

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MATRIMONIAL APPEAL NO.2 OF 2023

*(Arising from Matrimonial Appeal No. 2 of 2022 District Court of Biharamulo Originating
from Civil Case No. 9 of 2020 Biharamulo Urban Primary Court)*

ERICK D. SHUBI..... APPELLANT

VERSUS

GODELIVA JOSEPH RWEBANGIRA..... RESPONDENT

JUDGMENT

14th and 21st August, 2023

BANZI, J.:

The appellant Erick D. Shubi and the respondent, Godeliva Joseph Rwebangira were husband and wife since 2008 when they contracted their marriage under Christian rites. Their marriage was blessed with three issues. However, after some years, the marriage happiness turned into sour due to endless misunderstandings between them. Family reconciliations bore no fruits and the matter was referred to Biharamulo Urban Conciliation Board but still the parties could not be reconciled. The Board presented its findings before Biharamulo Urban Primary Court (the trial court) that it had failed to reconcile them. Thereafter, the appellant petitioned for divorce before the trial court vide Matrimonial Cause No. 2 of 2019. After hearing both parties, on 28/08/2019, the trial court was of the view that the marriage had not

reached into irreparable point and hence, it ordered separation between them for six months on condition that, in case they fail to reconcile within such period, the decree of divorce will be granted. It placed all children under the custody of their mother, the respondent, and ordered them to live in the matrimonial house. Also, the appellant was ordered to pay Tshs.200,000/= per month as maintenance of his wife and children.

The respondent was not satisfied with that amount, she filed a Matrimonial Revision No. 1 of 2019 before Biharamulo District Court praying for monthly payment of Tshs.800,000/= contending that, Tshs.200,000/= per month would not sustain the basic needs of their children and her as a wife. In its findings, the District Court upheld the amount of Tshs.200,000/= and the order of custody of children to continue to be under the respondent. However, it ordered the file to be remitted back to the trial court so as to determine the issue of custody and maintenance of children reasoning that they were new issues raised by the respondent at revision stage but were not determined by the trial court. She ordered those issues to be determined by a different magistrate with a new set of assessors.

With that order, the respondent returned to the trial court and instituted a fresh suit which was registered as Civil Case No. 9 of 2020. In that case, the respondent claimed for Tshs.800,000/= per month as

maintenance of children. At the end of trial, in its judgment dated 24/03/2020, the trial court ordered two children who had attained the age of 7 years to be placed to the appellant and the respondent to remain with one child aged 3½ years. Also, the maintenance amount was reduced to Tshs.100,000/= per month to cover only one child remained with the respondent.

The respondent was aggrieved with the decision of the trial court, hence, on 20th April, 2020 she appealed to the District Court and the appeal was registered as Matrimonial Appeal No. 2 of 2020. In that appeal, she faulted the findings of the trial court to place two children under the custody of the appellant who, according to the nature of his work as a soldier which involves emergency duties and relocation which can impact upon care, supervision and general parental guidance of children. It should be noted that, at the time when the respondent filed her appeal, parties were still under separation. While the Matrimonial Appeal No. 2 of 2020 was still pending before the District Court, on 14/05/2020, parties returned to the trial court seeking for the decree of divorce in Matrimonial Cause No. 2 of 2019 which was eventually issued on 18/05/2020. Matrimonial Appeal No. 2 of 2020 proceeded and was finally determined on 03/01/2023, when the District Court reversed the decision of the trial court and ordered all children

to be under the custody of the respondent while the appellant was ordered to pay Tshs.150,000/= per month as maintenance of children and to pay their school fees. The appellant was aggrieved with that decision, hence, this appeal. However, for the reasons which will be apparent shortly, I will not reproduce the grounds of appeal raised by the appellant.

At the hearing of the appeal, Mr. Manase King, learned advocate appeared for the appellant, whereas, the respondent had legal services of the learned advocate, Mr. Christian Byamungu. Before the appeal was heard, learned counsel for both parties were probed by this Court to address the legal issue on competence of Civil Case No. 9 of 2020 before the trial court concerning maintenance of children which is the root of this appeal.

Mr. Byamungu began to submit by stating that, it was not proper for the District Court in Matrimonial Revision No. 1 of 2019 to order the issue of custody and maintenance of children to be remitted back to the trial court and be heard by another magistrate with new set of assessors instead of the one who presided over Matrimonial Cause No. 2 of 2019. According to him, had there any necessity to remit it, the matter was required to be heard by the same magistrate with the same assessors who were conversant with the dispute rather than starting afresh with new assessors. He added that, after remitting back the file to the trial court, the new case was opened which was

registered as Civil Case No. 9 of 2019 but on appeal before the District Court, the matter changed its course to Matrimonial Appeal which was not proper. In that regard, Civil Case No. 9 of 2020 was incompetent and therefore, the appeals before the District Court and this Court are also incompetent. He supported his stance with the case of **Adam Mohamed Ndago v. Mwajabu Bakari Msongolo**, Matrimonial Appeal No. 1 of 2022 HC at Tanga where it was emphasised that, the case cannot change its course at the appellate stage. Basing on that position, Mr. Byamungu urged this Court to quash the orders of the District Court in Matrimonial Revision No. 1 of 2019 as it created confusion. He also prayed that, the issues of custody and maintenance of children as well as distribution of matrimonial assets be placed and determined vide Matrimonial Cause No. 2 of 2019.

