IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 47 OF 2021

(Appeal from the ruling and drawn order of Nyamagana District Court in Revision No. 4of 2021 dated 30th July, 2021 by Hon. Ryoba, RM)

EMMANUEL YOHANA ALPHONCE.....APPELLANT

VERSUS

LANGWIDA FRANCIS LAURIAN.....RESPONDENT

JUDGMENT

26th June & 4th August, 2022

DYANSOBERA, J.:

The parties herein celebrated Christian marriage on 27th June, 2009 at Nyasubi, Kahama. They were blessed with two children. During the subsistence of their marriage, they managed to acquire some assets including a residential house situated at Igoma, in Mwanza Region.

Sometime later, their marriage atrophied forcing the respondent to knock at the doors of the court whereby, in Matrimonial Cause No. 31 of 2011, she petitioned the Urban Primary Court at Mwanza for dissolution of marriage, maintenance of the infant children and the division of matrimonial assets. The main ground advanced by the respondent at the trial in support of the petition was cruelty exhibited by the appellant. The appellant resisted the petition denying committing any cruelty against the respondent and argued that he still loved her as his wife, the respondent. The trial Court was satisfied that the respondent had proved her petition and granted it. It dissolved the marriage, made a custody order placing the children under the custody of the respondent and ordered the

appellant to pay Tshs. 200,000/= monthly as maintenance for the infants for the whole period they would be under the custody of the respondent.

With respect to the division of the matrimonial property, the trial court considered the evidence and the listed matrimonial assets and the assets to be distributed among themselves else, either party to have the liberty to buy out the share of the other party. The decision of the Primary Court was handed down on 8th July, 2011.-

Few months later after their marriage was dissolved, the parties resolved to join and live together and resumed cohabitation. During this period, parties decided to sell the two motor vehicles they had previously acquired (Reg. No. T. 315 BJY, Toyota Corona-Premio and T. 550 BLB Toyota Hiace) and bought other two motor vehicles, that is, Reg. No. T.447 CYF Toyota Hiace and Reg. No. T.300 BVA, make Nadia. It appears, after some years, the appellant deserted their matrimonial home. The respondent then, on 30th June, 2020 went back to the Primary Court and sought to execute the decree of the court dated 8th July, 2011 in Matrimonial Cause No. 31 of 2011. The appellant was traced but could not enter appearance and the trial court proceed ex parte against him. In his ruling delivered on 15th day of March, 2021, the learned Resident Magistrate, Mr. C.M. Mwalimu declined to grant the respondent's prayer for dissolution of the marriage for the second time maintaining that there was no subsequent married contracted after the parties had divorced.

With regard to the division of matrimonial assets, the trial court ruled as follows:

'F. 160(2) la sheria ya ndoa, linaelezea haki ya mwanamke na Watoto pale dhana ya ndoa inaposhindwa kupingwa. Mwanamke anaruhusiwa kuomba na kupewa haki zote kama anazopata yule ambaye alikuwa katika ndoa na talaka ikatolewa.

Katika shauri la awali la wadaawa mgawanyo wa mali ulishafanywa kwa Mahakama kuamuru wagawane kwa usawa mali zao na kutoa uhuru kwa mmoja wa wadaawa kumfidia mwenzake nusu ya thamani ya mali zao kama inavyoonekana katika nakala ya hukumu (kielelezo P1). Kwa bahati mbaya wadaawa hawakutimiza amri hiyo kutokana na kukubaliana kuendelea kuishi kwa pamoja na kuchuma mali nyingine.

