IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CIVIL APPEAL NO. 16 OF 2022

(Arising from the District Court Sumbawanga in Civil Appeal No. 10 of 2022 and originated from Sumbawanga Urban Primary Court in Matrimonial Cause No. 50 of 2021)

BONIFACE S/O KAZOLE ..... APPELLANT

VERSUS

LEOKADIA D/O JANUARY @ MBAULE ..... RESPONDENT

JUDGMENT

10th July & 11th September, 2023

This is a second appeal. The appellant **Boniface Kazole** preferred this appeal following his dissatisfaction with the decision of the District Court of Sumbawanga at Sumbawanga in Civil Appeal No. 10 of 2022. Simply, the facts of this case can be narrated thus; the parties to this appeal were couples dully married on 1988 through a civil marriage at Bomani, Sumbawanga.

In their cohabitation they were blessed with six issues namely Happy Kazole (32), Peter Kazole (28), Paulina Kazole (25), Pius Kazole (25), Patrick Kazole (17) and Witness Kazole (10). They also acquired several assets including two houses one located at Kizwite, Vuta Street, another at Msando Muungano, both are within Sumbawanga in Rukwa Region

At Songea the said spouses acquired one plot located at Songea, Mlete village and two motor vehicles. It appears that, their marriage was in difficulties while they were at Songea Army camp, and they were reconciled by the appellant's superior officers at his work which, however, bore no fruits.

The relationship started to turn sour whereas, on 2012 the appellant was transferred to Arusha and left his wife at Songea army camp, later she vacated from the house, and then she communicated with the appellant and informed him about the incident. The appellant came and rented the house and the respondent lived with her family.

The respondent stayed in the house until the rent went off, as a result the landlord vacated them from the house and Good Samaritan gave her a shelter with her children. Afterwards the appellant abandoned the

respondent and returned to Sumbawanga after he retired from his work employment.

On 2021 the respondent petitioned for divorce, division of property and custody of children at Sumbawanga Urban Primary Court. After a full trial the trial court decided in favour of the respondent, the trial court ordered that the marriage was broken beyond repair; hence they were no longer wife and husband.

It also ordered that the two children Patrick Kazole and Witness Kazole be under the custody of the respondent and the appellant was ordered to contribute Tzs. 20,000/= per month as maintenance costs, the respondent be given a car with registration number T461 AFY made Toyota Land cruiser and the respondent be given 50% of the appellant's pension money and house located at Msanda Muungano be given to the appellant.

Aggrieved by the decision of the Sumbawanga Urban Primary Court, the appellant challenged the said decision and filed an appeal to the District Court of Sumbawanga in Civil Appeal No. 10 of 2022 (the first appellate court) which after considering the grounds of appeal and the rival

submissions between the parties before it, upheld the decision and findings of the trial court.

Being dissatisfied with the decision of first appellate court, the appellant came before this court armed with four grounds of appeal. I take the liberty to list his grounds of appeal thus:

1. *The trial District Court magistrate erred in law and fact by dividing the matrimonial property to wit demanding (a) Tsh 1,200,000/= (b) a car with registration number T 461 AFY made Toyota Land Cruiser (c) and the respondent be given 50% division of matrimonial property while she has married a new husband; and hence the subject to division reaching to the wrong decision.*
2. *The trial District Court magistrate erred in law and in fact basing completely to the respondent to order the appellant to pay Tsh 85,000/= to the respondent every month while he knew the respondent has married another husband and thus reaching to wrong decision.*
3. *The trial District court magistrate erred in law and fact to grant custody of two children (a) Witness Boniface Kazole 13 years old and (b) Patrick Boniface 20 years old; the appellant ordered to pay*

maintenance costs of 20,000/= monthly without considering the children age as what the Child Law No. 21 of 2009 directs; and hence reaching to the wrong decision.

4. *The matrimonial dividend car, vehicle made Toyota Land cruiser is not a matrimonial property and it does not belong to the appellant for the appellant is just a driver and it is not registered for the appellant's name.*

When this appeal came for hearing, both the appellant and the respondent appeared in person, unrepresented. Starting with the appellant, he submitted by praying this court to adopt his petition of appeal filed in this court on 2nd day of November, 2022 in order to form part of his submission in chief. Hence, he called upon this court to allow his appeal, quash and set aside the Judgment of the first appellate court and let the appellant be free from the order of maintenance of children.

In reply, the respondent submitted that she filed her reply to the petition of appeal on 15th day of March, 2023 which is self-explanatory, and henceforth she prayed to this court to adopt her reply in order to form part of her submission in chief. Additionally, she implored this Court to dismiss

the instant appeal with costs and uphold decision of the first appellate court.

I have dispassionately considered the grounds of appeal in the light of the submission of both parties. Having stated the above, I should now be in a position to confront the issue of contention in this appeal.

