IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY

AT MWANZA

MATRIMONIAL APPEAL NO. 07 OF 2021

(Arising from the judgment of the District Court of Misungwi District in Matrimonial Cause No. 1 of 2021)

HAPPINESS DICKSON ..... APPELLANT

VERSUS

WILSON MAKOYE ..... RESPONDENT

JUDGMENT

2/11/2023 & 6/2/2023

ROBERT, J:-

At the District Court of Misungwi, the appellant herein, petitioned for divorce and prayed for division of matrimonial properties as well as custody and maintenance of a child. The District Court having made a finding that there was a presumption of marriage between the parties and satisfied by the reasons for divorce proceeded to declare the marriage between parties to have come to an end under section 107(2)(f) of the Law of Marriage Act, gave custody of the child to the appellant herein, ordered the respondent herein to pay for the maintenance of the child at a tune of TZS 50,000/= per month and divided a plot of land at Iteja Village between the parties as the

only matrimonial property. Dissatisfied, the appellant filed this appeal challenging the judgment and orders of the District Court.

The appeal was opposed by the respondent who filed a Reply to the Memorandum of Appeal on 4/4/2022. When the appeal came up for hearing on 28/9/2022, the respondent informed the Court of his intention to file a Notice of Preliminary Objection on the point of law which he did on the same day to the effect that:-

(a) The appeal contravenes jurisdiction of this Honourable Court.

Considering that hearing of this appeal had been pending for a long time, the Court gave an order directing parties to file their respective written submissions in respect of the point of Preliminary objection and the appeal with a view that, if the preliminary objection is not sustained the Court would proceed to determine the appeal on merit.

Highlighting on the point of preliminary objection, Mr. Kadaraja Jestil, Counsel for the respondent, submitted that, the appellant's Memorandum of Appeal is incompetent for contravening the mandatory provision of rule 4(1)(a) and (b) of the Interpretation of Laws (Use of English Language in Courts (Circumstances and Conditions) Rules, G.N. No. 66 of 2022. He

argued that, the cited law requires a party to file pleadings in English and their corresponding translation in Kiswahili which the appellant has failed to adhere to.

He maintained that, the appellant ought to have filed two copies of the Memorandum of Appeal one in Kiswahili and another in English as section 84A(1) of the Interpretation of Laws Act (Cap1 R.E.2019) which provides that, the language of Courts, tribunals and other bodies charged with duties of dispensing justice shall be Kiswahili. Hence, he concluded that the appeal is improperly before the Court for omitting to file the Kiswahili copy of the Memorandum of Appeal. To support his argument, he cited the case of **Ibrahimu Pius Kangasha and Gilbert G. Mahumba vs Bera Karumba and Kigoma/Ujiji Municipal Council, HC Land Appeal No. 8 of 2022** at page 10 where Hon. Mlacha, J decided that "as for now we must proceed to file our pleadings in English with their Kiswahili translation" and proceeded to struck out the appeal for lacking the other mandatory required copy of pleadings in English language.

In response, Mr. Mussa Joseph Nyamwelo, learned counsel for the appellant conceded that the Memorandum of Appeal having been filed in

English language without its corresponding copy in Kiswahili language contravened the provisions of Rule 4(1)(a)and (b) of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and conditions) Rules, G.N. No. 66 of 2022. However, he maintained that non-compliance with the provisions of the cited law did not cause any injustice to the respondent as the later clearly understood the contents of the grounds of appeal and managed to file his reply.

He submitted further that, if the respondent and his representative were not conversant with English language, they would have raised that issue at the commencement of hearing of the present appeal and the Court would have ordered the pleadings to be interpreted in Kiswahili language as required under rule 5 of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and Conditions) Rules, G.N. No. 66 of 2022 which is not the case in this matter.

Alternatively, he submitted that if the Court finds the present appeal to be defective, the Court should not strike out the appeal as prayed by the respondent but give the appellant a chance to file a memorandum of appeal in Kiswahili language in order to comply with the requirement of the law and also to meet the substantive justice in accordance with the

overriding objective principle. To support his argument on the spirit embodied in the overriding objective principle, he cited the Court of Appeal decision in the case of **Joseph Magombi versus Tanzania National Parks (TANAPA),** Civil Appeal No. 114 of 2016, Dsm, (unreported).

