THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

LAND APPEAL NO. 13 OF 2022

(Originating from Mbeya District Land and Housing Tribunal in Land Application No. 233 of 2021)

BERTHA GILBERT ..... APPELLANT

VERSUS

MARK MACHIBULA ..... RESPONDENT

JUDGMENT

Date of last order: 13/07/2022

Date of judgment: 05/08/2022

NGUNYALE, J.

Substantially, I will revert to trace the historical background of the parties as far as litigation is concerned in order to appreciate the outcome of this appeal. The parties to this appeal were couples dully marriage under Christian rites in 2008. Initially, during the subsistence of their marriage they had very happy life. They were blessed with one issue. Happy life could not last long, later the marriage went sour for what the appellant

alleged to be lack of care from the respondent and cruelty. The matrimonial misunderstanding was subjected to reconciliation unsuccessful. The appellant preferred Matrimonial Cause No. 2 of 2018 before the Primary Court of Mbeya District at Mbeya. The trial Court heard the dispute and at the end on 16th February 2018 it decided in favour of the appellant. The Primary Court was satisfied that the Marriage had broken down beyond repair and divorce was issued.

Upon issuance of divorce, the parties were heard about the division of the matrimonial properties. The trial Court issued division of the matrimonial properties between the parties after consideration of contribution of each party towards acquisition of the same. The appellant was to get as share among other properties 35 percent of the matrimonial house and the respondent to get 65 percent of the same. In entering its decision the trial Court stated in part at page 3 of the typed ruling; '*Hivyo nyumba hiyo ni nguvu ya pamoja*' which means the appellant contributed towards acquisition of the suit house.

The respondent was aggrieved with the decision above, his first attempt to appeal through Matrimonial Appeal No. 3 of 2019 could not succeed. The appeal was dismissed for being time barred. In his further struggle for his right to appeal he preferred Miscellaneous Application No. 18 of

2020 where he was granted leave to appeal out of time. After being availed leave to appeal out of time he preferred Matrimonial Appeal No. 18 of 2020 before the District Court of Mbeya at Mbeya. The said appeal could not be determined on merit, it was dismissed for being *res judicata*. It was the reasoning of the presiding Magistrate that after Matrimonial Appeal No. 3 of 2019 was dismissed the proper remedy for the respondent was to appeal against the order of dismissal to the High Court and not to seek leave to appeal out of time.

The appellant was still aggrieved with the decision which dismiss his appeal for being *res judicata*, he never gave up, still determined, he preferred PC Matrimonial Appeal No. 04 of 2021 before this Court (DR. Mongella, J). The Court found that the first appellate Court was right to refrain from determining the appeal on merit because the decision to extend time to appeal out of time in Misc. Application No. 18 of 2020 was *res judicata*, the District Court was already functus officio as far as the appellants appeal was concerned.

The trend above gives a clear picture that the decision in respect of distribution of matrimonial properties especially the house remained intact as ruled on 16th August 2018 by the trial Primary Court. While the order was in place the respondent preferred Application No. 234 of 2020 in the

District Land and Housing Tribunal for Mbeya at Mbeya against the appellant seeking to be declared a lawful owner of the suit house.

The Tribunal conducted the trial and at the end of the day it pronounced *ex parte* judgment in favour of the respondent which is the subject of this appeal. The respondent was declared the sole owner of the suit house which was already subjected to division by the Primary Court. The appellant unsuccessful preferred an application to set aside the *expate* judgement.

The appellant was aggrieved with the decision of the District Land and Housing Tribunal, she preferred the present appeal advancing one ground of appeal that; -g

> *The trial tribunal erred in law and facts by failing to set aside the exparte judgment and hear both parties while knowing that the respondent abused court processes by instituting a case at the district tribunal while there by existed a primary court judgment dated 16/08/2018 and the High Court judgment dated 22/10/2022 over the same disputed land.*

Hearing was done by written submissions, the parties complied to the scheduling orders of filing the respective submissions timely.

