IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC. MATRIMONIAL APPEAL NO. 18 OF 2021

(Appeal from the judgment of the District Court of Nyamagana at Mwanza (Sumaye, SRM) in Matrimonial Appeal No. 36 of 2021 dated 30th of April, 2021.)

BERTHA MOSES ..... APPELLANT

VERSUS

THOMAS FREDRICK ..... RESPONDENT

RULING

18th, & 20th August, 2021

ISMAIL, J.

The parties hereto were married in 2013, and were blessed with two children. They also acquired several properties including a house, undeveloped pieces of land, and several assorted household items. In the subsistence of the marriage misunderstandings arose, necessitating a divorce. The Primary Court of Nyamagana ordered dissolution of the marriage, simultaneous with ordering an equal distribution of the assets.

Bemused by the trial court's decision, the respondent took an appeal. The District Court of Nyamagana before which the appeal was placed reversed some of the orders entered by the trial court. Specifically, the court

held that the house constituting part of the matrimonial assets was acquired before the parties got married. Consequently, the same was taken off the list. It is this decision that has aggrieved the appellant, hence the instant appeal to this Court. The Petition of appeal contained six grounds of appeal.

When the matter came up for hearing, Mr. Julius Mushobozi, learned counsel for the respondent, rose to address the Court on what he considered to be an anomaly in the trial proceedings. The anomaly resided in what was considered by the trial court as evidence of the parties. He argued that looking at pages 3, 4 and 5 of the proceedings, it is clear that what was adduced by the parties and considered as evidence were mere statements which were taken without subjecting the parties to any form of oath or affirmation. Unfortunately, the decision made by the trial court and supported by the 1st appellant court was based on these statements.

Mr. Mushobozi contended that the conduct constituted a violation of Rules 46 (2) and 47 (2) of The Magistrates' Courts (Civil Procedure in Primary Courts), GN. No. 119 of 1983, read together with regulation 1 (2) The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations. It was the counsel's argument that, owing that the said anomaly, the decision was based on a mere conversation which lacks the qualities of evidence prescribed in the cited provisions.

Mr. Mushobozi further argued that he raised this issue in the 1st appellate court but the same was not picked and, as a result, the decision on appeal went in his client's favour.

In her short reply, the appellant argued that Mr. Mushobozi was a counsel who represented the respondent during the appeal proceedings in the lower court but she does not recall hearing him raise this issue. She was not convinced that this is a point that can be raised at this stage of the proceedings. She urged the Court to dismiss it and let the appeal heard on merit.

From the parties' submissions the question is whether the trial proceedings were flawed. It should not be lost on the fact that conduct of proceedings of a civil nature, in the primary court, is governed by statutes that provide for procedural aspects of conducting the proceedings. These statutes are as cited by Mr. Mushobozi. Rule 46 (2) of GN. No. 119 of 1983 guides on how evidence in the trial proceedings should be taken. It provides as follows:

> *"The evidence of each witness shall be given on affirmation save in the case of a child of tender years, who in the opinion of the court, does not understand the nature of the affirmation."*

The foregoing provision beds well with Rule 47(2) of the Rules. It confers a right on the parties to cross-examine the witnesses called by the adverse party to the proceedings. This, along with the oaths or affirmations, are what are said to have not been observed in the trial proceedings. The consequence of non-observance of the imperative requirement of taking oath or affirmation before giving evidence has been judicially stated in various court decisions. In ***Catholic University of Health and Allied Sciences (CUHAS) v. Ephiphania Mkunde Athanase***, CAT-Civil Appeal No. 257 of 2020 (all unreported), the Court of Appeal held:

> *"From the provision which has been reproduced above, it is mandatory for a witness to take oath before he or she gives evidence before the CMA. This is also in conformity with s.4 (a) of the Act cited by the appellant's counsel. That provision states as follows:*
>
> *"4*
>
> *Subject to any provision to the contrary contained in any written law, an oath shall be made by-*
>
> *(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath or before a court."*
>
> *Under s.2 of Cap. 34, the word court has been defined to include every person or body of persons having authority to receive evidence upon oath or affirmation. In our considered view, the CMA falls under that definition and particularly so*

because as stated above, rule 25 (1) of GN No. 67 of 2007 compels a witness to testify under oath.

Where the law makes it mandatory for a person who is competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties' case. – See for example, the cases of ***Nestory Simchimba v. Republic*** *(supra) cited by the appellant's counsel and* ***Hamis Chuma @ Hando Mhoja and Another v. Republic****, Criminal Appeal No. 371 of 2015 (unreported).*

On the basis of the above stated reasons, we find that the omission vitiates the proceedings of the CMA. In the event, we hereby quash the same and those of the High Court."

Clear, as well, is the infraction of the imperative requirements of having a party prove the facts constituting the facts necessary to establish the claim, where no admission is made. In my considered view, the breach constituted a horrendous and intolerable irregularity that turned the trial proceedings a travesty of justice. The record shows that this issue was brought to the 1st appellate's Court's attention but it was not deliberated upon.

Accordingly, I quash the entire trial proceedings, set aside the ensuing and subsequent judgments and decrees, and order that the matter be remitted to the trial court for a trial *de novo*, before another judicial officer. Each party will bear own costs.

Order accordingly.

DATED at **MWANZA** this 20th day of August, 2021.

M.K. ISMAIL

JUDGE