IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO.10 OF 2020

(Originating from the Masasi District Court in Miscellaneous Civil Application No.15 of 2015)

MWAJUMA SELEMANI.....APPELLANT

VERSUS

MUSSA LAZIMA NJOWELE.....RESPONDENT

JUDGMENT

3 March & 26 August, 2021

DYANSOBERA, J.:

The present appeal is against the judgment of the District Court dated 29th day of November, 2019 in Misc. Civil Application No. 15 of 2019 in which the learned Resident Magistrate reviewed his judgment made in Matrimonial Appeal No. 6 of 2018. The appeal owes it origin from Matrimonial Cause No. 66 of 2017 whereby before the Primary Court of Masasi District at Lisekese, the herein appellant, a nurse, had successfully petitioned for dissolution of marriage and division of

matrimonial properties jointly acquired during the subsistence of their marriage, before said the marriage went in the rocks.

After a full trial of the petition, the trial court granted divorce and divided the matrimonial assets to the parties. The appellant was given two plots of land situated at Mkadaenda and Tokura and one lap top for his son. Whereas, the respondent was given one house situated at Mbonde, one plot of land situated at Mtandi, all farms, one tractor, motor cycle, bicycle and all construction materials. Apart from that, the trial court ordered some properties to remain in control of the original owners. For instance, the appellant was ordered to remain with her house situated at Nyasa and all furniture and utensils found at Mnero where the appellant resides. Also, the furniture and utensils which the respondent acquired with another woman were ordered to remain under the ownership of the respondent with another wife. Besides, the trial court ordered equal division of shares of food crops owned by the parties.

The respondent was aggrieved by the decision of the trial court. He successfully appealed to the District Court of Masasi vide Matrimonial Appeal No.6 of 2017 which, after hearing the parties, varied the order of the division of the matrimonial assets whereby the following properties

were given to both but with different shares as indicated in percentages mode. The properties given to both include tractor, food crops, farms situated at Namikungwi, Mbonde and Maili sita in which the appellant was given 40% of shares to each named property herein above. Likewise, the respondent was given 60% of shares of the same named properties. Besides, the first appellate court divided the following properties to each person with absolute ownership. The appellant was given a house situated at Nyasa, laptop, furniture and utensils found at Mnero whereas the respondent was given building materials, furniture and utensils found at Masasi.

After the delivery of the judgment, the appellant noted some errors on the face of record on the judgment of the appellate court in Matrimonial Appeal No.6 of 2018 and in consequence, filed Miscellaneous Application No.15 of 2019 before the same court seeking review of the judgment and orders in Matrimonial Appeal No. 6 of 2018 so as to rectify the typographical errors in the typed judgment dated on 16th August, 2018 including orders of matrimonial assets to wit, the house and three plots of land. No counter affidavit was filed by the respondent. The hearing of the review ensued in the presence of the parties and on 29.11.2019 a judgment was handed down whereby the

District Court divided the plot of land situated at Mkadaenda to the appellant and plot situated at Tokura to the respondent. The plot at Mtandi Street was ordered to be sold and the proceeds to be divided to the parties. The appellant was awarded 40% share of proceeds of sale while the respondent was given 60% of the same.

The appellant was aggrieved by the decision which resulted from the review of Matrimonial Appeal No.6 of 2018 and has decided to appeal to this court. From the petition of appeal filed on 23rd December, 2019 the appellant has fronted four grounds, namely: -

1. That the Court grossly erred in law and fact for rehearing of an appeal and setting aside its own judgment on matrimonial appeal No.6 of 2018 instead of reviewing the same as per application No.15 of 2019.
2. That the court erred in law and fact admitting new evidence, (documents) during review which the same was rejected by the same court at the time of hearing an appeal No.6/2018.
3. That the court erred in law and fact for raising new issues which were not subject to review in the application No.15 of 2019.

4. That the court erred in law and fact for unequal distribution of matrimonial property without any legal justification as the same acquired jointly including all the plots of land.

At the hearing of this appeal, the appellant and respondent, both appeared in person and unrepresented. The parties opted to dispose of the appeal by way of oral submissions.

