THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

MATRIMONIAL APPEAL NO. 03 OF 2022

(Arising from Matrimonial Cause No. 06 of 2021, District Court of Morogoro)

LINA MALISA MAFWERE ..... APPELLANT

VERSUS

BHAKILANA AUGUSTINE MAFWERE ..... RESPONDENT

JUDGEMENT

Last order on: 28/10/2022

Judgment date on: 18/11/2022

NGWEMBE, J.

The parties herein contracted a Christian Marriage in 2003, after cohabiting for not less than ten (10) years as husband and wife. They led a joint life and were blessed with four issues who in 2022 were aged 18, 23, 27 and 29 years respectively.

The parties acquired some material properties in their life. In 2018, the marriage started to face some difficulties, each of the spouse accusing the other for some matrimonial offences. Between 2019 and 2021 they attempted to secure peace in their marriage through St. Patrick's Cathedral of the Roman Catholic Church, and later before Kilakala Ward Tribunal. The endeavours were fruitless as if they were fighting a losing battle, at last the appellant landed to the court of law

petitioning before the District Court of Morogoro for the following reliefs: - **first,** dissolution of the marriage; **second,** equal division of matrimonial properties; **three**, Maintenance arrears from January 2020 to the filing date at Tshs. 1,000,000 per month; and **four,** costs.

Upon hearing both parties, the trial Magistrate was satisfied that the marriage was broken down irreparably. The only available remedy was to grant divorce as was not contested by either party to the petition. The tag of war was longed over division of matrimonial properties. Whereby a house built at Plot 314 Nughutu street; and three farms at Mkono wa Mara were declared matrimonial properties, thus divided into 40% to the petitioner and 60% to the respondent.

Two factories, a tractor and agro-equipment belonged to Baklina Company Ltd were not subject to division as matrimonial properties. The rest were not proved to exist as matrimonial properties. The court proceeded to order each party to bear his/her own costs, but did not rule out on the prayer for arrears of maintenance.

The appellant herein, Lina Malisa Mafwere was dissatisfied with the division of matrimonial assets and failure of the trial court to award arrears of maintenance. Thus, preferred this appeal through the legal services of learned advocate Baltalomew Tarimo. The appeal is grounded by four grievances which later were refined by the learned advocate into two namely: -

1)The trial court divided the matrimonial properties at 40% to appellant and 60% to respondent, instead of equal division while excluding other matrimonial properties from the division.

2)The trial court did not rule on maintenance arrears claimed by the appellant.

On the hearing of these grounds of appeal, Mr. Tarimo along with Ms. Leah Mwasa, learned advocates, represented the appellant and Mr. Jovin Manyama appeared for the respondent. Mr. Tarimo leading the submission for the appellant, argued that the evidence adduced during trial needed revisit and equal division be ordered. Basing on section 114 (2) of **the Law of Marriage Act, [Cap 29 RE 2019]**. He referred to page 3 of the trial court's judgment, one house and three farms were divided at 60% to 40% instead of equal division. Such decision was erroneous because there was no proof of any contribution by any party more than the other. The respondent did not establish if he owned any property prior to marriage and thus 50% to each party was appropriate because each spouse contributed equally towards acquisition of the properties.

He added, there are other matrimonial properties which were not included in the division, including the 120 acres at Mikese, 64 cows and 34 pigs, which argued them be divided equally.

In respect to maintenance, the learned advocate challenged the trial court for failure to rule on this issue. Submitted that on 02/09/2020 the trial court ordered the respondent to pay the appellant a maintenance of Tshs. 1,000,000/- per month, but the respondent did not comply with that order and the trial court did not make any order to that effect.

Advocate Javin Manyama commenced his submission by pointing out quite clear point of law that, division of matrimonial properties is

governed by section 114 of the **Law of Marriage Act**. The qualification of that property, must be parties' properties and acquired during existence of marriage and by joint efforts. The court is called upon to consider contribution of each party towards acquisition of those properties. To support his argument, he cited the case of **Nacky Ester Nyange Vs. Mihayo Wilmore, Civil Appeal No. 169 of 2019.** It was his stance that, the evidence established on a house built at Plot No. 314 Naghutu street and 3 farms were the only matrimonial properties. The appellant during trial claimed other properties, but did not establish the same on evidence to exist and that they were matrimonial. The learned counsel proceeded to argued that, the trial court was justified to rule those properties were not existing. Justified by referring this court to the case of **Asia Christopher Vs. Jafari Said, PC Matr. Appeal No. 09 of 2021,** on proof of contribution. The respondent proved on acquisition of the properties, but the appellant said nothing on her contribution.

Facing the second ground, advocate Manyama argued that maintenance was not an issue during trial. Therefore, cannot be an issue on appeal, rather the appeal may be dismissed.

