

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

PC. CIVIL APPEAL NO. 4 OF 2021

(Arising from District Court of Songea in Matrimonial Revision No. 1 of 2015 which originated from matrimonial Civil Application No. 41 of 2015 of Songea Urban Primary Court)

AMIRI ALLY HANYA..... APPELLANT

VERSUS

BAHATI MUSTAFA..... RESPONDENT

JUDGEMENT

30.06.2022 & 12.07.2022

U. E. Madeha, J.

This is a second appeal against the decision of the Songea District Court in Matrimonial Revision No. 01 of 2015 which was entered in favour of Bahati Mustafa. Disgruntled Amiri Ally Hanya elected to appeal to this Court, He is equipped with two grounds of appeal, namely:

- 1. The trial Court heard the matter without giving the opportunity to the appellant to be heard on a matter in which his rights were adversely affected contrary to the law.*

2. *That, the District Court erred in law and facts to determine the matter contrary to the law as it revised the trial Court decision and insisted on nullifying the same.*

The factual background of this matter is simply summarized as follows: The Appellant herein referred to as Amiri Ally Hanya and the Respondent herein referred to as Bahati Mustafa having cohabited for eleven (11) years, sometime around November 2014 Amiri Ally Hanya referred their misunderstandings to the Msamala Marriage Conciliation Board. Amiri Ally Hanya claimed division of jointly acquired properties together with custody and maintenance of their children. Bahati Mustafa rejected the whole idea of divorce for the reason that she was still in love with Amiri Ally Hanya and taking into account that they had four issues among them fourteen years disabled son whom they need to raise together.

After hearing the matter, on 16/12/2014 Msamala Marriage Conciliatory Board failed to reconcile the parties and stated that as per the Law of Marriage Act of 1971 it had no jurisdiction to end the relationship status of the parties and grant the divorce, divide their joint properties and

order maintenance and custody their children thereof. Consequently, the Conciliatory Board advised them to refer their matter to the Primary Court.

Following that decision, on 8th January 2015, Amiri Ally Hanya took the matter before Songea Urban Primary Court. The record reveals that on the date set for the mention, both parties entered appearance and the trial Magistrate inquired as to whether Amiri Ally Hanya preferred to continue to cohabit with Bahati Mustafa Milanzi but unfortunately he was of the view that he no longer loved her. On the other hand, Bahati Mustafa maintained that she still loved him.

Consequently, the primary court has to consider the issues of divorce, the division of matrimonial property, maintenance, and the custody of their children. They listed the joint-owned property along with their four children. It is worth considering that, their marriage was blessed with a business that is, one house located at Msamala Songea, 18,500 bricks, a shop business, and household items.

Moreover, the Primary Court Magistrate had ordered the division of the matrimonial properties which were none other than; a sofa set, curtains,

kitchen utensils, two (02) beds one shop, one house, and 18500 building breaks.

On the other hand, Songea Primary Court issued two orders: **First;** Amiri Ally Hanya was ordered to build a house for Bahati Mustafa that is 9 x 6 meters to be given to Bahati Mustafa. For the issue of children's maintenance, Amiri Ally Hanya was ordered to pay one hundred and twenty thousand (120,000), Tanzanian Shillings, to the mother of their children for the accommodation of their four (04) children per month that is on monthly basis. This simply means that each child was supposed to get thirty thousand (30,000) Tanzanian shilling per month for the accommodation. **Second-** Bahati Mustafa was supposed to be evicted from the house and this is what led the District Court to conduct revision and leave Bahati Mustafa in the house. The District Court made the following orders;

First, it blessed the divorce order as the two people no longer intended to stay together that is were not interested in each other.

Secondly, it was ordered that the order of evicting Bahati Mustafa from the house be quashed, and ordered her to stay in their matrimonial house and forthwith returned therein. Therefore, the house was given to

Bahati Mustafa. On the same note, Amiri Ally Hanya was left with a shop, 18,500 bricks, a compound, and other properties so as to assist him to construct another new house.

Third, on maintenance of children, it was ordered that; considering the age of Ally who was born in 2004 therefore he is above seven (7) years. And he could therefore stay with his father due to his disability which needs special attention, he was ordered to stay with his mother. the other three children were placed under their mother's custody.

Fourth; regarding the maintenance, the applicant was ordered to pay to Bahati Mustafa the amount of thirty thousand (30,000) for each child making a total sum of one hundred and twenty thousand (120,000) Tanzania shillings per month. It was however emphasized that the Appellant should keep on providing other necessities to his children including education, clothing, and medication.