The appellant submitted that the trial Tribunal denied her a right to be heard, she had genuine reasons for not attending the hearing of Application No. 233 of 2020. She applied to set aside the ex parte

judgment for the sake of justice so that both parties should be heard but the Tribunal denied her such right. She expected the Court to facilitate justice through legal procedures and not to impede it. She was of the view that the primary duty of the Courts is to decide substantive issues contested by the parties. The appellant sited the case of **Copper versus Smith** (1884) 26- Ch. D. 700, at page 710, Lord Bowen had this to say: -

> *"It is well established that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise then in accordance with their rights...I know of no kind of error or mistake which if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy"*

She went on to state that the Tribunal ought to avail her a right to defence or a right to be heard. She again cited the case of **National Industrial Credit Bank Ltd vs. Mutinda** [2003] 1 EA 194 (CCK) where it was held;

> *"The court has a wide discretion under Order IXA Rule 10 but the discretion must be exercised judicially. The right to defend ought to be cherished and a very high premium placed on it, it ought not to be taken away lightly"*

The appellant in her further submission stated that the disputed house was distributed in Matrimonial Case No. 2 of 2018 in Mbeya Primary Court. The Tribunal was made aware of the order of distribution in which the

decision was admitted as exhibit P1 by the Tribunal but the Tribunal disregarded it.

It was the opinion of the appellant that the Tribunal was not supposed to hear and dispose Application No. 233 of 2020 while being aware of the judgment of Matrimonial Cause involving the same disputed land. The matter was improperly brought before it by the respondent, the Tribunal ought to dismiss it for lack of jurisdiction. She referred the Court to the persuasive decision of **Emmanuel Burton Mwakiswambwe vs. Assa Salifu Kibale,** Misc. Civil Revision No. 5 of 2021 High Court at Mbeya where it was observed that it was improper and contrary to law for the District Land and Housing Tribunal to determine an issue of a disputed property which was a matrimonial property.

The respondent strongly contested the submission of the appellant, she submitted that the said house was not among the matrimonial properties as there was no proof on it. The said house was his own property before they contracted marriage, the law allows couples to each to own his/her own property.

The law under section 3 (1) of the Land Dispute Courts Act Cap 216 R. E 2019 establish special land dispute Courts to determine land disputes other than normal Courts. The Primary Court is not among those special

courts as provided under section 4 (1) of the Act, Cap 216 R. E 2019. The house in dispute cannot be called a matrimonial house because it was built in 2005/2006 but the marriage they contracted in 2008. The trial Tribunal entered a sound decision, the appellant waived his right to be heard unreasonably. The appellant knew from the beginning that she contributed nothing on the disputed land otherwise she could have attended the hearing so as to testify whether the said disputed house was a matrimonial property.

About the alleged decision of the High Court PC Matrimonial Appeal No. 04 of 2021 the respondent submitted that the same may be nullified by a superior Court because he is seeking certificate on the point of law for appeal.

The respondent went on stating that he concur with the appellant that the land tribunal has no jurisdiction to determine the matter on matrimoniai assets, but has jurisdiction on matters which are purely land matters. Land Tribunal was a proper avenue to pursue the dispute because it is a land matter.

The subject matter in dispute is a house which has been subjected to two orders from two different adjudicating platforms namely the District Land and Housing Tribunal (DLHT) and the Primary Court of Mbeya District.

The Primary Court was satisfied that the suit house was a matrimonial house and it ordered its division between the parties. In the other side, the DLHT has ruled that the said house is the sole property of the respondent. Existence of the two conflicting orders means execution cannot easily succeed in either of the orders. The second order gives an inference that the order of the Primary Court cannot be executed over an order that the property is not a matrimonial property.

The ground of appeal as raised by the appellant is focused on the point that the respondent abused the court process by instituting a case at the DLHT which thereby existed a Primary Court judgment over the same disputed land/house. Still, about the order of the Primary Court he submitted that he is facilitating procedures to fault the decision of the High Court (L. M. Mongella, J), but there is no proof that he is facilitating such procedures.

