IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL APPEAL NO. 16 OF 2021

(Originating from Civil Case No. 02 of 2021 of the Resident Magistrates' Court of Bukoba at Bukoba)

EVANGERINA KOKUSHUBIRA ELIZEUS..... APPELLANT

VERSUS

REVINA ANATORY..... RESPONDENT

JUDGMENT

21/03/2022 & 13/04/2022

NGIGWANA, J.

This appeal touches on the aspect of adultery under the Law of Marriage Act (LMA), Cap 29, (R.E 2019) under the laws of Tanzania, which proceeds to form void marriage. Moreover, the said appeal draws the distinction between void and voidable marriages on their corelative effects and reliefs which courts could ultimately order or grant when these marriages are at issue or in controversy. The major issue in particular being whether after the trial court had answered the issue of adultery (which was a cause of action before the trial court in the plaint) in affirmative, which resulted to the subsequent marriage in place of the former subsisting Christian marriage, did the trial court legally lack jurisdiction in the circumstance to declare the subsequent marriage as *null* and *void?.* Was the trial court legally justified to have ruled that the plaintiff now appellant had only one cause of action by bringing a petition as a **matrimonial proceeding**

under Part VI of the LMA upon which the trial court could have ordered a declaratory decree or annulment order?

The facts of this case for the purpose of comprehending the matter are necessary. They are therefore discerned from the record that, the appellant one Evangerina Kokushubira Elizeus officially contracted a Christian Marriage with her husband Elizeus Banyenza (who did not appear at the trial court) on 08.03.1998 at Buguruni KKKT Dar es salaam. Sometimes in February, 2020, she discovered that the respondent one Revina Anatory had inter feared her marriage by being in love affairs with her husband in their second family house in Kyendanzigu Village, Gera Ward. Circumstantial evidences which necessitated her to be aware of, was that, she firstly found severally the defendant's children at their village house where he occasionally visited. She was eventually satisfied that the respondent was a concubine as the appellant's husband had moved into the defendant's house which the said husband built her a house for his concubine at her shamba. More astonishing, she discovered that her husband had removed her ring and wore another new wedding ring which she described matched with the respondent's ring.

In further inquiry in her village marital house, she found a copy of the marriage certificate between her husband and his concubine (the respondent) which was celebrated before Misenyi District Commissioner Office in 2017 as the second Civil Marriage. Tirelessly, her investigation did not end there, she travelled to Misenyi District Commissioner's Offices where she met with District Administrative Secretary (DAS) who admitted

to have officiated the subsequent Civil Marriage after receiving affidavits of the parties to have stated that they had no any subsisting marriage.

The end of all that saga, the appellant had to file a plaint to institute a normal civil case in the District Court of Bukoba through Civil case No. 2 of 2021 claiming damages for adultery to the tune of Tshs. 50,000,000/= against the defendant being suffered damages arising from committing the adulterous acts with her husband. The reliefs claimed by the appellant in the district court as they appear to be relevant in this appeal are reproduced in verbatim as follows:-

(i) *The Declaration order that the Defendant has been committing the adultery with the husband of the Plaintiff.*

(ii) *Order for payment of the suffered damages accruing from adulterous act against the defendant.*

(iii) *The order for payment of the interest of the amended amount in the preceding paragraph at the rate of 12% per annum from the time of judgment deliverer up to the date of payment satisfaction.*

(iv) *The order for perpetual injunction against the further commission of the adulterous act.*

(v) *Costs.*

(vi) *Any other order(s) and relief(s) as this Honorable court deem just to grant.*

The District Court after conducting a full trial, arrived at its findings that the act of adultery was committed and that the subsequent marriage was contracted while the first Christian Marriage was still subsisting. The trial court gave no Declaration order or an order stopping adulterous relationship. The trial court neither said something on the effect of the said subsequent marriage and ultimately dismissed the Plaint. Hence this current appeal.

