IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO. 2670 OF 2024

(Arising from the decision of the District Court of Temeke at One Stop Judicial Centre in Civil Appeal No. 57 of 2023 and originating from Matrimonial Cause No.797 of 2022 of Temeke Primary Court at One Stop Judicial Centre)

FADHILI ALLY NDEKIO.....APPELLANT

VERSUS

LUCY JOHN MGOVA.....RESPONDENT

JUDGMENT

20/05/2024 & 31/05/2024

SARWATT, J.;

This is a second appeal, whereby the appellant approached this Court seeking to challenge the decision of the District Court of Temeke at One Stop Judicial Centre in Civil Appeal no 57 of 2023. The parties herein

started living together as husband and wife in 2008 and were blessed with three issues. When the matrimonial dispute arose between them, the appellant herein approached the Primary Court of Temeke via matrimonial cause no 797 of 2022 for the order to dissolve their marriage, distribute their matrimonial assets and custody of their issues. After a full trial, the trial Court was satisfied that their presumed marriage was irreparably broken down. It dissolved the same and ordered custody of their two children to the appellant and their last born to be under the custody of the respondent. The trial Court also ordered the division of their matrimonial assets. Dissatisfied, the respondent preferred to appeal against the decision in the District Court, which reversed the order of custody of children as well as the division of matrimonial assets.

Being aggrieved, the appellant decided to appeal to this Court. The grounds of appeal as per the memorandum of appeal are,

i. *That the learned Magistrate erred both in law and fact by proceeding to determine the appeal without according the parties a right to be heard on a filed notice of preliminary objection which was raised by the appellant.*

ii. *That the learned Magistrate erred both in law and fact by proceeding to determine the appeal without considering an issue of defectiveness of a copy of judgment and decree in matrimonial case no.797 of 2022 as pleaded in ground 7 of the respondent petition of appeal*

iii. *That the learned Magistrate erred both in law and fact by giving custody of children to the respondent herein without considering the best interest of the children and evidence on record adduced by the parties during the trial.*

iv. *That the learned Magistrate erred both in law and fact by determining the appeal without considering the wishes of the children when deciding the issue of custody as required by the law.*

v. *That the learned Magistrate erred in law and fact by failing to evaluate the evidence that was adduced by the parties during the trial regarding the division of matrimonial property as to the role of the parties in the acquisition of the said properties*

vi. *That the learned Magistrate erred in law and fact in*

determining the appeal without addressing the key issues raised by the parties.

During the hearing of the appeal, Obeid E. Mwandambo learned counsel represented the appellant while the respondent appeared in person, and by consensus of both parties, the appeal was heard by way of written submissions.

Submitting on the first ground of appeal, Mr. Mwandambo advanced that, in the lower Court, the appellant filed his reply to the petition of appeal, containing a notice of a preliminary objection that the respondent's petition of appeal was time-barred. However, the trial magistrate proceeded to determine the appeal without affording the parties the right to be heard on the raised point of preliminary objection, as evidenced form pages 1 and 2 of the typed decision. It was the counsel's view that, even if the objection had no merit, the lower Court had the duty to give the parties the right to be heard on the issue and make a ruling on the objection.

It was Mr. Mwandambo's further contention that the failure is a grave omission, as shown in the case of **Jamal Ahmed v CRDB Bank Limited** [2016] TLR 106. According to the appellant counsel, since the lower Court

proceeded to determine the matter without giving the parties an opportunity to address the Court on the raised objection, it denied their right to be heard.

Submitting on grounds no two and six of the grounds of appeal, the learned counsel advanced that the respondent's petition of appeal at the District Court contained nine grounds of appeal, whereas, in the 7th ground, the respondent challenged the defectiveness of the primary Court decision. According to the counsel, the respondent alleged that the decision indicates that it was delivered on 24th February 2023 while it was delivered on 24th March 2023, after it was postponed on 17th March 2023. He cited the case of **R.S.A Limited v Hanspaul Automechs Ltd & Another**, Civil Appeal no.179 of 2016, where the Court held that the decree which does not bear the date on which the judgment was pronounced contravenes the provision of order XX rule 7 of the Civil Procedure Code.

