IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC MATRIMONIAL APPEAL NO. 20 OF 2021

(Arising from PC Matrimonial Appeal No. 2 of 2021 from Ilemela District Court.)

JAPHET DAVID MAGANIRA---------- APPELANT

VERSUS

ANITHA JULIUS KAREGA---------- RESPONDENT

JUDGEMENT

Last Order: 30.06.2022
Judgement Date: 11.07.2022

M. MNYUKWA, J.

The appellant herein lost in the District Court of Ilemela which sat as a 1st appellate court. He now appeals against the said judgement dated 09/4/2021 in Matrimonial Appeal No. 02 of 2021, which originated from the decision of Ilemela Primary Court in Matrimonial Cause No. 120 of 2020.

The appellant has advanced two grounds of appeal reproduced hereunder as they appear in his petition of appeal;

1. *That the learned Resident Magistrate erred in law and in fact to order the matter to be heard de-norvo on the*

ground that the infant independent opinion was not taken while the issue was well verified and clarified in the Primary Court basing on the children welfare which is very crucial.

2. *That, the learned Resident Magistrate erred in law and fact for not taking into consideration the children's welfare and hence depart from the truth which leads him to reach a wrong decision/order.*

Apart from these two grounds, the appellant also had one additional ground of appeal which is;

1. *That, the learned District Court Magistrate erred in law and in fact by raising and giving decision on a new issue which was not pleaded by parties.*

The appellant prays for his appeal to be allowed with costs, the decision of the district court be quashed and set aside while the primary court decision be upheld and any other relief(s) this Court may deem fit and just to grant.

Before I dwell in hearing and determining of this appeal, I find it wanting to look at what transpired in the two lower courts. The records reveal that, the appellant herein instituted a Matrimonial Cause No.

120/2020 before Ilemela Primary Court (Mobile Court), petitioning for divorce, division of matrimonial properties and custody of children. During the hearing of the case, the appellant and respondent were the only witnesses. At the end of the trial, the trial court was satisfied that the marriage between the appellant and the respondent was broken down irreparably on the evidence of cruelty on the part of the respondent towards the appellant. Therefore, the trial court granted a decree of divorce, and distributed the properties by awarding the house at Buswelu to the appellant and a plot at Tuangoma to the respondent. The trial court also distributed 70% to the appellant and 30% to the respondent for the plots in Dodoma, Kahama and Godown in Shinyanga. The trial court also placed the custody of 3 issues of their marriage to the appellant herein.

The respondent was aggrieved by the trial court's decision and appealed to the District Court of Ilemela through a Matrimonial Appeal No. 2 of 2021. The respondent had 7 grounds of appeal that;

1. *That the trial court erred both on law and fact by failing to evaluate evidence of the Appellant.*
2. *That the trial court erred both in law and fact for declaring that the marriage between the Appellant and Respondent is broken down beyond repair on the ground of cruelty on the reason that the respondent prepare*

food for himself, and washes his clothes while in fact it was the respondent who decided to shift from their living room and started preparing food for himself after the appellant filed maintenance suit at Manzese Primary Court in Dar es Salaam, vide Civil Case No. 85/2019.

3. *That the trial court erred both in law and fact by deciding that the Respondent be given custody and maintenance of the children while in fact the respondent is incapable of maintaining the children due to his health status, he suffered from a stroke attack which made him to be paralyzed up to date, the situation which, makes him to be unfit to maintain the children.*
4. *That the trial court erred both in law and in fact by deciding that all the children are in boarding schools while in fact it is only one child who is in boarding school and the remaining two children are studying in the day school.*
5. *That the trial court erred both in law and in fact for not considering the fact that the house situated at Buswelu was jointly acquired by the Appellant and Respondent and not Respondent and his late wife, in fact it was the*

Appellant who build the 3 frames of shops located at the same house with her personal money.