The grounds of appeal coined in the memorandum of appeal were verbatim couched viz: -

1. *That even after finding and answering the first issue on the commission of the adulterous act by the respondent and the Appellant's spouse in affirmative the trial court immensely erred in law and fact by declaring there was no cause of action grounding on the absence of the knowledge of the marital status of Elizeus Banyenza notwithstanding the abundant and crystal adduced testimony.*

2. *That, the trial Magistrate misdirected herself by refusing to declare* ***null and void*** *the invalid subsequent contracted Marriage entered by the Respondent and the appellant's spouse as per the tendered Exhibit P2 whose prior Christian Marriage was still subsisting by basing on sections 39, 94 and 97 (1) & (2) of the Marriage Act Cap. 29 R.E. 2019.*

3. *That, in delivering its judgment the lower court failed to account for the established principles of the balance of probabilities in respect to the heavier evidence testified by the prosecution side.*

Finally, the appellant prayed to this Hon. Court to allow the appeal on the following reliefs.

(a) The reversal of the judgment entered by the trial court by declaring null and void the Subsequent Marriage Contract Entered by the respondent and the appellant's spouse.

(b) The order for the payment of the general damages arising from the adultery commission against the Respondent.

(c) Cost of this appeal.

(d) Any other Order(s) and Relief(s) as this Hon. Court may deem just to grant.

The parties were dully represented. Advocate Lameck Erasto represented the appellant, so did advocate Ibrahim Muswadiku for the Respondent. Both parties' advocates agreed to submit orally.

Invited to start his oral submission, the learned counsel Lameck for appellant, opted to argued grounds No. 1 and 3 jointly whereas ground No. 2 was separately argued. He therefore started with ground No. 1 and 3 jointly that the appellant instituted a suit against the respondent for interfering her marriage and committed adultery with her husband called Elizeus Banyenza praying that the appellant be compensated Tshs 50,000,000 and be stopped from continuing with adultery and the marriage

between the respondent and appellant's husband be nullified. Advocate Erasto went on that, from page 9 to 17 (of the trial court proceedings) the appellant (PW1) and the District Administrative Secretary, DAS (PW2) had proved that the respondent committed adultery with her husband.
That the appellant was a rightful wife of Elizeus Banyenza who they contracted their Christian marriage on 8/03/1980 and their certificate of marriage was issued which was tendered and admitted as exhibit P1 before the trial court. That since February 2020 the appellant, through circumstantial evidence, the respondent was repeatedly bringing two children in their village marital house and later on it was discovered that her husband was wearing new ring different from that of the first marriage.

Mr. Lameck further elaborated that the appellant, later on discovered that the respondent was married to her husband in 2017 at the District Commissioner's office and that second marriage being officiated by DAS (PW2). The learned counsel further submitted that the DAS at the trial court testified that the parties before him tendered their affidavits to prove that there was no subsisting marriage between them. That exhibit P2 was a certificate of marriage evidencing the subsequent marriage officiated by DAS which was tendered and admitted by the trial court.

To show that circumstantial evidence suffices to prove adultery, the learned counsel cited the case of **Gai Ipenzule vs Sumi Magoye** (1986) TLR 289 which ruled that adultery not always will be proved by *fragrante delicto.*He argued that generally adultery is proved by circumstantial evidence. Mr. Lameck exclaimed that it was very unfortunate that after the

trial magistrate had satisfied herself and concluded that the respondent had proved adultery it went on to state that there was no cause of action and dismissed the plaint. It was therefore Mr. Lameck's argument that the fact that the respondent was married to Elizeus Banyenza who had a subsisting marriage with the appellant in a Christian Marriage therefore the respondent was aware of the existing marriage.

In another issue, the appellant's advocate submitted that failure by the trial court to declare that the marriage between Elizeus Banyenza and the respondent was null and void was an error since it was contracted while another marriage was subsisting. He referred to us the provision of **section 10 (a) of the Marriage Act**, Cap 29 R.E 2019 that the marriage is either monogamous or intended to be monogamous. That, therefore exhibit P1 which was a Christian marriage certificate which was monogamous and hence was not competent to contract another marriage on top of it which is evidenced by exhibit P2. He again buttressed his stance by citing the provisions of **section 11 (5) of the Law of Marriage Act** (supra) where he argued that the law is clear that no marriage celebrated in Christian form may so long as both parties continue to profess the Christian faith be converted from monogamous to polygamous.

