THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

PC. MATRIMONIAL APPEAL NO. 8 OF 2021

(Arising from the District Court of Momba District at Chapwa in Matrimonial Appeal No.7 of 2021 Originating from the Primary Court of Momba District at Tunduma in Matrimonial Cause No. 17 of 2021.)

MARIA WILSON SIMBEYE .....APPELLANT

VERSUS

EMMANUEL KAMWELA.....RESPONDENT

JUDGMENT

Date of Last Order: 30/03/2023
Date of Judgement: 31/05/2023

NDUNGURU, J.

This is the second appeal, Maria Wilson Simbeye (the appellant) is challenging the decision of the District Court of Momba at Chapwa in the Judgment dated 26/08/2021. The matter originated in the Primary Court of Momba District at Tunduma in Matrimonial Cause No. 17 of 2021.

Before the Primary Court the appellant petitioned for the decree of divorce and division of matrimonial property against the respondent, Emmanuel Kamwela. Having heard the contentions by the parities the Primary Court found that the marriage of the parties had been irreparably broken out. It therefore went on distributing the matrimonial properties

to the parties where they were distributed at the tune 50% to each party. In distributing the properties, the Primary Court made it clear that there were some properties which the appellant has failed to prove of their existence and that the respondent failed to prove that one of their houses was acquired before marriage.

Dissatisfied by the decision of the Primary Court the appellant appealed to the District Court. The respondent also filed a cross-appeal against the same decision. At the end, the District Court confirmed the decision of the Primary Court. However, the judgment is not clear as far as the decision of the cross-appeal is concerned. Further discontented the appellant preferred the instant appeal. On the other hand, the respondent also filed a cross-appeal against the decision of the District Court.

The appellant has raised a total of eight (8) grounds of appeal as follows:

1. *That the District Court erred in law and facts by upholding the decision of the Primary court which decide that the farms located at MBEZUMA may not be included in the division of matrimonial property while the respondent has not tendered any sell agreement as proof that the appellant consented on the said sale.*
2. *The trial court erred in law and fact for not including the farm located at MAJENGO in division of matrimonial properties regardless*

of the testimony given by SM1 and SM2 that the said farm belongs to the appellant and the respondent.

3. *The trial court erred in law and fact for not including the plot located at MPEMBA in division of matrimonial property on relying on the testimony of the respondent and SU6 without considering the tight documentary evidence given by the appellant.*
4. *That the trial court erred in law and fact for not distributing the plot located at Kilimahewa Tunduma despite the strong evidence tendered by the appellant.*
5. *That the trial court erred in point of law and fact for including of bicycle spares as part of the joint acquired property thus to be distributed as matrimonial property without considering that the same was not acquired by the joint effort of the appellant and the respondent to wit it was acquired at the time when the appellant was deserted for five years by the respondent.*

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6. *That the first appellate court erred in law and fact in its due diligence to satisfy itself on the existence or non existence of the stone griding machine at Chunya.*
7. *That the first appellate court erred in law and fact to uphold the decision of the trial court which did not consider the evidence tendered by the appellant.*

8. *That the first appellate court erred in law and fact for failure to give reasons for its decision.*

The respondent, in his cross-memorandum of appeal raised five (5) grounds which however, this court has encountered some difficulties to comprehend them. However, they may be put as; **one**, the trial court erred to determine a matrimonial property case instead of the case for divorce; **two**, that the appellant's evidence was hearsay which is not admissible and **three**, that this court should determine legal issue as to whether the trial court was justified in its decision when it held at page 8 of the impugned judgment in Kiswahili that *Mahakama baada ya kupitia Ushahidi wa wadaawa imeona kuwa mashamba yote yana mgogoro wa umilik kati ya wadaawa na wanunuzi hivyo kutokana na hali hiyo madai anaweza Kwenda kufungua shauri baraza la ardhi dhidi ya mdaiwa na wanunuzi na ikithibitika kuwa mashamba hayo yaliuzwa bila kumshirikisha basi mashamba hayo yafanyiwe uthamini na kuuzwa na wadaawa wagawane fedha sawa kwa sawa.*

At the hearing of both the appeal and cross-appeal, the parties appeared in person and unrepresented. Upon the prayer by the parties and the leave of this court, the matter was disposed of by way of written submissions where they duly filed their respective submissions. Save that

the appellant did not make any replying submission in relation to the cross-appeal.

Mindful of the fact that the parties were unrepresented, their submissions are crafted in a lay person style which I have to admit that they are less helpful in determining their grievances. On that reason I will determine the grounds of appeal as presented in the memorandum of appeal as well as the cross-appeal basing on the record available.