I will pose here and make a determination on the merit of the point of objection raised by the counsel for the respondent. It should be noted that the Interpretation of Laws (Use of English Language in Courts) (Circumstances and conditions) Rules, G.N. No. 66 of 2022 cited by the counsel for the respondent was enacted under section 84A (5) of the Interpretation of Laws Act, (Cap. 1 R.E. 2019) as amended by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2021. Section 84A reads as follows:

> *84A.-(1) Notwithstanding any other written law,* ***the language of courts, tribunals and other bodies charged with the duties of dispensing justice shall be Kiswahili.***
> *(2) Without prejudice to subsection (1), courts, tribunals and other bodies charged with a duty of dispensing justice* ***may, where the interests of justice so require, use English language in the proceedings and decisions.***

(3) ***Where English language is used*** *in the proceedings and decisions,* ***such proceedings and decisions shall be translated and authenticated in Kiswahili language.***

(4) Where proceedings or a decision is translated in Kiswahili language and there occurs a conflict or doubt as to the meaning of any word or expression, ***the language which the proceedings or decision was recorded shall take precedence****.*

(5) ***The Chief Justice may,*** *in consultation with the Minister responsible for legal affairs,* ***make rules for the better carrying out of the provisions of subsections (2), (3) and (4)."***

(Emphasis added)

Guided by the quoted provision above, it is clear that while the language of the courts is Kiswahili under subsection (1), the use of Kiswahili or English languages in the proceedings or decisions is regulated by subsection (2), (3), (4) and (5). Thus, to carry out the provisions of these subsections, the Chief justice acting under subsection (5) above enacted the Interpretation of Laws (Use of English Language in Courts) (Circumstances and conditions) Rules, G.N. No. 66 of 2022. Rule 3 of the cited Rules provide that:-

3. Subject to the provisions of subsection (2) of section 84A of the Act, pleadings, proceedings or decisions may be in English language where it relates to matters stipulated in the Schedule to these Rules.

According to the schedule to the cited Rules, the circumstances and conditions for the use of English language in Courts includes where:- (a) either of the parties or their representatives to the proceedings are not Swahili speakers; (b) the matter is about an international investments dispute; (c) the matter is about a foreign trade or business; (d) the matter involves a finance and monetary affairs; (e) the matter is about tax and taxation; (f) the matter relates to International, Regional or Sub Regional affairs; (g) **the law governing the matter subject of litigation, and the practice and procedure thereto are not available in Kiswahili language** (emphasis added); (h) matters of science and technology are involved; or (i) for any other reason the interest of justice demands so.

Rule 4(1) of the cited Rules which is the subject of the objection raised by the counsel for the respondent provides that:

> *"4(1) A party who intends to initiate proceedings which, in his opinion, falls under the circumstances where the proceedings and decision thereto are to be conducted in English language, such party shall-*
>
> *(a)* ***file his pleading in English language with their corresponding translation in Kiswahili language;*** *and*
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> *(b) state the grounds upon which he relies to have the proceedings conducted in English language."*

Given that the subject matter of litigation in this appeal is regulated by the Law of Marriage Act which is not available in Kiswahili language, the proceedings and decision thereto may equally be conducted in English language. Under the circumstances, the party filing the pleadings in English must file the corresponding translation in Kiswahili language under rule 4(1) of the Interpretation of Laws (Use of English Language in Courts) (Circumstances and conditions) Rules, G.N. No. 66 of 2022.

However, as admitted by the counsel for the appellant, the Memorandum of appeal was filed in English language without a corresponding translation in Kiswahili. Therefore, the question for determination is whether failure to file the corresponding copy of the memorandum of appeal in Kiswahili language is fatal as to render the appeal incompetent.

