matter in question as a matrimonial cause when there was legally no cultural marriage contracted by the parties*
iii. *That the trial magistrate erred in law and fact in considering and deciding the petition as a matrimonial cause when there was no kind or type of marriage, leave alone the cultural marriage envisaged, pleaded anywhere in the respondent's petition contrary to the mandatory requirement of the law*
iv. *That the trial magistrate erred in law and fact in failing to appreciate that in the absence of matrimonial unison there can neither be matrimonial dissolution, distribution of matrimonial property, custody of issues nor reliefs to grant, hence failed to properly evaluate respondent's evidentiary province on both marriage and matrimonial properties*
v. *That the trial magistrate erred in law and fact in improperly introducing, imposing and addressing himself the un pleaded issue of "presumption of marriage" between the parties thus turning himself into a petitioner and witness contrary to the law, hence reached an erroneous conclusion to the detriment of the appellant*
vi. *That the trial magistrate erred in law and fact for failing to address properly the issues of custody of issues and assessment of attendant maintenance costs without regard to the law and petitioner's income*
vii. *That the trial magistrate erred in law and fact in not making a thorough paced examination, analysis and evaluation of the respondent's evidentiary*

province regarding matrimonial property without considering the degree of contribution of each party hence reached a wrong conclusion.

At the hearing appellant was represented by Mr Nsato learned advocate while respondent was offered legal aid by TAWLA, and her submission was prepared by Sandewa learned advocate. It was agreed that this appeal be argued by written submission.

In support of the appeal the learned Advocate abandoned grounds 1 to 5 of the appeal and submitted on ground 6 and 7.

Submitting on the sixth ground of appeal, the appellant argued that the trial court failed to analyse and consider what the law states on custody and maintenance of the children. He said, the trial court failed to consider the best interest of the child (welfare of the children), when it comes to where to place the custody of the same. To support his argument, he cited section 125 of the Law of Marriage Act, [Cap R. E 29] and section 39(2) of the law of the Child Act. He also offered support on the cases of **Halima Ally Enzimbali vs Ally Sefu Mwanzi**, Pc Civil Appeal No. 34 of 2020 (unreported) at page 8, **Neema Kulwa Mvanga vs Samson Rubele Maira,** Civil Appeal No. 1 of 2018 and **Ali Abdulrahman Bwando vs Mariam Yusuph Maganga**, Civil Appeal No. 142 of 2019 (Unreported).

He argued further that, the trial court neglected the requirement of the law concerning the children's opinion. According to him, the children of the parties were old enough to state their wishes if they could have been consulted. Mr Nsato learned advocate asserted that the trial court denied them that right. He cited section 11 of the Law of the Child Act. he therefore prayed for the order of custody and maintenance be quashed and set aside.

It was his submission on the seventh ground of appeal that, it was wrong for the trial court to revert shares once given to the appellant to compensate the respondent for what it was alleged to be misappropriation of motor vehicles. According to him, at the trial court, the market value of the house at Chamazi and of the motor vehicle were not established. He added, absence of that vital information become impossible to set

off one against another. He asserted more that; it is trite principle that the value of the land appreciates while the vehicle depreciates.

The counsel contended that, the motor vehicle make-Tata with registration number T575 DGA is under joint registration, however he said the same is a chattel mortgaged in favour of Equity Bank Tanzania Ltd. He then stated, the facts that the said bus was sold is not true. He argued as well that, it was not proved at the trial, if a Toyota RAV4 was a matrimonial property. according to his view, there is presumption under section 60 of the Law of Marriage Act, that the property bought during marriage but bearing the name of one party could be presumed to be his/her personal property, as held in the case of **Ali Abdulrahman Bwando** (supra).

It was the counsel's vehement assertion that the trial court failed to ascertain and be satisfied on the current status of the matrimonial properties which led to an erroneous decision. He therefore prayed for the decision of the trial court on division of matrimonial property be quashed and set aside, and allow this appeal with costs.

Disputing the appeal, Ms Sandewa argued ground six that, the trial court considered the best interest of the children when placing them to the respondent. She added that, since the children were under the age of majority, it was desirable for them to be staying with their mother. Apparently, it was said, the children were living with their mother when appellant left them, according to her this brings no doubt that the respondent is a fit person to have their custody. She referred this court to the provision of section 4(2), 39 of the Law of the Child Act and section 125(3) of the Law of Marriage Act.

