IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE-STOP JUDICIARY CENTRE)

AT TEMEKE

MATRIMONIAL APPEAL NO. 6 OF 2023

(Originating from Misc. Civil Application No. 92 of 2022 of OSC District Court)

SALVATORY KATAMAZA..... APPELLANT

VERSUS

LIGHTNESS YANGO @NYAKWESI MUGETA YANGO..... RESPONDENT

JUDGMENT

10/10/2023 & 26/10/2023

BARTHY, J:

The appellant aggrieved with the decision of the district court of Temeke at One-Stop Centre (to be referred to as the trial court) in Matrimonial Cause No. 189 of 2022, he preferred the present appeal armed with following grounds;

1. *That, the trial magistrate erred both in law and procedure by his failure to consider and address the issue framed at the outset of the hearing.*

2. *That, the trial court erred in law and fLMAs for failure to consider the evidence of the appellant.*

3. *That, the trial magistrate erred in law and fact for awarding the custody of all four issues of the marriage to the respondent who left the matrimonial home.*

4. *The trial magistrate erred both in law and procedure for not considering the wishes of the issues in respect of the parent they prefer to stay with.*

5. *That, the trial magistrate erred in law and fact for failure to realize that an order of separation for three years shall not be the relief of their matrimonial dispute it will rather instigate hostile which possibly may affect upbringing of their issues.*

6. *That, the trial magistrate commits a travesty of justice for issuing/ awarding prayers which were not requested by parties.*

The appellant therefore prayed to this court to nullify the decision of the trial court and allowed the appeal with costs.

Before determining the merit of this appeal or otherwise, in order to appreciate well this appeal, the background of this matter is important. The records of the trial court reveal that, the parties to this matter were

husband and wife who celebrate their marriage about 12 years ago and they were blessed with four issues; three boys and a girl aged between 11 years to 3 years.

Their union had not been a bed of roses as many would expect it. In the subsistence of their marriage, marital snags were experienced is very early years. The respondent then moved out of matrimonial home with all children which led to more scuffles. Hence, the petition for separation was lodged before the trial court by the respondent.

Upon hearing the matter, the trial court went ahead to grant the decree of separation for three years. Custody of all four issues was granted to the respondent and the appellant was granted the right to access the children during the weekend. The matrimonial assets were ordered to remain in the current position for the entire period of legal separation. The decision that did not amuse the appellant, hence this appeal.

At the hearing of this matter, the appearance was Ms. Lucy Nambuo learned advocate for the appellant and Prof. Cyracus Binamungu learned advocate for the respondent.

Hearing of this appeal was disposed of by way of written submissions which was timely lodged according to the schedule of this

court.

In the written submission in support of the grounds of appeal, Ms. Nambuo when addressing the first grounds of appeal, she was of the opinion that the trial court had failed to address the issues framed and decided on matters that were not at issue.

To prop her argument, she referred to the case of **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid** [2005] TLR 61, where the Court of Appel made an emphasis on making findings on issue framed in a case.

Submitting on the second ground, Ms. Nambuo faulted the trial magistrate for his failure to consider the appellant's evidence as he testified to the effect that, upon his arrival from where he was deployed, he found out the respondent had moved out of their matrimonial house with his children and all household items, save for those in their bedroom.

As for the third ground, Ms. Nambuo condoned the decision of the trial court to grant the custody of all four issues to the respondent without any proof of inability of the appellant to cater for those children.

She went on submitting for the fourth ground that, the trial court did not consider the wishes of those children on whose parents they wish

to live with. As they appeared in court and expressed their wish to live with the appellant.

On the fifth ground, Ms. Nambuo challenged the decree of separation for three years, stating it will instigate hostility and affect the upbringing of their issues. She also pointed out to the finding of the trial court stating their marriage was broken down beyond repair was contradicting with the issue framed.

It was further stated that, the order of the trial court to maintain status quo of their assets during separation period was ambiguous and contradicting.

On her final ground, she faulted the trial court for granting prayers not sought by the parties. Ms. Nambuo was firm that the prayer sought was for separation without any specific time. Also, the order for appellant to have custody of their issues on weekend was said to be difficult to implement and the issue for maintenance was not addressed by the court.