The law governing the distribution of matrimonial assets/properties is section 114 of the Law of Marriage Act, Cap. 29 R. E.2019 (the LMA). I need not however go to see the conditions set by the law in division of matrimonial assets since there is no dispute between the parties as to the efforts of each party in acquisition of the assets which the primary court ordered to be distributed. The contentious by the appellant is on why some properties (**farms at Mbezuma, at Majengo and plots at Mpemba and Kilima Hewa; and a stone griding machine at Chunya)** were not divided while they formed part of the matrimonial assets on one side. On the other side why other assets **(bicycle spare parts)** were included to form part of matrimonial assets where they were not acquired by the joint efforts of the parties. Under the circumstances, the appellant's complaints are purely a matter of facts which need re-visiting the evidence in order to resolve them.

It should be noted at the outset that this being a second appellate court the law restricts to interfere with the concurrent findings of facts made by the two lower courts, unless there is good cause to do so. What amount to good cause is not limited but may include where it is shown that there has been a misapprehension of the evidence or misdirection causing a miscarriage of justice. See the cases of **Nchangwa Marwa Wambura v. Republic,** Criminal Appeal No. 44 of 2017 CAT at Mwanza, (unreported), **Musa Hassani v. Barnabas Yohanna Shedafa (Legal Representative of the late Yohana Shedafa)** Civil Appeal No. 101 of 2018 CAT at Tanga (unreported), **Amratlal Damodar and Another v. H. Lariwalla** [1980] TLR. 31, in the latter case for instance, it was held that:

> *"Where there are concurrent findings of fact by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

In the matter at hand the first appellate court (the District Court) just confirmed the decision of the Primary Court without re-apprising the evidence. This court finds that the first appellate court abducted its duty. For that reason, in this second appeal, I will go through the evidence on the record and find out if the Primary Court was justified in its decision regarding the disputed properties. In the process, the guiding principle is

that he who alleges must prove and the law requires to sustain the evidence which is more probable than the other this per rule 1(2) the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulation GNs. Nos. 22 of 1964-66 of 1971 and section 110 of the Evidence Act, Cap. 6 R.E 2019. Bearing in mind also that the standard of proof in civil cases is on balance of probability.

As I have pinpointed above, the disputed properties are; **one**, the farms at Mbezuma. Parties are not diputing about their joint efforts in acquisition of the same. But it was contended by the respondent that they were sold to two different persons under a mutual consent of him and the appellant. The respondent called Kassim Mwamboneke (SU4) and Isakwisa Lupembe (SU5) as witnesses who testified in favour of the respondent that they purchased the disputed farms from the appellant and respondent as wife and husband respectively.

In this appeal the appellant is complaining that there was no documentary evidence adduced either by the respondent or SU4 and SU5 to prove that she consented. Looking at the appellant's complaint, she does not dispute about the disposition of the farms at issue, but she complains about the same being disposed without her consent. In the event, I am worried if it would be in the ends of justice if this court may venture into deciding the procedural regularities or irregularities of the

disposition without prejudicing the alleged purchasers. It should be noted that since it is undisputed that the farms at issue were disposed of, no doubt they are now in the hands and occupation of the purchasers who are not parties to this matter. In the premises, as it was correctly made by the Primary Court, this court also is not appropriate court to determine the procedural regularities of the disposition. I therefore find the Primary Court decision of excluding the farms at Mbezuma from forming part of matrimonial assets justified.

Two, a farm at Majengo. It was contended by the appellant that they used to lease the said farm from the village authority but later it was allocated to them by the same village. The respondent testified in the contrary that it never been their property. That they used to lease it but in 2015 was confiscated by the Chama cha Mapinduzi (CCM). The respondent called a witness one Elias Cheyo (SU3) who testified that he was Branch Chairman of CCM in 1980. That him and the respondent used to lease the farms owned by CCM. Later on, emerged a dispute regarding those farms as the result they were confiscated. He categorically said that the said farms never been in their ownership.

From the above evidence, it was upon the appellant to prove that the farm at issue was indeed allocated to her and the respondent. This is due to the reason that the appellant's evidence that they previously leased

the farm from the village authority collaborated the respondent's account that the said farm had never being in their possession. Since it was the appellant who alleged that it was allocated to them it was upon her to prove the existence of that fact at least by calling any village leader who participated in allocating the same. Further, the evidence available shows that the two farms referred above were sold and confiscated even before the emerging of troublesome of the parties' marriage. Before that there were no quarrel as far as the properties concern. In the upshot, this court finds the evidence by the respondent more probable than of the appellant.

