IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

PC. MATRIMONIAL APPEAL NO.02 OF 2021

(Arising from the decision of the Juvenile Court of Nyamagana in Civil Revision No. 09 of 2020, originated from Urban Primary Court in Misc. Application No.51 of 2019)

HAMIS JUMANNE ..... APPELLANT

VERSUS

RIZIKI SHABAN ..... RESPONDENT

JUDGMENT

Date of last Order: 17.05.2021

Date of Judgment: 19.05.2021

A Z. MGEYEKWA, J

Hamis Jumanne, the appellant, and Riziki Shaban, the respondent respectively, were husband and wife. Before I go into the determination of the appeal in earnest, I find it apt to briefly narrate the relevant factual background of the instant appeal. It goes thus: Hamis Jumanne,

and Riziki Shaban were married in 2017 contracted an Islamic marriage. The couple was blessed with four issues.

It appears their marriage went on well all along until the year 2010 when the relationship started to go sour whereas, the appellant claimed that the respondent was misbehaving. In 2019, the appellant filed for divorce, division of property, and custody of children at the Urban Primary Court of Mwanza. The trial court granted a divorce and distributed the matrimonial properties amongst the parties whereby 60% shares were awarded to the appellant and 40% shares were awarded to the respondent. The court placed the children in the custody of the respondent and ordered the appellant to take care of his children.

Aggrieved, the respondent filed a Revision Application No. 51 of 2019 before the Urban Primary Court of Mwanza claiming that the maintenance fee of Tshs. 80,000/=was not enough she claimed the trial court to revise the amount and increase it to Tshs. 300,000/=. The trial court decided the matter in favour of the respondent and ordered the appellant to pay Tshs. 200,000/= per month.

Dissatisfied the appellant in 2020 filed an appeal before the District Court of Nyamagana. The District Court dismissed the appellant's appeal and uphold the Revision Application No. 51 of 2019.

Undeterred, the appellant preferred this appeal in this Court. The appeal is predicated on two grounds of appeal namely:-

1. *That, the Revisional Court erred in law in failing to observe that the trial court exercised its jurisdiction illegally and improperly as the trial court was already functus officio.*

2. *That, the Revisional court erred in law and in facts in determining and deciding an issue which was not prayed for nor pleaded by the parties.*

The appeal was argued before this court on 17th May, 2021 through audio teleconference whereas, Mr. Linda, learned counsel represented the appellant and the respondent appeared in personal, unrepresented.

It was Mr. Linda, learned counsel who kicked the ball rolling in support of the appeal. On the first grounds of appeal, he argued that the District Court erred in law and fact to observe that the trial court exercised its

jurisdiction illegally because it had already determined the matter. Mr. Linda avers that the appeal arises from Matrimonial Cause No. 51 of 2019, whereby the appellant filed for divorce, distribution of matrimonial properties, and custody of children. He went on to state that trial court ordered the appellant to pay Tshs. 80,000/= as maintenance for children fee per month. He referred this court to page 5 of the trial court Judgment.

It was Mr. Linda's further submission that the respondent decided to file a revision at the Urban Primary Court of Mwanza praying the trial court to increase the maintenance fee from Tshs. 80,000/= per month to Tshs. 300,000/= per month. He added that the trial court revised its order and ordered the appellant to pay Tshs. 200,000/= per month.

Mr. Linda valiantly argued that the trial court erred to revise its own order. He argued that none of the parties filed an appeal. The learned counsel continued to argue that the District Court did not address the issue of illegality which was done by the trial court to revise its own decision while the trial court was *functus officio* to determine the

maintenance fee. Mr. Linda fortified his submission by referring this court to the case of **Scolastica Benedict v Martin Benedict** (1993) TLR 1. He added that the Court of Appeal of Tanzania in **Scolastica Benedict** (supra) decided that a court cannot overturn or set aside its own decision as it becomes *functus officio*.

