

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 8 OF 2022

(C/F Karatu District Court, Civil Appeal No. 11 of 2021, Originating from Matrimonial Cause No. 2 of 2021 of Mang'ola Primary Court)

SUNDAY LEONARDI HAULE.....APPELLANT

VERSUS

SILVIA JOSEPH SHIMORI.....RESPONDENT

JUDGMENT

14/7/2022 & 24/08/2022

GWAE, J

In the Mang'ola Primary Court ("hereinafter the trial court", the respondent Sunday Leonard Haule filed a petition for divorce, division for matrimonial properties and maintenance of the children against the appellant, Silvia Joseph Shimori on the followings grounds; continuous misunderstandings between the parties and desertion of the petitioner now respondent by the appellant.

The historical background giving rise to this appeal is that; the respondent and the appellant lived together as husband and wife for more than (10) ten years, however the evidence on record shows that, the parties herein had not contracted any formal marriage. The respondent

alleged that she lived with the appellant as husband and wife and they had two issues aged 11 and 4th years at the time of institution of this matter that is in the year 24th day of May 2021 and had also acquired some properties.

The appellant on his part disputed to have lived with the respondent as husband and wife however he admitted to have children with her. On the issue of properties, the appellant denied to have acquired properties with the respondent.

At the trial court, five issues were framed, namely; whether there was a customary marriage between the parties, if answered in affirmative whether the marriage between the parties has broken irreparably, whether there are properties jointly acquired by the parties, who between the parties is entitled to have custody of the children and what reliefs are the parties entitled to.

In answering the first issue, the trial court was of the findings that, the parties herein had not contracted customary marriage save that the parties lived together for more than 10 years and had children. As to the second issue, the court's findings were that since there was no marriage contracted between the parties therefore the court could not issue the decree for divorce. As to the third issue it was decided that the only

property that was proved to have been acquired jointly by the parties was a house located at Mang'ola Barazani. Upon such finding that the house at Mang'ola was jointly acquired, it therefore it was then ordered the same to be divided equally between the parties, on the fourth issue the trial court decided that the children to be under the custody of the respondent and the appellant to maintain his children by providing Tshs. 50,000/= monthly and other basic needs for both children

The trial court's decision aggrieved the appellant, hence filed an appeal to Karatu District Court (the 1st appellate court). Among others, the appellant complaints were on; division of matrimonial properties, jurisdiction of the court, maintenance of the children, custody of the children, infringement of his right to cross examine SM2 and evaluation of evidence. The first appellate court up held the decision of the trial court however it faulted the trial court for not holding that since the parties had not contracted any formal marriage and as the parties had lived together as husband and wife for more than ten years, the trial court ought to have declared presumption of marriage between the parties. The 1st appellate court also awarded the parties equal shares of the farm measuring 6 acres located at Kondo, and a house and a motor cycle be also divided equally between the parties.

The appellant was dissatisfied with the impugned decision of the 1st appellate court, he has therefore filed this appeal with a total of fourteen (14) grounds of appeal as listed in the petition of appeal.

At the hearing of this appeal, the appellant appeared in person whereas the respondent did not enter appearance to defend her this appeal. Therefore, the appeal proceeded to be heard ex parte. Supporting his grounds of appeal, the appellant submitted that he was not heard by the 1st appellate court and that he was not afforded an opportunity to cross examine the child aged 5 years old. The appellant also stated that the respondent is drunkard to maintain the children and he had never lived in one roof with the respondent save that he was in process of marrying her. The appellant added that the house in question is located at Karatu District and it was a renting house.

Having briefly demonstrated what transpired before the courts below, It is now time to determine the grounds of appeal. On the first ground of appeal the appellant alleged that the 1st appellate erred in law and fact for failure to determine and consider all grounds of appeal which amounts to mishandling of the case and contrary to the fundamental right to be heard.

In determining this ground of appeal, I had to carefully revisit the proceedings of the 1st appellate court, from the record, the 1st appellate Magistrate while disposing the appeal at page 2 paragraph 2 of the judgment said the following;

"Aggrieved by the decision the appellant appealed to this court with twelve grounds of appeal; however, for reasons which will be apparent herein, I do not intend to consider all the grounds of appeal raised by the appellant."

My further reading of the 1st appellate court's judgment discovered that the main issue that was considered by the 1st appellate court Resident Magistrate was, whether the appellant and the respondent were duly husband and wife. After determination of this issue, the 1st appellate court went on to pronounce that there was a presumption of marriage between the parties and gave other orders as to the division of the matrimonial properties, maintenance of the children and the custody of the children.

The appellant raised a total of twelve (12) grounds as explained earlier including failure to properly evaluate evidence. From the list of the grounds of appeal in relation to the judgment delivered by the 1st appellate court, it is with no doubt that the judgment did not dispose all grounds of appeal. Worse still the appellate Magistrate made a new

division of the matrimonial properties' contrary to what the trial court ordered.

It is a settled position of the law that, a matter not decided by the lower court exercising its original jurisdiction or appellate jurisdiction, cannot be decided by this Court. Hence, this court when exercising its appellate jurisdiction is entitled to consider only matters that were raised, considered and decided upon by the 1st appellate court save legal issues such as jurisdiction and limitation of time. This position was stressed at length by the Court of Appeal of Tanzania in **Swabaha Mohamed Shosi vs. Saburia Mohamed Shosi**, Civil Appeal No. 98 of 2018 (Unreported) when discussing the issue of a failure by the High Court to decide on the issue of alleged illegality in an application for extension of time, with the approval of its decision in **Alnoor Sharif vs. Jamal Bahadur Ebrahim**, Civil Appeal No. 25 of 2006 (unreported) held;

"Once we have found that the matter that was before the trial judge for consideration was not determined then it follows that, we have no base for continuing to address ourselves on the rest of the grounds".

Also in **Celestine Maagi vs. Tanzania Elimu Supplies (TES) and Another**, Civil Revision No. 2 of 2014 (unreported) where the Apex Court of the land stated:-

*"The powers of the Court on matters arising from the lower courts are only exercisable in two ways. First, by way of appeal and second by way of revision. This is provided under S, 4 (1), (3) of the Act **and ordinarily the Court would exercise its appellate and revisional powers only after the lower courts have handed down their decisions**" [Emphasis added].*

In this instant appeal, it is quite apparent that, there is no decision of the 1st appellate court with regard to the grounds of appeal filed and argued in writing by the appellant. It follows therefore, this court has no basis of continuing to address rest of the appellant's grounds of appeal contained in his petition of appeal.

Consequently, this appeal is allowed, the judgment and the ancillary orders of the 1st appellate court are hereby quashed and set aside. It is further ordered that, the lower record be expeditiously remitted to the 1st appellate court before the same Resident Magistrate for composition of a fresh judgment on all grounds of appeal unless one or two grounds are related, and if so, that should be stated with that effect. Considering the

nature of the relationship between the parties, I am therefore compelled to abstain from making an order as to costs of this appeal.

It is so ordered.


M. R. GWAE
JUDGE
24/08/2022

Order: Mention on 07/09/2022 at about 10:00 hrs before the 1st appellate Resident Magistrate




M. R. GWAE
JUDGE
24/08/2022