IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 122 OF 2021

ZALHA MOHAMED BAKARI ..... APPELLANT

VERSUS

BAKARI AMRI ..... RESPONDENT

(Appeal from the decision of the District Court of Mafia at Mafia in Matrimonial Appeal No. 2 of 2021)

JUDGMENT

26th and 30th September, 2022

KISANYA, J.:

In this appeal, Zalha Mohamed Bakari, the appellant herein, seeks the reversal of the judgment and decree of the District Court of Mafia at Mafia (the first appellate court) in Civil Appeal No. 2 of 2021 dated 10th June, 2021. In that judgment, the first appellate court confirmed the judgment and orders of the Primary Court of Kilinondoni (the trial court) in Matrimonial Cause No. 9 of 2021.

Briefly stated, the appellant successfully petitioned to the trial court for reliefs of divorce, division of matrimonial properties and maintenance of one issue. After hearing the evidence adduced by the parties herein, trial court granted the divorce and awarded the appellant 10% of the matrimonial properties, three

mobile phones and two tables. Further to this, the respondent was ordered to pay the appellant a sum of TZS 30,000 per month as maintenance cost of the said issue.

The appellant was aggrieved with the decision of the trial court. She appealed to the District Court of Mafia on the following four points of complaints, in verbatim:

1. *That the trial Magistrate erred in deciding in favour of the respondent on the issue of division of the matrimonial properties.*
2. *That the trial Magistrate erred in deciding in favour of the respondent on division of pieces of land.*
3. *That the trial Magistrate erred in law and in fact by failing to evaluate and consider the strong evidence adduced by the Appellant's witness and relying on weak evidence adduced by the Respondent.*
4. *That the trial Magistrate erred in law and in fact by ignoring some of the assets which were mentioned as subject of matrimonial properties.*

When the appeal was called on for hearing before the first appellate court, the appellant and respondent gave their evidence. Thereafter, the first appellate court went on delivering its judgment in which the judgment and orders of the trial court were confirmed.

The outcome of the appeal aggrieved the appellant. She lodged the instant appeal which is premised on four grounds of appeal. However, for the reasons to be noticed later, I find it not necessary to reproduce the grounds of appeal fronted by the appellant.

At the hearing of the appeal before me, the appellant was represented by Mr. Herman Kilenzi, learned advocate, whereas the respondent had the services of Ms. Neema Cathbet, also learned advocate.

Before the hearing could commence, I wanted to satisfy myself on the propriety of the proceedings of the first appellate court for the reason that, the District Court recorded the evidence of the parties instead of hearing them on the ground of appeal. Therefore, the learned counsel for the parties were invited to address the Court on that issue.

In their respective submissions, the learned counsel for the parties faulted the first appellate court for acting as a trial court. They were at one that the first appellate court ought to have determined the appeal after hearing the parties' arguments for and against the appeal. It was their further submissions that the appellant's appeal was not heard. In the result, this Court was moved to nullify the proceedings of the first appellate court, quash and set aside the decision made thereon.

Having considered the submissions made by the counsels for both parties, the issue for my determination is whether the first appellate court heard the appeal before it.

The procedure of hearing the appeal from the primary court is provided for under rule 14 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1964 (henceforth "the Rules") which reads:

> *"At the hearing of an appeal, the appellate court, after hearing such additional evidence, if any, as it may permit or require, shall first hear the appellant or his agent and then, unless it forthwith dismisses the appeal, the respondent or his agent and the appellant or his agent shall have the right to reply."*

Flowing from the above cited provision, it is clear an appellate court is enjoined to hear additional evidence. However, it is trite law that such power is exercised when there is an application to such effect. Even if the appellate court decides to hear additional evidence, it is bound to hear the appellant and respondents on the appeal lodged before it.

As hinted earlier, the first appellate court did not hear the parties on the grounds of appeal filed before it by the appellant. The record bears it out that the appellant and respondent gave evidence under oath. Nothing to suggest that the

appellant and respondent adduced additional evidence. This is when it is considered that there was no application for additional evidence made by the appellant or the respondent. Yet, the first appellate court proceeded to pass the judgment in respect of appeal without inviting the parties to submit for and against the appeal.

In terms of the settled law, a decision from the proceedings in which the right to be heard was infringed cannot be allowed to stand. It does not matter whether the court would have arrived at a similar decision after hearing the parties. I am fortified, among others, by the case of **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Faza Iboy**, Civil Application No. 33 of 2002 (unreported) in which the Court of Appeal underlined that:-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

In the light of the foregoing, I hold the view that the omission to hear the appeal in terms of rule 14 of the Rules vitiated the proceedings before the first appellate court. Consequently, the decision made thereon was also vitiated.

Therefore, I exercise the revisional powers of this Court and proceed to quash the proceedings of the first appellate court and set aside the judgment and decree made on the said proceedings. For the interest of justice, I remit to case file to the first appellate court for the appeal to be heard before another magistrate with competent jurisdiction. Considering the circumstances and nature of this case, I make no order as to costs.

DATED at DAR ES SALAAM this 30th day of September, 2022.

S.E. Kisanya
JUDGE

Court: Judgment delivered 30th day of September, 2022 in the presence of the appellant, Mr. Herman Kilenzi, learned advocate for the appellant and Ms. Neema Cuthibet, learned advocate for the respondent.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

S.E. Kisanya
JUDGE
30/09/2022