The counsel further argued that it is the principle of the law gathered from the decision of **Tanzania Breweries Limited v Antony Nyingi** [2016] T.L.R. 99 that if the Judge or Magistrate is to refuse reasoning evidence or argument of a counsel, witness, or a particular party to a suit, has to

advance reasons. He added the District Court decided the said ground of appeal without giving reasons for accepting or rejecting it, making the proceedings affected by a fundamental procedural error and occasioning a miscarriage of justice to the appellant and the respondent who was challenging the decision of the primary Court.

On grounds no three and four of the memorandum of appeal, the learned counsel referred the Court to the provision of section 125 (2) (3) and (4) of the Law of Marriage Act and section 26 (1) (a) and (b) of the Law of the Child Act and argued that, from the cited provision of the law, it is paramount condition for any Court, when deciding on issues of custody of children to consider the best interest of the child. According to the counsel, the records show that it was the appellant who was taking care of the family in terms of payment of their tuition fees and other necessities of life. Thus, it is in the best interest of those children to remain in the custody of their father.

He went further and submitted that despite the first appellate Court noting that the trial Court did not comply with the mandatory procedure of not allowing the children to express their wishes as provided for under section 125(2) (a) and (b) of the Law of Marriage Act, it went on and proceed to

determine the custody without complying to the mandatory provision of the law. This violation occasioned a miscarriage of justice for the appellant. He cited the case **Joseph Mtuka Mwafisi v Happiness Tilya,** Pc. Civil Appeal No. 20 of 2022 and **Alice Mbekenga v Respicious P. Mtumbala,** Civil Appeal No. 68 of 2020, which opted to remit back the case file to the lower Court for non-compliance with the mandatory provision of the law.

Submitting on ground five, the learned counsel referred the Court to the provision of section 114(2) b of the Law of Marriage Act and the cases of **Bi hawa Mohamed v Ally Seif** (1983) T.L.R. 32 and **Gabriel Nimrod Kurwijila v Theresia Hassan Malongo,** Civil Appeal no 102 of 2018 which insist to consider extent of contribution when determining the issue of division of matrimonial assets and to rely on evidence adduced by the parties to prove the extent of contribution.

According to Mr. Mwandambo, neither the trial Court nor the first appellate Court considered the issue of the role of the parties in acquiring the matrimonial assets as required by the provision of section 114(2)b of the Law of Marriage Act and non-compliance with the Court to evaluate the evidence as to the extent of contribution of each party when determining

issues of division of matrimonial assets, is fatal as held in the case of **Helmina Nyoni v Yeremia Magoti**, Civil Appeal no 61 of 2020.

The respondent, in her submission, opposed the appeal on the first ground and, insisted that the respondent's petition of appeal in the lower Court was not time-barred and referred the Court to the provision of section 20(4) of the Magistrate's Courts Act, which allows the District Court to enable the appellant to state the grounds of his appeal orally and determine the appeal. The respondent referred the Court to the case of **Abeid Mpozi v Republic**, Criminal Appeal no 476 of 2016, which states the principle that the appellate Court will only look into matters that come up and are decided in the lower Court. It was the respondent's contention that, as an appellate Court, the District Court could not be called to determine matters that were not raised nor decided in the lower Court.

On the second ground of appeal, the respondent submitted that the ground lacks merit as the copy of judgment and decree in matrimonial cause no 797 of 2022 were clear, and she cited the case of **Luhumbo Investment Ltd v National Bank of Commerce and 2 others**, Civil appeal no 503 of 2020.

On the third ground of appeal, she argued that section 26(1) b of the Law of the Child Act allows the Court to place the child with a parent who, in the opinion of the Court, is capable of raising the child. She supported the findings of the first appellate Court because the appellant's act of taking the children from their mother deprived their right to live and grow up with their parents, and cited the case of **Ezekiel Antoni v Adelina Mwalino,** Civil Appeal no. 12 of 2021.

Regarding the fourth ground of appeal, the respondent referred the Court to section 26(1) b of the Law of Child Act and section 125(3) of the Law of Marriage Act, which provides for the presumption that it is suitable for the infant below the age of 7 to live with their mother. Thus, she supported the findings of the first appellate Court as it is based on sufficient evidence.

On the fifth ground of appeal, the respondent submitted, the Court did not ignore the contribution made by each side in the acquisition of matrimonial property as the respondent showed before the Court her contribution to the acquisition of the assets and cited the case of **Godfrey Edward v Mary Philipo,** Matrimonial Appeal no 13 of 2020.

