THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC.CIVIL APPEAL NO.19 OF 2022

(Originating from Ruangwa District Court in Matrimonial Appeal No.1 of 2022, and from Mnacho Primary Court in Matrimonial Cause No.4 of 2022)

MAULANA AHMAD YUSUPH ..... APPELLANT

VERSUS

FATUMA RASHIDI ATHUMANI ..... RESPONDENT

JUDGEMENT

11/5/2023 & 27/6/2023

LALTAIKA, J.

The appellant herein **MAULANA AHMAD YUSUPH** is dissatisfied with the decision of Ruangwa District Court in Matrimonial Cause No.4 of 2022. She has fronted three grounds of appeal as follows;

1. *That Ruangwa District Court as an appellate court erred in law and fact by continuing to entertain the appeal that was prematurely referred to it before the trial court as the same was not referred before the reconciliation board and hence both courts had no jurisdiction.*
2. *That the Ruangwa District Court as an appellate court erred in law and fact by dividing the properties which are not matrimonial properties to with three rooms located at Chinongwe and one farm located at Chinongwe while are not matrimonial properties as the same belong to the appellant and his former wife and not with the respondent.*

3. *That Ruangwa District Court as an appellate court erred in law and fact by ordering the appellant to pay the maintenance to wit 60,000/= per month without considering the requirement of the law before granting the said order*

When the appeal was called on for hearing, both parties appeared in person, unrepresented. Consequently, this court had to read out and explain the grounds of appeal and allowed parties to respond to the same in turns. Before providing the summary of the responses, it is considered imperative to provide the following contextual backdrop to the appeal as can be gathered from the records.

In 1994 the respondent herein completed her Primary School Education. Half a year later that is in June 1995, she got married to the appellant. Unlike the respondent who was young and inexperienced, the appellant was already in another marriage. He was married to **Sophia Sadiki** whom he passionately describes as a generous woman. June. I found another woman. In 1999 the family worked collaboratively and upgraded their grass thatched house with corrugated iron sheets. The family worked even harder and bought land from *Shamba la Ushirika*. With the harvest from their newly bought shamba, an informal agreement was entered to build a modern house for the first wife and then the respondent's house would also be built at the following cashewnuts harvest season.

In the year that followed, although the harvest was bountiful, the promise was not fulfilled. Love was lost. On 13/9/2021 the appellant issued a *talaq* to the respondent. The respondent did not oppose the divorce but demanded her share of the property jointly acquired during marriage. Probably due to ignorance of the law related to divorce and division of matrimonial property

in our country, the parties reacted differently. Whereas the respondent approached the social welfare office, the appellant knocked the doors of BAKWATA. The dispute was referred to court.

At Mnacho Primary Court, the parties argued their cases and brought witnesses. The respondent felt that the court had failed to articulate how the "modern house" was built collaboratively among the three namely the appellant, the respondent who was the "younger wife" (mke mdogo) and her co-wife **Sophia Sadiki**. She appealed to the District Court of Ruangwa which decided in her favour. Apparently, the first appellate court confined itself to the grounds of appeal but managed to clarify a number of issues that had left the parties in limbo. The appellant is dissatisfied with the judgement and decree of the first appellate court hence this appeal.

Arguing in support of the first ground of appeal, the appellant stated that they (meaning the respondent and himself) were supposed to appear before the reconciliation board, but his ex-wife refused and went to the Mnacho Primary Court instead. He believed that the reconciliation board should have handled the matter according to BAKWATA requirements. He accepted the judgment when the respondent went to the Primary Court as it was a just decision based on the evidence of their relatives and parents. However, he expressed dissatisfaction with the District Court's decision, as it did not inquire from any witnesses. He stated that he was fine if the district court judgment was not upheld.

In response, the respondent disagreed with the appellant's statement. She clarified that the appellant **divorced her on September 13, 2021**,

and informed her family that he was ***learning*** to issue a divorce. Her parents eventually accepted and asked them to divide the property. She sought reconciliation assistance from BAKWATA, but their attempts failed. Due to the lack of access to the farm during the farming season, she decided to complain to the social welfare officer, who also failed to resolve the issue. Subsequently, she received a summons from BAKWATA, stating that she could not divide the property before the required waiting period. When the appellant failed to appear at the social welfare office, the officer provided her with a letter to take her complaints to court, which she submitted as evidence.

On **the second ground**, the appellant stated that when the respondent refused the reconciliatory board and went to court, the court conducted its own investigation to determine the property belonging to him and his first wife. They divided their 13 acres of land in Chinonge village, with the respondent receiving 4 acres, his first wife receiving 4 acres, and himself receiving 5 acres. Other assets, such as a milling machine and a car, were also divided, with the respondent receiving 25% and 30% respectively. **The appellant claimed that a house built by him and his first wife, in which the respondent was given 25%, should not be considered part of the matrimonial property.** However, the District Court awarded it to the respondent. He further mentioned that the disputed farm given to the respondent was originally given to her by his first wife and should not be considered part of the farm divided by the Primary Court.

The respondent provided her perspective on the farm issue, stating that when she got married in 1995, her husband gave her a 4-acre farm

without cashewnuts. She cultivated the farm for 30 years and informed the court about the sixth farm, namely the piece of land bought from a previous cooperative farm. The Primary Court acknowledged that it was unaware of the sixth farm. She also described the history of the house, stating that it was initially a thatched house and was completed with corrugated iron sheets in 1999. She claimed that the disputed house was built cooperatively by all of them, and the house she currently resides in has a different value.

