

IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
PC CIVIL APPEAL NO. 48 OF 2022

*(Originating from the Judgment of the District of Temeke at One Stop Judicial Centre, in
Matrimonial Appeal No. 05 of 2022)*

BONIPHACE WARYOBA**APPELLANT**

VERSUS

FLORA HOSSEA**RESPONDENT**

JUDGMENT

Date of last order: 31/07/2023

Date of Ruling: 05/09/2023

OMARI, J.

On 22 December, 2021 the Primary Court of Temeke vide Matrimonial Cause No. 21 of 2021 made orders to the effect that the marriage between the Appellant and the Respondent had broken down irreparably thus, a divorce decree be issued. Subsequently, it distributed the matrimonial properties where the parties were each to get 50% of the house in Yombo and the household items. The parties were each to remain with their respective cars and that the house in Mtoni be divided 70% to the Appellant and 30% to the Respondent. Furthermore, the trial court ordered the Appellant to pay TZS 200,000 per month as child support. Dissatisfied with this, the Appellant preferred an appeal to the district court vide Matrimonial Appeal No. 5 of 2022 challenging



the decision of the trial court in Matrimonial Cause No. 21 of 2021. The Appellant had four grounds of appeal to wit:

1. That the learned trial magistrate in the primary court erred in law and fact to arrive at the decision that the house situated at Mtoni kwa Azizi Ally Kiwanja No. MTN/SAB/273 KUMB NA.MTN/SM/SAB/MZN/10/2010 is a matrimonial property while it was not a matrimonial property.
2. That the learned trial magistrate in the primary court erred in law and fact to arrive at the decision that the land situated at Mwandege is a matrimonial property while it is not a matrimonial property.
3. That the learned trial magistrate in the primary court erred in law and fact to arrive at the decision that the Appellant should provide maintenance to children to the tune of TZS 200,000 per month himself while the Respondent is also a public servant of JWTZ, Mgulani JKT, SSGT (Mgulani 831 KJ).
4. That the judgment of the trial magistrate in the primacy court is bad in law and in fact for failure to state the modality of the



appellant to visit his children at this time as ordered to be under the custody of the Respondent.

It was on the basis of those four grounds that the Appellant beseeched the Temeke District Court at the One Stop Judicial Centre to declare the two properties as not matrimonial properties, for the Respondent to contribute TZS 100,000 per month as maintenance, for the Appellant to be allowed to visit the children during weekends and for the decision of the trial to court be quashed and set aside with costs.

In determining the Appeal, the district court considered the grounds of appeal and the trial court's record and the parties' submission. As for the first and second grounds of appeal, after re-evaluating the evidence adduced in the trial court the first appellate court varied the order for distribution of the properties to the effect that the Appellant is to get 60% and Respondent gets 40% of the Mtoni house. It also found the ground on the Mwandege property not to be meritorious. However, after considering the Respondent's submission and re-evaluating the evidence the first appellate court ordered a 50% division of the Mkuranga Plot, and Sigara Mtaa wa Ntuka while it held there was no evidence to prove the Respondent's contribution in the Chamazi Plot. The district court magistrate made reference to the Court of Appeal



case of **Damson Ndaweka v. Ally Said Mtera**, Civil Appeal No. 05 of 1999

which allows the first appellate court to re-evaluate the evidence and make its own decision where it is satisfied the evidence was not properly considered.

On the third ground of appeal the district court after going through the trial court's record found the order for maintenance was given without due regard for section 44 of the Law of the Child Act Cap 13 RE 2019 thus, found the ground meritorious and ordered for the case file to be remitted to the trial court for it to take evidence as regards the parties' finances, then make an order as regards to maintenance.

As for the last ground of appeal the district court found that the primary court's judgment was clear as regards to custody and access. Considering the Respondent's submission and prayers the district court held that the Appellant had access rights but not in the Respondents home therefore the parties are to plan and agree on how the Appellant will see the said children. It also granted the Appellant the right to be with the children during school holidays and weekends if it is necessary.