Guided by the spirit of rule 5 of the G.N No. 66 of 2022, which allows proceedings to be interpreted in Kiswahili where a party does not understand English language, this Court is of the considered view that failure to file the corresponding translation in Kiswahili language may not be fatal as to affect the competence of the appeal since the missing Kiswahili translation may be

remedied by additional filings or translations in Kiswahili language as the Court may order.

It is however basic that each case must be decided on its own merits and the prevailing circumstances at the time. In the present case, both parties are represented by the learned counsel, the pleadings in the original case were filed by the parties in English language and the submissions in respect of the objection and the appeal have already been filed in English language. In the circumstances, ordering parties to file the corresponding translation of pleadings in Kiswahili language at this stage will impose not only unnecessary burden on the parties but also cause further delay in the determination of this matter. That said, I find no merit in the point of objection raised by the counsel for the respondent and I hereby proceed to dismiss it accordingly. I will now proceed with the determination of this appeal on merit.

The appellant challenged the decision of the District Court of Misungwi armed with the following grounds of appeal:-

1. *That the trial Court erred in law and fact by unfairly distributing matrimonial properties*

2. *That the trial court erred in law and fact by disregarding evidence of the appellant in her contribution toward acquisition of matrimonial property*
3. *That the trial Court erred in law and fact by giving weight to the fabricated evidence of the respondent toward the acquisition of matrimonial properties*
4. *That the trial court erred in law and fact by awarding Tshs. 50,000/= as maintenance of the child.*

Based on the stated grounds, the appellant prayed for the appeal to be allowed, judgment and consequential orders of the District Court to be set aside, equal distribution of matrimonial properties and maintenance of the child to the tune of Tshs. 200,000/= per month.

Submitting in support of the appeal, the appellant's counsel opted to argue the 1st, 2nd, and 3rd grounds of appeal together as they are related. He argued that, trial Court records indicate that, the appellant and respondent started their relationship in 2015 until 2019 when matrimonial disputes arose. He argued that, records indicate that during their relationship parties managed to acquire matrimonial assets which were subject of the division at the trial Court. However, the trial Court in its judgment decided that parties herein started their relationship in 2018 and as such the appellant only deserve to be given her entitlement in respect of the plot located at Iteja

area and the remaining assets were not subject of the division on the account that the respondent obtained the said assets before getting married to the appellant.

He maintained further that, the appellant's testimony at page 6 of the proceedings that his relationship with the respondent started in 2015 and during their relationship they managed to acquire several assets was not challenged by the respondent in cross-examination which means the respondent agreed with the appellant on that.

On the last ground of appeal, he submitted that, the trial Court erroneously granted an amount of TZS 50,000/= as maintenance of the child. He argued that, maintenance of the child covers essential necessities for the survival and development of a child which may include but not limited to the provision of food, clothes, shelter, education medical care and school fees. He faulted the trial Court for issuing an order of maintenance of TZS 50,000/= without deliberation or judicial reasoning. He argued that a decision reached without judicial reasoning is not a judgment under Order XX Rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2019. Thus, he prayed for the trial Court proceedings and judgment to be quashed and the file be

remitted back to the trial Court before the same magistrate to compose a proper judgment as required by the law.

Replying to the first, second and third grounds of appeal, the counsel for the respondent argued that, the trial Court rightfully held that the other matrimonial asset were not proved by the appellant to have been acquired at the time of their existence except, the plot at Iteja village bought by both parties from PW2 should be divided equally. He argued that mere mentioning of the properties at page 3 of the proceedings by the appellant without any reasonable proof towards their acquisition is of no justification that they were found at the time of their marriage life (through presumption of marriage).

He submitted further that, the appellant had a duty to explain when the claimed properties were found and what contribution or effort did she offer towards acquisition of the said properties considering that the respondent had a wife before starting his relationship with her.

With regards to the argument that the appellant's testimony was not cross-examined by the respondent, he submitted that this is just an afterthought which cannot be used to overturn the decision of the trial Court

since the appellant's testimony was contested by DW1, DW2, DW3, DW4 and DW5 in their respective testimonies.

