

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MANYARA
AT BABATI**

PC CIVIL APPEAL NO. 2900 OF 2024

(Arising from Misc. Civil Application No. 2 of 2022 Hanang' District Court Originating
from Matrimonial Cause No. 8 of 2020 Katesh Primary Court)

DEEMAY LOHAY.....APPELLANT

VERSUS

JULIANA MUHALE.....RESPONDENT

JUDGMENT

28th May & 18th June, 2024

D. C. KAMUZORA, J.

Before Katesh primary court (hereinafter referred to as the trial court) the Respondent petitioned for divorce and division of matrimonial properties against the Appellant. According to the record, the Respondent claimed that she and her children had been deserted by the Appellant without maintenance and that the Appellant used to beat the Respondent frequently. The Respondent sought for division of matrimonial properties namely; 48 sacks/bags of maize, 17 sacks/bags of sunflower seeds, 60 hens and household utensils.

It is on record that the matter before the trial court proceeded *ex parte* against the Appellant. During hearing, the Respondent raised a

claim for 8 acres of land in which she alleged that it was not a matrimonial property rather her personal property. After hearing the Respondent's evidence, the trial court made a decision that there was no valid marriage between the parties since the Respondent had another subsisting marriage. In addition, the learned trial magistrate made a finding that 8 acres of land situated at Bias area in Dumbeta ward within Hanang' district was the sole property of the Respondent given to her by her parents.

The Appellant instituted a revision application, Misc. Civil Application No. 2 of 2022 before the district court of Hanang' at Katesh, asking it to exercise its powers of revision by calling the record and proceedings in Matrimonial Cause No. 8 of 2020 to satisfy itself as to the correctness legality or propriety of the said proceedings. In its ruling dated 14th July, 2022, the district court nullified the trial court's proceedings and judgment on account that the trial court had no jurisdiction over the matter.

The Respondent herein complained before this court over confusing orders of the district court as well as the District Land and Housing Tribunal. Upon calling the records, this court realized that before approaching the court's doors, the Respondent had filed a land dispute before the Ward Land Tribunal but the DLHT nullified the proceedings on revision for the reason that the Respondent's claim was purely based on matrimonial dispute triable by the court and not the land tribunal. She

then instituted a matrimonial dispute before the trial court where the decision was made on her favour. The decision of the primary court was nullified by the district court which held that the primary court has no jurisdiction over the matter. The interpretation that came from the two decisions was that, while the DLHT considered the claim as matrimonial dispute, the district court considered the claim as land dispute leaving the Respondent on cross-road not knowing what to do. To clear the confusion, this court called for records for revision *suo motto* vide Civil Revision No. 5 of 2023. It then held that the evidence before the primary court was stemmed from marital relationship of the parties suggesting the existence of matrimonial dispute which the primary court had jurisdiction to determine. This court therefore directed the district court to continue determining the matter on merit for it discovered that the revision application was not determined on merit.

The case file was remitted back to the district court which complied with the High Court directives by hearing and determining revision application No. 2 of 2022 and in its decision dated 18/01/2024, the district court dismissed the application without costs. The Appellant herein was aggrieved with such decision and preferred the instant appeal with six grounds of appeal which are summarized as follows;

- 1. That, the honourable district magistrate erred in law and in fact for holding that there was no illegality or irregularity on the trial court's decision.*
- 2. That, the honourable district court magistrate erred in law and in fact in upholding the decision declaring the Respondent as exclusive owner of 8 acres of land.*
- 3. That, the honourable district magistrate erred in law and in fact to declare that the trial primary court magistrate had jurisdiction to entertain and finally decide on the issue of land ownership.*
- 4. That, the honourable district court magistrate erred in law and in fact by failure to consider the fact that the Respondent did not file a counter affidavit.*
- 5. That, the district court magistrate erred in law and in fact by using the former proceedings in Misc. Application No. 2 of 2022 which were nullified by the High Court at Manyara in Civil Revision No. 5 of 2023.*
- 6. That, the district court erred in law and fact by referring the matrimonial cause No. 12 of 2022 instead of matrimonial cause No. 8 of 2020 when determining the matter.*

When the appeal was called for hearing, parties appeared in person and the appeal was disposed orally.

