IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 09 OF 2021

(C/F District Court of Babati Civil Appeal No 26 of 2020, originally from Babati Primary Court Matrimonial Cause No. 7 of 2020)

RAHMA MARANDO..... APPELLANT

VERSUS

BURHAN JUMA..... RESSPONDENT

JUDGMENT

16th & 27th May, 2022

TIGANGA, J.

This is a second appeal this time being preferred by Rahma Marando, the appellant herein who was a losing party in the district court of Babati vide Matrimonial Appeal No. 26 of 2020. In her appeal, three grounds were fronted before this Court to wit;

1. That, the appellate District court erred in both law and fact by failing to take into consideration that the court procedures were adhered to hence granted wrong decision.

2. That, the appellate District court erred both in law and fact by failure (sic) to consider evidences on record the (sic) reached erroneous decision.

3. That, the appellate District court erred in both law and fact by failing to take into consideration that the court form was correct and what claimed at (sic) trial was the same that (sic) granted.

All these grounds of appeal were vigorously contested by the respondent.

Brief history of the matter is that, the appellant and respondent were wife and husband married under Islamic rituals. Their marriage was officiated on 11/02/2013 in Babati but before such legal union, they were living together under one roof since 2003. During their union, in 2007 they started to build the living house which was finally finished in 2010. In 2014 misunderstanding ensued which later proceeded to the beginning of dissolution of their marriage.

Such misunderstanding as it was amplified, the only choice to the appellant was to step into the building of justice to seek legal remedies particularly dissolution of the marriage and division of matrimonial properties. Upon hearing the matter on merit, the Babati Primary Court

reached to the finding that the marriage was irreparably broken down and therefore proceed to break it and issue divorce. Again, the primary court found the house built in joint efforts of the parties and therefore a matrimonial property subject of division between them. The court order directed the said house to be sold and the proceeds be equally divided between parties.

The respondent did not stay well with such decision. He successfully appealed to the district court of Babati under which the decision of the trial court was turned down for the reason that the form used to ignite the case was not proper. That instead of using matrimonial form, it was used civil case form. Thus, the case was remitted back to the trial court for retrial. The appellant was dissatisfied with such decision, hence this second appeal.

The issues for determination this court found indebted to resolve is whether this appeal is meritorious.

Upon oral application of parties, the appeal was argued by way of written submission. In *gratis*, Ms. Happiness Mfinanga, learned advocate of Tanzania Women Lawyers Association appeared on behalf of the appellant while Mr. John J. Lundu represented the respondent.

In her written submission, Ms. Mfinanga attacked the decision of the first appellate court on the basis that, before and during hearing the case the appellant followed all due procedures necessary for instituting matrimonial cause. Also, that she managed to prove that the marriage was broken down beyond repair standing on the ground of cruelty.

Submitting on the second ground Ms. Mfinanga argued that, the first appellate court did not properly evaluate appellant's evidence. The evidence of the appellant was well backed up by the testimonies of all five witnesses brought to court by the appellant.

On the last ground Ms. Mfinanga contended that, the form filed was proper. On the contrary she said, the blame was to be thrown to the court because it was filed by the court clerk and in the event, it cannot be fatal to the extent of denying the appellant's matrimonial rights. Ms. Mfinanga also accused the first appellate court of embracing technicalities rather than determining the matter on merits. To fortify her submission, Ms. Mfinanga cited the case of **Shakila Issa Namateleka (Administratrix of the Estate of the late Hassan Issa Namateleka) versus Ibrahim Mohamed Kisanga and Salum Seleman Lilangu**, Misc. Land Application No. 16 of 2019 (Unreported) whereby the case of **Yakobo Magoiga Gichere vs Peninah Yusuph**,

Yusuph, Civil App. No. 55 of 2017 CAT (Unreported) was cited. These cases observed on disregard of technicalities on the advent of the principle of overriding objectives and have regard on substantive justice.

On his part, Mr. Lundu started his submission by bringing attention this court to the procedure of instituting matrimonial cause. He said, on record there is nothing which proves that the BAKWATA reconciliation board failed to reconcile parties. He went on submitting further that, assuming the procedure was properly followed, still procedure of filling Pleadings was wrong. That there is a special form which is Judiciary J/PCF 52 as reproduced by the first appellate court in its judgment. Mr. Lundu went on saying that, failure to fill that form cannot be an excuse to overriding objectives. However, he Distinguished the case of **Shakila Issa Namateleka (Administratrix of the Estate of the late Hassan Issa Nmatereka) versus Ibrahim Mohamed Kisanga and Salum Seleman Lilangu (supra)** as it was interpreting the phrase *"and any other enabling provision of the law"* to encompass section 41(2) of the Land Disputes Act. He said, failure to file proper pleadings is fatal which renders proceedings and judgment emanated therefrom null and void.

Arguing ground two Mr. Lundu submitted that it has no merit because after the first appellate court findings that the whole proceeding and judgment were null and void it remained with nothing to evaluate as evidence on record.