Coming to the last ground of appeal, the respondent's counsel argued that the trial Court correctly held that due to the age of the child the custody of the child should be under the appellant but the responsibilities of raising the child to be of all parties. He argued that, the Court's decision was in line with the provisions of section 41 of the Law of the Child Act, (Cap. 13, R.E.2019) and section 125(5) of the Law of Marriage Act, (Cap. 29 R.E. 2019). He opposed the argument made by the appellant's counsel that the impugned judgment of the trial Court had no reasoning and maintained that there was no violation of Order XX Rule 4 of the Civil Procedure Code, (Cap. 33 R.E. 2019). He argued that the trial Court gave regard to the bearing of the parties, the respondent being just a peasant and the age of the child.

Having read the rival submissions of both parties, I will pose here and make a determination on the merit of this appeal in the sequence adopted by the parties.

Starting with the first, second and third grounds of appeal, records from the lower Court indicates that the trial Court made a finding at page 12 and

13 of the impugned judgment that the appellant failed to bring evidence proving matrimonial properties acquired during the subsistence of their marriage apart from the plot located at Iteja Village which the trial Court divided equally to the parties. I have gone through the proceedings of the trial Court and noted that the trial Court was right in its findings. Indeed, apart from the landed property located at Iteja village which PW2 testified that he sold to the parties, the appellant did not bring any evidence to prove ownership of the other alleged matrimonial properties or the extent of her contribution to the acquisition of the said properties. Section 112 of the Evidence Act, (Cap. 6 R.E. 2019) requires that he who alleges must prove. In that regard, the lower Court properly made its decision on the division of the matrimonial property under section 114 of the Law of Marriage Act, (Cap. 29 R.E. 2019) since the appellant failed to prove acquisition of the properties mentioned in her testimony or her contribution towards acquisition of the said properties. That said, I find no reason to fault the decision of the trial Court on division of matrimonial property. I therefore dismiss the first, second and third grounds of appeal for lack of merit.

With regards to the last ground of appeal, records indicate that the trial Court observed at page 16 of the impugned judgment that due to the age

of the child the custody of the child should be under the appellant and the duty and responsibilities of the child support should be of all parties as required under section 41 of the Law of Child Act, (Cap. 13 R.E. 2019) and section 125 (5) of the Law of Marriage Act, (Cap. 29 R.E. 2019). The Court ordered the Respondent at page 14 of the impugned judgment to provide TZS 50,000/= each month for the maintenance of the child. The appellant faults the trial Court for awarding TZS 50,000/=without assigning reasons for his decision.

Having examined the impugned judgment, it is apparent that the trial Court's decision was backed by reasons which are however not accurate as he mixed up issues of custody and maintenance of a child.

Further to that, although the trial Court assigned responsibility of child support to both parties by relying on section 41 of the Law of Child Act, (Cap.13 R.E. 2019) which gives a parent in respect of whom an order of parentage has been made a duty to contribute towards the welfare and maintenance of the child, it should be noted that under section 129 of the Law of Marriage Act, (Cap. 29 RE. 2019) it is a duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food

and education as may be reasonable having regard to his means and station in life or by paying the cost thereof. The section gives a woman the duty to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.

Although the appellant prayed for payment of TZS 200,000/= per month as maintenance of the child, it is not clear how she came up with that figure. There is no evidence in record to establish the respondent's earning or station in life in order to ascertain his ability to provide maintenance. The records are also silent on the appellant's means and station in life in order to determine her ability to contribute to the maintenance of the child. However, considering the age of the child born in the year 2019 as stated by DW1, the reasonable maintenance needs of the child at the village and the fact that the respondent is married to another woman and he has other children as stated by DW3 and DW4, this Court finds it necessary to adjust the monthly maintenance payable towards the child from TZS 50,000/= as ordered by the trial Court to TZS 80,000/=.

In the end, this appeal is dismissed save for an order of payment of TZS 50,000/= monthly as maintenance of the child which is substituted and

replaced with monthly payment of TZS 80,000/=. Each party to bear its own cost.

It is so ordered.

K.N.ROBERT
JUDGE
6/2/2023