IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CIVIL APPEL NO. 43 OF 2022

(Originating from a decision Dodoma District Court in Matrimonial Cause No. 08/2021)

MADELINE LEVSON MUHUMHA.....APPELLANT

VERSUS

FREDY HENELY NYAMHOKYA .....RESPONDENT

JUDGMENT

Date of last order: 27/10/2023

Date of Judgment: 15/11/2023

LONGOPA, J.:-

On the 02nd day of June 2021, the Appellant herein petitioned for dissolution of her marriage with the Respondent, equal division of matrimonial assets and custody of children. The petition was filed at Dodoma District Court. To be specific, the Appellant prayed for the following reliefs: -

(a) An order that marriage between the Petitioner and the Respondent has broken down irreparably.

(b) An order to divorce the marriage and a decree for divorce to be granted.

(c) An order for equal division of the matrimonial properties as para 6 of the petition.

(d) The children be into the custody of the petitioner and respondent be ordered to assist the petitioner for maintenance of children.

(e) Costs of the suit.

(f) Any other order(s) or relief(s) that this Honorable Court may deem fit and just to grant.

At the end of trial, an order for divorce was granted. The trial Court found marriage between the Appellant and the Respondent to have broken down irreparably. The order as to the division of matrimonial assets was as follows; **one**, the Respondent was ordered to pay TZS. 11, 040,000/= to the appellant as her share of jointly acquired assets which the Respondent sold. **Two,** a house situated at Plot No. 29 Block 60 Kizota in Dodoma City was given to the Appellant whereas the one situated at Plot No. 1 Block S Kikuyu East in Dodoma was given to the Respondent. **Three**, a plot at Ndebwe was ordered to be sold its proceeds divided at 40% to 60% to the appellant and respondent respectively. As to the custody and maintenance of the children, the custody was given to the appellant and the Respondent was ordered to pay TZS. 300,000/= as maintenance. Aggrieved by the decision of the trial court the appellant appealed to this Court on the following grounds of appeal: -

1. *That, the Honourable District Court erred in law and in fact in deciding that there was no evidence of the existence of oil milling and gastro milling machines.*

2. *That, the Honourable Principal Magistrate misdirected himself that after assessing the division he did not use the formulated ratio to divide all assets.*
3. *That, the Honourable District Court of Dodoma erred in law and in fact in not considering some of the assets which were evidenced as joint efforts.*
4. *That the Honourable District Court erred in law and fact in giving the appellant a building which is not habitable as her resident whereas giving the respondent a house of higher value and habitable also without valuation.*
5. *That, the Honourable District Court erred in law and fact in ordering the appellant to be paid money as compensation of some assets without giving clear basis for the said decision which led to unfair division and against the laid formular.*
6. *That, the Honourable District Court erred in law and in fact in not awarding a house for the appellant to reside with the issues of the marriage.*
7. *That, the learned Principal Resident Magistrate misdirected himself in making the division against the evidence and/or against the law.*
8. *That, the Honourable District Magistrate erred in law and in fact in believing exhibits D1, D2, D3, D4, D5 and D6 which were questionable, untenable and baseless.*
9. *That, the Honorable Principal Resident Magistrate erred in law and in fact in ordering vague and inadequate maintenance to the children.*

10. *That, the Honorable Principal Magistrate erred in law and in fact in not ordering the payment of the school fees and other school requirements to the issues of the parties.*

On 31st day of October 2023, the appeal was heard. Both parties were represented. The appellant was represented by three Advocates namely, Mr. Machibya, Ms. Mbasha and Ms. Kimaro whereas the respondent was represented by Mr. Kalonga. The submissions from the learned advocates generally based on the issue of distribution of matrimonial assets and orders as to maintenance of children.

To support the appeal, on the first ground the Appellant's Counsel Ms. Mbasha submitted that the trial court erred in ordering that there was no proof on the existence of oil milling machines the fact which was proved by PW1 (the Appellant herein) and PW2. The evidence which was not challenged by the respondent during cross examination. On this citation of the case of **Bomu Mohamed v. Hamisi Amri**, Civil Appeal No. 99 of 2018 was made where it was held that a party who fail to cross examine a witness is deemed to have admitted that matter.