To further amplify his stance, he also wanted me to look on the case of **Abdala Hamidu Mohamed versus Jasnena Zarubra** (1983) TLR 313 where the court held in common law that a second marriage ceremony after the parties have validly married is of no legal importance. He cited

another case of **Elizaberth Mohamed vs Adolf John Magesa** (2016) TLR at page 121, where the court held that there can be no doubt that under the provision of **section 38 (1) (c) of the LMA** Cap 29 R.E 2002, the ceremony purporting to be a marriage is a nullity if either party is incompetent to marry by reason of subsisting marriage contracted under **section 10 (1) (a) and section 15 (1) of the same Act**.

He concluded that the failure by the trial court to declare that the second marriage was null and void was an irregularity because there was sufficient evidence before the trial court. There was certificate of marriage of the first marriage which was never annulled. Hence prayed his appeal to be allowed and the court declare that the second marriage was null and void and the respondent be condemned to costs.

Invited for the reply, Advocate Mswadiku for the respondent submitted that the decision of the trial court was very clear. He referred page 9-17 of the typed proceedings to show that the respondent had no knowledge of the existing marriage between the Appellant and her husband Elizeus Banyenza. He said that, at the trial court, PW2 testified that the appellant's husband swore affidavit which he presented in his office that he was not married. He elaborated that Elizeus Banyenza was living alone. He further substantiated that, but also, PW1 told the court that her husband had removed his wedding ring and that the appellant had abandoned her husband and separated because her husband was in village and the appellant was living in town. He contended that they were therefore separated since 2014 with no sexual relationship to each other and

according to those circumstances the respondent could not have reasonably known the subsisting marriage as the new relationship started from 2015.That there were 21 days' notice published prior the wedding but to his surprise, the appellant did not turn up for objecting the intended marriage.

It was Mr. Mswadiku further submission that looking at the respondent's evidence from page 18 to 20 of the typed proceedings it is apparent that the respondent proved to the balance of probability that Elizeus Banyenza was not married. He referred this court to section 110 of the Evidence Act that the one who alleges must prove and must do so on the balance of probabilities. He also backed up his position by the case of **Hemed Said vs Mohamed Mbilu** (1987) TLR 133 which held that the parties to the case cannot tie but the one with heavier evidence than the other must win the case. Mr. Mswadiku contended that in that circumstances the one who could be sued by the appellant was Elizeus Bnyenza, her husband as the respondent was duly innocent. He distinguished the cited cases by the appellant's counsel that in those cited cases by the appellant's advocate, parties had knowledge of the existing marriage which is different to case at hand where the respondent had no knowledge.

As to the submitted argument in chief by the appellant's counsel, that the respondent was a close neighbor to Elizeus Banyenza in the village, the respondent's counsel responded that it was a mere assertion which was not proved before the trial court, hence prayed for the court to disregard it.

Concerning the issue of prayers not being granted by the trial court, Mr. Mswadiku submitted that the trial court failed to annul the 2nd marriage because that was not among the prayer which the respondent prayed in the plaint. He emphasized that parties are bound by their pleadings and the court cannot grant a prayer which was not sought. He further substantiated that the appellant had no reason to blame the court. He argued that no one can benefit for its own mistake. He buttressed the said stance with the case of **Abdu Athumani Kinumi versus Sofia Hassan**, Misc. Land Application No.12 of 2021 HCT (Unreported). He therefore prayed this court not to grant the prayers sought. He finally prayed this court that the judgement and order of the trial court to remain undisturbed. He ended that section 72 (2) of the Evidence Act Cap 6 R.E 2019 is apparent that a party who has no knowledge cannot be condemned.

Submitting in rejoinder, Mr. Lameck reiterated what he submitted in chief by stating that the respondent had knowledge to the subsisting marriage as she engaged in love relationship with Banyenza Elizeus for almost 12 months that she would have reasonably known. That even if Elizeus Banyenza swore an affidavit it has no evidential value in law as it is the lie. That the court cannot rely on such affidavit.

