

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

(PC) MATRIMONIAL APPEAL No. 20 OF 2022

*(Arising from the District Court of Musoma at Musoma in
Matrimonial Appeal No. 10 of 2021 & Originating from
Nyambono Primary Court in Matrimonial Cause No. 17 of 2021)*

MAGDALENA IBAYA APPELLANT

Versus

MAKENE KABEYA RESPONDENT

JUDGMENT

27.03.2023 & 29.03.2023

Mtulya, J.:

The present appellant, **Magdalena Ibaya**, on 8th July 2021 had approached **Nyambono Primary Court** (the primary court) and lodged **Matrimonial Cause No. 17 of 2021** (the cause) praying for an order of divorce against **Makene Kabeya** (the respondent). About a week later, specifically on 19th July 2021, the cause was scheduled for framing of issues, and two issues were recorded by the primary court, namely: first, *endapo ndoa ya wadaawa imevunjika*; and second, *endapo mdai anastahili mgao wa mali*.

In a month time, full hearing of the cause was marked completed and the parties were summoned on 17th August 2021 for judgment reading. On this day, the primary court *suo moto* had

raised three (3) fresh issues and went ahead to resolve them without consulting the parties. The issues were, *viz*, first, *je mdai na mdaiwa walikuwa na ndoa inayotambulika kisheria*; second, *je madai ya talaka yamethibitishwa*; and finally, *je ni haki nyingine zipi ambazo mdai anastahili*.

The primary court finally had resolved all the indicated issues in affirmative save for the first one and ordered at pages 7 & 8 of the typed judgment that: first, *mdai apewe fidia ya asilimia 65 ya nyumba waliojenga*; second, *vyombo vya ndani wagawane nusu kwa nusu*; and finally, *mdaiwa arudishe mbao 15 na mabati 9 aliyochukua kabla ya mgawanyo wa mali*. The decision aggrieved the respondent hence rushed to the **District Court of Musoma at Musoma** (the district court) and lodged **Matrimonial Appeal No. 17 of 2021** (the appeal) protesting the holding of the first issue and order of compensation amounting to sixty five percent (65%) from the matrimonial house.

The parties were summoned to appear and register relevant materials at the district court and complied with the order. After registration of all relevant materials, the district court upheld the judgment and orders of the primary court save for the indicated compensation which was twisted to seventy five percent (75%) to

the respondent and twenty five percent (25%) to the appellant. The appellant was unhappy with the alterations ordered by the district court in the appeal hence knocked the doors of this court and registered six (6) reasons of protest against the judgment of the district court. The parties were called in this court on 14th March 2023 to register necessary materials for and against the appeal. However, before hearing proceedings could take its course, this court *suo moto* noted two (2) distinct sets of issues raised during the proceedings and in the judgment. The parties were invited to cherish the right to be heard on the cited discrepancies.

According to the appellant, the trial magistrate erred in law for raising new issues *suo moto* and composed judgment, without inviting the parties to address on the subject. In her opinion, the judgment of the trial court is a nullity for want of proper application of the law. In order to persuade this court to appreciate her submission, the appellant cited the authorities in **Ramadhani Msangi v. Sunna G. Mandara & Two Others**, Land Appeal No. 39 of 2017 and **Fatuma Idha Salum v. Khalifa Khamis Said** [2004] TLR 423.

Regarding appropriate available remedies, the appellant submitted that this court may quash the judgment of the trial court

and order the same to compose new judgment based on the raised issues during the proceedings or else invite the parties when it thinks that there are new triable issues. On the other hand, the respondent supported the thinking of the appellant. According to him, he was advised by his learned counsel to concede the fault and pray the record to be remitted to the primary court for fresh hearing of the cause.

I have scanned the record of the present appeal and found that it is vivid that the primary court in the cause had raised three (3) fresh issues without inviting the parties to produce necessary materials for and against the new discovery of the primary court. This is obvious shifting of the goal posts, which has been said in a number of decisions that it is a breach of the rules regulating pleadings and proceedings. The Court of Appeal in the cited decision of **Fatuma Idha Salum v. Khalifa Khamis Said** (supra), at page 7 of the decision had resolved that:

With all due respect to both [courts below], these issues were not pleaded and should not have been considered. It is now settled law that the only way to raise issues before the court for consideration

and determination is through pleadings as far as we are aware of, this is the only way.

This thinking and directive of our superior court has never been faulted and it is now an established law in precedents (see: **Mwalami Sadiki Mtumbuka v. Abdulhamani Sadiki Mtumbuka & Another**, Land Appeal No. 247 of 2022; **National Bank of Commerce (NBC) v. Maria Singano**, Labour Revision No. 489 of 2020; and **Mbaraka Said Ndabwe v. Rahma Ally Abdallah (PC)** Civil Appeal No. 4 of 2022).

Having said so, I support the views that points of contentions which are not based on pleadings or proceedings cannot be raised during drafting of the judgment, without inviting the parties to cherish the right to be heard. In the end, I invoke the provision of section 31 (1) of the **Magistrates' Courts Act [Cap. 11 R.E. 2019]**, to quash the judgement of the primary court and all proceedings and judgment of the district court for want of proper application of laws regulating pleadings and framing of issues.

Further, I remit the case file to the primary court, under the same judicial officer, to compose a fresh and proper judgment in accordance to the rules regulating pleadings, proceedings and judgment writing. The exercise must be done in a reasonable time

without any unnecessary delays. I award no costs as the contest is matrimonial cause and the irregularity was caused by the primary court and blessed by the district court.

Ordered accordingly.





F. H. Mtulya

Judge

29.03.2023

This judgment was delivered in Chambers under the seal of this court in the presence of the appellant, **Magdalena Ibaya** and in the presence of the respondent, **Makene Kabeya**.



F. H. Mtulya

Judge

29.03.2023