The learned advocate submitted further that, the trial court was acquainted with section 129 (1) of the Law of Marriage Act, when ordered the appellant to maintain his children. She said the amount of 300,000/= per month was ordered because the appellant is a business man, capable of paying the same.

Submitting on ground seven, the learned advocate argued, that matrimonial properties were acquired by the parties during marriage. She added, the respondent contributed to acquiring of the same by providing money and work. According to her, division by

the trial court was correct and fair as per section 114 of the Law of Marriage Act, and the case of **Bi Haw Mohamed vs Ally Seif** [1983] TLR 32

It was her submission further that, the trial court was right to order appellant's shares in matrimonial house to be reverted back to the respondent. The appellant sold the matrimonial vehicles without the consent of respondent. She added that, the motor vehicles were bought during the marriage. She stated, the respondent did not benefit from the sale. To support her argument, she made use of the case of **Omari Chikamba vs Fatuma Malunga** [1989] TLR 39. She then said the grounds of appeal are devoid of merits. She therefore prayed for the appeal to be dismissed in its entirety and the decision of the trial court be upheld.

Having gone through the submissions and records of the lower court, it is apparent that the trial of the respondent's was heard interparties. But that was not so, on the appellant's case. It would appear the respondent's was closed 10.06.2020, paving way to the appellants case (defence). The defence case (appellant) was scheduled for hearing on 13.7.2020. However, the appellant failed to appear to defence his case. Boldly, the trial court scheduled for the day of an exparte judgement. The appellant, who appeared on the judgement day, was aggrieved with the decision. He therefore brought this appeal challenging it. Upon meditation, I thought there was an anomaly demanding an explanation on the procedure.

In their submission, before this court, parties did not see anything wrong with the whether this appeal was proper before this court. I therefore invited them to address this court whether it was proper for the appellant who was never heard before trial court to prefer this appeal.

Mr Marijani learned advocate for appellant although he agrees with the fact that exparte judgement is not appealable, he asked this court to decide in its wisdom the proper procedure it thinks fit. The respondent, appearing in person, was not expected to have anything to add than to leave it to the court to decide

Coming to the issue at hand, it is settled that rules of the civil procedure code shall be used mutatis mutandis in matrimonial proceedings. Therefore, the law under the

provisions of section 74 of the Civil Procedure Code, expressly provides for orders which can be appealed against, and an exparte judgement is not among them.

Basically, this appeal originates from a matrimonial proceeding. The nature and character of matrimonial proceedings are governed by the Law of Marriage Act. But in terms of procedure, the law does not in all fours provide for the manner in which the same should be conducted. To deal with this lacuna, Rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules, GN No. 246 of 1997 (to be referred herein as the rules) provides for the answer as follows;

> *"The court shall proceed to try a petition in the same manner as if it were a suit under the civil procedure code, and the provisions of the Code which relate to examination of parties, production, impounding and return of documents, settlement of issues, summoning and attendance of witnesses, affidavits, judgements and decree shall apply mutatis mutandis to a trial of a petition"*

It is therefore trite, in my humble and considered view, that an aggrieved party, in a matrimonial proceeding, where an exparte judgement has entered against him, has to exhaust the remedies available in the Civil Procedure Code. That is therefore, with respect required to apply for setting it aside as it is under Order. IX Rule 9 of the CPC, which provides that;

> *In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*

In light of the provisions, the appellant ought to have applied before the trial court to set aside the exparte judgement.

This was important because it embodies the crucial constitutional right of being heard. In clear terms, if I may add, a person who was not heard at the trial cannot be heard through an appeal. This is the position as in the case of **Athuman Mussa Urrasa vs. Fatuma Khalifa Mturi**, (Pc Civil Appeal No. 20 of 2020) at page 8 [2021] TZHC 2361; (04 February 2021) www. Tanzlii.org.tz, this court held that;

> *"... As it transpired, the appellant was supposed to apply to set aside an exparte decision. The application was to be filed at the same court. The rationale is to afford a party who was not heard, a right to present her side of the story..."*

For the foregoing reason, with respect, and being mindful of the dictates of rule 38(b) and (c) of the Rules, GN 246 of 1997, which empowers this court to determine appeals on grounds other than those raised by the appellant, I hold that even without going to the merits of this appeal, it has no merit. It is therefore dismissed with no orders as to costs, because the respondent is a legal aided person.

ACK. Rwizile
Judge
15.04. 2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY