

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA  
AT MUSOMA  
PC MATRIMONIAL APPEAL NO 10 OF 2020**

**GARENDE NYABANGE .....APPELLANT**

***VERSUS***

**NYANZARA KYARATA .....RESPONDENT**

*(Arising from Matrimonial Appeal NO.1 of 2020 of Bunda District Court, originating from Bunda Urban Primary Court Matrimonial Cause No. 72 of 2018).*

**JUDGMENT**

*13<sup>th</sup> April & 31<sup>st</sup> May, 2021*

***Kahyoza, J.***

**Nyanzara Kyarata** sued **Garende Nyabange** in the primary court praying for divorce and division of matrimonial assets. **Nyanzara Kyarata** won the day. Aggrieved, **Garende Nyabange** appealed to the district where he lost the appeal. Determined lodged the appeal to this Court contending that-

1. That the appellate District Court erred in law and fact by failing to consider and make decision on the third ground of appeal filed therein, that the trial primary court failed to read over the evidence to the witnesses after recording the same and certifying at the foot of such evidence that she had complied with the said requirement.
2. That, the appellate District Court erred in law and fact by failing to consider that there is no evidence adduced by the respondent on the

acquisition and extent of contribution of the properties awarded to her.

The appellant was represented and the respondent appeared in person. The appeal raised two issues; **one**, whether the appeal is fatal on account of failure of the primary court to read the evidence to the witnesses after recording it and indicating that it has done so and **two**, whether the respondent contributed to the acquisition of matrimonial assets. I wish to point out that I will not reproduce the submission but I consider the submission while answering the issues.

**Is the proceedings and judgment fatal for trial court's failure to read the evidence to the witnesses after it recorded the same?**

The appellant complained that the district court did not make a determination to the third ground of appeal that the primary court erred by law for failing to read over the evidence of the witnesses after recording the same and certifying at the foot of the evidence that it has complied with the requirement. The appellant's advocate submitted that Rule 46 (3) of Civil Procedure rules in the Primary Court requires the magistrate to read the evidence to the witness and certify that it has so complied. The records of the primary court show that the law was not complied with. The appellant complained to the District Court that the primary court did not record his evidence as he testified.

The respondent filed a reply to the memorandum of appeal. She contended that the primary court made a decision after hearing both parties. She had nothing to counter when the appeal came for hearing.

Indeed, the primary court is duty bound to read the evidence to the witness after recording it and certify at the foot of the evidence that it has complied with the requirement. I examined the record and found that it is true that primary court did not comply with the rule 46(3) of the **Primary Courts Procedure Rules**, GN. 310/64 (the **PCPR**). As submitted by the appellant's advocate, also the district court did not make a finding on that ground of appeal. Rule 46(3) reads-

*"46(3) The substance of such evidence shall be recorded in Kiswahili by the magistrate and after each witness has given evidence the magistrate shall read over his evidence to him and shall record any amendments or corrections the magistrate shall certify at the foot of such evidence that he has complied with this requirement."*

It is common knowledge that matrimonial proceedings are governed by the Law of Marriage (**Matrimonial Proceedings**) Rules, GN 136 of 1971. The next question I asked myself was whether the **PCPR** do apply to matrimonial proceedings. The answer was in affirmative, they do apply. Section 93 of the **Law of Marriage Act**, [Cap. 29 R.E. 2019] (the **LMA**) states that-

*93. Notwithstanding the provisions of this Act, and subject to any rules made hereunder, where any matrimonial proceeding is instituted in a primary court, it may be instituted, tried and disposed of in the same manner as any civil proceeding instituted in a primary court and the provisions of the Magistrates' Courts Act,*

*and of any rules made there under regulating the institution, hearing and disposal of a proceeding of a civil nature in primary courts shall apply, mutatismutandis, to every such matrimonial proceeding.*

Given the above position of the law, it is indeed beyond dispute that the primary court violated the mandatory procedural rule. The issue is what is the remedy. The Court of Appeal has in cases without numbers discussed the consequences of non-compliance with an identical provision under the **Criminal Procedure Act**, Cap.20 (the CPA), which is section 210(3). The position of the Court of Appeal has not been uniform in all cases. There are cases where it held that non-compliance with section 210(3) of CPA was fatal. See the case of **Mussa s/o Abdallah Mwiba & Two Others v. Republic**, Criminal Appeal No. 200 of 2016 (CAT unreported). However, in recent case of **Flano Alphonse Masalu @ Singu vs Republic** (Criminal Appeal No.366 of 2018) published at [www.tanzlii.org](http://www.tanzlii.org), the Court of Appeal held that if the magistrate fails to read the evidence to the witness as required by section 210(3) that omission may be fatal or otherwise depending on whether the omission occasioned miscarriage of justice or not. It stated-

It is evident from the above excerpt that before I make a determination as to the consequences of non-compliance with rule 46(3) of the **PCPRI** have to answer the issue whether that procedural irregularity has caused any injustice. I will quickly reply that there is no proof that the omission occasioned any injustice. The appellant submitted that the

appellant complained to the district court that the primary court did not record his evidence. Unfortunately, I examined the district court's record I did not find that the appellant complained about the authenticity of the record before to the first appellate court.

As the record of the first appellate court bears testimony, the appellant apart from raising the issue of non-compliance with rule 46(3) of the **PCPR**, did not complain that the trial court did not recorded his evidence. The appellant complained that the primary court did not record his evidence for the first time before this Court.

I am of the firm view that appellant did not established that the omission to comply with rule 46(3) of the **PCPR**, occasioned any injustice as he did not complain about the authenticity of the record. Thus, I find that the violation of rule is 46(3) of the **PCPR** is not fatal. It is an irregularity, which is curable under section 37 (2) of the **Magistrates' Courts Act**, [Cap. 11 R.E. 2019] (the **MCA**). Section 37 (2) of the MCA states that-

*37(2) No decision or order of a primary court or a district court under this Part shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, or any process or charge, in the proceedings before or during the hearing, or in such decision or order or on account of the improper admission or rejection of any evidence, unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.*

In the upshot, I find the first ground of appeal without merit and dismiss it.

**Did the respondent contribute to the acquisition of the matrimonial property?**

I will now consider the second ground of appeal. The appellant complained that the respondent did not adduce evidence on the acquisition and extent of the extent of contribution of the property awarded to her. The record shows that the district court awarded the respondent seven heads of cattle, two acres of farm, one matrimonial house and 10% of the proceeds of the milling machine.

The appellant submitted in support that there was no proof that the respondent contributed to the acquisition of the milling machine. He stated that the machine was acquired before the appellant married the respondent.

The respondent replied to this that it true she found the appellant with one milling machine. The machine was sold and a new one bought. She claimed that she contributed to the acquisition of the new machine. She beseeched the Court the new machine to be sold and the proceeds shared between them.

The appellant's advocate submitted regarding the farm that the same was acquired before the appellant married the respondent. The respondent replied that she bought one acre of shamba at Nyangeri.

It is the position of the law that matrimonial assets include assets owned by one party, which has been substantially improved by either the



other party or by their joint efforts. See section 114(3) of the LMA, which states that-

*114 (3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.*

In the current case, the respondent explained how she worked with the appellant to build the house and acquire assets. I find that she contributed to acquisition of assets by either in the acquiring of the assets or by improving the assets substantially. The evidence shows that some of the assets were substantially improved after marriage and some acquired. As to the cows there is evidence that she brought to the appellant five herds of cattle which was her property after dividing the estate of her late father. The district court gave her seven herds of cattle believing that the five cows had reproduced two more cows. I see no reason to interfere with that finding.

This is a second appeal. I am also alive of the principle of law that where there are concurrent findings of facts by two courts, the second appellate court should not disturb the findings, unless, it is clearly shown that there has been a misapprehension of evidencing, a miscarriage of justice or violation of some principle of law or procedure. (See **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R31.) I did not find any misapprehension of evidencing, a miscarriage of justice or violation of

some principle of law or procedure, which may call this second appellate court to interfere with the findings of the two lower courts. I desist the urge to interfere with the findings of the district court.

For the foregoing reasons, I uphold the decision of the district court and dismissed the appeal in its entirety with costs.

It is ordered accordingly.



**J. R. Kahyoza**

**JUDGE**

**31/5/2021**

**Court:** Judgment delivered in the presence of the appellant's advocate Mr. Emmanuel P. Mng'are and the respondent via teleconference. B/C Ms. Catherine present.



**J. R. Kahyoza**

**JUDGE**

**31/5/2021**