IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 43 OF 2023

[*Arising from Civil Appeal No. 60 of 2022 of the District Court of Ilemela Original Matrimonial Cause No. 37/2022 of Buswelu Primary Court*]

MIRAMBO ALPHONCE ----------**APPELLANT**

VERSUS

LILIAN MHOZA----------**RESPONDENT**

JUDGEMENT

August 3rd & 30th, 2023

Morris, J

Mr. Mirambo Alphonce filed Matrimonial Cause No. 37 of 2022 before the Buswelu Primary (the trial court) against Lilian Mhoza. The trial court declared their marriage unsalvageable. It issued a decree of divorce. Subsequently, the matrimonial home located at Buswelu, Mwanza was divided on the basis of 10% to 90%; appellant to respondent respectively. Aggrieved by such pattern of division, the appellant unsuccessfully appealed to the District Court of Ilemela (the first appellate court).

The appellant still was dissatisfied with the judgement of the first appellate court. He has now knocked the doors of this Court; hearty for

justice. Through services of Mr. Constantine Ramadhani, learned advocate, the appellant raised eight grounds of appeal. The respondent was represented by advocate Kundy Ericka Nyenji. The appeal was argued by way of written submissions.

In a paraphrased mode, through this eight-ground appeal, the appellant is challenging the first appellate court for dismissing his appeal; for denying him right to call 5 witnesses; for allowing the respondent to call 7 witnesses; for failure to interfere with minimal distribution share of 10% awarded to him by trial court; and for failure to consider that he had many sources of income compared to the respondent. Hence, under grounds 7 and 8, the appellant claimed for being entitled to between 50% to 60% of the subject matrimonial home.

It was submitted in favor of the appeal that the appellant was a banker. His then-spouse, the respondent, worked as a primary school teacher. The appellant also argued that in dissolving their marriage which existed from 25/11/2006 to 8/11/2023 and dividing the property between them; the trial court was biased enough to disallow him to call his 5 witnesses to reinforce his evidence in support of acquisition of

matrimonial property. He also faulted the court for having permitted the respondent to call 7 witnesses who, according to him, testified falsely.

It was also argued that the first appellate court failed to interfere with division share of 10% of the matrimonial house given to him in disregard of his significant contribution towards its acquisition. Weirdly, the case of ***Bi. Hawa Mohamed v Ally Seif*** [1983] TLR 32 was referred hereof. To him, his contribution was greater because he was a banker; operations manager at Oric Air Services Limited; owner of a retail shop in Mwanza; and he ran a taxi business. Thus, he had greater contributions compared to the primary school teacher (respondent) earning Tshs. 140,000/= monthly. Finally, he prayed for a division ratio of 60%: 40% in his favour.

In reply, it was submitted that the appellant failed to prove how the first appellate court was biased. That is, the record does not indicate that the appellant intended to call 5 witnesses at trial. Also, the respondent argues that the appellant failed to prove his contribution in line with section 110 (1) (20 of ***the Evidence Act,*** Cap 6 R.E. 2022. To her, the distribution at 90% and 10% was correct considering the

respondent's share of contribution in acquisition of the matrimonial property. In rejoinder, the submissions in chief were echoed.

I have dispassionately considered the submissions by both parties. Before determining the grounds of appeal, I re-emphasize the settled law that second appellant courts usually determine matters of law only. Matters of facts are only entertained in special circumstances. In this appeal, the Court is second-high in such a pyramid. It shall not, thus, interfere with concurrent findings of two lower courts. The reason is straightaway: the appellant herein does not exhibit serious misdirection or non-direction of the first appellate court in matters of fact. The cases of ***Musa Mwaikunda v R*** [2006] TLR 387; and ***Salumu Mhando v R*** [1993] TLR 170 are followed in this connection.

Moreover, it is a cardinal law that matters which were not raised in first appellate court cannot be raised and determined by the second appellate court for want of jurisdiction. See the case of ***Simon Godson Macha (administrator of the estates of the late Godson Macha) v Mary Kimambo (administrator of the estates of the late Kesia Zebedayo Yenga)***; Civil Appeal No. 393 of 2019; ***Richard Majenga vs Specioza Sylivester***, Civil Appeal No. 208 of 2018; ***Remigious***

Muganga vs. Barrick Bulyanhulu Gold Mine, Civil Appeal No. 47 of 2017; ***Halid Maulid v R***, Criminal Appeal No. 94 of 2021; and ***Emmanuel Josephat v R***, Criminal Appeal No. 323 of 2016 (all unreported).

In the present case, the appeal before the first appellate court was hinged on five grounds. The appellant had contended that he was not given the right to call 5 witnesses while the respondent was allowed to call 7 witnesses: his great economic contribution toward acquisition of matrimonial home was not considered; the trail magistrate was biased after recusal of the magistrate in charge; that the appellant built the matrimonial home before their separation; and that he was erroneously given 10% division of the said house.