It is important to note that, this is a second appellate court; the Matrimonial cause originated from Primary court, the appellant appealed to the District court after being aggrieved by the decision of the Primary. He was hurt with the decision of the District thus appealed to this court as second bite. It is a settled principle that the second appellate court has to deal with the question of law. But this approach rests on the premise that finding of facts are based on a correct appreciation of the evidence. This position was enunciated in the case of **Amratalal D.M t/a Zanzibar Hotel** [1980] T.L.R 31 it was held that:

> *"As appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of same principle of law or procedure."*

Based on the principle aforementioned, I will be guided by the said principle when I am dealing with this appeal.

In determining the first ground of appeal, I wish to consider the most crucial issue whether the division of matrimonial properties was fair or not. Addressing the first and second grounds of appeal, they are related to the division of matrimonial properties. It is a trite law that the division of matrimonial properties is based on efforts made by both parties jointly during the existence of the marriage 114(3) of the Law of Marriage Act [Cap 29 R.E. 2019] assets acquired during marriage includes also the properties owned during marriage by one spouse but have been substantially improved during the marriage by the other party or jointly, they become liable for distribution as stated in the case of **Anna Kanungha v Adrea Kanungha** [1996] T.L.R. 195 HC

In the instant case, the appellant has claimed that the first appellate court erred in law and fact by equally dividing matrimonial property while the respondent was married with another husband. On her part, the respondent disputed the claim and argued that the properties were acquired during the subsistence of their marriage and not after divorce.

Having perused the records of the trial Court, it is apparent to this Court that there is nothing in the said records which indicates that the respondent was remarried with another husband. This argument was raised by the appellant in the first appellate court; and it was turned down with the reason that it was a new issue hence it could not be entertained at the appellate level.

I concur with the position of the first appellate court that the ground that the respondent is remarried and therefore does not deserve equal division of matrimonial assets, is a new one which was not raised and decided by the trial court during the trial. A case is built up by pleadings that are before the court. It is a requirement of the law that parties are bound by their pleadings and the trial court is required to deal with their pleadings. (See **National Bank of Commerce Ltd vs Mnaya Chalamila**, DC Civil Appeal No. 7 of 2008)

It has been decided by this Court and the Court of Appeal in many times without number that you cannot raise new issues before the appellate court which were not at issue in the trial court. See the case of **Yosia Makala Mankala and another v The Registered Trustees of ELCT Northern Diocese**, Land Appeal No. 49 of 2019, **Harison Mandala and**

9 others v The Registered Trustee of Archdiocese of Dar es Salaam, Civil Reference No. 4 of 2019 CAT and **Ramadhani Msangi v Sunna G. Madara and 2 others**, Land Appeal No. 39 of 2017; whereby in all above cases, the court emphasized that the appellate court cannot consider or deal with the issues which were not canvased, pleaded and or raised at the lower court.

Concerning the division of matrimonial property including Tshs. 1,200,000/=, a car T 461 AFY Toyota Land Cruiser and 50% of the appellant's pension money given to the respondent as the division of matrimonial property, this court has two observations; one, Tshs 1,200,000/= as a division of matrimonial property and two, 50% of appellant's pension money. The amount of 1,200,000/= demanded by the respondent from the appellant was not claimed during the trial court, the said claim in respect of such amount emerged at the stage of appeal before the first appellate court.

The amount of money was quantified in the judgment of the District Court at page 2 of the judgment. For the sake of clarity, I take liberty to reproduce what is provided at page 1 and 2 of the trial court judgment, as follows:

"In short but exhaustively, the matter before the trial court started when the respondent was filing a Matrimonial Cause No. 50 of 2021 at Sumbawanga Urban Primary Court, demanding TZS 1,200,000/= seeking divorce from the appellant, maintenance of children and distribution of matrimonial properties."

The above excerpt entails that the first appellate court referred the order of the trial Court on division of matrimonial property. I thoroughly went through the proceedings and judgment of the trial court to see whether there was an order of amount of Tshs 1,200,000/= granted to the respondent by the trial court. I am certain that the order granting Tshs of 1,200,000/= to the respondent was not made by the trial Court. Hence, that paragraph mentioning the amount of Tshs. 1,200,000/= was extraneous and the remedy is to expunge if from the record.

On the issue of 50% of appellant's pension money to be taken by the respondent, it is a trite law that pension contribution is the property of the Pension Fund and does not form part of the employee's assets or estate capable of attachment to satisfy court orders until such time when the benefit is paid to the insured employee as provided under section 76 of the

National Social Security Pension Fund Act, Cap 50 R.E. 2018. Similarly, this principle of the law applies to all pension funds.

Before one can benefit on the division of a matrimonial property, he or she has a duty to prove that the respective asset was acquired or substantially improved during the subsistence of marriage and through joint efforts. (See **Shomari Matambo vs Shamila Ally**, Civil Appeal No. 149 of 2019 (unreported).

