THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
AT MBEYA
MATRIMONIAL APPEAL No. 6 OF 2020.
(Arising from Misc. Matrimonial Application No. 7 of 2018, in the District Court of Kyela District, at Kyela, Original from Matrimonial Cause No. 32 of 2017, in the Primary Court of Kyela District, at Urban).

1. ROSE MHADE.....1ST APPELLANT
2. HENRY SIMFUKWE.....2ND APPELLANT
VERSUS
EMMANUEL MWAKABONGA..... RESPONDENT

JUDGMENT

11/02 & 22/04/2021.
UTAMWA, J.

In this appeal, the two appellants, ROSE MHADE and HENRY SIMFUKWE (the first and second appellant respectively) challenged the ruling (impugned ruling) of the District Court of Kyela District, at Kyela (the District Court) in Misc. Matrimonial Application No. 7 of 2018. The respondent, EMMANUEL MWAKABONGA resisted the appeal. Before going far, it is pertinent to understand the background of this matter as narrated below.

According to the record and the arguments by the parties, it is shown that, some years back, the first appellant and the respondent lived together. In 2017, the first appellant instituted matrimonial proceedings against the respondent before the Primary Court of Kyela District, at Urban (the trial court). It was registered as Matrimonial Cause No. 32 of 2017. In that matter, she claimed for divorce and division of matrimonial assets which involved motor vehicles. At the end

of the trial, the primary court essentially held that, there was no marriage between the two fit for divorce. They were mere lovers or sexual partners (*Mahawara* in kishwahili). It also held that, there was no evidence proving the existence of any property jointly acquired by the two during their relationship that was fit for division to them. The trial court however, advised them that, if there was any property worth division to them and if there was any claim for custody of children, they could properly move it for necessary orders.

The first appellant was aggrieved by the decision of the trial court. She thus, appeal to the District Court. Her appeal was registered as Matrimonial Appeal No. 1 of 2018. While the appeal was pending before the District Court, the appellant sold some properties including a house located at Ndandalo area within Kyela Township, henceforth the house. The house was sold to the second appellant. Indeed, the appeal was later dismissed.

The respondent herein was not contended by the sale of the house which he claimed to be among the properties jointly acquired by himself and the first appellant. He thus, made an application before the District Court while the appeal mentioned above was pending. The application was registered as Misc. Matrimonial Application No. 7 of 2018. It was against both appellants. The same was preferred under sections 138(1)(a)(d)(i) and (ii) and 59(1) and (2) of the Law of Marriage Act, Cap. 29 R. E. 2010 (the LMA). The application was supported by the respondent's affidavit. In the application, the respondent urged the District Court to set aside the disposition of the house made by the first appellant to the second appellant.

The application was resisted by the two appellants. However, at the end of the day, the District Court granted the application through the impugned ruling. It ordered that, the sale was null and void and the second appellant should vacate from the house. It also directed the first appellant to refund the purchase price to the second appellant. The impugned ruling was in fact, made long time after the dismissal of the appeal before the District Court.

The two appellants herein were aggrieved by the impugned ruling of the District Court, hence the appeal at hand. In their joint memorandum of appeal they initially preferred four grounds of appeal. However, during the hearing of this appeal by written submissions, the first appellant dropped the first and third grounds of appeal. She thus, remained with the following two grounds of appeal:

1. That, the application for setting aside the disposition of the house was made prematurely and was incompetent since there was no pending matter before the District Court.
2. That, the District Court erred in law and fact in failing to evaluate the evidence adduced in court when preparing the impugned ruling.

In his written submissions, the second appellant dropped the third and fourth grounds of appeal. He however, argued the second ground only. This was the ground which is also quoted above as the first appellant's first ground. It follows thus, that, the two appellants basically based their appeal on the above listed two grounds only. From now onwards, I will therefore, refer to these grounds as the first and second grounds of appeal respectively.

Owing to the two grounds of appeal, the appellants pressed this court to grant them the following reliefs: to allow the appeal and set aside the whole ruling and drawn order of the District Court.

As hinted above, the appeal was argued by way of written submissions. Thought the appellants preferred a joint memorandum of appeal, and though the court took it that they were both represented by Ms. Tumaini Amenye, they filed separate written submissions. The submissions for the first appellant were signed by Ms. Tumain, learned counsel while those for the second appellant were signed by himself. The respondent was advocated for by Mr. Maumba, learned counsel.

