IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

APPELLATE JURISDICTION

PC. CIVIL APPEAL NO. 4 OF 2022

(Originating from the decision of the District Court of Temeke at Temeke, in Matrimonial Appeal No. 45 of 2020, by Hon. Kihawa-SRM dated 3rd day of March, 2021)

MBARAKA SAID NDAMBWE ..... APPELLANT

VERSUS

RAHMA ALLY ABDALLAH ..... RESPONDENT

JUDGMENT

13th March, & 5th May, 2022

ISMAIL, J;

This is a second appeal in respect of matrimonial proceedings which were instituted in the Primary Court of Temeke at Mbagala. The present respondent was a petitioner who, besides praying for dissolution of the marriage, it ordered a division of assets which were jointly acquired in the subsistence of the marriage. The distribution bred anger and outrage. The appellant, the respondent then, felt hard done as some of the assets were excluded from the list of matrimonial assets on the ground that the same

were solely acquired by the respondent, before the couple got married. The exclusion was considered to be erroneous and without any justification.

The quest for better justice saw the appellant institute an appeal to the District Court of Temeke at Temeke (1st appellate court). Save for re-arrangement, the grounds of appeal in the 1st appellate court were a replica of what we have as grounds of appeal in the instant appeal. The 1st appellate court found nothing blemished in the decision of the trial court. It went ahead and dismissed the appeal, upholding the trial court's decision.

The decision in the 1st appeal irked the appellant, hence his decision to take a ladder up to this Court. The petition of appeal has five grounds, paraphrased as hereunder:

1. *That the 1st appellate Court erred in law and fact for failing to consider that part of the appellant's evidence was ignored or not recorded by the primary court;*

2. *That the 1st appellate Court erred in law and fact when it unjustifiably dismissed the appeal on the basis of the respondent's submission;*

3. *That the 1st appellate Court erred in law and fact by dismissing the appeal without taking cognizance of the fact that question relating to ownership of land in dispute was a matter over which the said court had no jurisdiction;*

4. *That the 1st appellate Court erred in law and fact for failing to consider that non-recording of assessors' opinion prior to its decision was a nullity; and*

5. *That the 1st appellate Court erred in law and fact for failing to evaluate, evaluate the parties' submissions before making findings on the matter.*

Disposal of the appeal took the form of written submissions, filed consistent with a schedule drawn by the Court. The appellant took the usual role of setting the ball rolling.

Submitting on ground one, the appellant submitted that evidence adduced during trial was ignored, and that the submission filed in support of the appeal to the 1st appellate court captured it but was ignored. The appellant contended that, as a result, the court arrived at a wrong finding that the appellant failed to prove how the excluded assets were acquired.

Regarding grounds two and three, the argument is that the trial court did not have jurisdiction to try a matter involving a landed property. This, he said, was against the legal position as set out in sections 3 (1) and (2), 4 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019; and section 167 of the Land Act, Cap. 113 R.E. 2019. In the appellant's contention, the decision of the trial court was reached while the court was not seized of the matter. In his rejoinder submission, the appellant reiterated his position on

the lack of jurisdiction by the trial court. On this, he cited the decision of the Court in ***Anthony Felician v. Shani Kakuru***, HC-(PC) Civil Appeal No. 16 of 2020 (unreported), and stressed that the position is that jurisdiction in respect of interest or claim in landed properties lies with forums set out in Cap. 216.

Ground four took an exception to the omission of the opinions of assessors who sat and took part in the proceedings, consistent with section 7 (1) of the Magistrates' Courts Act, Cap. 11 R.E. 2019. The argument by the appellant is that, since the role of the assessors in the proceedings is not evident, then the proceedings were shrouded in an irregularity which justifies his prayer for allowing the appeal with costs.

With regards to ground five, the appellant's argument is that the impugned judgment did not conform to the tenets of judgment writing. The appellant cited the case of ***Fatuma Idha Salum v. Khalifa Khamis Said*** [2004] TLR 423, as the basis for his contention. He contended that, in the impugned decision, the court was based on the arguments raised by the respondent without any reasoning of its own. He urged the Court to allow this ground of appeal.