Having in mind the conflicting orders of the two adjudicating organs, the grounds of appeal and the respective submission I think the proper way to resolve the conflicting orders is to determine the issue of jurisdiction. **Whether the DLHT was properly seized with the requisite mandate to adjudicate on a matter concerning the subject**

matter which has already been ruled upon by the Primary Court sitting as a matrimonial court.

The appellant was of the view that the DLHT had no jurisdiction to determine the matter which was previously determined by the Primary Court and subjected to appeal till the High Court. The respondent came with a different view that the DLHT has mandate to adjudicated land matters including determination of ownership of land. The DLHT was right to rule upon the suit land but it has no jurisdiction on matrimonial assets.

The appellant relied to the case of Copper (supra) which states that the duty of the Courts is to determine the rights of the parties and not to punish them. It will sound the same if one will observe that the Courts exist to settle the disputes and not to create disputes or chaos in administration of justice. In the present case the existence of two conflicting orders in my view is as good as no right has been given to either party, Instead it is an abuse of the Court process.

In the case of **Mzee Omari Mzee vs Mwanamvua Rashid Kilindi**, the Court of Appeal of Tanzania at Zanzibar observed that division of matrimonial assets should be dealt by the Court having jurisdiction on matrimonial causes. In the case at hand the Primary Court ruled about the property where the appellant was aggrieved with the decision. He

appealed to the District Court where the matter was not determined on merit as it happened to the High Court. In his submission the respondent stated that currently he is seeking certification of point of law in order to appeal to the Court of Appeal. I think exhaustion of remedies through this channel was proper before invoking jurisdiction of the Tribunal to avoid either abuse of court processes or ending with conflicting orders.

The normal Courts and the Tribunal are creatures of different laws with different jurisdiction. In my view I think to avoid abuse of Court process the appellant ought to exhaust remedies in the normal Courts the way he is doing instead of going with the two channels simultaneously or parallel. As he has said that he is in the process to go to the Court of Appeal it is a proper forum.

I agree with the appellant that the DLHT has jurisdiction to determine land disputes, and the marriage couples each has a right to own his/her own property. In the present case the Primary Court already ruled that the suit land is a matrimonial property, the fact that the matrimonial court has ruled on the suit land, the DLHT lacks jurisdiction because it has no mandate to overrule such decision of the Primary Court and the Primary Court has authority over matrimonial assets. It was found by the Primary Court that the appellant contributed towards acquisition of the suit

property therefore legally she was entitled to her share, the DLHT cannot decide about the extent of contribution. The Case **of Hawa Mohamed Vs Ally Seifu** [1985] TLR 32 stated that a married woman had a vital contribution to the family life and had a share in **family properties.** In case **of Richard Majenga v Specioza Sylivester** Civil Appeal NO. 208 OF 2018 where the Court of Appeal of Tanzania at Tabora (unreported) stated that:-

> *"It is clear that the Court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation of divorce."*

Guided by the above position the Primary Court acted in exercised its power to make orders for division of matrimonial properties the power which cannot be exercised by the DLHT. In the circumstance of this nature the DLHT may exercise jurisdiction in case the normal courts will allow the parties to seek interpretation from the Tribunal which is mandated with jurisdiction on determination of ownership in land matters while proceedings are suspended pending the interpretation. The two cannot exercise jurisdiction simultaneously or parallel over the suit property which is alleged to be a matrimonial asses or matrimonial property.

In the end result, I am settled that the trail Tribunal had no jurisdiction to entertain the matter before it. Consequently, the proceedings and

judgment of the trial Tribunal in respect of Application No. 233/2021 were a nullity. I therefore exercise revisional jurisdiction under section 43 (1) of Land Disputes Courts Act Cap 216 R. E 2019 to quash the proceedings and judgment, also set aside orders in Application No. 233 of 2021. The parties are advised to concentrate with the channel of the normal courts for the ends of justice to seek proper interpretation of the decision of the Primary Court otherwise the conflicting decisions will attract an abuse of Court process. Appeal allowed.

Dated at Mbeya this 5th day of August 2022.

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D. P. Ngunyale
JUDGE