Before responding to the issue raised, I prefer first to look on the claim raised by Mr. Lundu that there is nothing on record which show that the BWAKATA conciliation board failed to reconcile parties. I am so inquisitive because, certification to the failure of reconciling parties to court is a jurisdictional matter provided for under section 101 of the Law of Marriage Act, Cap. 29 R.E 2019 which says that;

> *"No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties"*

If at all the allegations by Mr. Lundu stand reality it has the effect of rendering the proceeding and judgment of the trail court a nullity. However, after going through the trial court record, I have discovered that what Mr. Lundu claims is nothing but a sham. The record sufficiently reveal that the parties were attended by the marriage reconciliation board so called BAKWATA WILAYA YA BABATI on 20/03/2020 and the prescribed form No III was certified to the court

with the clause "*Baraza Hili limeshindwa kuwapatanisha*" literary translated that the board has failed to reconcile the parties. Mr. Lundu might has been read the record upside down. In the event therefore, the contention remains baseless and liable for dismissal.

Coming to the grounds of pleadings and procedure for instituting the case I will also be guided by the record and documents enshrined therein. The form which the first appellate magistrate relied upon to quash and set aside proceedings of the trial court and order for retrial is Judiciary Form No. J/PCF 52 of which even Mr. Lundu accepts to be the true and legal document to ignite matrimonial causes in primary courts. the said form is titled

"Jamhuri ya Muugano wa Tanzania

Mdai."

The form which was used to file the claim in the trial court is also form No. J/PCF 52 titled

"Jamhuri ya Muungano wa Tanzania

Madai

Mahakama ya Mwanzo ya Babati Wilaya ya Babati.

Ndoa Talaka Namba...../2020."

In principle, these two forms are different in outlook as they have different contents though the format might be equal. The form number J/PCF 52 which is the petition in primary court is very vital making proceedings legal as it stands as a petition. However, upon going through such record it clicked into my attention that the matter was finally determined by the first appellate court on the issue which was raised by the court itself. It was not even among the grounds of appeal and unfortunately, it ended up the matter. In my settled view, it was not proper for the first appellate Resident Magistrate to raise the issue *suo mutu* without giving parties the right to address the court. It was apparently relied upon in contravention of the right to be heard which is a long-lived principle of natural justice enshrined in our Constitution. The constitution of the United Republic of Tanzania, 1977 as amended from time to time under Article 13(6)(a) Swahili version provides in part that;

> *"Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kikamilifu."*

This constitutional principle has been cherished in plethora of judicial decisions some of them being **Onesmo Nangole versus Dr. Steven Lemomo Kiruswa**, Civil Appeal No. 129 of 2016, **Mbeya Rukwa Auto**

Parts and Transport Ltd vs. Jestina George Mwakyoma, Civil Appeal No. 45 of 2000 and **Abbas Sherally and Another vs. Abdul Fazalboy**, Civil Application No. 33 of 2002 (All unreported) where the court observed in the latter case;

> *"The right of a party to be heard before adverse action or decision is taken against such 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."*

Despite the fact that the right to be heard is a principle of natural justice and constitutional right, yet when the issue is to be raised *suo mutu* parties must be called to address the court as said above on the new raised issue. This standing has also been reemphasised by the court of appeal of Tanzania in numerous decisions. In the case of **Kumbwandumi Ndemfoo Ndossi vs Mtei Bus Services Limited**, Civil Appeal No. 257 of 2018 (unreported) the court observed that;

> *From the above submissions of counsel for the parties, it is clear that they are at one that it was not proper for the learned High Court Judge to raise a new issue suo motu, in the course of composing the judgment and decide on it*

without according the parties the right to be heard. We respectfully, agree with them because it is evident at page 202 of the record of appeal that, the issue of the applicability or otherwise of the principle of vicarious liability in the appellant's case was not among the five grounds raised by the respondent in the memorandum of appeal. It is also not in dispute that the said issue was introduced by the learned High Court Judge in the course of composing the judgment contrary to the law and principles of natural justice on the right to be heard.

Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court."

See also the cases of **The Registered Trustees of Arusha Muslim Union versus The Registered Trustees of National Muslim Council of Tanzania *alias* BAKWATA,** Civil appeal No. 300 of 2017, **Tanganyika Cheap Store Limited and Two Others versus The National Bureau De Change LTD,** Civil Appeal No. 93 of 2003 (all unreported)

Without much ado I find there to be merit in this appeal which I accordingly allow. I find the judgment of the Babati District Court to have been a nullity for violation of the right to be heard. In the event the judgment and decree of the first Appellate Court is declared to be null and void. I accordingly, in the exercise of powers conferred upon me under section 31(1) of the Magistrates' Courts Act, [Cap 11 R. E. 2019] quash and set aside both the said judgment and decree that emanated there from. I order that the case be remitted to the District Court of Babati and be assigned to another Competent Magistrate who will proceed from the proceedings on 15/12/2020 when the matter was set down for judgment. Considering the matter and circumstance of the case, I order no costs.

It is accordingly ordered.

DATED at **ARUSHA**, this 27th day of May, 2022

THE HIGH COURT OF TANZANIA

J.C. TIGANGA

JUDGE