Mr. Erasto therefore was of the view that the trial court did not resolve every issue as the law is very clear that two marriages cannot co-exist. That even if there was no specific prayer to annual the second marriage the court as the court of justice ought to have resolved the issue. The

position that the court cannot grant what was not prayed for is the general rule but exceptional circumstance is that every case has its own facts and should be decided on its own merit. He was to the effect that since the appellant had heavier evidence the court could have decided on her favour and nullify the marriage.

I am respectfully enjoined to determine whether this appeal has merit. I have keenly considered all submissions by advocates as well as the entire record of this appeal. Through the entire assessment of submissions and record as well, I grasped that there are undisputed facts which I wish to state them at the outset of this judgment and which I firmly believe will narrow down the discussion and save time of this court as follows:
One, there is no dispute that the appellant was previously married to Elizeus Banyenza in a Christian form of marriage. **Two,** Parties do not dispute that the said Christian marriage was monogamous and was neither polygamous nor intended to be polygamous. **Three,** Parties are at one that while the first marriage was still subsisting another subsequent civil marriage between the respondent and appellant's husband Elizeus Banyenza was contracted. **Four**, there is no dispute that neither party has challenged the findings of the trial court that it was proved that the respondent committed adultery which resulted to the second marriage. **Five,** there is no dispute that the subsequent civil marriage cannot exist where there is the subsisting monogamous Christian marriage which was intended to be monogamous.

What appear to be borne of contentions between the parties and in fact which are issues which need to be resolved by this court are as follows:

1. *The appellant's counsel submits that when the respondent committed adultery, she had knowledge of the existing marriage. The respondent's counsel oppose that the respondent had no knowledge.*

2. *The appellant's counsel faults the judgment of the trial court that since it had concluded that the respondent committed adultery which resulted to the second marriage, it could have awarded reliefs of damages prayed and nullify the subsequent marriage even if the prayer to nullify the marriage was not prayed in the plaint. The respondent's counsel agrees with the decision of the trial court that it could not have annulled the marriage as there was no such prayer in the plaint.*

I start to dispose the first issue. The respondent's counsel submitted that the respondent had no knowledge whether the appellant's husband was married when she committed adultery. The trial court concluded that the respondent had no knowledge and dismissed the plaint. The appellant's counsel opposes that proposition. I wish to quote the wordings of the provision of section 72(2) of the LMA as follows:

"A suit brought under this section shall be dismissed ***if the defendant satisfies the court that he or she did not know and could not, by the exercise of reasonable diligence,*** *have known that the person with whom he or she committed the act of adultery was married"*

From the above provision, the respondent was duty bound to satisfy the court, as usual, on the scale of balance of probabilities that she made due diligence to inquire on the status of the appellant's husband before committing adultery. I derived much help from the **Black's Law Dictionary, Eighth, Edition of 2004** to see what do the word *due or reasonable diligence* entails.

"Diligence *is a continual effort to accomplish something or a care, caution; attention and care required from a person in a given situation. Due or reasonable diligence is the diligence reasonably expected from and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation. A failure to exercise due diligence may sometimes result in liability".*

I paused to ask, did the respondent attempt to satisfy the trial court that she made a continual effort or did she seek to satisfy herself whether Elizeus Banyenza was married before she could commit adultery with him? I was very keen at perusing the trial proceedings to see whether the respondent discharged such obligation in her defence but in vain. To confirm that the respondent made no due diligence, I am obliged to quote part of her testimony **on page 19** of the trial court proceedings as the record speaks for itself viz:

"I don't know Kyendanzigu village. Till to day I don't know where Elizeus Banyenza was staying by then and now"

The record has it that the appellant's husband one Elizeus Banyenza lived in Gera Ward and the respondent lived in Kitobo Ward, both are situated in

Misenye District but the respondent did not bother even to travel to her concubine to inquire the status of marriage. It is my considered view that if the respondent would have made any due diligence, she would have reasonably known that Elizeus Banyenza aged 62 years old was married, the obligation which she failed to discharge.