On the second and fourth ground which were consolidated, it was the submission of Ms. Mbasha that the parties' assets are in two group; movable and landed properties. Regarding the landed properties, she mentioned two houses namely Plot No. 29 Block 60 located at Kizota, Plot No. 1 Block S Kikuyu East. The two houses were admitted during trial as exhibit P9 and exhibit P11 respectively. The appellant was given the house

at Kizota whilst that of Kikuyu was given to the respondent. This distribution was challenged by the appellant's counsel on the reason that the Kizota house was not habitable as it is a godown were oil milling machines operate, further because she was given custody of the children the trial court ought to have considered this factor too. The East Kikuyu house on the other hand, she said the same is a big residential house with some frames. She submitted that no valuation was conducted as to the two houses.

Submitting on other properties which were admitted as exhibits D1, D2, D3, D4, D5 and D6 which were valued to TZS 27,600,000/=and the trial Magistrate divided them to 40% to 60%for the appellant and respondent respectively, this distribution was challenged by the appellant's counsel. It was argued that the trial Magistrate did not state as to where it got this value of the properties. The fact that the respondent parted with them was not pleaded in his written statement of defence rather on the notice of additional document the thing which Advocate Machibya opined not have formed the part of pleading hence were to be disregarded. It was his submission that in reply to petition the respondent disputed to have never been in possession of these properties. He fortified his submission with the case of **James Funke Gwagilo vs. Attorney General** [2004] TLR 161, where it was held that for a matter to be determined it must be pleaded.

In respect to ground three, six and eight, it was submitted that some properties were not distributed by the trial court. The properties included: one, the house at area C the evidence on it was admitted as exhibit P8.

Two, the house located at Chidachi the evidence pertaining to it was admitted as exhibit P10. Three, a house located at Ilazo which was alleged to be not disputed by the respondent. Four, a plot at Swaswa. The last property alleged to have not been distributed was a farm at Ndebwe.

It was the argument of the appellant's counsel on fifth ground of appeal that the trial Magistrate didn't indicate the basis of his decision on distribution of properties which the respondent was alleged part with them.

On the seventh ground of appeal, it was submitted that the distribution was against the provision of section 114 of the Law of Marriage Act Cap. 29 R.E 2019 which requires the extent of contribution of the parties towards acquisition and/or maintenance of the matrimonial properties. It was the submission on the part of the appellant that she proved his contribution as she was doing charcoal business and tailoring activities. Whereas the Respondent didn't prove at all as to his contribution and testified to the effect that he was bankrupt in his testimony. It was further submission of the appellant counsel that the appellant deserved big share and not token one as ordered by the trial court. In fortification of this submission reference to the case of **Anna Kanunga v. Andrea Kanungha** [1996] TLR 195-HCT was made.

On the ninth and tenth ground of appeal which concerns the issue maintenance, it was argued that TZS. 300,000/= ordered by the trial Magistrate was low and inadequate, and it was not stated as to whether it covers school expenses and other expenses or not. He prayed this court to rule out on this omission as the amount is not enough to the two issues of

the parties to cater for food, clothing and medication. He prayed for the specific order in respect to the school fees and other needs.

In reply, Mr. Kalonga submitting on the first ground of appeal stated that PW1 and PW2 were cross examined on the issue of oil milling machines. He referred the court to pages 47 and 53 of the typed proceeding. He submitted that PW1 the appellant herein didn't state the price, description of the machines and any permit in operation of the same. Therefore, he said the case of **Bomu Mohamed** (supra) is not applicable in the matter.

On the second and fourth ground of appeal, it was his argument that the principle on the division of matrimonial properties were considered and applied by the trial court. He said regarding to the house located at Kizota and Kikuyu East, no evidence was adduced to whether which house in habitable and which is not. Stating it at appeal stage he said that its introduction of new facts. On the issue of values of the houses the same he said was the duty of the parties to state during trial and not the trial court.

On other assets as per exhibits D1 up to D6, it was his submission that the same were not objected when tendered in court and were part of pleadings after the respondent filed notice for additional document and they were admitted in accordance with the law. He said that is why the trial magistrate found them to be matrimonial assets and divided them to the ratio of 40% and 60% for the appellant and respondent respectively. It was Respondent's submission that the distribution was very fair, and the

appellant proved to have contributed toward the acquisition through doing domestic activities. The amount of TZS 27,600,000/= originates from D1 to D6 which are contract evidencing parted assets.