When the court posed to compose the judgment, it discovered some issues which had not been addressed by the parties. It thus, re-opened the proceedings and invited them to address on the issues (henceforth the court issues). This was a course taken so as to give the parties the right to be heard regarding such issues. It was based on the guidance made by the Court of Appeal of Tanzania (the CAT) in the cases of **Zaid Sozy Mziba v. Director of Broadcasting, Radio Tanzania Dar es salaam and another, CAT Civil Appeal No. 4 of 2001, at Mwanza** (unreported) and **Pan Construction Company and Another v. Chawe Transport Import and Export Co. Ltd, Civil Reference No. 20 of 2006, CAT at Dar es Salaam** (unreported). These precedents essentially guide that, where in the course of composing its decision a court discovers an important issue that was not addressed by the parties at the time of hearing, it is duty bound to re-open the proceedings and invite the parties to address it on the discovered issue.

The court issues were as follows:

i. Whether or not there was any appeal against the judgment of the District Court in the Appeal No. 1 of 2018.

ii. Whether or not any party filed proceedings for division of matrimonial properties including the house at issue before the trial court or any competent court as advised by the trial court in its judgment in the Matrimonial Cause No. 32 of 2017, and if so, which is the stage of such proceedings?

iii. Depending to the answer to the two preceding issues, does this appeal remain relevant?

In addressing the issues raised by the court *suo motu*, the parties also filed written submissions in the representation shown above. The appellant had the right to begin and the respondent replied accordingly. In the parties' respective written submissions on the court issues, especially the third issue, the appellants maintained that it was still important to decide this appeal. The respondent's counsel was of the view that the same should be dismissed. Upon reading all the submissions of the parties, I found that, it is still important to consider the appeal on the merits as I hereby do.

In deciding the appeal, I will firstly consider the parties' respective submissions related to the first ground of appeal and determine it accordingly. In doing so I will also consider some of the arguments raised by them in answering the issues raised by the court *suo motu*. In case need will arise, I will also consider the second ground and the issues raised by the court. This plan of adjudication is based on the ground that, in case the first ground of appeal will be upheld, it will be legally forceful enough to dispose of the entire appeal without even considering the other ground of appeal and the court issue.

Now, the issue regarding the first ground of appeal is *whether c not the application by the respondent before the District Court wa competent in law.* Indeed, the record shows that, the appellants did nc raise any preliminary objection before the District Court against th application. Nonetheless, they are not precluded from challenging it competence at this appellate stage since this is a point of law. It is trite principle that, a point of law can be raised at any stage of th proceedings by the parties or the court *suo motu*. It is more s considering the fact that, this second ground of appeal also touches th issue of jurisdiction of the District Court as it will be demonstrated late It is also our law that, an issue of jurisdiction is a very fundamenta issue in the process of adjudication. The law further guides that, court's decision made without the requisite jurisdiction cannot stand.

In their arguments in support of the first ground of appeal the tw appellants in their respective submissions in chief, maintained that, th application before the District Court was incompetent since there was n any pending proceedings as required by the law. The house was als not part of matrimonial assets for the first appellant and the responden It was not even considered as the matrimonial asset before the tria court.

On his part, the counsel for the respondent contended in h original replying submissions that, the application was competent since was filed when the appeal before the District Court was pending. Th respondent had also written a letter to the trial court moving it to divid matrimonial assets including the house. The letter was capable c instituting proceedings before the trial court according the procedure c the law. He thus, argued that, there was also pending proceedinc

before the trial court. He further maintained that, the house was among the matrimonial assets.

Upon considering the record, the law and the arguments by the parties, I am of the settled opinion that, the circumstances of the case at hand do not attract answering the issue posed above regarding the first ground of appeal affirmatively. This opinion is based on the following reasons: in the first place, the provisions under which the application before the District Court was preferred (i. e. section 138(1)(a)(d)(i) and (ii) and 59 of the LMA) apply to matrimonial assets only and not to any other properties. In the matter at hand, and as hinted earlier, before the respondent filed the application under discussion before the District Court, the trial court had already decided *inter alia* that, there was no any marriage between the first appellant and the respondent. Their relation had been a mere bond of lovers not fit for any divorce. The respondent did not cross-appeal against that particular decision. That means that, he had accepted that there was in fact, no marriage between them.

Under the situation just demonstrate above, the house at issue could not, in anyway, be considered as a matrimonial house. This is so because, though the first appellant and the respondent could jointly own any property under other laws, as mere lovers they could not jointly own any matrimonial property under the LMA since they did not constitute any married couple. Their intimacy did not amount to any marriage. In our law, marriage means the voluntary union of a man and a woman, intended to last for their joint lives; see section 2(1) read together with section 9(1) of the LMA. However, the trial primary court had held that

the two were not married as observed earlier and the appellant did not appeal against that decision.

