IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MATRIMONIAL APPEAL NO. 03 OF 2022

(Originating from the District Court Rungwe in Matrimonial Appeal No. 08/2021. Originating from Matrimonial Case No. 07/2020 at Tukuyu Urban Primary Court)

LAZARO MWANGUNDA.....APPELLANT

VERSUS

REHEMA TUFIKILE.....RESPONDENT

RULING

Date of last Order: 27.10.2022

Date of Judgment: 15.12.2022

Ebrahim, J.

This is the second appeal. The appellant has lodged four grounds of appeal as follows:

1. That, the learned honourable Magistrate misled himself to order distribution of properties which are not matrimonial properties.
2. That, the honourable Magistrate misled himself to order distribution of properties which are neither known by the appellant nor proved its existence.
3. That the learned honourable Magistrate misled himself by regarding and considering some children as minor whilst they are over eighteen years old.

4. That the learned trial Magistrate erred in law and fact to enter judgement in favour of the appellant (herein referred as the respondent) basing on illogical examination of facts and evidences on records.

The brief background of this matter as per the court records reveal that parties herein contracted a Christian marriage way back in 1985. Their marriage came to a halt in 2021 when the respondent herein petitioned for divorce against the appellant herein at Tukuyu Urban Primary Court. The appellant herein/ petitioner claimed at the trial court that there have been continuous disputes between the two of them and that the appellant refused to take care of his sick mother (respondent's mother –in- law). Therefore, following their never ending disputes he decided to marry other wives. He listed two farms and a cattle as matrimonial properties and other four houses and farms belonging to his other wives.

On the other hand, the respondent claimed that they have been living together since 1985 and they managed to acquire four farms and houses. She challenged the divorce as they are still

husband and wife and that at times the husband comes to her house much as he has other wives.

After hearing the testimonies from witnesses of both parties, the trial court found the marriage to be irreparably broken in terms of **section 110(1)(a) of the Law of Marriage Act, Cap 29 RE 2019.**

Aggrieved, the respondent herein successfully preferred an appeal at the District Court of Rungwe at Tukuyu.

The appellate court considered the grounds of appeal and the evidence on record and proceeded to divide the matrimonial assets by rationing one of the houses located at Isaka to the respondent. The appellate court placed the custody of the two issues who are minor to the respondent and ordered the appellant to pay maintenance allowance of Tshs. 50,000/-.

The decision of the District Court did not amuse the appellant, hence the instant appeal.

In this appeal both parties appeared in person, unrepresented. The appeal was argued by way of written submission.

The appellant submitted the first and second grounds of appeal together. He argued that he has three wives of whom two of them

he married year 1992 and one in 2017 where he established four separate permanent residential houses for each one of them. He thus challenged the order of the 1st appellate court of declaring four houses as matrimonial assets to be violating the legal rights of other wives.

Arguing the third ground of appeal, the appellant mentioning the age of their three issues to be 22yrs, 17yrs and 14yrs; claimed that the children are not minors and therefore they can choose whom they would wish to live with.

As for the last ground of appeal, the appellant faulted the first appellate court for having not made a finding as to whether the marriage is broken down irreparably or not. He said, the appellate court illogically examined facts and evidence. He prayed for the appeal to be allowed with costs.

Responding to the submission by the appellant, the respondent contended that it is not true that each wife is living in her own house as she is living with the appellant's sister. She contended also that all the houses were acquired during the subsistence of their marriage.

As for the custody and maintenance of the children, the respondent argued that she is the one living with all the children and it is the children themselves who chose to live with her.

Concerning the issue of whether the marriage is broken down irreparably, the respondent claimed that there was a divorce already hence the appellate court dealt with division of matrimonial assets. She finally prayed for the appeal to be dismissed with costs.

In re-joinder, the appellant narrated the historical background of their life from when they got married in 1985. He insisted that he bought three houses in the name of each wife and that they began by selling one farm then bought two farms at Nkunga Ward at Isaka Village and another one at Lukata Village. He also admitted that he has no legal marriage with the three wives but has lived with them for 30 years. He maintained that the children should be placed under his custody.

Looking at the issues presented before this court for determination, they mainly touch on the evidence presented before the trial court which were ultimately re-visited by the 1st appellate court.

Beginning with the first and second grounds of appeal, the appellant claimed that the first appellate court illegally ordered the respondent to choose a house which belongs to one of the other wives. He claimed to have lived with the said wives for almost thirty years. With respect to the applicant, that piece of evidence is nowhere in the records and it is surfacing for the first time in this second appeal. The fact that those wives have contribution in the acquisition of the said houses did not feature anywhere in his testimony at the trial court. He however admitted to have four houses and the trial court did not order the division of the said houses because the name of the respondent does not appear in the purchase agreement. Therefore, the issue as to whether there is contribution of other wives has never been discussed by the two lower courts below. Besides, no such documents were tendered the trial to prove that those houses were in the names of the other three wives.

It is trite law that an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal; see **Hotel Travertine Limited and Others Vs. National Bank of Commerce Limited** [2006] TLR. I therefore find the submission of the

appellant on the issue to be an afterthought and dismiss the 1st and 2nd grounds of appeal for being unmeritorious.

As for the third ground of appeal, the appellant has mentioned the ages of the three issues to be 22years, 17 years and 14 years. Save for the one who is 22 years, **section 4(1) of the Law of the Child Act, Cap 13 RE 2019** states clearly that *"A person below the age of eighteen years shall be known as a child"*.

That being the position therefore, it is not correct for the appellant to claim in his third ground of appeal that the children are minor whilst he listed the age of those children.

The law i.e., **Section 125(2) of the Law of Marriage Act, Cap 29 RE 2019** set factors to be considered by the court in making order for custody of children. It guides thus, and I quote it verbatim for ease of reference:

"125(2): In deciding in whose custody a child should be placed the paramount consideration shall be ***the welfare of the child*** *and, subject to this, the court shall have regard to-*

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong.

Further **Sections126 and 127 of the same Act** provides for some additional conditions that may be set by the court in considering custody of an issue of marriage. It is thus my settled view that, the factors to be considered in making an order for custody, have to be strictly observed where applicable. This is because, as shown above, the welfare of the child is the paramount consideration that a court should take into account in deciding the issue of custody of a child of the marriage; see also decisions of this court in the cases of **Febronia Nicodem v. Yohana Shimba, (PC) Matrimonial Appeal No. 19 of 2019, High Court of Tanzania, at Mwanza** (unreported) and **Festina Kibutu v. Mbaya Ngajimba [1985] TLR 44**.

In this case as evidence on record would reveal, the children were all along living with their mother. The respondent contended also that it is the children who opted to live with her. That fact has not been challenged by the appellant. Therefore, I find that it would not be in the best interest of the children to disturb them. Thus, I would do not interfere with the findings of the 1st appellate court on the issue.

As for the issue that the 1st appellate court did not deal with the issue that marriage has broken down irreparably, the same is not true. The judgement of the 1st appellate court clearly state at page 10 of the typed judgement in dismissing the first ground of appeal that the court cannot force the appellant (the respondent at the 1st appellate court) to continue living with the respondent herein if he is not interest anymore. By dismissing the ground of appeal, the appellate court confirmed the decision of the trial court of issuing the divorce. This ground of appeal is therefore unmeritorious and it equally fails.

All said and done, I find this appeal to have no merits and I proceed to dismiss it in its entirety. I give no order as to costs following the relationship between parties.

Accordingly ordered.

R.A. Ebrahim
Judge

Mbeya
16.12.2022