6. *The trial magistrate erred both in law and in fact for not affording the appellant to bring her witnesses in court while she requested for the same several times.*
7. *That the trial court erred both in law and in fact for not considering the fact the properties acquired by the respondent and his first wife including the house situated at Mbezi- Dar es- Salaam were never disputed by the appellant.*

The respondent prayed for the appeal to be allowed with costs, the judgement and decree of the trial court to be quashed and set aside, equal division of the matrimonial properties acquired by their joint efforts and order of custody to be in favour of the respondent as the appellant is incapable to maintain them.

The first appellate court heard the appeal by way of a written submission, and in the end, ordered the matter to be tried *de-novo* on the reason that, there was no enough evidence regarding the division of matrimonial properties as neither witnesses apart from the parties to the case were called to testify and no exhibit tendered, there was no evidence that parties were married in which form of marriage, that there was no

evidence adduced by the parties to show that they have referred the matter to Marriage Conciliation Board, lastly that, children were not accorded right to express their independent opinion.

The appellant was not satisfied with the first appellate court decision and he has now appealed before this court with a total of three grounds of appeal as I have reproduced above.

When this appeal was argued, the appellant was represented by Mr. Demetrius Mtete, learned counsel, while the respondent did not enter appearance after being served and so the appeal proceeded exparte against her.

The Appellant's counsel chose to argue the first and second grounds of appeal altogether. He claimed that the first appellate court erred for not considering the welfare of the children based on the prevailing circumstances of the case at hand. He submitted that; it is true that the law requires a child to give his opinion as to whom the custody is to be granted. He claimed that the nature of the case does not require the children to give their opinion as the trial court rightly held that the children should be in the custody of the appellant as the respondent seems not to be a suitable person for the custody. That, the same can be reflected on page 3 of the trial court's judgement.

On the additional ground of appeal, the appellant's counsel attacked the first appellate court's judgement by referring to page 10, which asserts that the matter was not referred to the Marriage Conciliation Board. He remarked it to be a new issue raised by the court *suo moto* and parties were not given chance to submit on that. He went on by stating that, the records are clear that the matter was referred to the Marriage Conciliation Board which issued a certificate that they have failed to reconcile the parties.

He further submitted that, it is the position of the law that, if the matter is not raised by parties, the court can raise it *suo moto,* but parties should be given an opportunity to address on it. The appellant's counsel cited the case of **African Bank Corporation vs Sekela Brown Mwakasege**, Civil Appeal No. 127 of 2017, HC at Dar es Salaam that the court considered the issue that was not pleaded by the parties. The appellant's counsel finalised his submission by praying for this appeal to be allowed and the decision of the appellate court to be quashed and set aside and the decision of the trial court be upheld.

After a careful examination of the court's records, grounds of appeal raised and the Appellant's submission, the issue for determination is whether this appeal has merit. In determining the appeal at hand, I will

front the third ground of appeal which was the additional ground of appeal by the appellant.

It is the appellant's submission that, the first appellate court had raised the issue of the matrimonial dispute not to be referred to the Marriage Conciliation Board without giving the parties right to be heard on that issue. From the first appellate court's records, the respondent had raised as a 2nd ground of appeal that the trial court erred to hold that their marriage was broken down irreparably on the evidence of cruelty. In determining whether the trial court was right to hold that the marriage was broken down irreparably is when the first appellate court magistrate on page 10 of his typed judgement, raised *suo moto* the issue as to whether the dispute was referred to the marriage conciliation board, something that was not raised by the parties at the trial court as well as to the appeal. Although the first appellate court recognised that the certificate from the marriage conciliation board was appended to the trial court file, he was of the view that, that was not enough as the parties were to explicitly explain the matter when adducing evidence at the trial court.

As if that is not enough, the first appellate court also on the same page of its Judgement raised *suo moto* the question of which form of marriage does the parties contracted their marriage so as to know the

nature of the marriage and the reliefs that the parties are entitled to. His main point of argument is that the reliefs sought are different when the parties contracted a formal marriage or when they were living in a concubinage relationship.