When invited to argue his appeal, the Appellant adopted the grounds of appeal and urged the court to make decision based on the grounds of appeal raised. He also pointed out that he has been owning the land since 1996 and the Respondent filed a matter before the ward

land tribunal and later an appeal before the District Land and Housing Tribunal for Babati but parties were directed to go back to the primary court. The Appellant argued that, the dispute arises from land matter which the trial court had no jurisdiction to entertain.

In reply the Respondent argued that she was never married to the Appellant rather he found her on the suit land and they lived together from 1996 to 2017 and were blessed with three issues. She pointed out that, there is no land dispute in this matter since she got the disputed land from her parents.

In rejoinder the Appellant added that the one who gave him the disputed land is still alive.

Having gone through the record and the grounds of appeal, I will determine the 1st, 2nd and 3rd grounds jointly and the 4th, 5th and 6th grounds will be determined separately.

I will start my deliberation with the last three grounds in which the Appellant faulted the district court proceedings and judgment by pointing out three errors; one, that the trial court failed to consider the fact that the Respondent did not file a counter affidavit, two, that the trial court used former proceedings in Misc. Application No. 2 of 2022 which were nullified by the High Court in Civil Revision No. 5 of 2023 and three, that

the trial court erred by referring Matrimonial Cause No. 12 of 2022 instead of Matrimonial Cause No. 8 of 2020 when determining the matter.

I had a thorough perusal to the proceedings and judgment of the trial court. I do not agree with the Appellant's contention that Respondent did not file counter affidavit. The records before the district court clearly indicates that the Respondent duly filed a counter affidavit. The same was deponed by the Respondent Juliana Mhale on 28/04/2023, then filed and received by the court on the same date.

On the Appellant's argument that the district court relied on the proceedings in Misc. Application No. 2 of 2022 which were nullified by this court in Civil Revision No. 5 of 2023, I find argument baseless. Revision Application No 2 of 2022 was never nullified by this court. The court only nullified the proceedings and judgment and directed for hearing of the matter *de-novo*. The district court complied with the High Court order by re-hearing the revision application and making a determination.

On the Appellant's argument that the district court referred Matrimonial Cause No. 12 of 2022 instead of Matrimonial Cause No. 8 of 2020, this court finds that the error did not cause any injustice to the parties. It is true that in the title, the district court cited the original case number as Matrimonial Cause No. 12 of 2022 instead of Matrimonial Cause No. 8 of 2020. However, in the body of the judgment it referred the

correct original case number which is Matrimonial Cause No. 8 of 2020. Thus, such error in my view is not fatal as could be referred as typing error which does not go the root of the matter since the correct case number was well captured in the judgment. I therefore find the 4th, 5th and 6th grounds devoid of merit.

Turning to the 1st, 2nd and 3rd grounds of appeal, the same raises one cross-cutting issue on whether the district court was correct in holding that there was no illegality or irregularity in the trial court's proceedings and judgment. Two matters will be looked upon in this issue; jurisdiction of the primary court and irregularity or illegality of the proceedings and judgment of the trial court.

The argument before the district court was that, the primary court abrogated its duty of determining matrimonial dispute and instead landed to a wrong approach by deciding issue of land ownership. It is clear that when instituting a dispute before the primary court, the Respondent sought for reliefs which are awardable by the primary court; a decree for divorce and division of matrimonial properties. The district court referred the jurisdiction of the primary court on matrimonial dispute. It is not disputed that the primary court has jurisdiction over matrimonial dispute under section 72 of the Law of Marriage Act, [Cap 29 R.E 20220] (the LMA). It is not disputed that the primary court has jurisdiction to order for

division of matrimonial properties upon dissolution of marriage. The dispute is on the relief awarded by the trial court if they were relief awardable in matrimonial proceedings.

It was the Appellant's argument that the district court ought to have found that the trial court erred in deciding over ownership of 8 acres of land. The claim for 8 acres of land was not originally the relief sought by the Respondent in her claim form as it came out when the Respondent was testifying before the trial court. In its determination, the trial court concluded that there existed no valid marriage between the parties but went further to hold that the Respondent was a sole owner of 8 acres of land. Now the question is whether, after the concluding that there existed no valid marriage between the parties, the trial court was mandated to give any order regarding 8 acres of land.