The respondent herein could not thus, bring any matter under the provisions of the LMA cited above. This Act specifically carters for matrimonial proceedings. Such proceedings are spared for married couples only and not for lovers like them. The phrase "matrimonial proceedings" is defined as any proceeding instituted under Parts II and VI of the Act or any comparable proceeding brought under any written law repealed by that Act, in any court; see section 2 of the LMA. The legislative objectives of the LMA are also clear from its long title. It was intended to be an Act to regulate the law relating to marriage, personal and property rights as between husband and wife, separation, divorce and other matrimonial reliefs and other related matters. It follows therefore that, the relationship between the first appellant and the respondent did not fit under these objectives for the reasons shown above.

Owing to the reasons just adduced above, even if the appellant had rights or shares in the house, he had to claim such rights under any other law, and not under the LMA. A normal suit could thus, probably retrieve his rights (if any) upon him proving them.

Moreover, even if it is presumed (without deciding) that, the two parties were married and the application before the District Court was in relation to a matrimonial asset, that fact could still not help the respondent. This is because, the above cited provisions of the enabling law under which the application was preferred before the District Court, set clearly the circumstances under which an application of that nature can be made before a court. It is such circumstances which in fact, give

the court jurisdiction to set aside the disposition at issue. Such provisions of section 138(1)(a)(d)(i) and (ii) of the LMA provide as follows, and I will quote them for a readymade reference:

> **"138.-(1)** Where-
>
> **(a)** any matrimonial proceeding is pending;
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> **(b)** ...(inapplicable).
>
> **(c)**....(inapplicable).
>
> **(d)** maintenance is payable under any agreement to or for the benefit of a spouse or former spouse or a child,
>
> the court shall have power on application-
>
> **(i)** to set aside a disposition if it is satisfied that any such disposition of property has been made by the spouse or former spouse or parent of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his or her spouse of any rights in relation to that property; and
>
> **(ii)** to grant an injunction preventing that disposition if it is satisfied that the disposition of property is intended to be made with any such object."

According to my construction of these provisions, the court has powers to set aside a disposition regarding a matrimonial property or to issue an injunction regarding the disposition only where there are matrimonial proceedings pending before that same court.

It follows thus that, an application for an order of setting aside the disposition must be made to the court before which the proceedings are pending and not to any other court. It was for this understanding, I believe, this court (Sisya, J. as he then was) in the case of **Shillo Mzee v. Fatuma Ahmed [1984] TLR 112** held that, section 138(1) of LMA is only applicable where a matrimonial proceeding is pending before the court making the order. Indeed, this is so because, it is that court which has the record of the pending proceedings that can effectively assist it in making a just order for setting aside the disposition or for an injunction. In other words, the procedure under the above quoted provisions of the law envisages a situation where the pending proceedings become the

main proceedings and the application for setting aside the disposition or for injunction becomes an interlocutory application (or proceedings) before that same court, affiliated to the said main proceedings.

In the matter at hand, according to the chamber summons before the District Court and its supporting affidavit, the respondent filed the application at issue (Matrimonial Application No. 7 of 2018) before the District Court because he believed that the proceedings regarding the appeal No. 1 of 2018 before the same District Court were the pending and main proceedings to which the application was affiliated.

Again, according to the record and the arguments by the parties in answering the issues raised by the court *suo motu*, especially the first issue, it is not disputed that the appeal was dismissed by the District Court, i.e by Msafiri Resident Magistrate (RM). The parties also showed in those submissions that, no further appeal was preferred by any party against the dismissal of the appeal which was made on 27th August, 2018.

It is also on record and undisputed by the parties that, the impugned ruling was delivered by the District Court (Ngimilanga RM) on the 24th October, 2018. By simple arithmetic therefore, the delivery of the impugned ruling was made after a lapse of about two months from the date of the dismissal of the appeal. It follows thus, that, when the District Court set aside the disposition of the house through the impugned ruling, there was no any pending proceedings before it.

In my concerted view therefore, though the application was filed while the proceedings regarding the appeal were actually, pending before the District Court, it was rendered incompetent as soon as the appeal was dismissed. The powers/jurisdiction of the District Court in

setting aside the disposition were thus, also ousted as soon as the appeal was dismissed. The application thus, lacked one of the vital qualifications for the provisions of section 138(1) of the LMA to apply as guided by the law and the **Shillo case** (supra).

Again, the argument by the respondent's counsel that the respondent was justified to make the application before the District Court because there were also pending proceedings before the trial court for division of matrimonial assets following the letter he had written to it is not tenable. This is because, if that was true, then the respondent could have filed the application in the same trial court and not in the District Court. It is more so because, as I hinted earlier, the law requires the application for setting aside a disposition of a property under the provisions cited above to be file in the same court where the main proceedings are pending and not in any other court; see also the **Shillo case** (supra). It could not thus, be open to the respondent, to file the main proceedings before the trial court for division of matrimonial assets, and then file the application for setting aside the disposition of the house before another court, i. e. the District Court as he did.