In rejoinder, the learned advocate for the appellant insisted on presumption of equality of division. He said it was the respondent to prove that he contributed more than the appellant, and not the appellant to prove that he deserved 50% division. Reiterated on the trial court's exclusion of the farm, cows and pigs, in which the appellant deserved 50% as well.

Having summarized the rival arguments of learned counsels, I prefer to start with the second ground of appeal as it raises a pure

question of law. The remedy to be applied in case of the alleged contravention of the law, may render the first ground redundant. The appellant has raised an issue related to failure of the trial court to decide on the issue of maintenance pleaded and established by the appellant.

The law is settled that the trial court must determine issues framed or pleaded before it, failure to decide on the issues by trial court is a serious omission, which results to defect of the decision so entered. In the case of **Kukal Properties Development Ltd Vs. Maloo and Others (1990) E.A. 281**, it was inter alia ruled: -

> *"A judge is obliged to decide on each and every issue framed, failure to do so constitute a serious breach of procedure"*

This has been followed in our jurisdiction in the cases of **Alnoor Sheriff Jamal Vs. Bahadir Ebrahim Shamji, Civil Appeal No. 25 of 2006** and **Alisum Properties Limited Vs. Salum Selenda Msangi, Civil Appeal 39 of 2018** among others.

To test whether the issue of maintenance arose and whether was not determined, I have seriously examined the pleadings, proceedings and judgment of the trial court. I found that before the trial court the issue of maintenance was pleaded and was sought in the relief. The trial court did not frame an issue for determination on maintenance, but on the hearing, parties addressed the same. Unfortunate the court did not make any finding on that issue.

The appellant claimed that the respondent stopped to provide for her basic needs. Sometimes by agreement, which was allegedly adopted

by the trial court, an order was issued for the respondent to provide Tshs. 1,000,000/- per month which he did not honour, she said he just paid Tshs. 500,000/= and later defaulted.

Even by assumption, that the trial court forgot to frame the issue of maintenance among other issues, it would still be correctly to include it in the judgment had it noticed such omission in time as the parties submitted on it in their testimonies. According to the decision of **Agro Industries Ltd Vs. Attorney General [1994] T.L.R 43 (CAT)**, if the parties are allowed to address the trial court on any issue, the court must conclusively determine that issue. Notwithstanding the fact that the issue was not in the pleadings or listed among the issues. The Court of Appeal has followed this position later on in a good number of cases including in the case of **International Commercial Bank Limited Vs. Badecam Real Estate Limited, Civil Appeal No. 446 of 2020, CAT at Dsm,** where it held: -

> *"It is trite that findings in suits must be based on issues arising from pleadings. However, there is an exception to that rule. The trial court is not precluded from deciding an issue which, though not framed, parties left it for its determination"*

At least, the argument by the respondent's learned counsel can be rightly displaced by the above observation, that the trial court had the duty to rule on that aspect. This court is justified to fault the trial court for such failure. The second ground is therefore merited and thus allowed.

Before going into the remedy for the fault above, I have observed some other irregularity which, though was not raised by the parties, yet is a relevant issue for consideration. Due to the nature of the remedy to be applied on the second ground, also this court find the trial court in its judgment did not properly resolve the first issue on breakdown of marriage. The trial court decided partly as quoted hereunder: -

> *"To start with the first issue whether the marriage between the parties has been broken down irreparably. There is no doubt the issue is in affirmative because no any party during their testimonies disputed on that"*

Apart from the paragraph above, there is no other reasoning made by the trial court before reaching to the conclusion that the marriage is irreparably broken down. At this juncture, the court will not seek to fault the finding that marriage and grant of divorce (the merit) but the path to such finding (the procedure) is what this court finds necessary to comment on.

It seems to this court, that the trial court granted divorce summarily. However, that above approach was contrary to the doctrine of sanctity of marriage and judicial care, also it did not consider the true spirit of section 107 (1) and (2) of **The Law of Marriage Act** which requires the court to consider all the surrounding circumstances. It is unfortunate that, the trial magistrate did not even mention the provision of the law under which the said marriage was found to be irreparably broken down. By deciding that there was no dispute on the breakdown of the marriage and abstaining from determining the evidence before it, the trial court appears to have acted under the auspices of Order XV,

Rule I of **The Civil Procedure Code [Cap 33 RE 2019],** which he did not mention either, but it provides that: -

> *"Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment."*

My interpretation of the pleadings which I have ample time to examine, is that the respondent did not admit the matrimonial offences alleged against him, neither did the appellant admit the matrimonial offences alleged by the respondent against her. Just each party was pointing fingers against the other to be responsible for the disputes in their marriage. The spirit of **Order XV, Rule I** of the **Civil Procedure Code,** should be applied only where the facts alleged in the pleadings are admitted by the other party without any qualification or reservation as the provision requires the parties to be not at issue on any question of law or fact.