On the properties which were alleged to have not been listed nor distributed by the trial court as lamented in ground three and six, he submitted that the house at area C and Chidachi are not matrimonial properties as they belonged to one Feruz who testified as DW2 and that tendered exhibit D2 which indicated that the houses were used as collateral for the money advanced by respondent to one Mr. A.S. Feruzi and one Hamza Kassimu Abdalla respectively. The house located at Ilazo is mortgaged to NBC bank. Regarding a farm located at Ndegwe he said the same was ordered to be sold the proceeds to be distributed at 40% to 60% for the appellant and respondent respectively.

On the fifth and seventh ground of appeal it was submitted that the trial Court observed the principle laid in the case of **Bi Hawa Mohamed** (supra) and observed section 114 of the Law of Marriage Act by considering contribution of each party. He argued that the appellant did not produce tangible evidence regarding amount/profit from charcoal and tailoring business alleged to be her contribution. He added that the trial court was justified to give the appellant 40% the only available evidence on the part of the appellant was the domestic chores.

It was argued that the cited case of **Bibie Mohamed** (supra) and that of **Anna Kanungha** (supra) was in the respondent's favor. It was Mr. Kalonga's submission that according to DW1, DW4 and DW5 who are

workers at the respondent's business testified to the effect that the appellant did not participate in the respondent's business. He also disputed 40% given to the appellant asserting that the same was big share considering that no other contribution of the appellant apart from domestic chores.

Submitting on the eighth ground of appeal he said the trial court was proper to believe on exhibits D1 to D6 as part of evidence the same was pleaded on the notice of additional documents. The same were also not challenged when tendered in court. He said the documents passed the test of admissibility and reliability. He added that the court was satisfied that the respondent parted with the properties.

On the grounds concerning maintenance and inadequacy of TZS 300,000/=, he said it was the respondent who was to appeal against it. On the other hand, it was submitted that the amount is enough as the respondent is paying school fees to the issues who are studying at boarding school. However, he challenged it to the effect that the order is indefinite on the payment of TZS. 300,000/=. In rejoinder, by and large the appellant's counsel reiterated his submission in chief. If no need to repeat it.

I have carefully considered the grounds of appeal, the record of the trial court and submissions of both parties. All ten grounds of appeal relate to two main issues namely, the division of matrimonial properties and maintenance order issued by the trial court.

Commencing with division of matrimonial assets, the law permits the court when granting decree of divorce or separation to subsequently distribute matrimonial assets acquired by the couples or developed by their joint efforts during the subsistence of their marriage and make orders as to custody of the issues of marriage, if any, and maintenance. In respect of matrimonial assets, the relevant provision, section 114 (1) and (2) of the Law of Marriage Act, Cap 29 RE 2019 require division of matrimonial assets acquired by them during the marriage by their joint efforts. The factors to be considered include customs of the community to which the parties belong; the extent of the contribution made by each party in money, property or work towards the acquisition of the assets; any debts owing by either party which were contracted for their joint benefit; the needs of infant children, if any, of the marriage and subject to those considerations, shall incline towards equality of division.

From this provision, the position of the law guiding division has set out some conditions or principles to be followed. **One,** it must be established that the said property is actually a matrimonial asset. **Two,** the court must have regard to customs of the community. **Three**, the court must be guided by contribution made by parties in acquisition of matrimonial assets. **Four,** courts must address its mind to the debts of the family, if any. **Five**, Courts must consider needs of infant children, if any.

When it comes to percentage in the distribution, the benchmark is the extent of contribution by each party in acquisition of such matrimonial assets. In the case of **Yesse Mrisho vs. Sania Abdul**, **Civil Appeal No.**

147 of 2016, (unreported), the Court of Appeal observed the following on this assertion: -

> From the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. There is no doubt that, a court when determining such contribution, must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets.