Furthermore, even if it is presumed (without deciding) that, first appellant and the respondent were a married couple and the house at issue was a matrimonial property as the respondent claimed in the application before the District Court, these facts would not be considered in his favour. This view is based on the fact that, the provisions quoted above must be read together with the provisions of section 138(2) of the same LMA. These later provisions provide for definitions of the terms "disposition" and "property" envisaged under the

former provisions of the Act. Section 138(2)(a) defines the term "disposition" as follows, and I reproduced it verbatim for ease of reference:

> "...includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered **but does not include a disposition made for money or money's worth to or in favour of a person acting in good faith and in ignorance of the object with which the disposition is made.**" (Bold emphasis is mine).

According to these just quoted provisions of law, a disposition made for money or money's worth to or in favour of a person acting in good faith and in ignorance of the object with which the disposition is made, is an exception to the rule under section 138(1) of the LMA. This means that, these provisions do not apply to such exceptional disposition. In other words, the powers or jurisdiction vested in the court by section 138(1) of the LMA to set aside a disposition of a matrimonial property cannot be exercised where the person in whose favour the disposition was made acted in good faith and in ignorance of the object of the disposition. The ill object of the disposition which the law prohibits is none other than the one mentioned under section 138(1)(i) quoted earlier. This object is of reducing the means of a spouse to pay maintenance (if any) or of depriving his or her spouse of any rights in relation to the property involved in the disposition.

Owing to the statutory requirement just highlighted above, it is vital, in my view, for a spouse who applies for setting aside a disposition or for an injunction under section 138(1) of the LMA to clearly state in the affidavit supporting the application that, the person in whose favour the disposition was made did not act in good faith and was aware of the ill object of the disposition just mentioned above. Failure to include this

statement in the affidavit renders the application incompetent. This is because, that particular statement is a very material fact to the application according to the provisions of the law just reproduced earlier.

Now, in the matter at hand, it is undisputed that the person in whose favour the disposition at issue was made is the second appellant. However, in the affidavit supporting the application before the District Court, the respondent did not swear that in purchasing the house at issue, the second appellant did not act in good faith and was aware of the first appellant's ill object of the disposition. In other words, the respondent did not state in the affidavit that, the second appellant bought the house knowingly that the first appellant wanted to reduce her means of paying maintenance or that she wanted to deprive the respondent of his rights in relation to the house. If anything, the respondent only stated under paragraphs 9, 10 and 12 of the affidavit that, the first appellant sold the house (and other properties) to the second appellant to deprive him (respondent) of his share. In my view, such facts were insufficient in law since they did not disclose the ill motive of the second appellant in purchasing the house as I observed previously.

It follows thus, that, the failure by the respondent to state the material facts in the affidavit in relation to the second appellant's knowledge of the object of the disposition of the house by the first appellant, the application before the District Court could not be ranked as competent before the eyes of the law.

Having observed as above, I answer the issue posed earlier in relation to the first ground of appeal negatively that, the application by

the respondent before the District Court was incompetent in law. In fact, I would go further and declare that, the District Court also lacked jurisdiction to entertain such incompetent application for the reasons I adduced earlier. I therefore, uphold the first ground of appeal. This finding is, in fact, forceful enough to dispose of the entire appeal without even considering the second ground of appeal and the court issues. I will not thus, consider them.

Due to the above reasons, I grant the reliefs sought by the appellants in this appeal. I thus, allow the appeal and set aside the impugned ruling of the District Court. If the respondent still wishes, he can pursue his rights to the house (if any) under other laws apart from the LLA for the reasons shown above. I further order that each party shall bear his/her own costs since the District Court also contributed substantially in necessitating this appeal for its act of erroneously entertaining the incompetent application before it and without the requisite jurisdiction. It is so ordered.

JHK. UTAMWA.
JUDGE.
22/04/2021.

22/04/2021.
CORAM; JHK. Utamwa, J.
1ST Appellant: Mr. Ezekiel Mwampaka holding briefs for Ms. Tumain, adv.
2ND Appellant: Absent.
Respondent: present and Mr. Mwampaka adv. for Mr. Maumba, adv.
BC; Ms. Gaudensia, RMA.

Court: Judgment delivered in the presence of the respondent and Mr. Ezekiel Mwampaka, advocate, holding briefs for Ms. Tumaini, advocate and for Mr. Maumba advocate for the first appellant and the respondent respectively, in court, this 22nd April, 2021.

THE HIGH COURT OF TANZANIA

JHK. UTAMWA.
JUDGE.
22/04/2021.