Ms. Nambuo argued that the decision of the trial court fell short of legal requirement under Order XX, rule 4 of the Civil Procedure Code (to be referred to as the CPC) that require a judgment to contain concise facts of the case, points for determination, decision and reasons for that decision.

To wind up, she prayed for this appeal to be allowed, set aside the decision of the trial court and this court give proper orders.

On the respondent's reply submission, Prof. Binamungu on the first ground of appeal he responded on the arguments upon the findings that the marriage was broken down beyond repair was not based on the issues framed for determination. With respect to the case of **Sheikh Ahmad Said v. The Trusteed of Manyema** (supra) referred by appellant's counsel, he stated the same is distinguishable to this matter since it was not a matrimonial matter.

He went on arguing that, it is the requirement of the law under section 108(a) of the Law of Marriage Act, Cap 29 R.E. 2002 (to be referred to as the LMA) to inquire into the facts alleged and find proof if the marriage is broken down. It was his argument that, in the present matter the trial court determined the marriage was 'irreparably' broken down under section 108(d) of the LMA on matter of separation. Prof. Binamungu was firm that, the anomaly does not go to the root of the matter and urged this court to rectify the record.

Recounting on the second ground where the trial court is faulted for not considering the appellant's evidence in his judgment. Prof. Binamungu pointed out that, the trial magistrate in his decision he had referred to the

reply to the petition which did not resist the petition. Again, on page 3 to 4 of the judgment, the evidence of both sides was referred.

Tackling the third ground, the issue of custody of all four issues being left with the respondent: It was the argument of Prof. Binamungu that, the trial magistrate clearly assigned reason for granting custody to the respondent.

Prof. Binamungu further recounted that, with the nature of the job of the appellant which requires him to travel a lot, it is not for best interest of those children to be in his custody under the care of the house help. He therefore referred to section 125 of the LMA and cited the case of **Ward Idrisa Sadick v. Ansbert Ameselm Mugisha**, Matrimonial Appeal No. 3 of 2020, high court at Mwanza, where the court found the appellant was unfit parent to be granted custody of children since he had no time to care and stay with his children.

He also cited the case of Neema Kulwa **Mvanga v. Samson Rabule Maira**, Civil Appeal No. 1 of 2018, high court at Tanga, where the court emphasized on the need to place children of tender age to their mother.

Turning to the fourth ground, Prof. Binamungu recounted on the claim that the trial magistrate did not consider the wishes of the children. It was his submission that the wishes of children were considered, but the

court considered most their best interest. The reference was made to the case of **Gladness Jackson Mujinja v. Sospeter Crispine Makene** [2017] TLS LR 217 p. 232-234, where the court held that the wishes of the chid should not solely be relied on.

He further submitted that, the age of the children of the parties in this matter were 11yrs and 3yrs respectively. It was his argument that the court was correct to decide for their custody.

Responding to fifth ground that the trial court granted the relief not sought, as it granted decree of separation for 3 years which was said it will instigate hostility and affect upbringing of their children. On this ground he argued that, the trial court granted the relief sought according to the pleading; for custody of children, maintenance of status quo for the whole period of separation the fact which was never disputed by the appellant on his pleading.

Prof. Binamungu submission on the last ground which confronted the judgment of the trial court for not being inconformity with Order XX, Rule 4 of the CPC. To this ground he was firm that the judgment of the trial court was proper.

He added that, matrimonial matters are governed by the LMA and the Law of the Child Act of 2009. He therefore was of the view that, the

petition of separation and divorce are governed by section 106, 108 and 110 of the LMA. He was also firm that, the grounds of appeal have no merit and he prayed for this appeal be dismissed with costs.

Ms. Nambuo on her rejoinder submission she stated that, the prayer made to rectify the record of the trial court as prayed by the respondent's counsel is not tenable at this stage. She went further stating that, the anomaly cannot be rectified and it cannot be granted without being prayed for formerly.

