IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 58 OF 2020

(C/F Civil Appeal No. 21 of 2020 in the District Court of Arusha at Arusha, Original, Matrimonial cause No. 14 of 2015 at Arusha Urban Primary Court)

REUBEN ABRAHAM MOLLEL.....APPELLANT

VERSUS

NAY ELISHA.....RESPONDENT

JUDGMENT

18/05/2021 & 27/08/2021

GWAE, J

The appellant, Reuben Abraham Mollel is aggrieved by the decision of both Arusha Urban Primary Court in Matrimonial Cause No. 14 of 2015 ("trial Court") and District Court of Arusha at Arusha (1st appellate court), he is now before this court for the second appeal.

To better appreciate the context of the case, it is pertinent to narrate the factual landscape though in brief. The parties here in are an old couple which contracted their marriage in the year 1968 and according to their testimonies, this couple has been blessed with seven issues.

In the year 2015, the appellant filed his petition for divorce at Arusha Urban Primary Court vide Matrimonial cause No. 14 of 2015 seeking for an order for divorce and division of matrimonial properties. On 22/02/2020 (second trial) judgment was delivered where the trial magistrate gave an order of separation followed with subsequent orders thereof such as the division of the matrimonial property. Dissatisfied with the trial court's decision the appellant lodged his appeal to the Arusha District Court, unfortunately the grounds of appeal raised at the first appellate court are the same as those raised at this this second appeal, thus, for the purposes of this appeal, the grounds of appeal are enlisted herein under;

i. That, the first appellate Magistrate erred in law and in fact for failure to appreciate that the trial Magistrate erred in law and in fact for granting an order for separation and divorce/revoke the marriage at the same time.
ii. That the appellate Magistrate erred in law and in fact for failure to appreciate that the trial Magistrate erred in law and in fact by ordering division of matrimonial property over the inherited properties which do not form part to the matrimonial properties.
iii. That, the appellant Magistrate erred in law and in fact for failure to appreciate that the trial magistrate erred in law and in fact for failure to properly raise the issues, analyze the fact and there is no reasoning for the decision.

iv. That, the appellate magistrate erred in law and in fact for failure to appreciate that the trial Magistrate erred in law and in fact for failure to evaluate and consider the evidence adduced by the appellant to the effect that some properties alleged to be sold were remitted back to the owner (one Agness Abraham Mollel).

On the hearing of this appeal, the appellant was represented by the learned counsel **Ms. Elizabeth Kabwe** while the respondent appeared in person unrepresented. With leave of the court the appeal was disposed of by way of written submissions.

Submitting on the first ground of appeal, the appellant argued that the trial magistrate gave two contradictory orders one being for divorce and another for separation which has left the appellant into dilemma as to whether they are divorced or separated. The appellant further quoted the part of the trial court's judgment which he alleged to have contradictions as follows;

> ".....isipokuwa mahakama kwa ajili ya ustawi wa wanandoa hawa inatoa utengano wa kipindi cha miaka mitano....."'imeamriwa hivyo na haki ya rufaa ni siku 45 kuanzia leo siku ambayo mahakama imevunja ndoa hii".

The appellant is of the view that the trial court ought to have given an order of divorce on the reason that he is already cohabiting with another

wife and that the appellant and the respondent have separated since the year 2013.

In the second ground of appeal, the appellant's counsel submitted that it was improper for the trial court to order the division of matrimonial properties without taking into consideration the mode of acquisition of such properties as well as the extent of contribution. According to her, the appellant vividly testified at the trial court that he had inherited the said properties form his late father the fact which was also admitted by the respondent when cross examined by the trial court's assessors. It was the appellant's view that the respondent herein is not entitled to inherit from such properties as the same were given to the appellant by his parents. Miss Kabwe went on submitting that even if the respondent is entitled to inherit such properties yet she has not given proof as to her contribution towards the improvements of such properties.

Amplifying on the third ground of appeal, the appellant contended that the trial court's judgment did not contain issues, neither was there evaluation of evidence adduced by parties nor reasoning to substantiate the court's findings. According to him the judgment was a nullity as it contravened the

fundamental principal that every judgment should state the facts of the case, should give sufficient and plain reasons to justify the findings.

As to the last ground of appeal the appellant submitted that the first appellate court erred in law and in fact for not appreciating the fact that the trial court did not evaluate and consider the evidence by the appellant that some of the properties alleged to have been sold by him were actually given to one Agness Abraham, the appellant's sister who was the real owner of the said properties. The appellant went on stating that the troubles between the couple arouse when the appellant who was the administrator of the estate of his late father decided to give his sister her portion of land which she was bequeathed by her late parents, the act which was not accepted by the respondent as she believed that the said land belonged to them.

Replying to the appellant's submission, on the first ground of appeal the respondent submitted that the last paragraph in the trial court's judgment which appears to be an order for divorce is a mere typing error as when reading the judgment as a whole one will note that it was not the intention of the trial magistrate to order for divorce. The respondent went further to state that, this being an appellate court it has the discretionary powers to correct the irregularity.

On the second ground of appeal, the respondent submitted that, the trial magistrate was justified to have ordered for division of matrimonial properties citing section 114 (1) of the Law of Marriage Cap 29 R.E 2002 which allows division of the matrimonial properties when granting or subsequent to the grant of an order of separation or divorce. Furthermore, the respondent submitted that the trial court also properly considered the contribution and efforts of the respondent as a wife and a mother towards acquisition of the matrimonial properties.