Having heard rival arguments of both parties, I'm tasked to determine if

the present appeal is merititous. On the first ground of appeal, the appellant faulted the first appellate Court, as it denied their right to be heard on the raised point of preliminary objection. According to the appellant, during the appeal, he raised a point of preliminary objection that the appeal was hopelessly time-barred. However, the first appellate Court proceeded with the hearing of the appeal without affording them the opportunity to address the Court on the raised point of objection.

I have gone through the record of the first appellate Court and noted that the appellant herein raised a point of preliminary objection on his reply to the petition of appeal, that the appeal before the Court was time-barred. However, the first appellate Court continued to determine the appeal. In its decision, the Court observed that there is no need to give parties a chance to address the same because the appeal was filed within the time, and on pages 1 and 2 of the typed judgment, the presiding Magistrate remarked;

> *"Nimekutana na pingamizi hili wakati naandaa uamuzi huu hivyo nimerejea kwanza jalada la Mahakama ya Mwanzo kujiridhisha. Nakala ya hukumu inaonyesha hukumu imesomwa mbele ya wadaawa tarehe 24/02/2023. Rufaa iliyopo mbele yangu imesajiliwa tarehe 6/4/2023 ambayo kwa*

hesabu rahisi ni kuwa imesajiliwa kwenye siku 41 baada ya uamuzi kusomwa. Natosheka kuwa pingamizi limekosa mantiki na linapuuzwa. Silazimiki kutumia muda wa mahakama kuwataka wadaawa wajenge hoja zao kwenye pingamizi hili kwa kuwa kifungu cha 80 cha Sheria ya Ndoa ni bayana."

From the record and the extract of the decision, it is suffices to say that the Magistrate determined the preliminary point of objection without giving the parties the opportunity to address the same. It is a known procedure of the law that once a preliminary point of objection is raised, it has to be determined first. The legal procedure requires that, once a preliminary objection in a suit or application is raised, it must first be determined prior to hearing of the application or suit on merit.

In the case of **Shadida Abdul Hassanal Kassam v. Mahedi Mohamed Gulamali Kanji,** Civil Application no 42 of 1999, the Court emphasized that where a preliminary objection is raised, it should be heard first before the disposal of the matter on merit.

To be heard implies that the parties were given an opportunity to address the issue and the Magistrate to give his decision on the point in

controversy. In the present case, the Magistrate proceeded to give his decision on the raised point of objection, without first giving the parties the right to address the same.

Even though the presiding Magistrate observed the existence of the point of objection when composing his decision, it was incumbent for him to invite and hear the parties before deciding on it. The act of the presiding Magistrate deciding on the raised point of objection without allowing the parties to address him infringed on their right to be heard before the decision is made.

In the case of **R.S.A Limited v Hanspaul Automechs Limited and Another**, Civil Appeal No. 176 of 2016, the Court of Appeal of Tanzania, when faced with a case where the raised point of preliminary objection was dismissed without giving the parties the opportunity to address on the same had this to say;

> *"It was incumbent on the party of the learned trial judge to re-summon and hear the parties. Therefore, it is disturbing that the parties were not given the opportunity to be heard before the dismissal of the point of objection. On this, the Court, in a*

plethora of decisions, has emphasized that the courts should not decide matters affecting the rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned without being heard."

Corresponding remarks were made by the Court of Appeal of Tanzania at Dar es Salaam in the case of **Charles Christopher Humphrey Kombe v Kinondoni Municipal Council**, Civil Appeal no. 81 of 2017, whereby the Court referred to its previous decision in **Deo Shirima and Two others v Scandinavian Express Services Limited**, Civil Application no. 34 of 2008 and observed;

"The law that no one should be condemned unheard is now legendary. It is a trite law that any decision affecting the rights or interest of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. This principle of law of respectable antiquity needs no authority to prop it up. It is a common knowledge."

Guided by the above authorities, I'm of the firm view that the presiding Magistrate ought to have given the parties a chance to contest the issue before giving his decision on it. The omission is fatal and renders the whole decision a nullity as decided in the case of **R.S.A Limited (supra).** In the Circumstances, I hereby quash the proceedings of the first appellate Court and nulify its decision.

I order the file to be remitted back to the first appellate Court for a hearing of the preliminary point of objection. Since this ground suffices to determine the whole appeal, there is no need to address the remaining grounds.

It is so ordered.

Dated at **Dar es Salaam** this 31st day of May, 2024.

S. S. SARWATT

JUDGE

Delivered in the presence appellant and the respondent in persons.