**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**PC MATRIMONIAL APPEAL NO. 4 OF 2022**

(C/f Matrimonial Appeal No.33 of 2004 of Moshi District Court at Moshi Originating from Madai Na. 11 of 2003 of Uru Primary Court)

**STELLA SIMON MATERU ..... APPELLANT**

***VERSUS***

**MONISA WILFRED KIMEI ..... RESPONDENT**

## *EX PARTE* JUDGMENT

*16.03.2023 & 27.03.2023*

**SIMFUKWE, J.**

This is a second appeal against the decision of the District Court of Moshi which in effect confirmed the decision of Uru Primary Court (trial court) on the issue of divorce, division of matrimonial properties and maintenance of children. Before the trial court, the appellant established that she was married to the respondent since 1994 and they acquired properties. The appellant also claimed that they were blessed with five issues. Thus, she implored the trial court to issue divorce, to distribute the matrimonial properties and to order custody of the children. In its order, the trial court stated *inter alia* that:

> *"Kwa ushauriano wa pamoja na waheshimiwa washauri wa mahakama tumetafakari Ushahidi wa mdai tumeona*

*hautoshi kuthibitisha madai yake. Mdai ameshindwa ada imepotea."*

The appellant was aggrieved, she unsuccessfully appealed to the district court of Moshi (1st appellate court). The first appellate court supported the decision of the trial court and had this to say:

*"…firstly, there is no evidence that the appellant is married to the respondent. The appellant averred that they celebrated a customary marriage. Under such a situation the appellant was duty bound to call witnesses to support that she actually got married to the respondent in 1994. The appellant failed to discharge that duty. Secondly, even if it is assumed that the appellant and the respondent are married, there is no evidence that their marriage has irreparably broken down. It follows therefore that this appeal is devoid of merits and it is accordingly dismissed."*

The above decision troubled the appellant, she approached this court on the following grounds:

1. *That the court erred in failing to grant divorce even when the parties are not living together and with no desire to resume cohabitation.*
2. *That the 1st Appellate Court erred in glossing over the evidence without taking into account substantive justice.*
3. *That the 1st appellate Court erred in not granting any reliefs to a divorcee namely property rights, maintenance, custody/visitation.*

The Appellant prays for the following orders: -

*a) Divorce be granted*

*b) Division of Matrimonial assets.*

*c) Rights to visit children*

*d) Costs.*

During the hearing of this appeal which proceeded ex *parte*, the appellant was unrepresented and she adopted the grounds of appeal and had nothing to add.

I have keenly examined the subordinate courts' records in relation to the grounds raised by the appellant. I am of considered opinion that the issue which cut across all grounds of appeal is ***whether there were justifiable reasons for the lower courts to deny the appellant's prayers?***

Before going to the gist of this appeal, I wish to state categorically from this very beginning that, this being the second appellate court, the court is limited in interfering with concurrent findings of the lower courts unless there are misapprehension of the evidence, miscarriage of justice or violation of principles of law. See the case of **Helmina Nyoni vs Yeremia Magoti (Civil Appeal No. 61 of 2020) [2022] TZCA 170.**

Turning to the grounds of appeal, under the first ground of appeal, it was alleged by the appellant that the lower courts failed to issue decree of divorce while the parties have no intention to resume cohabitation.

For a decree of divorce to be issued, the first and foremost factor to be considered is existence of legal marriage between the parties. The second determinant factor is whether the marriage has broken down irreparably as enshrined under **section 99 of Law of Marriage Act**, **Cap 29 R.E 2019.** In addition, before issuing the decree of divorce, the

court must consider factors provided for under **section 107(2)(a)-(i) of the Law of Marriage *Act*** *(supra)* which are*:*

> *(2) Without prejudice to the generality of subsection (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree-*
>
> *(a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest;*
>
> *(b) sexual perversion on the part of the respondent;*
>
> *(c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;*
>
> *(d) wilful neglect on the part of the respondent;*
>
> *(e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;*
>
> *(f) voluntary separation or separation by decree of the court, where it has continued for at least three years;*
>
> *(g) imprisonment of the respondent for life or for a term of not less than five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed;*
>
> *(h) mental illness of the respondent, where at least two doctors, one of whom is qualified or experienced in psychiatry, have certified that they entertain no hope of cure or recovery; or*
>
> *(i) change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of*

*religion dissolves or is a ground for the dissolution of marriage.*

Having established the position of the law, I now turn to the appellant's evidence to see whether the above criteria was met. Before the trial court, the appellant established that she had no marriage with the respondent. Therefore, since there was no marriage between them, then there was no way the court could have issued the decree of divorce as rightly decided by the first appellant court.

As rightly decided by the first appellate court, even if there was marriage between the parties, still the appellant did not establish any of the factors listed under **section 107(2)(a)-(h) of Law of Marriage Act** (supra). The appellant should have presented enough evidence that their marriage has broken down irreparably.

Basing on the above findings, the first and second grounds of appeal have no merit, the same are dismissed accordingly.

On the third ground of appeal, the appellant condemned the 1st appellate Court for not granting any relief to a divorcee namely property rights, maintenance and custody.

For the court to grant the reliefs sought by the appellant, the court must satisfy itself on the existence of marriage. This was emphasized by the Court of Appeal in the case of **Richard Majenga vs Specioza Sylvester, Civil Appeal No. 208 of 2018** at page 8 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 or divorce..."*

Guided by the above authority, I am of firm opinion that the 1st appellate court was correct not to interfere with the decision of the trial court particularly on the issue of division of matrimonial properties, maintenance and custody since there was no decree of divorce issued. The court could not order subsequent reliefs of division of matrimonial properties, maintenance and custody of children as the decree of divorce was not issued.

Basing on the above reasoning, I am of considered opinion that the first appellate court as well as the trial court correctly decided the matter and I find no reason for faulting the concurrent findings of the two courts below. Consequently, this appeal is dismissed. Since the matter proceeded *ex parte*, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 27th day of March, 2023.


X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

**27/03/2023**