I am not ready to agree with the findings of the trial court that since there was evidence from the plaintiff case (at the trial court) that the appellant's husband swore affidavit before contracting the second marriage and since the respondent was told by the appellant's counsel that he was single and that since it was not in dispute that Elizeus Banyenza did not wear a first marriage wedding ring, it was enough for the respondent to satisfy herself that Elizeus Banyenza was not married. I do not subscribe to such reasoning because when the concubine swore affidavit for the purported second marriage, they were already in adulterous relationship for almost a year and for such a long period, no diligence effort was ever exercised by the respondent and again the testimony given by the respondent that she had never gone to Elzeus Banyenza, and till to date, she did not know where Elzeus Banyenza is staying negates that proposition that she had made neither effort nor due diligence to discharge her obligation. It is not enough to believe somebody who merely says was single without further effort. Again, the fact that somebody has no ring in his or her finger is not final and a conclusive proof that he/she is not married. It should be noted that adultery is a voluntary sexual relation between a party who is legally married and a person who is not his/her spouse. The circumstances in the matter at hand revealed that the respondent entered into sexual

relationship with the appellant's husband while knowing or having reasons to have known that the said man was married. The first issue is answered that the respondent failed to satisfy the trial court that she had no knowledge.

I am aware that the question of damages in adultery are assessed at the discretion of the court. I am also aware that there are principles of assessing damages which the court should take into account before awarding damages for adultery. I have considered the fact that damages awarded by the court for adultery are aimed to compensate the injured party not to penalize the fault party. In other words, damages for adultery are not awarded as punitive damages. See **Gaipensulle vs Sumi Magoye** 1984 TLR 289. Again, I have considered the fact that both parties belong in the same community which is Haya customs where both adulterers were supposed to compensate the appellant but she did not sue both. **Gaipensulle vs Sumi Magoye** (Supra). I have also considered that the appellant and her husband were not living together when adultery was committed as the appellant opted to live in town while her husband opted to live in village after retirement. See **Mafuru Magabanya versus Joseph Mulya** 1987 TLR. ***This is taken as conniver on the part of the appellant as to condone to adultery.*** The appellant in her evidence testified that in the village the respondent was the one taking care of his husband when he was sick. Though there is no evidence of court separation but the available evidence shows that for quiet long time the appellant and her husband are not living together after retirement of her husband. To condone to adultery is to keep quit with knowledge of one-

party committing adultery. Given the circumstances of this case and the afore stated reasons, I will not award damages.

I now move to determine the second issue. I am aware that the parties are bound by their pleadings and similarly that courts will generally refrain from granting reliefs which were not prayed for. I have also noted that the appellant brought this matter by way of plaint where she sued for adultery and among the prayers she pegged on the plaint as I reproduced already above, she prayed for the court to declare that adultery was committed and the court to stop it. There was no prayer to annul the second marriage. The trial court observed that during hearing the appellant prayed annulment and nullification of the second marriage. While refusing such prayer through appellant's testimony, the court observed and stated that the plaint had no such prayer. Let the record speak for itself:-

"On the oral prayer by the plaintiff that the second marriage between her husband and the defendant be annulled, this prayer is not among the prayers in the plaint, this court lacks powers to do so, because only the parties to the marriage can bring a petition for annulment of the marriage and not otherwise, see section 97(1) and (2) of the law of marriage Act (Supra) unless one of the parties is the minor." The trial court went on that:

"The marriage between the defendant and the plaintiff's husband is not among voidable marriages under section 39 read together with section 96 of the Act which can be annulled, again, this court cannot grant declaratory decree under section 94 of the said Act because this suit is not brought

under Part VI as matrimonial proceedings of the Act which specifically states that an interested party may petition for declaratory decree in any proceeding of the said part."

For the reasons and analysis, I endeavor to discuss, I think the Trial Magistrate invited the unnecessary debate which was uncalled for in the circumstances. I think the Trial Magistrate did not properly direct her mind on the distinction between void and voidable marriage as per Law of Marriage of Tanzania and their effects. Void marriages are explained under the provisions of section 38 of the Law of marriage Act whereas voidable marriages are explained under the provisions of section 39 of the same Act. Void marriages result from void ceremonies which are purported ones and have no legal effect in law as they are nullity and void ab initio whereas voidable marriages are those which although imperfect but regarded as valid subsisting marriage until annulled by the court of law. See **Dereneville vs. Dereneville** [1948] ALR 56. Voidable marriage is avoided at the optional of either party in that marriage by petitioning to court to annul it whereas in void marriage any interested party may petition for the declaratory order.