Fifthly, it was ordered that the domestic utensils remain to Amiri Ally Hanya. **Lastly,** the District Court ordered those 18,500 bricks be left to Bahati Mustafa in order to be used in the construction of the new house.

It appears that after the division of the matrimonial property ordered by the District Court Songea, Amiri Ally Hanya decided to reconcile with Bahati Mustafa, and they continued to live together as husband and wife for the second time. So, the division of the matrimonial properties in question right now is the division of matrimonial property that broke up six years ago.

The District Court of Songea relied on sections 22 (1) & (2) of the Magistrate Court Act Cap 11 [Revised Edition 2002] (*by then*) which in essence confers its revisional powers. On the same note, it is from that revision case where Amiri Ally Hanya approached this Court with a prayer of extension of time to file an appeal out of time which the same was granted. Moreover, undaunted they are now before this honourable court battling their rights by way of appeal.

During the hearing of the appeal, Amiri Ally Hanya was represented by Mr. Dickson Ndunguru, the learned advocate whereas Bahati Mustafa enjoyed the service of Mr. Selemani Mwenda, the learned advocate. Both sides consented to have the appeal disposed of by way of written submission and the filing schedule was entered accordingly and complied with.

Mr. Dickson Ndunguru the appellant's learned advocate argued that on the first ground of appeal, the District Court erred in law and facts in determining the matter without affording Amiri Ally Hanya the opportunity to be heard on a matter in which his rights were adversely affected, contrary to the law. As a matter of fact, he stated that the right to be heard by Amiri Ally Hanya was necessary because the Court altered the decision of the Trial Court, which was conflicting.

That, the matrimonial house, which was given to Bahati Mustafa should be divided equally between the parties that are, Bahati Mustafa and Amiri Ally Hanya. But strangely Amiri Ally Hanya was left with nothing in that house, that contravenes the mandatory provision of *Section 23(3) of the Magistrate Court Act Cap 11 R.E. 2019*, which provides that;

"(3) The district court may in its discretion postpone its inquiry under the provisions of subsection (1) of this section until the expiration of the time for filing an appeal against conviction and, if the appeal has been filed before the district court commences the inquiry, the district court may in its discretion postpone the inquiry until the final

determination of the appeal or for such lesser period as the court may deem fit."

Mr. Dickson Ndunguru, prayed that: The proceedings and orders of the lower Court be quashed until the parties are given the opportunity to be heard. He made reference to Article 13(6) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

Mr. Morice Selemani Mwamwenda learned counsel for Bahati Mustafa while submitting on the first ground, he said: *"In perusing and reading between the lines of the applicant's written submissions, his submissions were based on non-accorded a chance of being heard while the court was going on its Revisional jurisdiction out of Civil Case No. 4 of 2015 at Songea Urban Primary Court."*

The learned counsel for Bahati Mustafa contended further that, the Revision which was done by the Resident Magistrate acted positively and rightly in accordance with *section 22(1) (2) of the Magistrate's Court Act Cap 11 R.E. 2019*, which states that: -

"22. -(1) A district court may call for and examine the record of any proceedings in the primary court established for the

district for which it is itself established, and may examine the records and registers thereof, for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court, and as to the regularity of any proceedings therein, and may revise any such proceedings.

(2) In the exercise of its revisional jurisdiction, a district court shall have all the powers conferred upon a district court in the exercise of its appellate jurisdiction including the power to substitute a conviction, or a conviction and sentence, for an acquittal; and the provisions of paragraph (b) of subsection (1) of the section shall apply in relation to an order quashing proceedings and ordering a rehearing which is made in the exercise of a district court's revisional jurisdiction as they apply in relation to any such order made in the exercise of its appellate jurisdiction."

Therefore, clarifying the above-cited provisions of the law, Bahati Mustafa learned advocate said that it is very unfortunate that the District Court on 18th, June 2015, Revised the Primary Court order after the matter

had been decided that Bahati Mustafa was supposed to vacate the house and the order for the maintenance as well. He prayed that the order of evicting Bahati Mustafa be quashed and Bahati Mustafa remain in the matrimonial house.