Back to the case at hand, the Appellant in paragraph six of the petition for divorce, filed in the trial court a list of matrimonial properties acquired in their marriage, to wit:- matrimonial house situated at plot 1 Block S, Kikuyu East within Dodoma City Council, matrimonial house situated at plot No. 29 Block 60 situated at Kizota within Dodoma City Council, Matrimonial House situated at Plot No. 2A Block 15 Area A within Dodoma City Council, Matrimonial house situated at Block No. 31 Block E Chidachi West within Dodoma City Council, matrimonial house situated at Plot No. 112 Block F Ilazo South within Dodoma City Council, Plot No. 61 Block H within Nkuhungu within Dodoma City Council, unsurveyed plot of land measured one acre located at Ndembwe village within Dodoma City Council, one sunflower milling machines, one gastro obscure milking machine, one juice milking machine both situated at matrimonial house plot No. 29 Block 60 Kizota within Dodoma City Council, vehicle with registration T.370 CLF(CANTER), Vehicle with registration T821 CQW (SCANIA), vehicle with registration T. 541 CSH (KIRIKUU), Vehicle with

registration number T.899 DSS (HARRIER), Vehicle with registration No. T.852 DUN (TOWNHIACE).

It was the appellant testimony before trial court that her contribution towards acquisition of the said properties arose out of the fact that she was doing charcoal and tailoring business thus proceeds of the two business were used in acquiring the abovenamed properties. It was her further testimony that she participated in running the respondent's business for which the proceed obtained were applied in acquisition of construction of the movable and immovable properties.

The complaint in respect to the house distributed to her by the trial court is that the same in not habitable because it is the godown not fit for residential purposes and that its value is lower compared to the one distributed to the respondent. The general rule is that he who alleges must prove. The rule finds a backing from section 110 and 111 of the Law of Evidence Act, Cap. 6 which among other things state:

> 110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.
>
> 111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.

See also the cases of **Attorney General and Two Others vs. Eligi Edward Massawe and Others**, Civil Appeal No. 86 of 2002, **Ikizu**

Secondary School vs. Sarawe Village Council, Civil Appeal No. 163 of 2016(both unreported) and **Godfrey Sayi vs. Anna Siame Mary Mndolwa**, Civil Appeal No. 114 of 2012 [2017] TZCA 213 (TanzLII). It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities.

In addressing a similar scenario on who bears the evidential burden in civil cases, the Court of Appeal in the case of **Antony M. Masanga vs. Penina (Mama Ngesi) and Another,** Civil Appeal No. 118 of 2014 [2015] TZCA 556 (TanzLII) cited with approval the case of in Re B [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities states that:-

> If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 if returned to and the fact is treated as having happened.

That being the position of the law in relation to the complaint of the appellant on the house she was given and its value, it was the duty of the appellant to prove that the same is not fit for residential purposes and its value is low compared to the one given to the respondent.

Stating it at this appellate stage is raising a new fact which this court cannot deliberate on as it lacks sufficient evidence from the record to so decide. It is trite law that appellate court cannot decide on the matter which was not pleaded in the trial court. The appellate court can only determine on issues that was pertinent and available evidence on record would dispose such issues.

In the case of **Juma vs. Manager of PBZ limited and Others** [2004] 1 EA 62, It was held that:

> ...the 1st appellate judge, therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place.

The question of value of the house was not a subject of determination by the District Court. The appellant invited the court to find that house was a matrimonial asset and order its division to the couples. That is what the Court did. Bringing a question of higher and lower value or habitability or otherwise is an afterthought that can not be entertained at this level.

On the existence of the milling machine, I find no reasons to depart from the decision of the trial court that the same were not proved if they

exist. It is true that the appellant stated that they own the oil milling machines. It was expected that the appellant would have tendered or produces material evidence proving existence of machines, permits, its day-to-day sales, operators of the machines, current status-whether the same operate or otherwise etc. The appellant's counsel stated the PW2's evidence supported the fact that the machine exists. However, it was PW 2's evidence that he knew existence of the gastro milking machine way back eight or nine years ago. There was no evidence of continued existence of the same.

In the circumstances, absence of clear evidence on existence the alleged machines and the situation regarding their operational status led the trial court to find this aspect in the negative. I am of the view that this finding by the trial court was correct as there was no material evidence placed before it to substantiate that the same existed and were operational.

On the issue of properties which were admitted as exhibit D1 to D6 are alleged to be parted with the respondent I find the same was also deliberated by the trial court in accordance with the law. The trial court found them to be the matrimonial properties.

