

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

PC. MATRIMONIAL APPEAL NO. 28469 OF 2023

*(Originating from Matrimonial Appeal No. 18 of 2023 of the district court of Mbeya in
Matrimonial Cause No. 34 of 2023 of the primary court of Uyole)*

ANITA ADAM MATINYAAPPELLANT

VERSUS

CHARLES ALEX SHAURIRESPONDENT

JUDGMENT

Date of hearing: 12/4/2024

Date of judgment: 20/6/2024

NONGWA, J.

The appellant Anita Adam Matinya and Respondent Charles Alex Shauri contracted a Christian marriage at Catholic church Mbeya Urban in 2013. It was until in 2023 when the appellant petitioned before the primary court of Uyole for decree of divorce and division of matrimonial properties in Matrimonial Cause No. 34 of 2023 of the primary court of Uyole (trial court).

The trial court after hearing parties found that the marriage has irreparably broken down and the decree of divorce issued. On matrimonial properties it was clear to the court that the respondent was almost the maker and that there was a shop at Sokoine Mbeya and the matrimonial home. The appellant was given a shop at Sokoine and the respondent a matrimonial house. The issue of marriage was placed under custody of the appellant, the respondent providing all necessary need plus Tsh. 100,000/= per month for maintenance.

The decision aggrieved the appellant, unsuccessfully appealed in Matrimonial Appeal No. 18 of 2023 of the district court of Mbeya (appellate court). The appellate court sustained the findings of the trial court save for maintenance which was enhanced to Tsh 150,000/= per month. The appellant is still aggrieved and filed this second appeal predicated two grounds which are reproduced hereunder;

1. That the 1st appellate court erred both in law and fact for not considering or discussed the 1st, 2nd and 4th grounds of appeal save as 3rd ground which was also not properly considered and for not comprehending that if it could well consider all grounds of appeal properly before it could have find that the value of matrimonial property distributed to the respondent alone was more that Tsh 122,400,000 (one hundred twenty two million and

four thousand shillings) while those distributed to me was only shop contains goods valued at Tsh 800,000 rented in the house belonging to Mbeya municipal city council the distribution which was not equally divided.

2. That the appellate court decision was not just at all.

When the appeal was called for hearing parties appeared in persons without legal representation. They prayed to file submissions, the court indorsed the prayer and set the scheduling order which was adhered to by the parties.

In her submission the appellant opted to argue her grounds generally. Submitting, the appellant listed seventeen properties which she said that were acquired by joint efforts but according to her it was not recorded by the trial court and distributed. The appellant contended that she was only given a shop worth Tsh. 800,000/= out of all properties which had the estimated value of Tsh 143,216,000/=.

The appellant went on to argue that the court did not consider her contribution under section 114(1)(2), 115(1)(c), 129(1) and 130(1) of the Law of marriage Act. The case of **Katurama Robert vs Elizabeth Katurama**, HCT-01-CV-MA No. 026 of 2017 of Uganda and **Sixbert Bayi Sanka vs Rose Nehemia Sanzugui**, Civil Appeal No. 68 of 2022 which states that in distribution of Matrimonial properties the extent of

contribution of each spouse toward acquisition of the joint property must be established.

It was further submitted that parties are of different tribes thus no norms could be employed in the distribution of joint properties. She contended that misconduct and mismanagement of matrimonial property has to be considered when dealing with issue of distribution of joint property. The case of Omari **Chikomba vs Fatuma Mohamed Mahenge** [1987] TLR 39 was referred.

From the above submission, the appellant prayed this court to interfere with the findings of the lower courts.

Replying to the above, the respondent highlighted that written submission are not evidence, sanctity of court record must be preserved and that submission in appeal must base on what surfaced in the lower courts. Elaborating the respondent stated that the appellant list of matrimonial properties introduced in submission is nowhere to be seen in the lower courts record. He added that only houses, shop and motor vehicle were mentioned in the trial court.

The respondent stated further that evidence in record established that he is the one who contributed to acquire those properties by taking loan at his work places and that the house was acquired before marriage.

He stated that the respondent was impeaching court records when he submitted that not all properties were listed. This he said was contrary to sanctity of court record principle.

Last, the respondent appreciated authorities cited by the appellant on considering extent of contribution before distribution of matrimonial properties. However, he was not convinced that the appellant proved her contribution. Thus, was in favour of the lower courts finding.

During rejoinder the appellant came with the issue of jurisdiction of the trial court on the matter, she submitted that they contracted a Christian marriage as evidenced by Certificate of marriage, thus the trial court had no jurisdiction. She referred the court to section 18(1)(a) of the Magistrates' Court Act [Cap 11 R.E 2019] in that the primary court has jurisdiction when the applicable law is customary or Islamic law.

The rest of submission was repetition of her submission which I intend not to reproduce here.

Having considered the record of appeal and rival submission I will start to deal with the issue raised in the rejoinder by the appellant that the trial court had no jurisdiction because they had contracted Christian marriage. The law under rule 38 of the Matrimonial Proceedings Rules prohibit to raise new issues not reflected in the memorandum of appeal

without leave of the court. This is so because memorandum or petition of appeal is a pleading to which parties are bound with. In the case of **Bahari Oilfield Services FPZ Ltd vs Peter Wilson**, Civil Appeal No. 157 of 2020 [2021] TZCA 250 (11 June 2021; TanzLII) the court held;

'... the principle that requires parties to be bound by their pleadings extends to grounds of appeal in an appeal which means that in so far as an appeal is concerned an appellant's written and/or oral submission must be in consonance with the grounds of appeal.'