Moving on to **the third ground**, the appellant argued that his income as a farmer is not reliable, and he cannot guarantee earning a specific amount. He mentioned that he can take care of their three-year-old last-born child but should not be obligated to support the grandchildren since their parents are alive.

The respondent confirmed that they have one child, and the court determined that it would be better for the child to stay with her parents. The court ordered the appellant to pay 60,000/= TZS as child maintenance. In rejoinder, the appellant disputed the claim, stating that he never agreed to pay 60,000/= TZS.

Having dispassionately considered the rival submissions and keenly examined the lower court records, I will confine my analysis to the three grounds and determine whether any of them, and the appeal in its entirely is meritorious.

The record shows that the respondent filed a Matrimonial disputed at the Marriage Conciliatory Board of BAKWATA at the Chinongwe Ward. **On 18/01/2022** the Marriage Conciliatory Board of BAKWATA at the

Chinongwe Ward issued Form No.3 **that it had failed to reconcile the parties** and proposed the matter to proceed with the next procedural requirements of instituting the Petition. To this end, I see no merit to the first ground of appeal.

On **the second ground,** I have keenly read through the proceedings of the lower courts. It was alleged that the respondent found the appellant and his first wife, **SOPHIA SADICK**, in a mud house with two bedrooms and one sitting room. Each wife of the appellant occupied her own bedroom. The reasoning of the first appellate court, which reasoning I fully subscribe to, is that the enlisted properties that were acquired after the second marriage belong to the three and not the appellant and his first wife only. Excluding the respondent as if she never contributed is unjust.

In our jurisdiction section 114(1) of the Law of **the Marriage Act [Cap. 29 R.E. 2019]** has empowered the courts to divide any assets acquired by parties during their marriage by their joint efforts or order the sale of any such asset and divide between the parties the proceeds of sale. This order may be implemented by the court when granting or subsequent to the grant of a decree of separation or divorce.

Whenever a court of law in our jurisdiction is called upon to exercise its powers under **section 114(1) of the Law of Marriage Act**, it is obliged to observe the factors enshrined under subsection 2 of section 114 of the Act. These factors include one, the customs of the community to which the parties belong. Two, the extent of the contribution made by each party in money, property, or work towards the acquiring of the assets. Three, any

debt owing by either party which were contracted for their joint benefit. Four, the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

Having thoroughly read the judgment of the trial court, I am fortified that the division of all matrimonial assets to the parties as envisaged at page 10 of the typed judgment of the trial court observed all the important factors outlined by the Law of Marriage Act including the extent of contribution or joint efforts made by each party be it in monetary form, work or property towards the acquisition of the assets (See the Court of Appeal of Tanzania's case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo Civil Appeal No.12 of 2018, CAT, Tanga).** To this end, the second ground of appeal is equally without merit.

On the third ground of appeal, I must admit that the same has exercised my mind quite a bit. The appellant has lamented bitterly that as a peasant his income is unreliable and the demand for payment of TZS 60,000 was too heavy a burden. He added that he was being forced to support his grandchildren while their parents (his children) were alive. He admitted that there was only one child that needed the support of both parents, and he was always willing to support her through sharing farm produce.

First and foremost, when the respondent's petition at the trial court carried only two reliefs as envisaged in the **FOMU MADAI-3 dated on 3/2/2022.** She did not claim for custody and maintenance of the child. As a result, the trial court did not determine the issue of custody and maintenance of the child. It does not take much thought to realize that the

first appellate court erroneously acted on an issue not raised at the trial court. The Court of Appeal in the case of **Fatma Idha Salum Vs. Khalifa Hamis Said, Civil Appeal No. 28 of 2002 (unreported) stated:-**

> *"With all due respect to both the district court and the Resident Magistrate Court, this issue was not pleaded and should not have been considered. It is now settled law that the only way to raise issue before the court for consideration and determination is through pleading and as far as we are aware off, this is the only way"*

In the quest to understand the motivation of the first appellate court, I asked parties what they thought of the order for payment of TZS 60,000 monthly. Both of them admitted it was impractical because the appellant was not an employee. The respondent quipped that the magistrate made the decision because the appellant sounded as if he was joking by stating that he could pay TZS 1,000/=

I think the learned magistrates should have considered the culture and lifestyle of parties. Not every section of our Law of Marriage Act applies mechanically to every conflict. I agree, TZS 60,000 per month is not only too heavy a burden but also not a wish of either party from the beginning. Therefore, the order is hereby quashed and set aside.

All said and done, this appeal stands dismissed. Save for ground three, the judgement and all orders emanating from the judgement and decree of Ruangwa District Court are hereby upheld. I make no order as to costs.

It is so ordered.

E.I. LALTAIKA
JUDGE
27.06.2023

Court

Judgement delivered under my hand and the seal of this court this 27th day of June 2023 in the presence of both the appellant and the respondent who have appeared in person, unrepresented.

Court

E.I. LALTAIKA
JUDGE
27.06.2023

The Right to Appeal to the Court of Appeal of Tanzania fully explained

E.I. LALTAIKA
JUDGE
27.06.2023