Still feeling aggrieved the Appellant preferred this appeal armed with four grounds to wit:

1. That the appellate court erred in law and in fact to bless the decision of the Temeke Primary Court that the house situated at Mtoni kwa Azizi Ally Kiwanja No. MTN/SAB/273 of KUMB NA. MTN/SM/SAB/MZN/10/2010 is a matrimonial property while is not a matrimonial property.
2. That the appellate court erred in law and fact to arrive at the decision that there were no proper documents relating to the sale agreement tendered in the Primary Court of Temeke that the house situated at Mtoni kwa Azizi Ally Kiwanja No. MTN/SAB/273 of KUMB NA. MTN/SM/SAB/MZN/10/2010 was procured before the existence of the marriage.
3. That the appellate court erred in law and fact to arrive at the decision that the Respondent contributed to build the house situated at Mtoni kwa Azizi Ally Kiwanja No. MTN/SAB/273 of KUMB NA MTN/SM/SAB/MZN/10/2010 through the loan from NMB Bank and Bank of Baroda without proof.



It is on the basis of those three grounds that the Appellant is seeking this court to allow the appeal and grant orders that the said house is not matrimonial property, there were proper sale documents for the said property and no loan was taken by the Respondent to build the said house in addition to the decision of the first appellate court be quashed and set aside.

. The Appellant had the services of Emmanuel Hyera and the Respondent had the services of Musabila Ntimizi both learned advocates. The appeal was disposed by way of written submission upon request of counsel for the Appellant

In his submission the Appellant's counsel began with an objection on a point of law that the proceedings in the primary court and the subsequent appeal to the district court were not proceeded by a reference to the Marriage Conciliation Board (MCB) as required by section 101,104(5) and 106(2) of the Law of Marriage Act, Cap 29 RE 2019 (the LMA). The Appellant's contention is that the Respondent did not tender the MCB Certificate, this is Form No. 3 when testifying during the trial. In the counsel's opinion failure to tender the MCB Certificate while other documents were tendered is contrary to section 104(5) of the LMA which compels the MCB to issue a



certificate setting out its findings. Counsel submitted that no certificate was tendered in court to prove that the parties attended the MCB and alleged the MCB had no competence thus, the trial court lacked jurisdiction to entertain the matter. Counsel referred to the cases of **Shillo Mzee v. Fatma Ahmed** Matrimonial Civil Appeal No. 1 of 1984 TLR 112, **Ratifa Rafael Kipande v. Ramadhani Yusuph Mkoba**, PC Civil Appeal No. 195 of 2020 (HC) and **Abdalla Hamis Kiba v. Ashura Masatu**, Civil Appeal No. 465 of 2020.

Submitting on the three grounds of appeal collectively the Appellant's counsel began by offering a background giving rise this appeal. He stated that the parties were married in the civil form sometime in 2012. The house which is the centre of the appeal was bought by the Appellant on 27 April, 2010 and he testified to this effect in the trial court as can be seen on page 21 of the trial court's typed proceedings.

The Appellant's counsel went on to pose a question as regards the said property having two sale agreements arguing that the said plot was registered in 2010 and given Reg. No. MTN/SM/SAB/MZN/10/2010 which is also reflected in the deed of sale. He went to state that on the other hand the Respondent tendered a sale agreement from 2015. Furthermore, the Appellant's counsel argued that the Respondent did not testify how she was

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involved in the acquisition of the said property. Then went on to cite section 114(2)(b) and (3) of the LMA; the case of **Bi Hawa Mohamed v. Ally Sefu** (1983) 32 TLR as regards to what are matrimonial assets that are subject to distribution.

The Appellant's counsel stated that having adduced evidence that the house/plot was purchased in 2010 while the Respondent gave the same for the purchase being in 2015 it was wrong for the trial court to hold that his was not the right evidence and on the basis of that order that the house be included as matrimonial property. In his view this defies the principle of who alleges must prove. The evidence was adduced and supported by witnesses and the Respondent had not proved anything. He cited the case **of Berelia Karangirangi v. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 where the Court of Appeal stated that the general rule is he who alleges must prove and in civil cases that proof is on the balance of probabilities. Counsel for the Appellant then went on to refer to section 110(1) and (2) of the Evidence Act Cap 6 RE 2022 to the effect that whoever desires a court to give judgment in their favour must prove the existence of facts owing to the right or liability in their favour. Concluding his submission counsel

referred to section 114(2) stating the extent of contribution by each party in money, property or work towards acquisition of the assets.