Submitting on the second ground which states that the revisional court erred in law and facts in determining and deciding an issue which was not prayed by the parties. Mr. Linda stated that the first appellate court by his own motion determined a new issue, whether the parties were afforded right to be heard which was not pleaded by any party. To fortify his submission he referred this court to page 2 of the District Court. He went on to argue that the said issue was not among the appellant's grounds of appeal.

The learned counsel for the appellant strongly argued that the District Court was required to determine the grounds based on the pleadings tendered by parties. To support his submission he cited the case of Jones v National Coal Board (1957 Queens bench 55.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to quash the decision of the District Court and set aside the first appellate court decision in Civil Revision No. 09 of 2020 dated 27th October, 2020 and the trial court decision in Misc. Application No. 51 of 2020 dated 10th July, 2020. He also urged this court to uphold the trial court decision in Matrimonial Cause No. 51 of 2019 dated 09th July, 2019 with costs.

Responding, the respondent argued that the appellant was ordered to provide maintenance of children but he did not obey the court order. The respondent stated that she filed a revision at the Urban Primary Court of Mwanza through a complaint letter and the trial court decided in her favour. She went on to state that the trial court made the right decision and the first appellate court uphold the trial court decision. She urged this court to uphold the said decisions and order the appellant to pay Tshs. 200,000/= for maintenance of children as ordered by the Urban Primary Court of Mwanza.

In a short rejoinder, the learned counsel for the appellant reiterated his submission in chief.

Having subjected the rival arguments by the learned counsel for the appellant and the respondent to serious scrutiny they deserve. Having so done, I think, the bone of contention between them hinges on the question *whether the appeal is meritorious*.

I have opted to consolidate the first and second grounds of appeal. In determining these grounds I wish to consider Mr. Linda complained that the first appellate court failed to consider that the trial court exercised its jurisdiction illegally since the said court was *functus officio*. I have perused the trial court proceedings in Misc. Application No. 51 of 2019, as rightly pointed out by the learned counsel for the appellant, the respondent filed a revision, praying for the trial court to revise its own decision by reducing the maintenance fee from Tshs. 80,000/= to Tshs. 300,000/=. The question is whether this was proper?

In my firm view, the existence of the Judgment in Matrimonial Cause No. 51 of 2019 was a bar to any person to lodge a revision application

in the same court. The Urban Primary Court of Mwanza was *functus officio* to revise the maintenance fee which it had already determined and ordered the appellant to pay the maintenance fee to a tune of Tshs. 80,000/= per month. In other words, the trial court was not in a position to assume revisional powers over its own orders. Therefore, I am in accord with Mr. Linda that the Urban Primary Court was *functus officio* to determine the Misc. Application No. 51 of 2020.

If at all, there was any person aggrieved by the Judgment of the Urban Primary Court in Matrimonial Cause No.51 of 2019, he/she ought to have challenged it through an appeal or any other available remedies of challenging a Decree, lodging a revision was not a proper way of challenging the existing Decree. As rightly pointed out by the learned counsel for the appellant that a court cannot overturn or set aside its own decision. The same was held by the Court of Appeal of Tanzania in the case of **Scolastica Benedict** (supra) that:-

> " *As a general rule, a primary court, like all other courts, has no jurisdiction to overturn or set aside its own decisions as it becomes functus officio, after making its decisions."*

Guided by the above authority, the trial court was tied up from entertaining the revision application, Misc. Application No. 51 of 2020. Originated from the same court in Matrimonial Cause No. 51 of 2019 since the trial Magistrate was *functus officio*. In case the appellant was dissatisfied he ought to file an appeal in the upper court disputing the decision or order of the trial court. Therefore, this ground is answered in the affirmative.

Submitting on the second ground, the learned counsel for the appellant complained that the first appellate court determined a new issue; whether parties were afforded rights to be heard which was not pleaded by the parties. He was emphatic that the said issue was not amongst the grounds of appeal instead the first appellate court raised and determined it in his judgment.