On the argument that the appellant is the frequent traveller, she stated there was no proof for the same; apart from the single trip which he travelled abroad and the respondent used it as the chance to move out of their home to her rented house.

On remaining grounds, Ms. Nambuo maintained her arguments she made in her submission in chief as well as for the prayers.

Having heard the rival submissions of both sides, this court is now tasked to determine whether the appeal has the merit.

I will begin my deliberation with the first ground of appeal, where the trial court is faulted to have determined matters not at issue. With respect to this ground, the records reveal that, the petitioner had prayed

for four reliefs which are quoted hereunder for easy reference;

a) *That, an order for separation for three years as between the petitioner and the respondent be granted in order to allow a smooth cooling time.*

b) *That, this honourable court be pleased to grant custody of the children listed under paragraph 7 herein-above to the petitioner; and, the respondent be allowed to see the children at a place convenient any time he deems fit;*

c) *That, this honourable court be pleased to grant orders of maintenance of children listed under paragraph 7 herein above against the respondent.*

d) *That, this honourable court be pleased to grant orders of maintaining status quo over the matrimonial assets under paragraph 17 above during the entire period of separation.*

Having in mind the arguments of both sides, it is now an established principle that, in every matter the parties and the court are bound by the pleadings filed by the parties. This was lucidly emphasized by Court of

Appeal in the case of **Barclays Bank T. Ltd vs Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875 quoting with approval a passage in an article by Sir Jack I.H. Jacob bearing the title, "The Present Importance of Pleadings," first published in Current Legal Problems (1960) at p. 174 stating thus;

> *The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation*

As clearly stated by both sides that the court is bound to determine the matter according to the pleadings and issues framed. The issues are framed from matters in dispute from the pleadings of the parties. The records therefore reveal that the issues framed by the court which was agreed by both sides were as follows;

1. *Whether the marriage between the petitioner and the respondent is experiencing problems which warrants separation for three years*

2. *Who between the petitioner and the respondent deserves custody of the issues of the children?*

3. *To what reliefs are the parties entitled to?*

The trial magistrate upon hearing the matter made his findings to grant the petition ordering the separation for three years, the custody of children to be with the respondent herein and the appellant was granted the right to access. Also, it was ordered status quo for the matrimonial assets to be maintained for the whole period of separation.

It is therefore clear that, the petition before the trial court was for separation for three years which was also reflected on the issues framed and agreed by both parties. The court had considered the evidence tendered before it and found that the marriage between the parties had broken down beyond repair.

However, that the trial magistrate had found the marriage was broken down beyond repair and went ahead to grant the decree of separation.

Despite the fact that the trial court found the marriage was broken down beyond repair and went ahead to grant the decree of separation,

this being the first appellate court, has mandate to re-evaluate the evidence on record and come to its own finding if necessary. The emphasis of this duty was logically stated in the case of **Ally Patric Sanga v. Republic** (Criminal Appeal 341 of 2017) [2019] TZCA 254 (20 August 2019).

The records of the trial court reveal that, the respondent had claimed the petitioner to be violent by assaulting her, locking her outside their matrimonial room, prohibit friends and relatives in their house and even banned the respondent to use certain assets of the family.

In addition to that, the respondent claimed the appellant was not maintaining the family because she was earning an income. There was also claim of infidelity by the appellant.

The appellant on his side he informed the court that they always had quarrels with the respondent and never had good communication between them as the respondent always took advice from her parents. He made it pretty clear that, they had endless quarrels since the first year of their marriage.

With allegation of physical and mental cruelty as well as constructive desertion by respondent who claimed she was forced to leave matrimonial house. These is the evidence provided under section 107(2)(c) and (e) of the LMA.

Also, there was the evidence of the appellant that they have been unhappy since the first year of their marriage, their once sweet love became tart without good communication between them. Such evidence proves the marriage between the parties has broken down as provided under section 108(d) of the LMA.

The emphasis of considering the evidence that proves the marriage is broken down before the court grant decree of separation was made by my brother, justice Kilekamajenga in the case of **Wilson Ishengoma v. Frolence Ishengoma** (Matrimonial Appeal 1 of 2020) [2020]

I therefore find that the grant for separation order for three years did not prejudice the parties as it was among the prayer sought in the petition. The court therefore find the third ground of appeal is devoid of merit and it is dismissed.