Nonetheless, he sought leave of the first appellate court to and did amend his petition of appeal. He filed the amended version on 21/12/2022. This time, only four grounds of appeal were fronted. That is, the trial court erred to determine the matter without reference to the marriage conciliation Board; the trial court erred by allowing witnesses who had interest in the case; the court erred in admitting exhibits D1 to D13; and the trial court erred in evaluating the evidence on record.

With the forgoing amendment, one would presume that the appellant challenged the division of matrimonial property in the 4th (last) ground above regarding the evaluation of evidence. However, in his submissions supporting that 4th ground (in the amended petition), he directed his attack to the effect that testimonies by SU1 and SU2 were contradictory and never disclosed anything with evidential value but rather they were hearsay. He, however, did not give further elaboration in such regard.

The above history in place, I now circumnavigate the grounds of appeal before this Court. It is evident that, after the amendment of the petition of appeal at the first appellate court; the 2nd to 8th grounds of appeal filed in this Court did not feature in the said subordinate (appellate) court. That is, only one ground clearly features in both appellate courts. However, in ground two, there is a technical aspect which will warrant me to determine it. The reason is given at the opportune place below. Therefore, I have no jurisdiction to fault or condone the first appellate court on matters not determined by it. I will, thus, hastily delve into the duet grounds spared herein.

In the first ground of appeal, the appellant is faulting the first appellate court for dismissing his appeal. In the submissions, this ground of appeal was simply reproduced. Nothing was specified as being point in which the trial court erred by so dismissing the appeal. Therefore, the first ground of appeal is devoid of merit for being imprecise and ambiguously winding. I disallow it.

The only issue of law in this appeal is indirectly fused in ground 2: that the appellant was denied right to call his desired witnesses. Technically, this aspect touches on one of the principles of natural justice. Pursuant to law, parties in the trial court retain the right to be heard; and to do so fully. Intrinsically, such right entails calling and relying on witnesses' testimonies in order to support their respective cases to complete satisfaction.

It is a cardinal principle of the law that, a decision reached without affording parties right to be heard is a nullity. The omission is fatal which goes to the root of the decision even if the decision would have not changed upon hearing them thereof. Reference is made to cases of **Alisum Properties Limited v Salum Selenda Msangi (administrator of the estate of the late Selenda Ramadhani**

Msangi, Civil Appeal No. 39 of 2018; **The Registered Trustees of Arusha Muslim Union v the Registered Trustees of National Muslim of Tanzania @ BAKWATA**, Civil Appeal No. 300 of 2017; and **Kumbwandumi Ndemfoo Ndossi v Mtei Bus Services Limited**, Civil Appeal No. 257 of 2018 (all unreported).

In the matter at hand, I have taken liberty to read the entire proceedings of the trial court. On 1/11/2022, after testimony by SM2, the appellant is recorded as saying: "*nafunga ushahidi wangu*". Literally, the phrase implies that: "I (pray to) close my case". Consequently, the trial magistrate marked the appellant's case as closed and continued to allow opening of the respondent's case for defence. As correctly submitted for the respondent, there is nowhere, in such record, the appellant prayed to call 5 witnesses. Nor is there any record to the effect that the trial court forced him to stop/end prosecuting his cause.

It is a fundamental principle of law that, courts records bear unquestionable sanctity. That is, court's records are presumed to be pure, accurate and authentic. See the Court of Appeal cases of ***Selemani Juma Masala v Sylivester Paul Mosha and Another***, Civil Reference No. 13/2018; and ***Alex Ndendya v the Republic***, Criminal Appeal No. 207

of 2018; and ***Hellena Adam Elisha @ Hellen Silas Masui v Yahaya Shabani Rashid Juma***, Civil Application No. 118/01 of 2019 (all unreported).

Moreover, in ***Halfani Sudi v Abieza Chichili*** [1998] TLR 527 the Court gave two central positions thereof that:

> *"(i) A court record is a serious document. It should not be lightly impeached.*
>
> *(ii) There is always a presumption that a court record accurately represents what happened."*

Therefore, as there is glaring absence of proof that the appellant was not fully accorded the right to be heard, as alleged, this ground of appeal lacks merit. In other words, as the record does not indicate how the trial court hindered him to have 5 witnesses on the trial roll, this Court lacks the basis upon which to fault the subordinate courts howsoever. The second ground is equally not sailing through.

In fine, the appeal is barren of merits. It is accordingly dismissed. This being matrimonial matter, parties shall bear own costs. I so order. The right of appeal is fully explained to parties.

C.K.K. Morris

Judge

August 30th, 2023

Judgement delivered this 30th day of August 2023 in the presence of Mirambo Alphonce and Lilian Mhoza, the appellant and respondent respectively.

C.K.K. Morris

Judge

August 30th, 2023