

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA
MATRIMONIAL APPEAL NO. 01 OF 2023**

(Arising from the Decision of Tabora District Court in Matrimonial Case No. 01 of 2021)

**NORBERT NGORONGORO APPELLANT
VERSUS**

ONESTA EXAVELI NTAONTUYE RESPONDENT

Date of Last Order: 17.08.2023

Date of Judgment: 22.09.2023

JUDGMENT

KADILU, J.

This case originated from the decision of the District Court of Tabora in Matrimonial Cause No. 01 of 2021. Before determination of the matter, I find it appropriate to narrate the factual background of the case. The record depicts that the appellant and the respondent started living together in 2008 as husband and wife without contracting any formal marriage. They were blessed with five issues and succeeded to acquire some properties. It appears their cohabitation went on well from 2008 to 2018 when the relationship started to be sour.

Several attempts were made to resolve their misunderstanding, but all proved futile. In March 2020, the Itetemia Conciliation Board issued a certificate indicating that it had failed to reconcile the parties. After that, the respondent filed Matrimonial Case No. 08 of 2020 in Tabora Urban Primary

Court. After finding that the parties had no formal marriage, the trial court invoked the presumption of marriage under Section 160 (1) of the Law of Marriage Act [Cap. 29 R.E. 2019] to give legal recognition to the parties' cohabitation. It then proceeded to order the equal distribution of matrimonial properties between the appellant and the respondent. The decision annoyed the appellant. He appealed to the District Court of Tabora. The district court heard both parties and found that the primary court determined the case without having the requisite jurisdiction. It stated that primary courts have jurisdiction to entertain matrimonial cases where the parties have contracted customary or Islamic marriage, not where they lived under the presumption of marriage.

Following that decision, the respondent filed Matrimonial Case No. 01 of 2021 in the District Court of Tabora. The case was decided in favour of the respondent. The trial court ordered all matrimonial properties to be sold and the proceeds to be divided equally between the appellant and the respondent. Aggrieved by the decision, the appellant preferred the appeal in this court on the following grounds:

- 1. That, the honourable trial court erred in law and facts for its denial to allow the appellant to call his witnesses to prove his case.*
- 2. That, the honourable trial court erred in law and facts by rejecting the exhibits tendered by the appellant to substantiate his ownership of the house alleged to be a matrimonial house.*
- 3. That, the honourable trial court erred in law and facts by entertaining the case without having jurisdiction.*

4. That, the honourable trial court erred in law and facts for entertaining the case which is res-judicata.

The appellant prayed this court to allow the appeal, nullify the decision of the trial court and order a re-trial. He also prayed for the respondent to be condemned to pay the costs of this case.

When the appeal was called on for hearing, the appellant was represented by Mr. Amosi Gahise, the learned Advocate while the respondent appeared in person, without legal representation. In support of the appeal, Mr. Gahise submitted that the appellant was denied an opportunity to be heard in the trial court as the case was heard in a rush mode. According to him, the case was heard in one day and none of the parties was allowed to call witnesses. He elaborated that the parties were denied a constitutional right to be heard and the right to a fair hearing.

Concerning the second ground of appeal, Mr. Gahise stated that the trial court rejected the appellant's exhibits which were to be tendered by his witnesses if he would be allowed to call them. He said the act affected the appellant's rights as the court ordered the properties to be distributed equally, including those which are not matrimonial properties. In the third ground of appeal, Mr. Gahise submitted that the District Court had no original jurisdiction to entertain the matter. He called the court to refer to Section 18 (1) of the Magistrates' Courts Act, for this position.

The learned Advocate opined that the case was supposed to be filed in Tabora Urban Primary Court, not in Tabora District Court. He explained that Tabora Urban Primary Court had original jurisdiction to determine the dispute and the district court is vested with appellate jurisdiction. He referred to the cases of ***Fanuel Mantiriri Ngunda v Herman Mantiriri Ngunda***, [1975] LRT no. 7 and the case of ***Steven Masatu Wasira v Joseph Sinde Warioba***, [1999] TLR 342 in which the essence of jurisdiction was stated by the court.