Three, a plot at Mpemba. The appellant said that they owned a plot at Mpemba. The fact that the parties owned a plot at Mpemba was not denied by the respondent. He nonetheless, adduced evidence that it was given to one Abel Kamwela (SU6) for settlement of the debt the appellant and the respondent owed to him. It was the respondent's contention that they owed SU6 Tshs. 1,000,000/= for the work of constructing their house in Dar es salaam. SU6 was also called as a witness and he testified in that regard. I find nothing in the evidence adduced by the appellant to outweigh the respondent's evidence as far as the plot at Mpemba is concern. The Primary Court was therefore justified in excluding it from the distributed matrimonial assets.

Four, a plot at Kilima Hewa at Tunduma. I have scanned the entire evidence adduced by the parties before the Primary Court. Neither the appellant nor the respondent talked about the existence of the plot at Kilima Hewa. It seems the appellant raised the complaint about the plot at Kilima Hewa in the first appellate court. However, the Primary Court had never talked about it. In the premises, the complaint by the appellant is unmaintainable since this court has no power to fault the lower courts' decisions on the fact neither talked nor featuring in the record of appeal.

Five, a stone griding machine at Chunya. Again, observing to the principle of he who alleges must prove. The appellant only said that there is a stone gridding Machine at Chunya. The respondent denied its existence. I hasten resolve that the appellant failed to prove her allegation. This is because, there is the appellant's statement that she had never seen it. Also, she accounted that her and the respondent jointly obtained a loan of Tshs. 2,000,000/= which the respondent contributed with his friends to buy the said machine. Nevertheless, the appellant did not mention the said friends of the respondent nor mention the name of the Bank where they secured a loan. I therefore see no reason to fault the Primary Court's decision in excluding it.

The appellant's final complaint is that the Primary Court erred in including a shop of bicycle spare parts as the assets acquired by joint

efforts while the appellant acquired it at the time when the respondent deserted her. On his part the respondent maintained that there is a shop and a store of bicycle spare parts which they own together. The respondent claimed at the time he gave evidence that the same were still helping them in their daily expenses. It was the respondent's further evidence that a store where they kept spares the appellant did not need him to engage in that business the act which forced him to require the appellant to enter into written agreement for both to participate. He tendered the said agreement as exhibit KSU1. The same was tendered without being objected by the appellant.

In that exhibit as I read it the parties agreed that the store should not be open by one of them but should be opened in their accompany. Under that circumstance this court finds that the claim by the appellant that she solely owned the spare parts lacked a proof. This is so because, if the same was the property of the appellant only she could have not agreed to open it when the respondent is present. That takes me to conclude that the Primary Court was justified to include the bicycle spare parts in the distribution of matrimonial assets.

The above analysis and findings take me to the complaints by the respondent in a cross appeal. The complaint that the appellant's evidence was less heavy than his, have been resolved by re-evaluating them and

reached to the conclusion as above said. The remaining complaint is the order of the Primary Court which was to the effect that there is dispute regarding all farms, it suggested that appellant would institute a land dispute in the land tribunal against the respondent together with the purchasers in case it is resolved that the respondent did not involve the appellant is selling them then the same farms be evaluated and sold then the proceeds be equally distributed to the appellant and the respondent.

Looking at the nature of the order, indeed it is ambiguous one. It generalized that all farms are at dispute. Nonetheless, when read it keenly like in the statement that "when it will be proved that the farms were sold without involving the appellant" it seems the Primary Court meant not all farms mentioned in the matter but those which the appellant complained that they were sold without her consent.

To clear the ambiguity this court re-constructs the order to read; *for all farms which the appellants disputes about their sell without her consent, specifically the farm at Mbezuma and the plot at Mpemba, and the dispute about the allocation of the farm at Majengo; the appellant, if wishes may institute a land dispute in an appropriated court or tribunal with competent jurisdiction to entertain land disputes matter. And in case she proves her claims those land shall constitute matrimonial assets thus, be divided equally to the parties or be sold and the proceeds therefrom*

be equally divided to the parties. Or, in the respondent compensate the appellant at the tune equal 50% of the value of the said properties.

Owing to what I have observed above, save for the rephrased order made in resolving the complaint raised by the respondent in a cross appeal. The main appeal by the appellant is hereby dismissed for want of merits. Being a matrimonial matter, I make no order as to costs.

It is so ordered.

THE HIGH COURT OF TANZANIA

D.B. NDUNGURU,

JUDGE

26/05/2023