It should be stated at this juncture that what was found to be matrimonial property in Exhibits D1 to D6 are not the real properties (houses) themselves. There are two sets of properties. First, money owed to the Respondent by the owners of the houses that were provided as collaterals i.e. the house at Area C and Chidachi. It is evident from record

that the owners of the said houses did discharge their obligation by paying their dues to the Respondent to retain back their houses. That amount collected is part of the TZS 27,600,000/=. Second, there are movable properties that were sold prior to the time of institution of the matrimonial cause including the cars. The proceeds of sale was also accounted as part of TZS 27,600,000/=. In fact, the question of misappropriation as submitted by the Counsel for appellant do not arise as all the amounts arising out of the sale and recovery of advanced money was distributed to both appellant and respondent. Third, the were properties that evidence proved that the same did not exist. The motorvehicle made Kirikuu is an example in that respect.

The trial magistrate rightly held that 40% of the proceeds should be the entitlement of the appellant from disposed assets. The trial court arrived at the total of TZS 27,600,000/= after adding up proceeds from loans Exhibit D 1 TZS 3,000,000/=, Exhibit D 2 TZS 1,600,000/=, Exhibit D3 TZS 2,000,000/=, Exhibit D 6 (Sale of Harrier) TZS 7,000,000/=, Exhibit D 4 (Sale of Lorry) TZS 10,000,000/=, Exhibit D5 (Sale of Canter) TZS 4,000,000/=. Therefore, upon admission of these Exhibits D 1 to D6 the question on whether the houses at Plot 2A Block 15 Area C, house at Plot 31 Block E Chidachi West and that of Plot No. 29 Block 60 Dodoma Municipality with Reference No. CDA/KZR/N41/ was resolved. It was evident that appellant and respondent had interest on those properties in terms of money that was loaned to respective owners.

In fact, these transactions were done at different times since 2015 to 2020 for the last property prior to institution of petition for divorce

between the appellant and respondent. Three houses were redeemed by their owners in 2015 and 2016 while two motorvehilcles were sold in 2019. The exception was only one motorvehicle that was sold in 2020.

Considering the evidence on record in totality, respondent is the one who contributed much on the acquisition of the said matrimonial assets. The Respondent's witnesses categorically testified that at no point in time did the appellant participate in the business of the respondent. It was explained how the respondent started doing business by selling vitenge and Kanga, he become an agent of Azam products at all this time he was not yet married to the appellant. This means the appellant found already doing business. It is on record that the respondent later started doing transport business by hiring his motor vehicles trucks to be specific. Therefore, I find the distribution of 40% to 60% properly made by the trial court in respect of all the assets that were divided between the parties.

The other complaint is on the house of Ilazo which was not distributed to the parties. The submission by the parties were that the house was under mortgage arrangement with NBC Bank Limited. Evidence of the appellant was to the effect that the loan was fully discharged though she did not tender any evidence as to when exactly was the repayment of loan finalised to warrant her assertion that such mortgage was discharged.

Given the fact it is the Respondent who is still repaying the loan advanced in respect of the mortgaged property, it is fair to order that house to remain with the respondent. Reasons for so doing are numerous. First, it is the respondent who is and shall continue to discharge the loan liability which benefited both spouses. Second, it is evidence on record that

this house was constructed sometimes between 2005/2006 and 2007. This was when the Appellant was still in another marriage as per **Exhibit P2**. According to this Exhibit P2, the Appellant former marriage was terminated on 7/11/2007. This is a per record on page 36 and 84 of the proceedings respectively. That evidence is vital as the house was acquired prior to the parties herein commencing cohabition thus it was not acquired during the subsistence of the marriage. Third, as I shall point out later, respondent is still responsible not only for maintenance of issues of the marriage but provision of educational necessities to those issues. Fourth, the contribution of the respondent in acquisition of all matrimonial assets was higher than the other spouse (appellant). On that account, it is not expected that division should be equal.

Considering all these factors, I find it fair to order the same to remain property of the respondent once the mortgage is fully discharged. The totality of evidence on record points out to the direction that this house was acquired by the respondent before the marriage while the appellant was still in another valid marriage. Further, given the added responsibilities of the respondent to issues of the marriage in respect of educational expenses, I am inclined to rule in favour of the respondent on this aspect. It is my firm considered opinion that respondent should not be impaired completely from ability to discharge his obligations towards the issues of the marriage particularly responsibilities to provide educational necessities.

