IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF SONGEA

AT SONGEA

PC CIVIL APPEAL NO. 12 OF 2023

ASIMNA JUMA PONELA ..... APPELLANT

VERSUS

JAFARI KAYOMBO ..... RESPONDENT

(Appeal from the decision of the District Court of Namtumbo at Namtumbo in Civil Appeal No. 02 of 2022)

JUDGEMENT

21st August & 29th September, 2023

KISANYA, J.:

The parties to this appeal lived together as husband and wife from 2010. On 23rd May, 2022, the respondent, Jafari S. Kayombo petitioned before Namtumbo Primary Court for decree of divorce. His petition was predicated on the ground of desertion. He also listed the assets he claimed to have acquired jointly with the respondent which include, two houses, one at Kanjele, Namtumbo and another at Songea Municipality, one motorcycle and household items. The respondent further stated that their relationship was blessed with three children aged 9, 5 and 2 years respectively.

After the trial, the trial court found that, the parties were not legally marriage but they lived under presumption of marriage for a decade. Based on section 160(2) of the Law of Marriage Act, Cap. 29, R.E. 2019 (the LMA), the trial court held that, the respondent was entitled to petition for division of

matrimonial properties and custody of children. In the end result, it placed one child aged 9 years under the custody of the respondent, while the other two children were placed under the appellant's custody. As for the division of matrimonial properties, the trial court awarded the respondent 10% and 25% shares of the houses situated at Songea and Namtumbo, respectively, while the household assets were equally shared. With respect to the motor cycle, the trial court held that, it was the appellant's property and not among the matrimonial properties.

Aggrieved, the respondent appealed to the District Court of Namtumbo at Namtumbo (the first appellate court), through Civil Appeal No. 2 of 2022. His appeal was premised on nine grounds which can be rephrased as follows: **One,** the trial court erred in law and fact for awarding the division of matrimonial properties without considering the appellant's (now respondent) contribution toward acquisition of the properties. **Two,** the trial court erred in law and fact for failure to consider the appellant's (now respondent) evidence and came up with a decision which prejudiced the appellant's right. **Three,** the trial court erred in law and fact for awarding the respondent (now appellant) a motorcycle, while she failed to explain as to how she acquire the same. **Four,** the trial court erred in law and fact for failure to consider that the respondent's (now appellant) contradicted herself on how she acquired the matrimonial properties. **Five,** the trial court erred by ordering the appellant (now respondent) to hand

over the children to the respondent (now appellant) without considering that they had been under his custody.

In its judgment, the first appellate court held the view that the sole issue for its determination was "whether the trial court erred in law and fact when making decision of the matter at hand." It went on finding that, the trial court's decision was based on division of matrimonial properties and custody of children while the pleading instituted before the trial court was for divorce. Further to this, the first appellate court found that the respondent herein (the then appellant) was not accorded the right to cross examine the appellant (the then respondent) as mandatorily required under rule 47(2) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, 1964. In view thereof the said defect, the first appellate court quashed the proceedings of the trial court for being a nullity. It ordered for the matter to be heard afresh.

Undaunted, the appellant has preferred this appeal which is grounded on two (2) points of grievance. I find it not necessary to reproduce them due to the reasons to be noticed shortly.

With leave of this Court, the appeal was disposed of by way of written submissions. The appellant appeared in person, the respondent enjoyed the service of Mr. Optatus Japhet, learned advocate. I also probed the parties to address this Court, in their respective written submissions, on whether the

appellant and respondent were accorded the right to be heard on the issue which formed the basis of the impugned decision of the first appellate court.

As the issue raised by this Court, *suo motto,* goes to the root of this appeal, I will dispose it first.

In her written submission, the appellant did not address at all the issue raised, *suo motto,* by this court. She only illustrated on the points of grievance fronted in her petition of appeal. The appellant then urged this court to allow the appeal on the contention that the first appellate court's orders was improper.

On the other side, Mr. Japhet conceded that the parties were not given the right to address the issue which was raised *suo motto* by the first appellate court. He submitted the decision of the first appellate court was made in contravention of Article 13(6)(a) of the Constitution of the United republic of Tanzania of 1977, Cap 2 as amended time to time. His submission was based on the settled position that, where the court raises an issue *suo motto* before passing the judgement or decree, parties must be given a chance to address it. To cement his argument, he cited the case of **EX- B.8356 S/SGT Sylvester S. Nyanda v. The Inspector General of Police and Another**, Civil appeal no. 64 of 2014, Court of appeal at page 11 and 12 (unreported).

In her rejoinder submission, the appellant did not address this Court on the issue under consideration.

I have considered the arguments expressed by both parties. At the outset, I agree with the respondent's counsel that, it is a cardinal principle that cases must be decided basing on the issue or grounds on record. If the court finds it appropriate to decide an issue that was not raised before it, such issue must be placed on record; and the parties must be invited to address the court on the same. This requirement is based on the right to be heard which is enshrined under Article 13(6)(a) of the Constitution which provides for the right to fair hearing.

It is a long settled position that, any decision arising from the proceedings in which parties were not accorded the right to be heard is a nullity. This stance applies even if similar decision would have been made after hearing the parties. There is a number of authorities on that position including, **The Director of Public Prosecutions v. France Dominicus Chiwangu @ Sharo**, Criminal Appeal No. 526 of 2021, [2023 TZCA 17520 (24 August, 2023) TanzLII, **Margwe Erro and 2 Others v. Moshi Bahalulu**, Civil Appeal No. 111 of 2014, [2015] TZCA 282 (25 February, 2015) TanzLII, **R.S.A Limited vs. Hanspoul Automechs Limited and Another**, Civil Appeal No. 179 of 2016 [2021] TZCA 96 (6 April 2021) and **Abbas Sherally and Another vs. Abdul S.H.M Fazalboy**, Civil Appeal No. 33 of 2002 (unreported) to mention but a few. For instance, in the **Abbas Sherally's** case (*supra*) the Court of Appeal underlined that:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasised by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice"*

It is not disputed in the matter at hand that, the proceedings and decision of the trial court were nullified on the ground that the respondent was not given the right to cross-examine the appellant. As shown herein and stated in the appellant's submission, another ground was to the effect that, the decision of the trial court was not based on the pleadings filed before the trial court. However, the issues whether the respondent was denied right to cross-examine the appellant and whether the trial court granted reliefs which were not prayed for in the pleadings were not stated or raised in the petition of appeal which the responded filed in the first appellate court. Both issues were raised, *suo mottu,* by the learned resident magistrate of the first appellate court, in course of composing the judgment.

Reading from the record, I entirely agree with Mr. Japhet that, nothing to suggest that the parties were recalled to address the first appellate court on the said irregularities. As the impugned decision was based on the two issues, I hold that the parties herein was not accorded the right to be heard. Being guided by aforementioned precedents, I find that the decision of the first

appellate court is a nullity for contravening the principle of natural justice. It is clear that the issue raised by this Court, *suo mottu,* suffices to dispose of this appeal. Therefore, I will not deal with the merit of the appeal.

In the final analysis, I hereby exercise the revisionary powers vested upon this court under section 44(1)(b) of the Magistrate Courts Act, [Cap 11, R.E. 2019] by quashing and setting aside the judgment of the first appellate court and the orders made therefrom. I accordingly remit the case file to the District Court of Namtumbo for it to accord the parties the right to be heard on the issue raised by the learned resident magistrate *suo motto*, and/or the grounds of appeal; then compose another judgment in accordance with the law. Each party shall bear its own costs.

Order accordingly.

DATED this 29th day of September, 2023.

S.E. KISANYA
JUDGE
29/09/2023