Above that, the conclusion of whether the marriage is broken down irreparably must not be reached unless the Matrimonial court has analysed the facts laid before it, including those admitted. This is what this court held in the case of **R Vs. R [2004] T.L.R. 121,** where among other holdings, we discouraged granting of divorce summarily. I will quote some extensive parts of that decision for easy of reference, the court commenced that: -

> *"First and foremost, it should be made very clear from the outset that the case of Butiku v. Butiku is not binding upon this Court. However, the facts of that case are both parties, agreed on more than sufficient issues of fact and of law*

raised in their pleadings. The pleadings establish that the marriage has broken down irreparably; hence the dissolution of the marriage. In the instant case, parties are not at one on grounds of divorce. The petitioner said there is no love, whereas the respondent said it is the petitioner who caused the situation to be thus. Obviously, the parties are not dancing so to speak, to the same music. It follows therefore that the facts of this case and that of Butiku case are distinguishable."

After such an elaborate interpretation of the circumstances surrounding the case, this court on the other way asked itself whether the **Law of Marriage Act** allowed granting divorce summarily. Hereunder is what it decided: -

"And it is no wonder that one of the usual issues which features in the matrimonial proceedings is whether the marriage has broken down irreparably. This in my view shows that Court ought to first resolve whether the marriage has broken down. Thereafter the former issue of irreparability of the marriage follows. And this in my settled mind shows that the legislature has imposed a duty upon Courts of law to see to it that marriages should not be easily dissolved. The rationale is not far to seek families are foundation of a nation and it is truism that strong families breed strong nation. So, Court of law should not be a place for rubber stamping, rather they are required to handle matrimonial disputes with judicial care. Of course, this does not mean that Courts should go to the extent of forcing the parties to stay together; not at all. Courts of law

have no such mandate. Having said thus, I am of the opinion that applying Order XV, rule I of the Civil Procedure Code 1966 in matrimonial proceeding will defeat the whole concept of judicial care. And as procedural rules are not supposed to override substantive law, I hold that order should not be applicable in matrimonial proceedings."

On the basis of the above, the provisions of Order XV, Rule I of the **Civil Procedure Code** should apply only when the respondent concede (plead guilty) to the matrimonial offences levelled against him or her under section 107 (2) of **The Law of Marriage Act,** yet the *proviso* which appears in that section must always be observed that: -

"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"***

It is on the above observation that before going into the remedy applicable to the second ground, I find it significant to present my exposition of the law on the above aspect even if same was not raised by the parties. Having cautioned myself and satisfied that no prejudice will be occasioned by this recourse. Having so said and reasoned, this court is prepared to deal with the remedy fit to the defect(s) discussed above.

Coming to the remedy, I understand that this court being the first appellate court, has wide authority including re-assessment of the questions of fact and law dealt with by the trial court. But the issue of

maintenance in this matter, having not been decided by the trial court, it limits the jurisdiction of this court. The trite law has been that the appellate court shall enjoy the powers over questions that arose before the trial courts and determined conclusively. There is a number of authorities, including the case of **Celestine Maagi Vs. Tanzania Elimu Supplies (TES) and Another, Civil Revision No. 2 of 2014 (unreported)** where it was ruled that: -

> *"The power of the Court on matters arising from the lower courts are only exercisable in two ways. First, by way of appeal, and second by way of revision... And ordinarily the Court would exercise its appellate and revisional powers only after the lower courts have handled down their decisions."*

Following the authorities referred herein above on the power of the appellate court on issues not determined by the trial court, I will not evaluate the evidence relevant to the issue. Following the precedent in **Alisum Properties Limited Vs. Salum Selenda Msangi (supra)** the proper remedy as above observed is to nullify the whole decision and remit back the case file to the trial court for a proper judgment. The above disposes of the whole appeal, there is no need of dealing with the first ground.

Having reasoned as above, the appeal is allowed on the strength. The decision by the trial court is nullified for contravening the law to the extent above revealed. The case file be remitted back to the trial court and before the same trial magistrate for him to compose a proper judgment which shall cover all issues, including that of maintenance

sought by the appellant. Mindful of the fact that this is a matrimonial matter, I make no order as to costs. Order accordingly.

Dated at Morogoro on this 18th day of November, 2022.

P. J. NGWEMBE

JUDGE

18/11/2022

Court: Judgment delivered at Morogoro in Chambers on this 18th day of November, 2022 in the Presence of Leah Mwasa for Tarimo Advocate for the Appellant and the presence of Mathew Mtemi for Manyama Advocate for the Respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

18/11/2022