When it was his turn, Mr. Ntimizi commenced his submission by first responding to the point objection raised by the Appellant, the Respondent disputed that Matrimonial Cause No. 21 of 2021 and Matrimonial Appeal No. 05 of 2022 before the Temeke Primary Court and the Temeke District Court at the One Stop Judicial Centre respectively were a nullity as averred by the Appellant. Counsel went on to state that according to section 101 (c) of the LMA the Appellant was required to appear before the MCB and wilfully failed to attend then the requirement of prior reference to the MCB and a certificate there from shall not apply.

The Respondent's advocate went on to state that the MCB in its certificate stated that it has failed to reconcile the two for it has failed to have a joint sitting with them. He further stated that since the Respondent referred the dispute to the MCB and the Appellant refused to appear the MCB went on to register it had failed to reconcile them thus, the Respondents counsel stated the Primary Court of Temeke had jurisdiction to entertain the matter.



When replying to the ground of appeal the Respondent's counsel choose to canvas the three grounds seriatim as they appear in the Memorandum of Appeal.

On the first ground the Respondent's counsel stated that the couple albeit having contracted a marriage in the 2012 started to cohabit in 2009. On the argument that the plot was bought in 2010 before the marriage counsel contended that if one scrutinizes the evidence the couple acquired four plots between 2009 and 2011. Counsel contended further that the testimony of SM2 establishes how the Respondent contributed to the acquisition of the said house. He argued further that the Appellant's behaviour of concealing property by way of deed of gifts is just seeking to deprive the Respondent of her interests over the house. On this ground counsel concluded that both the Temeke Primary Court and the District Court of Temeke did not err in law or fact to find the said house is matrimonial property.

Moving on to the second ground of appeal the Respondent's counsel submitted that the court had not erred to conclude the way it did since the documents tendered by the Appellant were in any case not original and not certificated copies. He went on to argue that the evidence established the



Respondent's participation to the acquisition of the said house during their marriage.

On the third ground of appeal the Respondent's counsel submitted that during trial the Respondent claimed apart from her salary and businesses she also procured loans and this was supported by SM2. He further stated what should matter is the Respondent's contribution to the acquisition of the house whether it be through work, loans and others. To buttress his argument, he cited the case of **Mohammed Abdallah v. Halima Lisangwe**, (1988) TLR 197 stating the compensation needs to be at 50% also citing the case of **Sophia Mgalla v. Adolf**, Civil Appeal No. 3 of 2005. Counsel concluded his submission by stating that the Appeal has no merit and should be dismissed in its entirety with costs.

In his rejoinder Mr. Hyera reiterated that the MCB Certificate was not tabled in court and that the parties were never involved in any form of reconciliation. Furthermore, in the whole proceedings of the trial and in the appeal, there is nowhere in the testimony of SM1, SM2 and SM3 as well as SU1, SU2 and SU3 or documentary exhibits that were adduced as regards the issue of marriage conciliation under s. 101, 105(5) and 106 of the LMA. He concluded his rejoinder on the point of objection by refuting the act of



the Respondent saying the said MCB Certificate was annexed to the submission the same is not evidence.

As regards the grounds of appeal he reiterated his submission on the issue of burden and standard of proof in civil matters stating that the proceedings of the trial court on Page 10 depicts the court denied to admit the evidence of the loans yet found she contributed. He concluded by beseeching this court to evaluate the evidence.

Having considered the parties submissions I am aware of the fact that the requirement of prior reference to the MCB is a legal requirement that goes to the jurisdiction of the trial court to determine the matter before it.