It is evident in the present case that the parties were not heard on the issue whether the parties were afforded the right to be heard which was raised and determined by the first appellate Court when composing the judgment. The first appellate court, therefore, arrived at the finding that the parties were granted fair grounds in the trial without determining

whether there was any illegality in the decision of the Urban Primary Court dated 10th July, 2020. I have scrutinized the trial court proceedings on page 6 the appellant in his submission stated that the trial court in Matrimonial Cause No. 51 of 2019 ordered him to pay a monthly maintenance fee to the tune of Tshs. 80,000/= and the same court reheard the case and overruled its own decision which was wrong.

This matter was not discussed nor analysed by the first appellate court instead it embarked to determine the issue of fair hearing which was not the concern of both parties. It is trite law that a party must be afforded with a right to be heard failure to afford a hearing before any decision affecting the rights of any person. In the case of **Tan Gas Distributor Ltd v Mohamed Salim Said** Civil Application for Revision No. 68 of 2011, the Court of Appeal held that:-

> *" No decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."*

The consequences of a breach this principle is to the effect that, its breach or violation, unless expressly or impliedly authorised by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard as it was held in the case of **Patrobert D Ishengoma v Kahama Mining Corporation Ltd and 2 others** Civil Application No. 172 of 2016 which was delivered on 2nd day of October 2018. **Abbas Sherally and Another v Abdul S/H.M Fazalboy**, Civil Application No.33 of 2002 (unreported).

With the above analyses, I am in accord with the learned counsel for the appellant that failure to accords the parties right to be heard. It is my considered view, this was a breach of natural justice and a violation of fundamental right to be heard under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. In case the first appellate court wanted to address the said issue then he would allow the parties to address the court on the new issue on right to be heard that was not the issue for determination at the trial court.

It is a settled position of the law that cases must be decided on the framed issues on record. And if it is desired by the court to raise other issues either founded on the pleadings or arising from the evidence by witnesses of the parties or arguments during the hearing of the suit, those issues should be placed on record and parties should be allowed to be heard by the court. Commenting on the foregoing legal position, the Court of Appeal of Tanzania at Zanzibar had the same observation in the case of **Juma v Manager PBZ Ltd and others** [2004] I EA 62, it held that: -

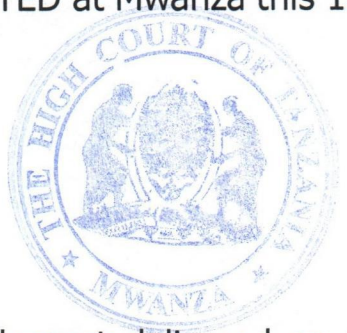
> *"...the first appellate Judge, therefore, erred in deliberating and deciding upon an issue which was not pleaded in the first place".*

As alluded above and as is apparent in the quoted excerpts of the first appellate court decision, the finding that the appellant was afforded the right to be heard formed the basis of the decision of first appellate court. Consistent with the settled law, the resultant effect is that such finding cannot be allowed to stand. It was a nullity.

For the foregoing reasons, I quash and set aside the resultant judgment and decree of the first appellate court in Revision No. 09 of 2020 and the trial court decision in Misc. Application No. 51 of 2020 2012 together with subsequent orders thereto. I uphold the Urban Primary Court of Mwanza decision in Matrimonial Cause No. 51 of 2019. The appeal is therefore allowed and under the circumstances each party to bear its own costs.

Order accordingly.

DATED at Mwanza this 19th May, 2021.



A.Z.MGEYEKWA

JUDGE

19.05.2021

Judgment delivered on 19th May, 2021 through audio teleconference whereby Mr. Linda, learned counsel, and the respondent were remotely present.

A.Z.MGEYEKWA

JUDGE

19.05.20

Right to appeal fully explained.