In his ruling, the learned district court magistrate held that the trial court had jurisdiction to determine whether there were matrimonial properties in terms of section 114 of the LMA. He pointed out that the trial court rightly declared that the disputed land was not a matrimonial property but the exclusive property of the Respondent as per section 58 of the LMA.

For purpose of clarity, I will reproduce the referred provisions and in section 114, my emphasis will be on subsection 1. Section 114 (1) of the LMA reads: -

*114.-(1) The court shall have power, **when granting or subsequent to the grant of a decree of separation or divorce**, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale."*

The applicability of the above provision is conditional to granting divorce. In other words, division of matrimonial properties comes after the court is satisfied that there existed marriage and the same is broken beyond repair to the extent of granting separation or divorce.

In the matter at hand, it is clear that the trial court never issued decree of separation or divorce as there existed no valid marriage between the parties. Thus, it was wrong for the district court to have concluded that the trial court exercised its powers under section 114 of the LMA. Having declared that there existed no marriage between the parties and no order for dissolution could be issued, the trial court could not invoke the provision of section 114 above which applies only when there is dissolution of marriage.

Section 58 referred by the district court, reads: -

*"58. Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, **a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled** or to prevent either the husband or the wife from acquiring, holding and disposing of any property."*

In the same footing, section 58 of the LMA applies to protect personal property from being referred as matrimonial properties. The said provision does not direct division where the court declare no marriage between the parties. Section 59 referred under section 58 above is a special provision relating to matrimonial home. In simple terms, the clasp words in both provisions are 'matrimonial property'. Anything becomes matrimonial property upon establishing that there existed marriage between the parties. It is my settled views that, upon the trial court being satisfied that there was no valid marriage between the parties which could be dissolved, there was no matrimonial property within the meaning of section 114 of the LMA. In other words, since there was no decree for divorce or separation issued by the trial court, the question of matrimonial properties could not arise.

From the above analysis, I agree with the district court that the trial court had jurisdiction but only to determine matrimonial dispute. The trial court therefore correctly heard the parties over matrimonial dispute.

However, I do not agree with the district court's conclusion that the trial court was right to declare 8 acres of land as exclusive property of the Respondent subject to the provision of section 58 of the LMA. The district court ought to have found that there was serious irregularity for the trial court to make a declaration which can be made only upon proof that there existed marriage between the parties.

It is clear that the trial court found the parties to have illegal relationship which could not be termed as marriage. In her petition before the trial court, the Respondent sought for divorce and division of the matrimonial properties as indicated above. In her evidence, the Respondent claimed that she was given the disputed land by her parents. By this statement, the Respondent intended to establish the source of her ownership over that land. Since it was concluded that there existed no marriage between the parties, the dispute over ownership could no longer be determined under the umbrella of matrimonial dispute rather a land dispute upon which, each party has to prove how he acquired the same. That was not within the mandate of the trial court to determine.

I understand that the DLHT dealt with this dispute in Land Appeal No. 9 of 2018 which arose from the decision of the Ward Tribunal in Land Case No. 19 of 2017. The appeal was initiated by the Respondent herein complaining that the ward tribunal dealt with a dispute which was purely

matrimonial matter. As per the facts captured by the DLHT, parties presented a marriage conflict before the ward tribunal which ordered parties to live together as it was before and the Respondent (Appellant herein) to take his role as a husband by providing all necessary needs to his family. From those facts, the DLHT was correct to overturn the decision of the ward tribunal and to direct the parties to file a matrimonial dispute because the same was basically a matrimonial dispute. The facts that were before the DLHT revealed existence of marriage but now that it is clearly and properly determined by the competent court that there existence no valid marriage between the parties, the trial court had no powers to determine dispute over ownership of land raised by the parties.

I therefore agree with the Appellant that the district court erred in concluding that there were no serious irregularities or illegalities in the trial court's proceedings and judgment. The above pointed out is a serious irregularity for it goes to the jurisdiction of the court in determining the dispute.

I therefore allow the appeal by quashing and setting aside the proceedings and decisions of the two courts below and any orders resulting therefrom. Whoever intends to pursue claim over ownership of 8 acres should file a suit in any tribunal or court with jurisdiction to determine land dispute. However, in considering the circumstance of this

case and the confusion that came to the parties on the proper channel to pursue in this matter, I will not make any order as to costs.

DATED at **BABATI** this 18th Day of June, 2024.



D. C. KAMUZORA

JUDGE