The respondent was valiantly opposed to the contentions raised by the appellant. With regards to ground one, the respondent's argument is that

the appellant's contention on working at the Iranian Embassy was not backed by any evidence which would help the appellant to discharge the duty imposed by section 112 of the Evidence Act, Cap. 6 R.E. 2019. This provision imposes the burden of proof on a person who alleges as to the existence of a certain fact. She fortified her position with the decision of the Court of Appeal in ***Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo***, CAT-Civil Appeal No. 102 of 2018 (unreported); and ***Hemedi Saidi v. Mohamed Mbilu*** [1984] TLR 113. The respondent argued that in this case, she led sufficient evidence which justified the decision that operated in her favour.

Regarding grounds three and four, the argument by the respondent is that primary and district courts have jurisdiction to preside over matrimonial proceedings. She argued that question on whether the property is a matrimonial asset or not is merely intended to establish extent of spouse's contribution in the acquisition, and it is intended to determine the manner in which the same has to be distributed or shared. She fortified her case by citing the decisions of the Court in ***Eliamini Nduuni & Another v. Kwanensisya Leonard Teti***, HC-Land Appeal No. 33 of 2016; ***Zainabu Hussein Hoza v. Mbwana Mohamed Twalib***, HC-Land Appeal No. 141 of 2020; and ***Anthony Felician v. Shani Kakuru*** (supra) (all unreported).

Submitting on ground four, the respondent argued that, in terms of section 7 (1) & (2) of Cap. 11, opinions of the assessors need not be shown in the judgment. In this case, the respondent argued, opinions were factored in, and the 1st appellate court was right in its decision to uphold the decision of the trial court.

On ground five of the appeal, the contention by the respondent is that pages 4 through to 9 of the judgment clearly show that the parties' submissions were analyzed and evaluated, and that the decision embodied reasons for the decision.

The respondent concluded by contending that the appeal is lacking in merit, and urged the Court to dismiss it with costs.

From the parties' contending submissions, the broad question is whether the appeal carries some merits.

The appellant's gravamen of complaint in ground one is that the trial court ignored or failed to record the testimony adduced by the appellant and no justification was given for such howler. The evidence allegedly ignored included his identity card and salary slips.

Let me begin by stating that this ground of appeal was also a ground of appeal in the appeal to the 1st appellate court. It featured as ground three of the appeal which was disposed of by way of written submissions. In his

submission in the lower court, the testimony that the appellant alleged it had been omitted was in relation to issuance of TZS. 170,000/- for the acquisition of a piece of land on which Mikwambe house is standing. Issues pertaining to employee identity card and salary slips which feature in the present ground of appeal as being omitted were not given a mention. This implies that the appellant isn't sure of what he considers to be the testimony that was omitted or ignored.

My reading of the proceedings of the trial court does not suggest that issues relating to identity card and salary slips was introduced by the appellant or at all. There is no indication, either, that such testimony, in paper trail, was tendered and admitted as evidence. This gives me the impression that the same was neither spoken of nor was it tendered as evidence. It is implausible and hard to be given credence.

In my considered view, this ground is lacking in merit and I dismiss it.

Grounds two and three of the appeal decry what the appellant contends to be the trial court's handling of the matter in respect of which it did not have jurisdiction to preside over and determine it. The appellant's other argument is that dismissal of the appeal was based on the respondent's submission and upon nothing else. The appellant's contention in both of the grounds is hinged on the argument that this is a land matter whose conduct

ought to have been instituted in one of the forums stipulated in section 3 of the Land Disputes Courts Act, Cap. 216 R.E. 2019. These forums do not include primary courts from which the instant matter arose. This contention was raised in the appeal that bred the instant appeal. The view taken by the 1st appellate court is that this was purely a matrimonial matter which is triable by courts as provided for under the provisions of the Law of Marriage Act, Cap. 29 R.E. 2019.

I agree with the findings of the 1st appellate court on this contention. The question of ownership of the property that featured in the discussion subsequent to the decision to order dissolution of the marriage. The trial court did that while vested with jurisdiction conferred upon it under section 76 of Cap. 29 which provides as follows:

> *"Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court."*

In our case, the decision on the matrimonial assets including the landed property was a consequential to the decision that resolved that the marriage between the parties had been irreparably broken down. This culminated in the divorce subsequent to which matters relation to division of assets, custody and maintenance of the issues of marriage came up and

were deliberated upon. Such division was consistent with section 114 (1) of Cap. 29 and would not require another court to get involved, cognizant of the fact that the decision is one in the long chain of the matrimonial proceedings. For ease of reference, section 114 (1) states as hereunder:

> *"The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale."*

Since allocation of the property to the parties hereto was part of the court's duty under the quoted provision, such allocation would not and did not convert the matter into a land dispute which would be triable by a court or tribunal whose jurisdiction is vested in it by section 3 (1) of Cap. 216. I am not convinced, one bit, that the appellant's argument in this ground of appeal is legally or logically plausible.