Regarding the last ground of appeal, Mr. Gahise submitted that the case was determined to the finality by Tabora Urban Primary Court in 2020 so, the matter was *res-judicata* as stipulated under Section 9 of the Civil Procedure Code (CPC) [Cap. 33 R.E. 2019]. According to him, from the primary court, the respondent was required to appeal to the district court, not to file a fresh case as what she did.

The respondent on her part, did not have much to tell the court when called to address in opposition to the grounds of appeal. Her main request was for the court to consider her contribution towards the acquisition of the matrimonial property and dismiss the appeal. She contended that she was also denied an opportunity to call witnesses during the trial in the district court. Concerning the second ground of appeal, she stated that the house that the appellant is claiming to be his personal property is a matrimonial property because it was built jointly by the appellant and her.

She explained further that she was doing small business and gave the money to the appellant which he used to purchase the plot and construction of the house thereon. She added that at one point in time, they borrowed Tshs. 1,000,000/= from the bank to finance the construction of the said house, but now the appellant is alleging that the house belongs to his young brother. On the third and fourth grounds of appeal, the respondent replied that she has nothing to submit as they are legal aspects and she is not a lawyer.

I have examined keenly the petition of appeal, records of the lower courts, and submissions by the parties. The point for my consideration is whether the appeal is meritorious or not. In my determination, I will start with the third and fourth grounds of appeal as they both fault the jurisdiction of the trial court when it determined the matter. The appellant contends that the dispute was supposed to be filed in the primary court instead of the district court. As shown in the records, initially the case was determined by the primary court, but on appeal to the district court, it was ruled that the primary court had no jurisdiction on a matrimonial case in a non-customary or Islamic marriage.

Therefore, this court is called upon to determine the question whether the primary courts are statutorily empowered to entertain matters involving the presumption of marriage. I think this issue should not take much of the court's time. Since jurisdiction is a creature of the statute then, I will let the provisions of the law assist in checking if the holding by the appellate district

court is a correct position. Section 18 (1) (b) of the Magistrates' Courts Act provides that:

"A primary court shall have and exercise jurisdiction ... in all matrimonial proceedings in the manner prescribed under the Law of Marriage Act."

From the above provision, it is apparent that primary courts have jurisdiction to determine matrimonial disputes including those involving presumed marriages. In the cases of ***Richard Majenga v Specioza Sylvester***, Civil Appeal No. 208 of 2019, Court of Appeal of Tanzania at Tabora and ***Gabriel John Musa v Voster Kimati***, Civil Appeal No. 344 of 2019, Court of Appeal of Tanzania at Dodoma, it was held that primary courts have jurisdiction in presumed marriages and the court can issue consequential orders thereof. The Magistrates' Courts Act is categorical that the powers vested to the primary court to entertain matrimonial disputes should be exercised in the manner prescribed under the Law of Marriage Act. The relevant provision of the Law of Marriage Act which prescribes for jurisdiction of courts in matrimonial cases is Section 76 which stipulates as follows:

"Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court, and a primary court."

Therefore, the powers vested in the primary courts by the Law of Marriage Act are unconditional. All the courts from primary courts to the High

Court have concurrent jurisdiction over matrimonial proceedings irrespective of the nature of the marriage from which the dispute has emanated. Section 75 of the Law of Marriage Act cited by the appellate district court is a specific provision conferring jurisdiction to the primary court when dealing with claims of adultery where the parties are married under Islamic or customary marriages or they would have proceeded in that manner. See the case of ***Wilson Andrew v Stanley John Lugwisha & Another***, Civil Appeal No. 226 of 2017 where the Court of Appeal stated that the primary court has jurisdiction to entertain claims of damages for adultery where there is no petition of divorce against any person with whom his or her spouse has committed adultery.