On his side, Mr. King cited the case of **Fatuma Mohamed v. Saidi Chikamba** [1988] TLR 129 and submitted that, it was proper to file a new case concerning custody of children and their maintenance. However, what was not proper is to file the Civil Case instead of Matrimonial Case as it was stated in the cited case of **Adam Mohamed Ndago**. Thus, since Civil Case No. 9 of 2020 was improperly filed, all subsequent cases including this appeal have no legs to stand. He added that, it is four years now since parties were divorced but their matrimonial assets were not distributed as per section 114

(1) of Law of Marriage Act [Cap. 29 R.E. 2019] ("the LMA") and some of properties may be depreciated or misappropriated. He prayed the all cases beside Matrimonial Cause No. 2 of 2019 be nullified and the parties be directed to file the case on distribution of matrimonial properties, custody and maintenance of children.

Having carefully considered the submissions of learned counsel for both sides, the main question which calls for my determination is the competence or otherwise of Civil Case No. 9 of 2020 which is the basis of this appeal.

Upon perusing the record, it is apparent that, the confusion began with the order in the Matrimonial Revision No. 1 of 2019, when the District Court ordered the file concerning Matrimonial Cause No. 2 of 2019 to be remitted to the trial court for hearing of custody and maintenance of children before another magistrate with new set of assessors. Adhering to the directives of the District Court, the trial court opted to register the new case and worse enough, it was registered as a civil case instead of matrimonial cause. By registering a normal civil case involving custody and maintenance of children, Primary Court lacked jurisdiction to determine the same, because such jurisdiction is vested on the Juvenile Court pursuant to section 98 (1) (b) of the Law of the Child Act [Cap. 13 R.E. 2019]. Primary Court is only clothed

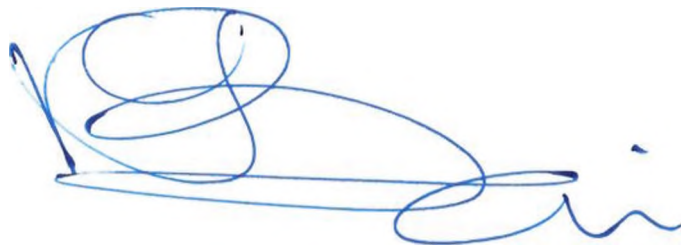
with jurisdiction to determine custody and maintenance of children in cases of matrimonial nature pursuant to the provisions of the LMA, i.e., in Matrimonial Causes or Matrimonial Applications. In that regard, the trial court had no jurisdiction to determine Civil Case No. 9 of 2020 involving custody and maintenance of children. Besides, it was not proper for Civil Case No. 9 of 2020 to change its course to matrimonial appeal at the appellate stage before the District Court and High Court. Thus, whatever transpired in Civil Case No 9 of 2020 was a nullity, and so as Matrimonial Appeal No. 2 of 2020 which is a product of nullity.

Without prejudice to the foregoing, there is another issue concerning the order made by the District Court in Matrimonial Revision No. 1 of 2019. The matter that was presented before the District Court was the claim of the respondent that Tshs.200,000/= that was ordered by the trial court was not enough and she wanted to be given Tshs.800,000/= per month. In that view, the District Court was required to determine the propriety or otherwise of maintenance order of Tshs.200,000/=. Had the District Court observed that, there were some new issues on custody and maintenance of children that were raised by the respondent which could not be determined in that revision, it was required to direct the trial court before the same magistrate and same set of assessors to determine them and give appropriate orders,

taking into consideration that, parties were still under separation and the decree of divorce was yet to be issued. Thus, the District Court acted without justification by ordering those new issues to be heard and determined by another magistrate with new set of assessors because there was no error committed by the presiding magistrate who was presided over the matter from the beginning. Normally, such order is issued when the magistrate or judge who presided over had committed error. Therefore, it is the considered view of this Court that, the order of the District Court requiring the new issues of custody and maintenance of children to be heard and determined by another magistrate with new set of assessors is unjustifiable, uncalled for and a source of confusion.

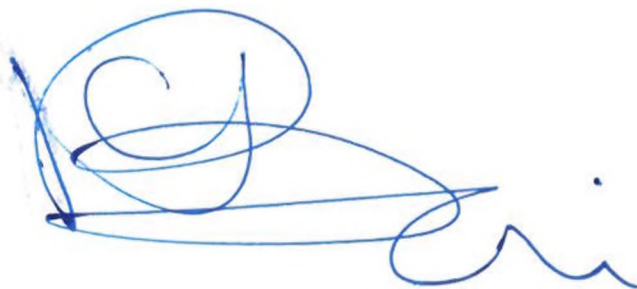
Having said so, I invoke the revisional powers under section 31 of the Magistrates' Courts Act [Cap. 11 R.E. 2019] and nullify the proceedings, quash the judgments and set aside orders in Civil Case No 9 of 2020 before Biharamulo Urban Primary Court and Matrimonial Appeal No. 2 of 2020 before Biharamulo District Court. Equally, the order of the District Court Matrimonial Revision No. 1 of 2019 requiring the new issues of custody and maintenance of children to be heard and determined by another magistrate with new set of assessors is hereby quashed. With this conclusion, as far as division of matrimonial properties is concerned, parties are directed to

comply with the order of the trial court issued on 18/05/2020 when it issued the decree of divorce. Otherwise, the order of the trial court issued on 28/08/2019 in respect of custody and maintenance of children still stands. Owing to the nature of the case, I make no orders as to costs. It is accordingly ordered.



**I. K. BANZI
JUDGE
21/08/2023**

Delivered this 21st day of August, 2023 in the presence of Ms. Gisela Rugemalira, learned counsel who is holding brief of Messrs. Manase King and Christian Byamungu learned advocates for the appellant and the respondent, respectively.



**I. K. BANZI
JUDGE
21/08/2023**