

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB REGISTRY OF SHINYANGA  
AT SHINYANGA**

**PC CIVIL APPEAL NO. 27 OF 2023**

*(Originating from the decision of Maswa District Court Appeal No. 12 of 2022, Originating from Nyalikungu Primary Court Matrimonial Case No 56/2017)*

**DORIS KATOLE.....APPELLANT**

**Versus**

**ABDALLAH CHUMA.....RESPONDENT**

**JUDGMENT**

16<sup>th</sup> October 2023 & 12<sup>th</sup> February, 2024

**MASSAM, J.:**

The decision of the district court as the first appellate court aggrieved the appellant, hence the appeal at hand. The present appeal was based on the following five grounds which I quote verbatim for ease reference:

- 1. That, the appellate district court erred in law and fact to entertain at the appellate stage, a matter which was neither pleaded nor taken at the trial court.*
- 2. That, the appellate magistrate erred in law and in fact to entertain*

3. *That being a first appellate court the appellate senior resident magistrate erred in law to decide a case without revisiting the evidence on trial court record and for such error, totally failed to consider the appellant's evidence.*
4. *That the appellate court order to remit the record to the trial court to add the second house is unmaintainable and unexecutable for want of evidence of identity and location of the alleged house.*
5. *That the appellate magistrate failed to address properly on evidence as the subject matter at the trial court was a house on **plot No 1 Block F Biafra street Maswa town**, of which the appellate led evidence that it was only property they jointly acquired during their marriage, proving a case on required standard.*

On these grounds of appeal, the appellant prayed this court to allow the appeal with costs.

The respondent resisted the appeal and prays the dismissal of appeal as it has no merit. On hearing of this appeal and by consent of the parties this appeal was heard by written submissions, the appellant was represented by Mr. Robert Masige learned counsel. On the other

hand, the respondent was presented by Mr. Godfrey Tuli learned counsel.

Arguing in support of his grounds of appeal, the appellant's counsel chose to argue first ground and consolidate the remaining four grounds. On the first ground he argued that, the trial court's judgment made its decision on the distribution of the matrimonial property to wit a house situated at Biafra Street at Maswa that the appellate will be divided 40% of the house and the respondent 60%.

On the other hand, the High court's order on the PC Civil appeal No 15/2020 was to the effect that the matter be remitted to the trial court to collect evidence on the contribution of each party to the acquirement of the above stated house property.

He submitted that, there was no order to take evidence on the contribution of the second house as was ordered by the magistrate in matrimonial appeal No 12/2022, and that the respondent did not plead the same as in the proceedings, he referred this court to the case of **Theofrida Mhagawa Vs Njengafibili Mpondoli Mwaikugile (As legal representative of Jackson Ruben Mwaikinga), Civil Appeal No 160 of 2020 CAT**, quoting the case of **George Celestine Mtikila Vs Registered Trusetee of DSM and Another [1998] TLR 512 at**

**page 16** and the case of **Hotel Travertine LTD and Two others V NBC LTD.**

On the other grounds he submitted that the first appellate magistrate erred to held that there was another house at Kasulu while there was no any evidence on the record to prove the same hence his decision based on assumption.

He added that the respondent conceded that a house on plot No 1 Block "F" situated at Maswa town is matrimonial property acquired by the couple during their existence of marriage but failed to establish the existence of a house at Kasulu. He referred this court to Section 112 of The Evidence Act Cap 6 R.E 2022 and the case of **Daniel Dagala Kanuda (Administrator of the estate of Mbalu Kushaha Buhida) Vs Masaka Ibeho and Others**, Land Appeal No 16 of 2015 at page 4 and 5.

He therefore submitted that the alleged second house by the respondent is not existing and there is no evidence proving the acquisition, he added that the allegation by the respondent that his evidence was not taken in the trial court is not in existence hence he tries to impeach the evidence on the trial court record. He referred this



where it was held;

**“A court record is serious document: it should not lightly be impeached”**

He prayed this court to allow the appeal.

In reply, the respondent submitted on the first ground that, the first appellate court remitted the matter to the trial court to inquire on the second house for the interest of justice, and the allegation by the appellant that the second house was not pleaded, he submitted that there were some facts which were omitted and not recorded as evidence at page 17 of the trial court proceedings.

He added that it's the power of the first appellate court to scrutinize and analyse the case before it and if necessary, call additional evidence when necessary for the interest of justice as per the provision of Section 21(1) of the Magistrate Court Act [Cap 11 R.E 2019] and the decision in **Justus Ntibandetse Vs CRDB Bank PLC** ,Misc. Civil Application No 41 of 2021 HC at Moshi at page 13.

Hence the first appellate court was not in error exercising the power conferred to it by the law by remitting the matter for the trial court to add the second house to the evidence .

On the other grounds he argued that, the respondent gave the locality and geographical area of the second house but the trial court omitted to feature the same hence the respondent can not be blamed for the mistake of the court. He referred the case **Timoth Meja (Thenos Meja) Vs JG Gear Group T LTD, Civil revision No 2 of 2013 HCT at Mwanza page 5.**

He added that the allegation by the appellant that locality and geographical area of the second house was not featured, he argued that the cited case of **Daniel Dagala Kanuda** (Supra) is distinguishable to the extent that the record speaks by it self at page 17 of the trial court proceedings and was well stated by the respondent in his reply to the petition of the appeal, hence this ground is unmerited. He prayed this court to disallow the appeal. The appellant had no rejoinder to his submission.

After a careful consideration of the party's argument for and against this appeal, the records of the case and the law, and now the

point for determination is **whether this appeal has been brought with sufficient cause.**

However, in determining this appeal I will base on the 4<sup>th</sup> ground of appeal and do away with the rest grounds of appeal to the effect that the first appellants court erred to remit the records to the trial court for it to divide the second house while it has appellate powers to rule out that issue. See section 21 (1) (b) Of the Magistrates' Courts Act.

The appellant complained that the 1<sup>st</sup> appellate court determined issues which were not addressed before the trial court.

According to the appellant there was a question of ascertaining the matrimonial properties. The trial court despite of taking additional evidence of including the house located at Kasulu to be matrimonial property, yet in its final determination failed to analyse and specify as to what exactly the order of division was all about. For instance, there was the house located at Maswa and the other located at Kasulu. The order of the trial court ordered for the division of matrimonial house without mentioning as to which house the order is about. In other words, the order of the trial court was uncertain.

The first appellate court concluded that the matter be remitted to the trial court for it to add the house at Kasulu for division of matrimonial properties.

Now, my pause for determination is that both lower courts counted serious irregularities in determination of this matter. The trial court after had heard the matter and taking additional evidence pursuant to the direction of this Court, yet failed to include all properties in dispute for determination in his judgment. Whereas, the 1<sup>st</sup> appellate court erred to order the trial court to make analysis of the contribution and divide the matrimonial property specifically the house at Kasulu instead of exercising its power as the first appellate court by making re-evaluation of the evidence brought by the trial court and make decision to the effect as provided under Section 21(1) (b) of the Magistrate Courts Act, Cap 11 R.E 2019 that;

*".....whether or not additional evidence is heard or taken, to confirm reverse, amend or vary in any manner the decision or order appealed against (including power to substitute a conviction or a conviction and sentence for an acquittal....."*



See the case of **Petro Ngoko Versus Republic**, while making reference to the above position went on saying at Pg 10 that,

*"Having found that the trial court failed to properly analyse the evidence before it, I think, this Court, being the first appellate court is duty bound to re-evaluate and weigh the evidence by both sides (as a whole) so as to arrive at a just and fair finding"* See also the case of **Charles Thys vs. Hermanus P. Steyn, Civil Appeal No.45 of 2007.**

The trial court records were vividly on all houses but the only problem did not give reasons and issue final order to the effects.

On the strength, I am satisfied that the pointed omissions and irregularities amounted to a fundamental procedural errors that have occasioned a miscarriage of justice to the parties. In consideration of the matter have taken several recourse in determination, I hesitate to remit the matter to the trial court to start afresh, instead I pause my mind to direct the 1<sup>st</sup> appellate court to step into shoes of the trial court and recompose the judgment by evaluating and analysing the evidence by at looking the complained issue and make order on the division of matrimonial house of Kasulu in the manner which will deem fit and just

to determine and thereafter any aggrieved party by the said decision may appeal to this Court.

No orders as to costs.

It so ordered

**DATED** at **SHINYANGA** this 12<sup>th</sup> day of February, 2024



A handwritten signature in black ink, appearing to read "R. B. Massam".

**R. B Massam**  
**JUDGE**  
**12/02/2024**