Submitting in support of her appeal, the appellant, she argued that some of the assets were wrongly included and pressed that the record of the trial court is self-explanatory. She maintained that the District Court wrongly received evidence.

In response, the respondent submitted that he told the Primary Court that he had fifteen witnesses but was ordered to produce only three witnesses. He complained that he was refused to call witnesses but allowed to bring documents. It was in the respondent's further submission that the house at Nyasa was built while he was there though the piece of land belonged to the appellant. Furthermore, the respondent argued that he put all his efforts to service and build the house. He emphasised that there is no asset bought by the appellant's former husband rather it was him who bought the items.

In a short rejoinder, the appellant conceded that the respondent had told the trial court that he had fifteen witnesses though he was allowed to call only three witnesses. She pressed that the thatched grass house is not concerned with the respondent and laid emphasis that she did not find the respondent with three houses but only pieces of land or 'gofu' unfinished house. the appellant concluded that the review was on the typing errors but the learned Resident Magistrate re-heard the appeal.

Having gone through the lower court records, grounds of appeal and submissions of the parties for or against this appeal, the issues calling for determination in this appeal are, one, whether the first appellate court was properly moved and vested with jurisdiction to review his judgment and whether the reviewed 'judgment' can be sustained.

As the record of the District Court shows, the appellant had moved the District Court under section 78 and Order XLII Rule 1 (a) and (b) of the Civil Procedure Code, [CAP 33 R.E. 2019] herein after referred to as 'the Code'. According to section 78, the review can only be entertained from any person considering himself aggrieved by a decree from which an appeal is allowed by the Code but from which no appeal has been

preferred or aggrieved by a decree from which no appeal is allowed by the Code. This provision must be read together with section 70 of the same Code which states that an appeal shall lie to this Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction. As parties will agree with me, the appeal that was before the District Court and which was sought by the appellant to be reviewed originated from the Primary Court at Lisekese. The District Court, therefore, in that appeal, was not exercising its original jurisdiction but its appellate jurisdiction. This means that section 78 of the Code was inapplicable.

Second, even if the provisions of section 70 were applicable, the court was not properly moved. According to Order XLII rule 3 of the Code, the provisions as to the form and of preferring appeal shall apply mutatis mutandis, to applications for review.Order XXXIX rule 1 (1) of the Code on the forms of appeal, contents and attachment categorically states that an appeal must be preferred by a memorandum. In the instant case, the review was preferred by way of a chamber summons supported with an affidavit. That was in violation of clear provisions of Order XLII rule 3 read together with Order XXXIX rule 1 (1) of the same Code.

Third, as rightly pointed out by the appellant, the learned Resident Magistrate erred in law and in fact in reviewing his judgment as he did. In fact he heard his own judgment as an appeal. undoubtedly, the power to review is limited in scope and normally is used for correction of a mistake but not to substitute view in law. what the learned Resident Magistrate did was in violation of the principles obtaining in review. This is clear in the so called judgment in Misc. Civil Application Non. 15 of 2019 where at p. 2 stated, the respondent prays that this Hon. Court make re-division afresh basing on the extent of contribution n of each spouse towards acquisition of matrimonial property in question, cost of this appeal and any other relief that the court may deem fit to grant. Further, at p. 3, the District Court framed the issue for determination thus, whether or not the matrimonial properties were correctly divided and at p. 5, it was observed that:

> 'Therefore, this court reverse the orders of the primary court and make a division of matrimonial property as follows [1-12]'.

Clearly this was not a correction of an apparent error on the face of the record rather, a hearing of his own appeal by the learned Resident Magistrate.

For those reasons, I am satisfied that the learned Resident Magistrate wrongly entertained the application for review. The judgment in Misc. Civil Application Non. 15 of 2019 was a nullity and I so declare. The same are quashed and set aside. The appeal is allowed with no order as to costs.

W.P. Dyansobera

Judge

This judgment is delivered under my hand and the seal of this Court on this 26th day of August, 2021 in the presence of both parties in person and unrepresented.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge