IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SISTRICT REGISRTY

AT SONGEA

PC CIVIL APPEAL NO. 04 OF 2022

(Originated from Matrimonial Appeal No. 08 of 2021 Mbinga District Court at Mbinga which emanated from Matrimonial Cause No. 06 of 2021 at Matiri Primary Court)

DEOGRASIAS I. MPANGALA ..... APPELLANT

VERSUS

DEVOTHA K. KOMBA ..... RESPONDENT

EX PARTE JUDGEMENT

Date of last Order: *21/07/2022*
Date of Judgement: *30/08/2022*

MLYAMBINA, J.

As a second bite, the Appellant, Deograsias I. Mpangala lodged this appeal to challenge the decision of Mbinga District Court at Mbinga (henceforth the First Appellate Court) on *Matrimonial Appeal No. 08 of 2021* delivered on 24th January, 2022 before Hon. G. E Kimaro. The First Appellate Court upheld partly the decision of Matiri Primary Court (henceforth the Trial Court).

The genesis of the matter as per the Court records is as follows; the parties in this case were living together since 1993. They were blessed with one issue. They jointly acquired some properties including; a house situated at Chumbageni Hamlet, a farm measuring 10 hectors,

Solar Panel make Sunder, Sunder battery, house utensils, a bed and its mattress. They lived happily until on 17th June, 2020 when their paradise turned into sour. The Appellant herein took the Respondent to the Village Government Chairman and before him he handled the Respondent to her parents to stay for three months. After three months, the Respondent went back to the Chairman but she was told that her husband has said nothing. He advised her to return to her parent's house.

The Respondent decided to lodge the Matrimonial cause before the Trial Court in which she prayed for the following orders: *First*, divorce decree. *Second*, division of matrimonial property. *Third*, custody of a child and; *forth*, child maintenance.

After full trial, the Trial Court separated the parties; the custody of a child was placed to the Respondent; the Appellant was ordered to pay TZs 30,000/=(Thirty Thousand Tanzanian Shillings only) monthly as maintenance to the child and each party was given a half of the property acquired during the subsistence of their marriage.

The Appellant unsuccessfully appealed to the First Appellate Court, in which the decision of the Trial Court was partly upheld and the remaining part on the issue of jurisdiction was dismissed, hence this appeal based under the following grounds:

1. That, the Appellate Court erred in law and fact by receiving and upholding the decision of Trial Court of which it has no jurisdiction to entertain;
2. That, the Appellate Court erred in law and in fact by upholding the decision of the Trial Court and assuming the nature of the marriage of the Appellant and the Respondent without strictly proof from the parties; and
3. That, the Appellate Court erred in law and fact by upholding the decision of Trial Court which ordered for equal division of the joint acquired properties without justification and even regard to the extent of contribution of parties and needs of matrimonial issues.

At the date scheduled for the hearing, the Appellant was represented by Mr. Denis Lazaro, learned Advocate. The Respondent did not appear in Court without any information though she was properly served. As a result, the case was heard *ex-parte* under the provisions of *Order IX Rule 1 and 8 of the Civil Procedure Code [Cap 33 Revised Edition 2019].* Hence, *ex-parte-judgement.* The appeal was heard orally.

The Counsel for the Appellant prayed his memorandum of appeal to be adopted and be party of his submission. Furthermore, the Counsel

dropped the third ground and submitted the first and second grounds collectively.

As regards the first and second grounds of appeal, the issue is; *whether the trial Court had jurisdiction to entertain the matter before it.* Counsel Denis Lazaro averred that, nowhere in the proceeding of the trial Court the issue of nature/type of marriage contracted by the parties was discussed. Instead, the trial Court continued to entertain the matter without satisfying itself as to whether it had the jurisdiction to entertain the matter or not.

Counsel Denis submitted further that the issue of jurisdiction was also raised before the First Appellate Court by the Appellant herein. The First Appellate Court in its decision at last paragraph of page 3 to first paragraph of page 4 had these to state:

> *So longer as parties did not prove the type of their marriages, even submitting their Marriage Certificate. Hence this Court assumes the trial Court to have had jurisdiction of the case before it.*

Counsel Denis added that, if Parties to the case proved their marriage to be Christian marriage, then the trial Court would have lacked jurisdiction over that matter. Before determining the said matter, the status and the type of the said marriage had to be determined so

that to be certain if the Court has jurisdiction or not. He supported his argument with the case of **Wilson Andrew v. Stanley John Lugwisa and Tatu Joseph,** Court of Appeal of Tanzania at Mwanza, Civil Appeal No. 226 of 2017 (unreported). After the arguments, the First Appellate Court Magistrate went on to dismiss the appeal for want of jurisdiction. The First Appellate Court erred on assuming the nature of Marriage. Therefore, the assumption made by the First Appellate Court goes to the root of the authority of the Court as to whether it had jurisdiction to entertain the matter before it. He buttressed the arguments with the case of **Fanuel Mantiri Ngunda v. Herman Mantiri Ngunda and 20 Others** [1995] TLR 155.

More so, Counsel Denis added that, the question of jurisdiction of the Court is basic. It goes to the root of the authority of the Court to adjudicate upon cases of different nature. The question of jurisdiction is so fundamental. The Courts must as a matter of practice on the face of it, remain certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the Court to proceed with the trial of a case on the assumption that the Court has jurisdiction to adjudicate upon a case.

It was Counsel Denis' views that the First Appellate Court erred in law and in facts by upholding the decision of the Trial Court of which it

had jurisdiction to entertain it. He prayed this appeal be allowed, the proceedings and Judgement of the lower Courts to be quashed and set aside for lack of jurisdiction and any other order as the Court deems fit to grant.

After careful consideration of the submission from the Counsel for the Appellant and the record of the subordinate Court, I will start with the issue; *whether the trial Court have jurisdiction to entertain the presumption of marriage.* Before going to the merit of this case, I will re-evaluate the evidence of the Trial Court. It must be recalled that re-evaluation of the evidence is the domain of the First Appellate Court. But failure to do so empowers the Second Appellate Court to cautiously reevaluate the concurrent findings of the facts made by the subordinate Courts below unless such subordinate findings are a result of misapprehension, misdirection or non-direction of the evidence resulting into the miscarriage of justice. This was stated in the case of **Elias Mwangoka @ Kingloli v. The Republic**, Criminal Appeal No. 96 of 2019, Court of Appeal of Tanzania at Mbeya (unreported).

It has to be noted that jurisdiction of the Court is a creature of the statutes. It is conferred and prescribed by the law and not otherwise. That was the position in the case of **Patrick William Magubo v. Lilian**

Peter Kitali, Civil Appeal No. 41 of 2019, Court of Appeal of Tanzania at Mwanza (unreported).

A Judge or Magistrate before embarking on adjudication of a case must ascertain on the jurisdiction point because it goes to the very root of the case. The same principle was stated in the case of **Republic v. Ahmad Ally Ruambo**, Criminal Revision No. 03 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported). The jurisdiction of the Primary Court over matrimonial matters is provided for under two laws: First, *section 18 (1) (b) of the Magistrate Courts Act [Cap 11 Revised Edition 2019].* Second, *section 76 of the Law of Marriage Act [Cap 29 Revised Edition 2019].* For easy of reference section *18 (1) (b) and section 76 (supra)* provides that:

> 18.-(1) A primary Court shall have and exercise jurisdiction-
>
> (a) NA
>
> (b) in all matrimonial proceedings in the manner prescribed under the law of Marriage Act.
>
> 76.- Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a Court of Resident Magistrate, a District Court and a Primary Court.

From the above provision, it is expressly clear that the law vests the Primary Court with the jurisdiction to entertain all kind of matrimonial proceedings which are recognized under *the Law of Marriage Act (supra).*

The word "matrimonial proceedings" is defined under the provision of *section 2 of the Law of Marriage Act (supra)* as "any proceedings instituted under *parts II and VI of the Law of Marriage Act (supra)."* Under *Part II of the Law of Marriage Act (supra),* all forms of marriage recognized in our jurisdiction are stated. It includes Christian Marriages, Islamic Marriages, Traditional Marriages and Civil Marriages. Apart from that, *section 160 of the law of Marriage Act (supra)* provides that:

> If the parties have lived together in which a presumption of marriage arise and such presumption is rebuttable in any *Court of competent jurisdiction* the part shall be entitled to the reliefs consequential to the order of dissolution of marriage. [Emphasis applied]

The phrase "Court of competent jurisdiction" stated under the provision of *section 160 of the Law of Marriage Act (supra),* means all Court vested with the jurisdiction under *the Law of Marriage Act (supra)* including Psrimary Court as per *section 76 of the Marriage Act (supra).* The same position was reached by this Court in the case of **Abdul**

Milanzi v. Asha Makeo, DC, Civil Appeal No. 10 of 2021, High Court of Tanzania at Songea (page 28 and 29). Therefore, I find the First Appellate Court Magistrate erred in law on ousting jurisdiction of the Primary Court. It is the holding of this Court that Primary Courts have jurisdiction in all matrimonial proceedings including presumption of marriage. The same holding was stated in the case of **Limbu Ntalima v. Ester Kaoande,** PC. Matrimonial Appeal No. 3 of 2019 High Court of Tanzania at Shinyanga (unreported).

However, from the record, the Trial Magistrate ordered divorce decree under the provision of *section 107 (2) (e) of the Law of Marriage Act (supra)* while there was no any proof as to which form of marriage the parties contracted. There is no dispute that the parties lived together since 1993 until on 17th June, 2020. They lived together for more than 17 years and they acquired a reputation of being husband and wife and there was no formal marriage between them. The right provision of the law which was supposed to be used was the provision of *section 160 of the Law of Marriage Act (supra)* as the parties lived under presumption of marriage. The presumption of marriage is not a formal marriage capable of being dissolved under *section 107 (2) (c) of the Law of Marriage Act (supra)*. The same position was stated in the case of **Hidaya Ally v. Amiri Mlugu** [2015] TLR 329.

As rightly argued by the Counsel for the Appellant, the First Appellate Court Magistrate erred for upholding the decision of the Trial Court by assuming the nature of marriage of the parties without any strictly proof from the parties themselves.

Woefully, the 1st appellate Court did not detect the said irregularity as it also fell into the trap by blessing the decision of the trial Court which was based on the provision of *section 107 (2) (e) of the Law of Marriage Act (supra)* contrary to the requirement of the law and proceeded to grant the reliefs consequential to.

Notwithstanding there was no dispute that the parties were cohabiting as wife and husband, there was a need for the Trial Court to satisfy itself if the said presumption was rebuttable or not. It was inappropriate for the Trial Court to determine the presumption of marriage based on the provision of *section 107 (2) (e) of the Law of Marriage Act (supra)* while there is no any proof if the parties had contracted a formal Marriage.

More so, the act of the trial Magistrate of granting subsequent reliefs prayed before satisfying itself on the existence of the presumption of marriage is unacceptable. This was stated in the case of **Richard Majenga v. Specioza Sylvester**, Civil Appeal No. 208 of 2018, Court of Appeal of Tanzania at Tabora (unreported).

After re-evaluation the trial Court evidence, I noted a strange procedure undertaken by the Trial Court Magistrate for visiting the *locus in quo* i.e the matrimonial house and the farm which were mentioned as part of their matrimonial assets. There are no clear reasons and motives which carried out the legal mind of the Trial Court in reaching such decision. It must be restated that the purpose of visiting the *locus in quo* was stated in the case of **Avit Thadeus Massawe v. Isidory Assenga,** Civil Case No. 6 of 2017, Court of Appeal of Tanzania at Arusha (unreported) when it cited with approval the Nigerian High Court decision of the Federal Capital Territory Abuja Judicial Division in the case of **Evelyne Even Gardens NIC Limited and the Hon. Minister, federal Capital Territory and Two Others,** Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017. In the latter case, the Court stated the following circumstances of visiting locus in quo:

> "1. Courts should undertake a visit to the *locus in quo* where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (see **Othiniel Sheke v. Victor Plankshak** (2008) NSCQR Vol. 35, p. 56.

2. The essence of a visit to *locus in quo* in land matters includes *location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land* (see **Akosile v. Adeyeye** (2011) 17 NWLR (Pt. 1276) p.263.

3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the Court to visit the *locus in quo* (see **Ezemonye Okwara v. Dominic Okwara** (1997) 11 NWLR (Pt. 527) p. 1601).

4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. (Emphasis added)."

So, it is clear that the Court can visit a *locus in quo* only if the evidence is conflicting to each other or to verify on the location of the disputed land, the extent, boundaries and physical features on the land.

From the record of this case, all the properties were clearly identified and their location was ascertained. Therefore, there was no need for the Trial Court Magistrate to visit the *locus in quo*. Allowing the Trial Court visiting a *locus* in matrimonial cases will create bad precedent

and wastage of time and resources. Indeed, it is unnecessary luxury which should not be preferred as it serves nothing in justice delivery.

In upshot, this Court has reached into a conclusion that the proceedings before the subordinate Courts were vitiated. As such, I hereby allow the appeal. The proceedings of the subordinate Court are hereby nullified, Judgement and the order consequential to are quashed. If the party are at liberty to initiate the proceedings afresh; it has to be initiated in accordance with the law and be tried by another competent Magistrate. No order to costs. Order accordingly.

Y. J. MLYAMBINA

JUDGE

30/08/2022

Judgement pronounced and dated 30th day of August, 2022 in the presence of learned Counsel Denis Lazaro for the Appellant and the Respondent in person. Right of Appeal explained.

Y. J. MLYAMBINA

JUDGE

30/08/2022