***Hivyo mahakama hii inaona ni vyema mgawanyo wa sasa kuzingatia dhana ya uamuzi wa awali wa Mahakama**. Awali kulikuwa na nyumba moja sasa kuna nyumba mbili. Nyumba iliyoongezeka inavyumba vinane na imepangishwa na SU1. Magari mawili yaliuzwa na yakanunuliwa mengine mawili.*

Kwa mantiki hiyo mahakama inaamuru mgawanyo ufanyike si kwa kuuza mali bali kwa kugawana kwakuwa zinagawanyika. Hivyo basi mdai anapewa nyumba ya kuishi iliyoko mtaa wa Mtakuja- Igoma ili aendelea kujiifadhi na Watoto wao wawili. Pia apewa gari moja aina ya Toyota Hiace T. 447 CYF imsaidie katika mahitaji ya familia kama chakula malazi, elimu na matibabu.

Kwa upande wake mdaiwa anapewa nyumba ya Ndofe aliyopangisha pamoja na gari moja Nadia T. 300 BVA.

SM1 pia aliiomba mahakama kukamata gari. Kwa kuwa upo uwezekano wa SU1 kuitorosha, kuihamisha, kuiuza, kuiweka rehani au kuiharibu mara baada ya uamuzi huu, mahakama inakubaliana na ombi la SM1 mgawanyo utakapotekelezwa. Hivyo kwa kipidi hiki cha mpito SM1 pia hapaswi kutenda chochote juu kitakachoweza kuathiri umiliki wa gari hilo.

The appellant was aggrieved by that decision. He preferred an application (Application for Revision No. 4 of 2021) before the District Court of Nyamagana. The application was heard a determined in his disfavor. Still dissatisfied, the appellant has come to this court appealing.

After considering the material on record and the submissions of the parties, the main issue calling for determination is whether the revisional proceedings entertained by the District Court in Civil was competent. There is no dispute that after the first decision of the trial primary court was given in Matrimonial Cause No. 31 of 2011, no execution was carried out as the record shows that parties resorted to cohabit together for more than nine years. What followed thereafter was the execution proceedings as reflected in the proceedings as here under: -

'MAOMBI YA KUKAZA HUKUMU
KATIKA MAHAKAMA YA MWANZO MJINI
SHAURI LA MADAI (TALAKA NO. 31/2011
MDAI.....LANGWIDA LAURIAN
MDAIWA.....EMMANUEL ALPHONCE

Tafadhali husika na somo tajwa hapo juu.

Katika shauri lililotajwa hapo juu lililohukumiwa tarehe 08/07/2011 mimi mdaiwa nilipata ushindi nikapewa talaka, mgawanyo wa mali za ndoa na matunzo ya Watoto. Hata hivyo kabla hukumu hiyo haijatimilizwa mdaiwa aliomba radhi kupitia kwa viongozi wa dini yetu ya RC akiahidi kuishi nami kwa amani pasipo kurejea makosa yake. Nilimuamini tukaendelea kuishi pamoja katika nyumba yetu ya ndoa na kufanya maendeleo zaidi kwa kuuza magari mawili (2) ya awali na kununua mengine mawili (2) pamoja na kiwanja huko mtaa wa Ndofe – Igoma ambamo tulijenga nyumba nyingine kwa kushirikiana.

Kwa kuwa mdaiwa amekuwa akikiuka kiapo chake mara kwa mara kwa kurudia makosa yale yale na kwa kuwa nimefikia ukomo wa uvumilivu wangu naomba hukumu ya shauri hili itimilizwe nipewe haki zangu ninazositahili kwa kupewa hati ya talaka, kugawanywa mali zote za ndoa ikiwemo nyumba ya Ndofe, nyumba ya Mtakuja, Hiace Na. T 447 CYF na Nadia Na. T300BVA Pamoja na matunzo ya Watoto.

Pamoja na barua hii naambatanisha nakala za hati za manunuzi ya gari (Hiace) na manunuzi ya kiwanja cha Ndofe kwa ajili ya uthibitisho'.

Besides, the appellant was, before the District Court in Application for Revision No. 4 of 2021, calling upon the court to nullify **the execution proceedings in Urban Primary Court in Matrimonial Cause No. 31 of 2011**. This is reflected under paragraphs 2 and 3 of the Chamber

Summons/Application the appellant had presented for filing before the District Court on 26th May, 2021.