The appellant has further urged the Court to be inspired by its own decision (Hon. Mgeyekwa, J) in ***Anthony Felician v. Shani Kakuru*** (supra), and the argument is that the holding of the Court in the said decision is that disagreements in matters of land must be referred to a proper forum that deals with ownership of the landed properties. With profound respect,

the appellant has misconceived the position set by the Court in the cited decision. The Court's holding in that regard was where the disputants were not married to one another. In that case, the property in dispute does not become a matrimonial property whose division would be catered for by section 114 (1) of Cap. 29. In the instant matter, the parties were spouses and the contention revolves around whether the property in dispute was part of the matrimonial assets. The cited decision cannot come to the appellant's aid in this case. I choose to disassociate with it and dismiss this ground of appeal.

Ground four of the appeal takes exception to what the appellant contends as a failure, by the trial court, to consider the opinion of the assessors in its deliberations and findings. The appellant considers this as a serious violation that renders the proceedings are a nullity.

The law, as it then obtained, provided that conduct of the proceedings in the primary courts would be conducted with the participation of assessors whose roles and manner of involvement is provided for under section 7 of the Magistrates Court's Act, Cap. 11 R.E. 2019. Sub-section (3) provides that assessors should be allowed to give opinions to all questions involved in the matter. This is only applicable where the law involved is either customary or Islamic.

The narrow question that follows is whether such opinions need be reflected in the decision that is eventually delivered by the court. My hastened answer to this question is in the negative. It is enough if the decision embodies signatures of the assessors, signifying their concurrence with the said decision. In ***Sospeter Bwilima v. Ereno (Stephen J. Ngawa)***, HC-(PC) Civil Appeal No. 28 of 2019 (MZA-unreported), the Court was confronted with the same question on the involvement of and role of assessors in the conduct of primary court proceedings. The Court held the following view:

> *"Involvement of assessors in the decisions borne out of the primary court proceedings is, as correctly contended by the counsel for respondent, governed by the provisions of the Magistrates Court's (Primary Courts) (Judgment of Court) Rules, GN. 2 of 1988. These Rules (Rule 3) are to the effect that opinions of the assessors are reflected in the signatures that they append on the decisions and not otherwise."*

Significantly, the Court's position was inspired by the reasoning of the Court of Appeal in the case of ***Neli Manase Foya v. Damian Mlinga,*** CAT-Civil Appeal No. 25 of 2002 (unreported), in which it guided as follows:

> *"With due respect to learned High Court judge, this is not what Rule 3 (2) provides. The assessors are members of the court and sign the judgment as such, and not for the purpose of*

authenticating it or confirming it. In answer to the second point of law, assessors are neither required to give their opinions, nor to have their opinions recorded by the magistrate."

Glancing through the trial court proceedings, it comes out clearly that assessors who sat with the trial magistrate appended their signatures on the decision and the proceedings for day on which the decision was delivered. This is enough to allay fears that the appellant would have on the legitimacy of the proceedings. I find nothing blemished in this respect and hold that ground four of the appeal is destitute of any fruits. I dismiss it.

Turning on to ground five, the appellant's consternation is that the parties' submissions were not analyzed and evaluated before the court came to a conclusion on who, between the parties was a victor.

I have gone through the decision of the 1st appellate court, together with the parties' submissions. What comes out clearly is that the parties' contentions, as contained in the submissions, were factored in the judgment that is the subject of this appeal. In the end, the 1st appellate court was convinced that the respondent's submission had the requisite potency to sway the decision in her favour. It is my considered view that the 1st appellate court performed its duty properly and that the decision that came

out was on the basis of the analysis of the parties' representations on the matter. I find the ground of appeal hollow and I dismiss it.

Overall, and on the basis of the foregoing, I find the appeal barren of fruits and I dismiss the appeal. I uphold the concurrent decisions of the lower courts.

No order as to costs.

It is so ordered.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 5th day of May, 2022.

M.K. ISMAIL

JUDGE

05.05.2022