This is not the first time the court is faced with tendency of parties to raise new issue in the submission, in **Q-bar Limited vs Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 163 of 2021 [2022] TZCA 381 (16 June 2022; TanzLII) the court stated;

'With respect, we find the submissions by both counsel for the parties to be misconceived. This is so because, in his written submissions, the appellant's counsel instead of clarifying issues alleged in the grounds of appeal, he introduced new issues on points of law. We find this to be irregular as, in a written submission, a party to the appeal is expected to only explain and clarify the grounds of appeal before the Court and not to introduce new matters based on new views. We need to emphasize the principle that litigants should not be allowed to

change their goal posts when new views are discovered in the course of litigation, unless expressly permitted by the law.'

Parties are bound to stick to the grounds of grievance raised in the memorandum of appeal and not to raise new points of grievances midway through submissions at their own convenience. To allow otherwise is not healthy for the proper administration of justice and more in particular in the spirit of affording each party adequate opportunity to address the court on matters in controversy.

In the present appeal the appellant in her rejoinder raised a concern with jurisdiction of the lower courts on the matter at the time when the respondent had no any chance to respond to it. Records speaks itself that the matter was filed by the appellant in the trial court, anything wrong with the case the appellant is to blame herself to get advice on jurisdiction of the court at the sunset hours. That said and done, the invitation by the respondent to deal with the matter not reflected in grounds of appeal is rejected.

Back to the appeal, this is a second appeal, as a general rule the second appellate court should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principles of law or procedure, or have occasioned a

miscarriage of justice. There is a considerable body of case law in this. See, for instance, **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31 and **Martin Kikombe v. Emmanuel Kunyumba**, Civil Appeal No. 201 of 2017.

It is the submission of the appellant that some properties were left undistributed, she also blamed the court for not recording all properties. In reply the respondent argued the claim was new not decided by the lower courts and the appellant was trying to impeach authenticity of court record.

It is a settled law that, a court record is a serious document that it cannot be impeached lightly. In the decision of the Court of **Halfani Sudi vs Abieza Chichili** [1998] T.L.R. 527, where the record of the High Court was questioned, it was held that;

'A court record is a serious document; it should not be lightly impeached, there is always a presumption that a court record accurately represents what happened.'

[See also: **Hellena Adam Elisha @ Hellen Silas Masui**, Civil Application No. 118/01 of 2019 [2021] TZCA 669 (11 November 2021; TanzLII).

Equally the appellate court has only power to determine matters which were decided by the lower court unless it is a point of law which can be raised even on second appeal. In the case of **Nurdin Musa Wailu vs Republic**, Criminal Appeal No. 164 of 2004 cited in Galus Kitaya vs Republic (Criminal Appeal 196 of 2015) [2016] TZCA 301 (15 April 2016; TANZLII) the court held that:

'...usually, the Court will look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal.'

I have perused record of the trial court, the appellant mentioned the house located at Mponja built in one plot, shop at Sokoine, a car and motor cycle which its number did not know and households. The respondent on his part admitted to own the house and shop but in regard to the car and motor cycle, he said that he sold it after parts were being stolen where he parked them. The appellant did not contest those evidence.

In the district court, the appellant stood to the properties which was distributed by the trial court, there was no any complaint that there were some properties left or not recorded by the trial court as submitted in this court.

In this appeal in the submission the appellant has emerged with list of seventeen properties which according to her was acquired by joint effort and subject for distribution with exception to the already mentioned which were distributed to parties by the trial court and confirmed by the district court. As rightly submitted by the respondent and conceded by the respondent in her rejoinder, this court being the second appellate court has no jurisdiction to assume and adjudicate on the matter which was not decided by the lower court. Therefore, the added list of properties purported to be matrimonial properties is a new factual point which cannot be taken for the first time in the appeal because in appeal the court is only required to look for errors committed by the lower court which its duty is the search of truth on evidence placed before it. Akin scenario was discussed in **Erastus Vicent Mtui vs Coca Cola Kwanza Limited**, Consolidated Civil Appeal No. 619 of 2022 & 13 of 2023 [2024] TZCA 122 (23 February 2024; TanzLII) and the court held;

'... It is axiomatic that, like trial courts, the arbitrators' duty at the CMA is to search for truth from the facts, issues and evidence before them. It is equally true that appellate and revisional courts are concerned with search for errors from the trial.'

The determination of the share of matrimonial property to be divided to the parties upon dissolution of the marriage is purely a matter

of fact which will depend on weight of evidence given regarding contribution of each party in acquiring them. The side with heavier, reliable and credible evidence will obviously take a lion share and the one with weak and questionable evidences may lose or take a lioness share. See the case of **Regnard Danda vs Felichina Wikesi**, Civil Appeal No. 265 of 2018, CAT at Iringa (Unreported).

Any attempt by this court to consider the list, it will require evidence both oral and documentary in order to establish the extent of contribution of each spouse, the act which is the domain of the trial court and not the appellate court as in this case. Circumstance of this case is not one in which it can be said additional evidence is required rather a total new factual issue which its existence and extent of contribution has to be established first before making the distribution order.

Looking closely to the appellant's argument, the complaint is not that the respondent was given a lion share, but that some properties jointly acquired were left. I have already held that the new list of jointly acquired properties which has surfaced in this second appeal the court has no jurisdiction over it.

Flowing from the above, I find nothing to fault the decision of the lower courts. The appeal is hereby dismissed. This being matrimonial dispute I make no order as to costs.



A handwritten signature in blue ink, appearing to read "V. M. Nongwa".

V. M. NONGWA
JUDGE
20/6/2024

DATED and DELIVERED at MBEYA this 20th day of June 2024 in presence of the parties.

Right for further appeal is fully explained.

A handwritten signature in blue ink, appearing to read "V. M. Nongwa".

V. M. NONGWA
JUDGE