It is therefore, preposterous on his part, now in the petition of appeal (PC Civil Appeal No. 47 of 2021) to argue, as he did in paragraph 2 of the petition of appeal, that the subsequent suit filed by the respondent in the primary court was *res judicata.*

As rightly submitted by learned Counsel for the respondent, the application for revision was misconceived.

In the first place, the trial court's subsequent proceedings were heard ex parte after the court was satisfied that the appellant who, despite being served through substituted service by way of publication, defaulted appearance.

The trial primary court complied with the law. Rule 23 of the of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, GN. No. 310 of 1963 as amended (hereinafter referred to as 'Rules') provides that: -

> 'Where the claimant appears and the defendant does not appear when the proceeding is called on for hearing, then–
>
> (a) if the court is satisfied that the summons was duly served, the court may permit the claimant to prove his case by adducing such evidence as he may have in support of his claim and the court

may, if it is satisfied that the claimant has proved his claim, give its decision in the absence of the defendant:

Provided that where the court is not satisfied that the summons was served on the defendant in sufficient time to enable him to appear and answer on the day fixed in the summons, or where the court is satisfied that other circumstances exist which may have rendered it difficult for the defendant to appear and answer, the court shall adjourn the hearing to a future day to be fixed by it and shall direct that notice be given to the defendant;

(b) if the court is not satisfied that the summons was duly served, the court shall direct that a second summons be issued and served on the defendant'.

As the trial court's record depicts, the trial court complied with the dictates of the above cited law and properly used its discretion to proceed ex parte after the appellant deliberately absented himself. The legal remedy which was then available to the appellant was not to file revisional proceedings before the District Court but to go back to the Primary Court and file an application to have the ex parte judgment set aside. He was enjoined in this by the law. rule 30 (1) of the Rules provides thus: -

'(1) Where a claim has been proved and the decision given against a defendant in his absence, the defendant may, subject to the provisions of any law for the time being in force relating to the limitation of proceedings, apply to the court for an order to set aside the decision and if the court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient

cause from appearing when the proceeding was called on for hearing, the court shall make an order setting aside the decision as against such defendant upon such terms as it shall think fit'.

It is through that legal procedure that the appellant could have aired his grievances as raised in his affidavit sworn and verified on 25th May, 2021 and filed on 26th day of May, 2021, namely, whether or not after the divorce, the appellant and respondent cohabitated or became concubines and whether during the subsequent proceedings, the court overturned the decision of the primary court issued on 8th July, 2011 and distributed properties which were not matrimonial properties.

The appellant's averments in his affidavit that the matter was heard in his absence and that service was not proper supports my finding.

For those reasons, the insistence of the learned Counsel for the respondent before the District Court that the applicant had to apply to have the ex parte ruling/order set aside and the proceedings heard on merit was without legal substance as that is what the law dictated.

Second, the application for revision filed by the appellant before the District Court to impugn the ruling and order of the primary court given on ------was improper on another front. There is no doubt that revision is re-examination of cases which involve the illegal assumption, non-exercise or irregular exercise of jurisdiction. In case of revision whatever powers

the revisional authority may or may not have, it has no power to review the evidence unless the statute expressly confers on it that power. Such power can only be exercised in an appeal which is a continuation of proceedings; in effect, the entire proceedings are before the appellate court and it has power to review the evidence subject to the statutory limitation prescribed.

As stated earlier, the appellant in his affidavit sought the District Court to review the evidence whether the parties cohabitated after the marriage and if there was any jointly acquired property which could be matrimonial property and subject to subsequent distribution. The revisional court had no such power to review the evidence.

The decision of the District Court was a nullity and the same is quashed and set aside.

The ruling/order of the primary court in execution proceedings is endorsed and should be carried out.

No order as to costs.

W. P. Dyansobera
Judge
4.8.2022

This judgment is delivered under my hand and the seal of this Court this 4th day of August, 2022 in the presence of the respondent but in the absence of the appellant.

W.P. Dyansobera
Judge