Based on the above submission by parties, starting with the first ground of appeal concerning the issue of the right to be heard, this court is of the opinion that parties to the suit were heard in the Primary Court regarding the division of marital property. Amiri Ally Hanya had not appealed against the orders issued by the Primary Court. Amiri Ally Hanya said that he was not heard but in a real sense Amiri Ally Hanya was given a chance to be heard at the Primary Court and failed to file an appeal. Though, after the revision decisions made by the District Court and after the Division of matrimonial property Amiri Ally Hanya was satisfied with the District Court decisions, instead of appealing, he went to cohabit with the second marriage with Bahati Mustafa and they lived together for over six years and conflict started again, hence this appeal.

Coming to the second ground of appeal, the District Court was not right to conduct revision, in answering this ground of complaint, when conducting Revision, there must be a complaint verbally or in writing. This

stance was discussed in the case of **Hamed Husein and 5 Others v. Nyemela Gandamwenda** High Court of Tanzania at Dodoma Miscellaneous Civil Application No. 66 of 2003 (unreported), when deciding this case, the High Court cited the case of **Awaki Shauri v. Christopher Gwandu & Another**, Civil Revision No. 9 of 1998 before the Arusha High Court Registry, whereby in reaching the decision the Court cited the case of ***Israel Mwakalabeya v. Ibrahim Mwaiiamba** Miscellaneous Civil Application No. 21 of 1991 Mbeya High Court Registry Unreported:* "

The right to invoke the Courts powers of revision is not an alternative to appealing. Where the order complained against is appealable, the court will not use its revisional powers, for the right to appeal is a remedy open to the aggrieved party. Even where the time for appealing has expired, a party has the remedy of applying to appeal out of time."

It is the view of this Court that the District Magistrate was right to conduct a revision, taking into account that there is illegality apparent on the record that the Primary Court Magistrate issued two conflicting decisions and

that the decision, on the contrary, was revised the same, not knowing that it was a *functus officia*. **The first order** that was issued by the Primary Court was that Amiri Ally Hanya to build a house for Bahati Mustafa and Amiri Ally Hanya to pay One Hundred and Twenty Thousand (120,000), Tanzania Shillings to Bahati Mustafa for the accommodation of the four children. **The second order** which was issued by the Primary Court was the eviction of Bahati Mustafa and this was the reason which led to the District Court conducting a Revision based on Bahati Mustafa's complaints. Thus, in the circumstances, the District Court was right as it needed to satisfy itself on the correctness and legality of the proceedings, and orders thereof of the primary court. This stance was provided by the provision of section 22(1) (2) of the Magistrate's Court Act Cap 11 R.E. 2019 cited by the Respondent counsel.

I found that there were sufficient reasons for revision due to two orders. So, the conditions for conducting revision were appropriate. The District Court looked at the circumstances of the children in making the division of matrimonial property. The Law of Marriage Act needs the Court to look into the circumstances of the children, especially in the context of these parties. These parties have a disabled child, which is an exceptional

circumstance for the court to warrant such a decision considering that there was an eviction order issued by the Primary Court to evict Bahati Mustafa from the matrimonial house with a disabled child.

However, during that period, the distribution was equal because Amiri Ally Hanya was given a shop, a plot, and bricks so that he could build another house whereby Section 114 (1) (2) of the Law of Marriage Act Cap 29 (R. E. 2019) and the case of **Bi. Hawa Mohamedi v. Ally Seif** (1983) TLR 32 was used in District Court to facilitate the division of matrimonial property. The power of the Court to divide the matrimonial assets is derived from **Section 114 (1) and (2) of the Law of Marriage Act Cap 29 (R. E 2019)** which provides as hereunder: -

"114-(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale. (2) In exercising the power conferred by subsection (1), the court shall have regard to –

(a) the customs of the community to which the parties belong;

(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division."

Secondly; Bahati Mustafa and her four (04) children wanted to be evicted from the matrimonial home. However, the Primary Court decided that Amiri Ally Hanya should build another house for Bahati Mustafa and his children and the second order of the same Primary Court is to evict Bahati Mustafa from the matrimonial home, and this was the basis of the revision made by the District Court. Strange as it may appear until now, he has not built Bahati Mustafa a house with his children. In the case of **Rex v. Sussex** Justices, (1924) 1 KB 256 it was emphasized that "Justice must not only be done but also seen to be done." Observing the context of reality, the District Court looked at the circumstances of the children in making the division of matrimonial property. These parties have a disabled child, which is an exceptional circumstance for the Court to warrant such a decision considering that there was an eviction order issued by the Primary Court to evict Bahati Mustafa from the matrimonial house with a disabled child.