Under the provision of section 38 (1) of the LMA there is a litany of circumstances or ceremonies which result from purported marriages which are declared to be a nullity. Capacity to marry, see **Alhaji Muhammed vs. Knott** [1968] 2ALR 563, parties having same sex See **Cobert vs. Cobert** [1970] WLR 1306), being in a prohibited relationship. See **Michael Mangare vs. Mangana** [1976] LRT 19 and **Fatma Massoud vs. Massoud** [1977] LRT 3, lack of consent where required, where there is

subsisting marriage. See **Ramadhani Said vs Mohamed Kilu** (1983) TLR,309, marriage expressed to be temporary and for Islamic faith re-marrying before expiry period of one month of "idda". In our particular case Section 38 (1)(c) provides:

"A ceremony purporting to be a marriage shall be a nullity; if either party is incompetent to marry by reason of an existing marriage.

Hence the trial court having found that the wrong of adultery was proved which resulted to a purported marriage in a situation where there was subsisting marriage and which was a monogamous Christian marriage in terms of provision of section 10 (1) of LMA as also referred by the appellant's counsel, it was therefore incumbent for the trial court to declare that the second marriage was a nullity. In my view, this was an inevitable and obvious order which need not even be prayed in the plaint or being petitioned as declaratory order under section 94 of the matrimonial proceedings. ***The trial court ought only to declare the marriage void ab initio and not to issue a declaratory decree.*** Where there is a valid subsisting marriage especially monogamous, no one can contract another marriage, otherwise, the marriage contracted while there is subsisting monogamous marriage, the purported the second marriage is void ab initio. See **Ramadhani Said vs Mohamed Kilu** (1983) TLR,309. Courts as temple of justice are expected to resolve the controversy between parties and to do justice.

I am thus inclined to agree with the submission from the appellant's counsel that every case must be decided by its own facts. I am alive that

the trial magistrate got stuck to order the second marriage a nullity after she had wrongly dismissed the plaint. This is an exceptional circumstance which the court as a temple of justice cannot shut eyes on it as the two marriages cannot co-exist. See **Elizaberth Mohamed versus Adolf John Magesa** (2016) TLR at page 121 **Abdala Hamidu Mohamed versus Jasnena Zarubra** (1983) TLR 313. In this particular appeal, if the court refrains from nullifying the second purported marriage which in itself is a nullity, there will be a travesty of justice. Courts are discouraged to create travesty of justice. See **Amani Nwangunule versus The Republic**, Criminal Appeal No.26 of 2004, CAT at Mbeya (Unreported). Section 15 (1) of LMA provides that no man, while married by a monogamous marriage, shall contract another marriage. **The second marriage was therefore nothing in law but a nullity.**

In recap, the respondent did not satisfy the trial court that she did not have knowledge that the appellant's husband was married hence the suit on adultery was wrongly dismissed. Given the peculiar circumstances of this case, the trial court had power to declare that the second civil marriage which resulted from such adulterous relationship was null and void and with no legal effect even if there was no such specific prayer in the plaint.

This appeal is allowed with the following orders.

1. *This court orders that the second marriage between the respondent and the appellant's husband one Elizeus Banyenza was void ab initio meaning, with no legal effect at all.*

2. *Costs of this appeal and at the trial court to be borne by the respondent.*

It is so ordered.

E.L. NGIGWANA

JUDGE

13/04/2022

Judgment delivered this 13th day of April 2022 in the presence of the appellant and her Advocate, Mr. Geofrey Rugaimukamu, Respondent in person and her Advocate, Mr. Ibrahim Mswadick, Mr. E. M. Kamaleki, Judges Law Assistant and Ms. Tumaini Hamidu, B/C.

E.L. NGIGWANA

JUDGE

13/04/2022