It is settled law and there are a number of decisions to this effect that before hearing any matter, a court has to satisfy itself that it has the legal mandate to entertain the same. In the case of **MIC Tanzania Limited v. Hamisi Mwinyijuma & Another**, Civil Appeal No. 112 of 2019 this court held that:

'Jurisdiction is a creature of law and, important for the Court's to satisfy themselves of its powers to determine matters firstly and prior to attempting them, lest it finds itself addressing a nullity. In the event of lack of jurisdiction, in determination of matters whichever the outcome the whole proceedings and, findings a nullity.'



Moreover, as it was held in **M/S Tanzania - China Friendship Textile Co. Limited v. Our Lady of the Usambara Sisters**, Civil Appeal No. 84 of 2002 the question of jurisdiction can be raised at any stage. Thus, I seek to determine the point of objection before proceeding with the grounds of appeal if need be. There is only one issue regarding the point of objection that is whether the same has merit and if so what is the way forward.

To determine the objection, I rummaged through the trial court's record to achieve three things. The first is to establish whether there was an MCB Certificate annexed to the Petition at point of admission, secondly to establish the propriety and contents of the said MCB Certificate and thirdly to establish whether the MCB Certificate was ever a matter of contention in the trial court. These are what will guide my determination of the point of objection; of course, coupled with the law as regards to the requirement of prior reference to the MCB.

My findings on the first question are that the form that was filled and filed to institute Matrimonial Cause No. 21 of 2021 at the Temeke Primary Court



was indeed accompanied by a copy of Form No. 3 which is the MCB Certificate issued on 16 March 2021.

Before I determine the propriety and or contents of the said MCB Certificate as I seek answers to the second question I wish to first refer to section 104 (5) of the LMA which provides:

'Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings.'

In the matter at hand the MCB issued a Form No. 3 in which it remarked as follows:

'kwa kuwa ni vigumu hata kuwakutanisha, Baraza lina mleta Bi Flora Hosea Manyiwa kwa hatua Zaidi'

The above unofficially translates to as it has been difficult to get them together (for conciliation) the Board is presenting Ms. Flora Hosea Manyiwa for further steps. The said Form No.3 is signed by a Chairman of the MCB. It is dated 16 March, 2021 and has a stamp. The LMA requires that where the MCB has failed to reconcile the parties it shall issue a certificate setting out its findings, see section 104(5) of the LMA. Furthermore, Rule 9(2) of



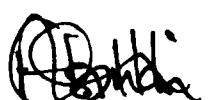
the Marriage Conciliation Boards (Procedure) Regulations, GN No. 240 of 1971 provides:

'Where the dispute is between a husband and his wife, and relates to the breakdown of the marriage or an anticipated breakdown of the marriage and the Board fails to reconcile the parties, the Board shall issue a certificate in the prescribed form.'

The Appellant's contention is that the effect of there being no prior reference to the MCB or not tendering the MCB Certificate renders the whole proceedings a nullity. As already stated the MCB Certificate is in the trial court's file perhaps the question would be does the said MCB Certificate reflect the spirit of section 104(5) of the LMA.

In my view the same is clear that the MCB failed to reconcile the parties therefore issued the said MCB Certificate which the Respondent duly attached to her Petition in the primary court as required by section 101 of the LMA. Having already found there is an MCB Certificate which at this point I find was properly issued by the MCB.

I now move to the third question which relates to the Appellant's contention that the same was not tendered and nowhere in the proceedings does the same turn up as evidence in and or as any of the witness's testimony. This



is what predicated the endeavour to establish if the said MCB Certificate was an issue during trial.

The Appellant contends that the absence of the MCB Certificate in the proceedings makes the proceedings a nullity. Having gone through the proceedings I agree with the Appellant only to the extent that the record of the trial court has nothing on the MCB Certificate. This in my considered view is because it was never an issue between the parties nor did the Appellant raise this issue until now. Furthermore, there was no issue as regards the said MCB Certificate and or prior reference to the MCB and if the said MCB Certificate is in the form prescribed in the Rule 9(2) of the Marriage Conciliation Boards (Procedure) Regulations, GN No. 240 of 1971 then the proceedings of the trial court where the MCB Certificate features then the non-tendering of the MCB Certificate does not make the proceedings a nullity as the Appellant contends.