In the case of **Helmina Nyoni vs Yeremia Magoti** (Civil Appeal 61 of 2020) [2022] TZCA 170 (1 April 2022), the Court of Appeal stated as follows:

It is obvious that the decision and others we have laid our hands on say nothing more than echoing the spirit of the law under section 114 of the Act. All it does and which it has consistently done, is to guide courts in determining the division of assets considered to be matrimonial assets upon dissolution of the marriage to the extent of the share rather than entitlement by individual spouse. This is so because section 114 (2) (b) of the Act enjoins courts to incline towards equal divisions where there is evidence of equal contribution towards acquisition of the matrimonial assets between the parties. **Obviously, that case does not have an automatic application for an equal division and indeed that may not be realistic considering that each case has to be decided on its own individual facts (Emphasis is mine).**

According to available evidence on record, contribution of the appellant was not of the same level as that of the respondent. It was quite proper for the trial court to order a share of 40% of all assets that were not encumbered at the time of ordering division of matrimonial assets to the appellant. It was just and fair share to the appellant.

I am contented that given the prevailing circumstances on contribution towards acquisition and the obligations that respondent shall continue to discharge in respect of the issues of the marriage it is only equitable and fair to grant that house at Ilazo to the Respondent. After all, it is evident that this house was acquired prior to parties being married. It was acquired while the appellant was still in a former marriage.

In the case of **Yesse Mrisho vs Sania Abdul** (Civil Appeal 147 of 2016) [2019] TZCA 414 (7 November 2019), the Court of Appeal reiterated the necessity of the factor on contribution to be taken on board. That contribution should also reflect share in the division of the same. It stated at page 12 of the judgment that:

> The principle drawn from Bi Hawa Mohamed vs Ally Seif (supra) is unambiguous, stating that the efforts made towards acquisition of the said matrimonial property must be assessed and determined, and as also discussed in **Bibie Maulid vs Mohamed Ibrahim** (supra), **the contribution granted should not necessarily lead to 50% share each, since it is dependent on a party's contribution which is the determining factor of what share one should receive and each case has to be considered on its own circumstances.**

There was also an issue regarding maintenance that was contested. It was submitted by appellant that TZS 300,000/= per month ordered to cater for two issues of the marriage was inadequate and not clear whether it covers for education expenses of the two issues of marriage. On the hand, the respondent argued that the amount is on the higher side and he is not disputing that he shall continue to discharge his obligation as a parent towards educational needs of the issues of marriage.

I have ascertained the fact that respondent's readiness to continue taking a good care of educational needs of the issues of marriage, I do not see reasons why this matter should detain the Court. It was a firm submission of the respondent's case that there is no doubt that respondent

as a responsible father would continue discharging his obligations in respect of catering for educational expenses of two issues of the marriage. I shall proceed to vary the decision of the trial court to the effect that in addition to the maintenance that was ordered, the respondent shall be responsible to provide all educational necessities for the two issues of the marriage until the issues complete their education to the level of their ability subject to attaining the age of majority.

This Court as the first appellate court have found it imperative to determine these two aspects which were not considered by the trial court. The case of **Khamis Abdalla Mbaruku vs Neema Juma Said** (Civil Appeal No 277 of 2020) [2023] TZCA 17652 (26 September 2023) is illustrative on the powers of the first appellate court on matters that have not been determined by the trial court. The Court of Appeal, at pages 7-8 of the judgement stated that:

> We should hasten to observe that the High Court in the instant matter sat as the first appellate Court, with jurisdiction to rehear the evidence on record and draw its own inferences of fact. It cannot be gainsaid the Court had all powers and duties of the trial court. On this basis, we perturbed why the court chose to remit the case to the trial court instead of stepping into the shoes of that court and determine the issue on the evidence on record and in accordance with the law.

Save for two aspects that this Court has determined in the foregoing, I find that the judgement and decree of the District Court is in order. There

are no cogent reasons to interfere with it. It based its finding on the available evidence on record and both judgment and decree are in accordance with the law.

That said and done, the appeal succeeds to the following extent: (i) The trial court's order in respect of distribution of matrimonial assets is upheld save for the house located at Ilazo which shall remain property of the respondent once he discharges the existing mortgage; (ii) That, the respondent is ordered to provide all educational necessities for the two issues of the marriage, in addition to the maintenance order stated by the trial court; and (iii) the parties shall bear their respective costs.

DATED and **DELIVERED** at Dodoma this 15th day of November 2023

E.E. LONGOPA

JUDGE

15/11/2023