From that point, the first appellate magistrate misdirected himself on the matter, as it is a long-established principle of the law that, the court must confine to the raised issue and if the need arises then the court may raise the issue *suo moto*, but it must give the parties an opportunity to address the same before the court can give its decision. The purpose of that procedure is for the court to observe the cardinal procedural principle of law that, a party must be given an opportunity to be heard before the court can give its decision. This cardinal principle has been elaborated in a number of case laws, including the case of **Pili Ernest v Mushi Musani**, Civil Appeal No. 39 of 2019 CAT at Mwanza, where the court had this to say;

> *"This Court has in numerous decisions emphasized that courts should not decide matters affecting the rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard."*

The above decision connotes the fact that, parties are in a better position to know what is in dispute among them. That is why even though the trial judge/magistrate has a duty to frame issues, but still parties are involved to assist the court in raising those issues which are in controversy that need to be determined by the court. This was also observed in the case of **Barclays Bank Tanzania Limited v Sharaf Shipping Agency (T) Limited and Habibu African Bank Limited and Habib African Bank Limited v Sharaf Shipping Agency (T) Limited and Barclays Bank Tanzania Limited,** Consolidated Civil Appeals No 117/16 of 2018 and 199 of 2019, CAT at Dar es Salaam, as the court said;

> *"Although the duty to frame issues is of the trial judge, the same cannot be done without involving the parties or their advocates who have both the duty to assist the court on the process and a right of hearing as well."*

Turning to our case at hand, as I have earlier on pointed out, the first appellate court recognized that there was a certificate by the Marriage Conciliation Board within the trial court's file, but it was his view that, it was not enough to prove their attendance before the board. From the above elaboration of the principle of natural justice, the first appellate court was supposed to give the parties the right to address the issue as to whether the parties attended to the Marriage Conciliation Board or not

in order to satisfy himself as to whether that was the issue to be determined as it was not disputed by the parties themselves.

Therefore, the act of the first appellate court to raise an issue *suo moto* was not a mistake at all, as the court has a duty to determine all contentious matters that arise during the determination of any suit that are either raised by parties or the court *suo moto*. The issue is, the first appellate court did not record what he observed and gave opportunity to the parties to address the court on the matter as the procedural rules requires, something that led to a miscarriage of justice, as the issue determined prejudiced the parties. This was also observed in the case of **Kumbwandumi Ndemfoo Ndossi vs Mtei Bus Services Limited,** Civil Appeal No. 257 of 2018, CAT at Arusha, where the court held that;

> *"Basically, cases must be decided on the issues or grounds on record and if it is by the court to raise other new issues either found on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given opportunity to be heard by the court."*

Thus, I agree with the appellant's submission that, indeed parties were denied the right to be heard on a newly raised issue by the first

appellate court. Now, what are the consequences of the above procedural irregularity pointed out?

As it is the cardinal principle of law that the right to be heard being a natural justice and a constitutional right, its denial vitiates the whole proceeding and renders a judgement a nullity. The effect of denial of right to be heard was also discussed in the case of **Said Mohamed Said vs Muhusin Amir & Another**, Civil Appeal No. 110 of 2020 where the court held that;

> *"Settled law is to the effect that any breach or violation of that principle renders the proceedings and orders made therein a nullity even if the same decision would have been reached had the party been heard."*

See also the case of **Pili Ernest v Mushi Musani**, Civil Appeal No. 39 of 2019 CAT at Mwanza, **Kijakazi Mbegu & 5 Others vs Ramadhani Mbegu** [1999] TLR 174.

In the upshot, the 3rd ground of appeal is allowed, and consequently, the entire Proceedings, the Judgement and the Orders of the first appellate court are hereby quashed and set aside, for the interest of justice I remit the file to the first appellate court and direct that the appeal before the District of Ilemela to be heard and determined afresh

before another Magistrate. In the result I find the remaining grounds of appeal dies a natural death. Taking into consideration of the relationship of parties, I make no order as to costs.

It is so ordered.

M. MNYUKWA

JUDGE

11/07/2022

The right of appeal is fully explained to the parties.

M. MNYUKWA

JUDGE

11/07/2022

Court: Judgement delivered this 11th day of July, 2022 in the presence of the Appellant and in the absence of the respondent.

M. MNYUKWA

JUDGE

11/07/2022