Back to the present case, despite his claiming to have interest in the appellant's pension fund, the respondent did not prove her extent of contribution towards acquisition of the same. I may also add in passing, that it can hardly be accepted that the pension fund is a matrimonial asset because for it to have such status it must be proved either that both spouses contributed to its acquisition during subsistence of their marriage and the extent each of them contributed to, or that although being acquired before marriage, it was substantially developed by the two of them. The respondent not being part of the employment contract between the appellant and his employer, cannot be said to have been contributing or developing the pension fund the appellant was entitled to be paid after his employment contract expired.

With due respect to the appellant herein, it is therefore, a considered view of this court that the trial court order granting the respondent 50% of the appellant's pension was against the law/illegal. Besides, the pension of a retired person does not fall under provision of section 114(1) of the Law of Marriage Act, for it to be termed as a matrimonial property which will be subject division.

It is therefore, my settled view that it was erroneous for the first appellate court to divide 50% of the appellant's pension to the respondent while the same was not among the matrimonial properties which falls under the ambit the section 114(1) of the Law of Marriage Act. With the foregoing reasons, the first ground of appeal is therefore resolved affirmatively.

On second ground of appeal, the appellant claims that the appellate trial magistrate erred in law by ordering the appellant to pay 85,000/= from the appellant's pension to the respondent. The respondent disputed that ground and argued that she was his legal wife before divorce. This court has discussed in length on the issue of division of 50% pension fund of the appellant which was given to the respondent. The amount of 85,000/= is coming from the division of 50% of the appellant's pension fund which I have previously discussed and disposed of negatively. Therefore, this court

holds that the division of appellant's pension was unlawful and improper; hence the second appeal is found to be meritorius.

Coming to the third ground of appeal which faults the first appellate court decision for misdirecting itself to grant custody of two children to the respondent and order the appellant to pay maintenance costs of TZS 20,000/= without considering the children's age, the records of the trial court reveals that the two children namely Patrick Kazole, 17 years old and Witness Kazole, 10 years old, both were less than 18 years when the suit was filed in trial court. I have to say that what matters in the custody of a child is the best interest and welfare of the child. Section 4(2) of the Law of the Child Act provides that:

> *"The best interest of a child shall be primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, court or administrative bodies."*

It is evident from the record that initially the two children were in the custody of the Respondent; the respondent has lamented that appellant denied them that they were not his children; and that one of his children is not attending to school. In response, the appellant claimed that he was

living with his children, one of standard two and two young son without any problem for about three years, until when she came back on October and took them.

In my considered opinion, since the two children are under the custody of the respondent and they are supposed to attend education, it would serve the best interest of the children far better to allow the Respondent to continued being their caretaker.

The trial Magistrate reached to such decision after considering that the two children are staying with the respondent. Section 129(1) of the Law of Marriage Act, provides a duty to a man to maintain his children whether they are in his custody or the custody of any other person either by providing them with such accommodation, clothes, food and education as may be reasonable having regard to his means and station in life or by paying the costs thereof.

Therefore, in the light of the foregoing reasons and pursuant to the above provisions of the law, it is my considered opinion that the trial Court was justified in ordering the appellant to provide for their maintenance and the amount of Tsh. 20,000/= was based on the fact which I have explained

above. Therefore, the trial court order on the amount of said money of the two children is maintained.

In relation to a complaint that the vehicle made Toyota Land cruiser that is not a matrimonial property and therefore, does not belong to the appellant, the appellant contended that he is just a driver and the vehicle is not registered in his name. Examining the records of the trial Court the appellant in his examination in chief, he testified that the said vehicle is not belong to him but he is a driver; hence, the vehicle is not a matrimonial property which can be divided.

Despite the fact that appellant denied that the said vehicle belongs to him, I have observed that at no time he tendered a document of the vehicle to prove what he testified or claimed. The evidence given by the appellant contain mere words. Thus, I am not moved to believe that the said vehicle is not belonging to the appellant.

The law clearly states that the burden of proof is always on the person who alleges on existence of any fact he asserts. Failure to do that the court is not moved to decide in his favour. Section 110(1) of the Law of Evidence

Act, Cap 6 R.E. 2019 states categorically to whom the burden of proof lies as follows: -

> *"Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist"*

Applying the above provision of the law, it is clear that the appellant is the one who asserts that the said car does not belong to him. Therefore, he had a burden to prove his allegation on a balance of probabilities. A mere statement without tendering documents of the ownership of the vehicle or certified motor vehicle card and calling the alleged owner of the vehicle to testify in Court renders the appellant's assertion to have not been proved on a required legal standard as it goes contrary to section 110(1) of the Evidence Act. Hence, from the foregoing reasons, I find no any reason to differ with the findings of the first appellate court. This ground has no merit.

Thus, owing to the above reasons, the present appeal is partly allowed to the extent herein stated above. I therefore, set aside the trial Court's award of division of 50% of appellant's pension money to respondent and

sustain the rest orders of the first appellate court in respect of the division of matrimonial properties, custody and maintenance of the two children made against the appellant.

It is so ordered.

A.A. MRISHA
JUDGE
11.09.2023

DATED at **SUMBAWANGA** this 11th day of September, 2023.

A.A. MRISHA
JUDGE
11.09.2023