To put it in a nutshell, considering Amiri Ally Hanya's side, he was given a compound and a shop so as to earn money for building another house. Also, he was awarded the compound and one Thousand and Eighty-Five Hundred (18,500) bricks.

However, after keen scrutiny of the records in the lower Courts, submissions from representative advocates of both sides, and the grounds of appeal thereof in this Court, I noted some material irregularity in the decision of the Primary Court of Songea Urban with respect to what transpired in Divorce Case No.1 of 2015 which was embraced by the District Court of Songea as well, thus, resulting into this appeal. It seems to be true that, I had to pause and question myself as to whether the Primary Court of Songea Urban did in fact legally try/entertain the divorce case (i.e, Talaka Na.1/2015).

Consequently, in response, I had to revisit the position of the Law (substantive and procedural) in regard to the trial of presumed marriages. Whilst, I discovered that the records of the Primary Court of Songea Urban reveal that the trial of the said case before it was not handled with care that is incorrectly handled.

As far as I can see, this is due to the reason that there is nowhere it is recorded in the records of the Primary Court of Songea where it attempted to satisfy itself on the existence of the presumed marriage as required by the law.

As a matter of fact, the Primary Court of Songea did not establish the matrimonial status of the parties. Instead, it only jumped to the conclusion to confirm the divorce and subsequent reliefs without having troubled itself to determine the relationship of the parties.

Moreover, it is my observation that a trial court must initially attempt to establish proof of the existence of presumption of marriage (which is a substantial and factual issue established by evidence) and thereafter grant any subsequent reliefs thereto as given by the law.

Nevertheless, it is unclear whether the Primary Court confirmed the decision of the Ward Tribunal because the Ward Tribunal was clear from its decision that it neither had jurisdiction to end the relationship of the parties nor pronounce any reliefs among them. This fact was as well overlooked by the District Court of Songea since it stated in its revision order that it blessed the divorce between the parties.

It is worth considering that, in the prevailing circumstances there was lack of proof of the existence of presumption of marriage between the parties. The Primary Court could not have assumed the facts and proceeded to deal with the matter.

Worse enough, there was no evidence in the Primary Court tendered by the parties to depict their reasons for the dire need of the divorce. The extent of contribution in their joint properties source of earnings, etcetera moved the Court to determine their rights and liabilities.

On the same note, the presumption of marriage is governed by section 160 (1) (2) of the Law of Marriage Act Cap 29 (R.E. 2019). The said section states that: -

- (1) Where it is proved that a man and a woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*
- (2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of*

competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make order or orders for maintenance and, upon application made therefor either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceeding for and orders of maintenance and other reliefs in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section."

Reference is made to the case of **Richard Majenga v. Specioza Sylvester**, Civil Appeal No. 208 of 2018 (Unreported), the Court of Appeal in expounding section 160(1)(2) of the Law of Marriage Act Cap 29 had this to say in page eight (8) of its judgement: I hereby quote: -

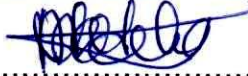
"Following the above provisions, it is clear that the court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce. Therefore, though in this case both parties' pleadings were not disputing that they were cohabiting as husband and wife but since their relationship was based on presumption of marriage, there was need for the trial court to satisfy itself if the said presumption was rebuttable or not".

To put it in a nutshell, in the circumstances, and for the foregoing reasons, I find that this appeal is well-founded. On the same note, the grounds of appeal prompting this appeal appear immaterial with respect to the above findings since they are a resultant of the revision order of the District Court which contained the pointed substantial irregularity vitiating the entire proceedings before that Court as well.

Therefore, I hereby invoke revisionary powers of this Court under section 44(1)(b) of the Magistrate Courts Act Cap 11 [Revised Edition 2019] henceforth nullify the entire proceedings and quash the revision order thereof of the District Court of Songea with respect to this matter. Similarly, the entire proceedings and decisions thereof the Primary Court of Songea Urban are nullified and quashed respectively.

For the genuine reason stated above, I proceed to grant a temporary injunction, that the appellant is restrained by this Court to disturb the respondent so that the status quo to be maintained that the respondent should remain in the disputed house, and the appellant should continue to provide children's maintenance until the final determination of this case or further necessary orders. Furthermore, the parties are at liberty to institute a fresh petition in accordance with the law before another magistrate. Each party has to bear his or her own costs. it is so ordered.

DATED at SONGEA this 12th day of **JULY, 2022**





**U. E. MADEHA,
JUDGE.
12.07.2022**