Marriage Conciliatory Boards are created by Section 102 of the LMA. In essence the Boards are supposed to act as a mesh, allowing people to channel their disputes through them in the hope for reconciliation. In effect, it is only those marriages that have failed to be reconciled that are supposed to end up in court. This is the gist of the MCB certifying to the court that

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they have failed to reconcile the parties as provided for in Section 104 (5) and (6) of the LMA.

At this juncture I would like to agree with this court's reasoning in **Hassan Mohammed Timbulo v. Rehema Clemens Kilawe**, Civil Appeal No. 163 of 2020 that an MCB Certificate is something that is required at admission stage, it must exist before the case is registered and given a number. It is a registration condition which might not necessarily be needed later. What is important is it must be in existence as part of the pleadings. It was this court's view that in circumstances where there is an issue calling proof using the document then it should be tendered as evidence, otherwise failure to tender the document should not affect the case. As alluded to earlier in the present matter the issue of the prior reference to the MCB and or the MCB Certificate is only being brought up by the Appellant now which I consider an afterthought on the part of the Appellant especially when the said contention comes at this juncture. There is an MCB Certificate and the wording in the said Certificate evidences that the MCB failed to reconcile the parties then it is proper to consider there is prior reference to the MCB. See **Sadiki Rashidi v. Mariam Mohamed** PC Civil Appeal No. 3 of 2021 and **Janeth Gondwe Rubirya v. Pastory Peter Massawe**, Civil Appeal No.



39 of 2022. Consequently, I find the point of objection as unmeritorious and proceed to determine the Appeal on merit.

The three grounds of appeal as submitted centre on one property a house situated at Mtoni kwa Azizi Ally Kiwanja No. MTN/SAB/273 of KUMB NA. MTN/SM/SAB/MZN/10/2010 which the Appellant is disputing is not matrimonial property, there were proper sale documents tendered by the Appellant in the trial court to evidence that the said property was obtained before the marriage and that the Respondent contributed the acquisition of the property through loans from NMB Bank and the Bank of Baroda without proof. In the trial court's judgment, the said property is adjudged as follows:

'Mali nyengine ni nyumba ya Mtoni kwa Azizi Ali ambayo mdai amesema alichukua mkopo wakajenga. Mdai aliwasilisha nakala ya hati ya manunuzi ambayo inaonyesha nyumba hio imenunuliwa 2015. Kwa upande wake mdaiwa amesema amenunua nyumba hio mwaka 2010 na ameleta nakala ya hati ya manunuzi ya mwaka 2010. Taarifa zote katika vielelezo hivyo zinafanana, isipokuwa mwaka ambao nyumba hiyo imenunuliwa. Kwa kuwa hakuna nakala halisi na uthibitisho kutoka pande zote, ushahidi huo siyo halisi na hauaminiki. Mahakama inaona nyumba hio iwekwe katika mali za ndoa'

In brief the learned magistrate stated that there was a house in Mtoni kwa Azizi Ali, the Respondent told the trial court she took a loan for construction



of the said house that was bought in 2015 a copy of the sale agreement that she tendered in court. The Appellant on the other hand had a sale agreement for 2010. The magistrate went on to state that the two documents (that is PE 10 and DE2) are identical except for the dates of the alleged sale. There being no original copy of the sale agreement then she went on to rule it a matrimonial property for both copies of the sale agreement were not good evidence. Having found that the learned magistrate went on ahead to issue an order for valuation of the said property and for the Respondent to get 30% and the Appellant 70% of the said house.

The learned district court magistrate in determining the first and second grounds of appeal which concerned the said property re-evaluated the evidence of the trial court considered the two sale agreements, she remarked that she agrees with the findings of the trial court that the said house is a matrimonial property. The first appellate court also observed that when giving the said house as a gift the Appellant should have consulted the Respondent. It went on to opine that the Respondent deserved more in the division of the said house and quashed the order of the 70% by 30% division as ordered by the trial court then ordered that the value of the said house be divided 40% to the Respondent and 60% to the Appellant.