Submitting on the third ground of appeal, was of the view that the trial court properly framed issue, analyzed the evidence adduced before it and gave reasons for his findings contrary to what the appellant's contention. According to her, the framed issue by the trial court is as follows; "swali ambalo mahakama hii imejiuliza ni je, mdai ameweza kutoa ushahidi wowote wa kuthibitisha kwamba ndoa yao na mdaiwa imevunjika pasipowezekana kurekebishika tena saws na matakwa ya fungu la 99 la sheria ya ndoa sura ya 29 R.E 2002."

Responding to the last ground of appeal, the respondent was of the view that the trial court properly evaluated the evidence before it and

reached a proper decision that the properties sold belonged to the parties herein.

Having taken into consideration of both the trial court and the 1st appellate court records and having read carefully the parties' submissions, this court is of the view that the **first ground** of appeal suffices to dispose of this appeal for the following reasons;

The appellant in his first ground of appeal complained that the trial court **granted two orders one being for separation and another for divorce**. In the first appellate court the appellant raised the same ground of appeal and in determining it, the appellate magistrate was of the view that after reading the whole judgment the intention of the trial magistrate was to separate the parties and not to issue an order for divorce. The Magistrate went on stating that the last paragraph in the trial court's judgment which reads that;

> "Imeamriwa hivyo na haki ya rufaa ni siku 45 kuanzia leo siku ambayo mahakama imevunja ndoa hii."

According to the appellate court magistrate this was a typographical error which can be corrected under section 96 of the Civil Procedure Code

[Cap 33 R.E 2019]. The Magistrate further cited the case of **Tanganyika Haulage LTd vs. Coretco Ltd** [1979] LRT 45, where it was stated that;

> "Although the judgment once written, dated and signed cannot be altered, the trial Magistrate or Judge can effect corrections to typographical errors."

Much as I agree with the first appellate court Magistrate that when reading the judgment of the trial court as a whole one will inevitably note that the express intention of the trial magistrate was to separate the parties and **not** to issue an order of divorce. This position is evidently depicted at page 4, last paragraph and the first paragraph at page 5 of the typed judgment where the trial magistrate stated as follows;

> "Kwa sababu hizo mahakama hii haioni sababu yoyote ya msingi ya kuipelekea kuivunja ndoa hii ya wadaawa hawa. Isipokuwa mahakama kwa ajili ya ustawi wa wanandoa hawa inatoa utengano wa kipindi cha miaka mitano kwao ili kusudi wapate nafasi ya kutafakari upya juu ya Maisha ya ndoa yao. Wakishindwa kurudiana hii ndiyo itakuwa sababu ya kuvunja ndoa yao. Yeyote kati yao anaweza kuitumia kuomba talaka mahakamani baada ya kipindi hicho kumalizika."

Nevertheless, the trial magistrate in the last paragraph of his judgment when explaining the right of appeal to the parties strangely stated as follows;

"Imeamriwa hivyo na haki ya rufaa ni siku 45 kuanzia leo siku ambayo **mahakama imevunja ndoa hii.**" (Emphasis is mine)

It is this last paragraph of the trial court's decision that, the appellant is seriously complaining that, the trial Magistrate issued two orders; of separation and that of divorce. I respectfully disagree with the appellant's version, on the reasons that when reading the judgment as a whole and in particular on the above quoted paragraphs, as correctly decided by the first appellate court magistrate it is quite apparent that the intention of the trial magistrate was to issue for an order of separation and not an order for divorce as indicated in the last paragraph of page 5 of the judgment. Notably, this must have been a slippery thought or omission to conclude as per her finding was as rightly decided by the first appellate court however under the circumstances of this case, I am of the view that the error is so fatal such that it affects the execution of the said order by the parties since two words "separation and divorce, go to the root of the matter.

It is therefore the view of this court that the said error ought to have been promptly cured by way of correction of the judgment and the same cannot in itself be a ground of appeal capable of justifying this court to quash and nullify or set aside the trial court's decision. The trial court's judgment

having contained vague and contradictory orders renders it defective in substance. As far as the appeal is concerned it suffices to say that the same was incapable of moving both the first appellate court and the present appeal. This court (Maige J, as he then was now J.A), in **Madeleka Advocates vs. Lars Tonny Hansson & another,** Civil Appeal No. 6 of 2018 (unreported) Stated;

> "In my opinion therefore, the decision of the trial court though titled in the District Court of Arusha, was delivered by the Resident Magistrate Court of Arusha. The insertion of the title "District Court" in the ruling, I agree with Miss Mariam, was a mere typographical error which cannot in itself be a ground of appeal. It would have been addressed under sections 95 and 96 of CPC by way of correction of judgment / ruling. The appellant was expected so to do so before filing his appeal.....In so far as the appeal is concerned, the legal implication of the error does not render the ruling defective in form and thus incapable of moving the Court for an appeal."

In our instant appeal, I do not find the error so caused by the learned trial magistrate to be a mere typographical error. It follows therefore, the decision in the case of **Tanganyika Haulage** (supra) is applicable as opposed to that of **Madeleka Advocates** (supra). The conclusion arrived

at by the trial court, in my decided view, renders the decision thereof defective as the words "separation and divorce" used in the judgment are different words. Hence, the error requires correction of the judgment by the trial court magistrate just like in a situation where a decree appears to be different from its judgment which requires a correction by the same magistrate or her successor as the case may be by giving proper reasons of her findings and right conclusion tallying with reasons/findings.

In the final event, this appeal is allowed in the 1st ground of the appellant's appeal. Exercising my revisional powers under section 32 of the Magistrate Courts' Act Cap 11, Revised Edition, 2019, I order the file to be expeditiously remitted back to the trial court for correction of the impugned error (s) of the typed judgment. Given the parties' relationship and the fact that, the parties are not to blame to the error, each party shall bear his or her costs.

It is so ordered.

M. R. GWAE
JUDGE
27/08/2021