The parties herein filed their matrimonial dispute in Tabora Urban Primary Court seeking for distribution of matrimonial properties. This is well reflected in the records and submissions by both parties. There is no doubt therefore, that the primary court did what it was mandated to do by the law. For this reason, the Matrimonial Appeal No. 07 of 2020 was properly before the district court and it was a misdirection by the court to rule that the primary court had no jurisdiction to determine the matter. The court was required to determine the appeal in substance, a duty which the learned appellate Magistrate abrogated from. As such, the respondent was not justified in filing a fresh matrimonial case in the district court as she did after the misdirection by the appellate district court. Having found so, I find the third and fourth grounds of appeal meritorious.

I now turn to resolving the first and second grounds of appeal in which the appellant complains that he was denied an opportunity to present his evidence. As it came up, the respondent had a similar complaint. The basis for the dissatisfaction by the parties on this point is that the case was heard hurriedly. I have perused the proceedings of the district court and found that the district court determined the dispute in a day. The parties' discontent is that they requested time for them to call witnesses, but they were denied. The record is however, silent about the parties' request to call their witnesses and the alleged denial thereof. On page 14 of the typed proceedings, the appellant addressed the court as follows after the completion to adduce his evidence:

"I pray to close my case. I have no witnesses."

The prayer was granted. The proceedings reveal that the respondent addressed the court in the same way as can be deduced from page 12 of the district court's proceedings. As for the exhibits, the record shows that the respondent was able to tender the decisions of the primary court and that of the district court which were admitted as exhibits P1 and P2 respectively. In this regard, the parties cannot be heard complaining that their right to a fair trial was contravened simply because the case was heard in one day.

The right to a fair trial is a fundamental right enshrined under Article 13 (6) (a) of the Constitution which provides that when the rights and duties

of any person are being determined by the court or any other agency, that person is entitled to a fair hearing. See also the cases of ***Samwel Gitau Saitoti @ Saimoo @ Jose & 2 Others v The DPP***, Criminal Application No. 73/02/2020, ***Ausdirili Tanzania Ltd v Mussa Joseph Kumili & Another***, Civil Appeal No. 78 of 2014 and ***Mbeya-Rukwa Autoparts & Transport Ltd v Jestina George Mwakyoma***, [2003] T.L.R. 252.

In the circumstances, I find the argument by Mr. Gahise that the parties were not afforded the right to be heard as mere words which lacks a cogent proof. Consequently, the first and second grounds of appeal are without merit and I dismiss them accordingly. Notwithstanding the foregoing, it is the finding of this court that the parties were not heard properly in respect of Matrimonial Appeal No. 07 of 2020 before the district court of Tabora as the appellate Magistrate raised a question of jurisdiction *suo moto* and proceeded to resolve it without engaging the parties. In the case of ***Said Mohamed Said v Muhusin Amiri & Another***, Civil Appeal No. 110 of 2020, Court of Appeal of Tanzania at Dar es Salaam, it was stated that:

"...a trial judge is obligated to decide the case on the basis of the issues on record. As to what should a judge do in the event a new issue crops up in the due course of composing a judgment, the new question or issue should be placed on record and the parties must be given opportunity to address the court on it."

From the authorities cited above, I find that since the point was raised by the learned Magistrate *suo motu*, it was improper for her to proceed

unilaterally without inviting the parties to address her on the point. I fully agree with Mr. Gahise that the parties were not heard properly in respect of the appeal filed in the district court. Consequently, the appeal succeeds partly and fails partly. For the stated reasons, I nullify the proceedings and set aside the decision and order of the district court in Matrimonial Case No.01 of 2021. I hereby remit the file to the district court for the grounds of appeal in Matrimonial Appeal No. 07 of 2020 to be determined on merits before a different Magistrate expeditiously. Given the outcome of the appeal, I make no order as to the costs.

Order accordingly.




KADILU, M.J.
JUDGE
21/09/2023.

Judgment delivered in chamber on the 22nd Day of September, 2023 in the presence of Mr. Norbert Ngorongoro, the Appellant and in the absence of the Respondent.



A handwritten signature in blue ink, appearing to read "S.I. MZIGE".

S.I. MZIGE

AG. DEPUTY REGISTRAR

22/09/2023.

**DEPUTY REGISTRAR
HIGH COURT, TANZANIA
LABORA**