To determine whether the appeal is meritorious one question has to be answered, that is whether the said property is indeed matrimonial property. Having gone through the trial courts record and that of the first appellate court I am of the considered opinion that, there is no evidence of who purchased the said house and when the said purchase was done. The two so called sale agreements, that is PE 10 and DE2 are not only copies that are uncertified but also do not list either of the parties as owners of the said property. I agree with the trial magistrate that the two are bad evidence and cannot be relied upon. Going back to the Respondent's testimony one finds on page 8 of typed trial court's proceedings that she is quoted to have stated that they got "eneo" which literary translates to an area or a plot Kwa Azizi Ali that the Appellant paid for and hid the documents. She also testified that later he showed her the documents and they began construction and moved into (the house). She is also quoted to have said she took a loan from NMB Bank and Bank of BARODA, however, she did not expound on what the said loan was for. It was during cross examination that she stated that she took the loan to build the house at Kwa Azizi Ali as depicted on page 10 through to 11 of the typed trial court's proceedings. Thereafter on page 12 she is

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quoted to have tendered various documents including "*Hati ya ununuzi ya Banda- Kwa Azizi Ali*".

The Appellant on the other hand is quoted to have stated during trial that he bought a house at Kwa Azizi Ali on 27 April 2010. On page 21 of the trial courts proceedings he stated that the said house is not matrimonial property. On page 22 of the same proceedings he tendered documents including "*Hati ya manunuzi nyumba ya mtoni kwa Azizi Ali*". According to the testimony of SU 2 the said house was bought on 27 April, 2010 and the Appellant sought for a permit to rehabilitate the said house on 10 December, 2010 as it was dilapidated.

Having said the above first and foremost I agree with the learned district magistrate that section 114 (1) of the LMA governing the division of matrimonial assets and the case of **Ahmad Said Sanga v. Ashura Yahya Omari**, Matrimonial Appeal No. 08 of 2018 where this court stated that in granting an order for division of properties one has to adduce evidence as to the extent of the contribution towards the joint acquisition so as to justify the division. Likewise, the extent of contribution of each party is an evidentiary matter as was decided by the Court of Appeal in **Gabriel**



Nimrod Kurwila v. Theresia Hassan Malongo, Civil Appeal No. 102 of 2018.

Therefore, I also agree with the learned trial magistrate and district magistrate that in the absence of any other evidence the testimonies of the parties and that of SM 2 and SU 2 the said house is matrimonial house. Being that the Appellant failed to dispute that the Respondent had not contributed to the acquisition and or improvement of the said property as per section 114 (3) of the LMA and is also on record to have said "*tumejenga*" which literary translates to we have built as can be seen on page 23 of the trial court's proceedings. The record is clear when he cross examined the Respondent about the loans he was told they were for building and he did not refute or press any further. It is trite law that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts as per section 110 of the Law of Evidence Act, Cap R.E 2022 (the TEA). This was also propounded in the case of **Abdul Karim Haji v. Raymond Nchimbi Alois and another**, Civil Appeal No 99 of 2004. Moreover, it is a fundamental principle of the rules of evidence in civil litigation that the burden of proof is discharged on the balance of probabilities as per section 112 of the TEA and as decided in



Paulina Samson Ndawanya v. Theresia Thomas Madaha, Civil Appeal

No. 45 of 2017. Furthermore, the Appellant failed to prove that he bought the house in dispute alone and therefore it was his, to gift. On page 22 of typed trial court's proceedings the Appellant is quoted to have tendered a deed of gift where in he gifted the said house to his three children. Even if for assumption's sake one were to assume that the said gifting was correctly executed then it cannot be to the expense of the Respondent's right over the said matrimonial property.

Consequently, the appeal is unmerited on all three grounds and it is therefore dismissed, the decision and orders of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Appeal No. 5 of 2022 is hereby upheld. Being that this is a matrimonial matter, I make no orders as to costs.

It is so ordered,



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Ruling delivered on 05th September, 2023.

A handwritten signature of "A.A. OMARI" above the word "JUDGE" and the date "05/09/2023".