I will now turn to the third and fourth grounds of appeal which are centred on granting the custody of all four issues to the respondent who was said to have left the matrimonial home and without considering the wishes of those children.

To these grounds, Ms. Nambuo argued that there was no any evidence on appellant's inability to carter for those children and the court did not heed to the wishes of those children expressed before the court.

On the side of Prof. Binamungu, he was firm that the trial magistrate assigned good reasons for granting custody to the respondent, since the appellant is the frequent traveler. He also emphasized on the need of children of tender age to stay with their mother.

With respect to these grounds, I have considered the arguments of both sides as well as the findings of the trial court on the issue of custody of children.

It should be born in mind that, the age of four issues was 10, 8, 6 and 3 years at the time the court granted the order of custody.

The records further reveal that, the trial magistrate in his decision he considered the provision of section 125(2) and (3) of the LMA which also requires to consider the wishes of the parents and community as well to safeguard the interest of children in granting the custody of children.

Also, the evidence further reveal that two children were infants below the age of seven years, and even for older children, their age was in close interval with those infants. In the circumstance of this case, looking on evidence tendered in totality, the best interest of children cannot be perceived by looking on their wishes alone. Rather the court has to consider their continuous stable environment for their upbringing.

A detailed account on how best to safeguard the interest of the child was stated by the Court of Appeal in the case of **Nacky Esther Nyange vs**

Mihayo Marijani Wilmore (Civil Appeal 169 of 2019) [2022] TZCA 507 (16 August 2022, where the court considered on desirability of siblings to live together as another factor to be considered in the custody of children.

Considering total circumstances of this matter, it is for the best interest of those children to grow in stable environment. Since the respondent was the one who was staying with those children when the appellant was on official trip. Also, currently those children are in her custody, I find no reason to fault the decision of the trial court which properly justified granting the custody to the respondent.

I therefore find it is in the best interest of all four children to stay with the respondent. Thus, the third and fourth grounds are also devoid of merit and dismissed.

I will proceed to address the second ground of appeal and determine as to whether the decision of the trial court is fatal for not considering the evidence of the appellant.

To this ground, Ms. Nambuo was of the view that the appellant had informed the court that he was on official trip when the respondent absconded their matrimonial home with all their children. She therefore implored the court to grant custody of children to the appellant.

Prof. Binamungu on his side, he was firm that the trial court properly considered the evidence of both sides, also the appellant on his reply to

the petition he did not rebut the claim.

In determining this ground, I have keenly gone through the evidence of both sides and I have and it will suit to reproduce part of it hereunder;

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In addition to that, parties were also not far apart when it come to the condition of their marriage. Both having agreed that their marriage was heavily troubled wit unsolvable disputes...

The trial court went further to state;

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In the present case both parties prayed for the custody. In fact, they both had reasons why they are the better option...

The petitioner was adamant that being their mother and having more time than the respondent who travels and is frequently absent from home... respondent did not agree. He contended that, since the petitioner left the matrimonial home on her own accord and he did not chase her away, *then the children should be left to stay with him at their home...*

Owing to the analysis of evidence above, I find no justification to interfere with the findings of the trial magistrate. As the trial court did correctly evaluate the evidence which was adduced by both parties and came to the findings which I find no reason to fault it.

Turning to the sixth ground of appeal which is faulting the trial magistrate for granting prayers not sought by the parties.

To these grounds Ms. Nambuo was firm that, the judgment was composed against the requirement of the law. As the trial court granted reliefs not sought by the parties.

On the other hand, Prof. Binamungu was content that, the decision of the trial court had complied with the provisions of section 106, 108 and 110 of LMA which govern issues of separation. He added that, the impugned judgment contained all necessary elements required to be in the judgment.

I agree with the arguments with Ms. Nambuo that every judgment must contain brief facts, issue, decision and reason for that decision as the law requires. However, each judge/magistrate may adopt a different style of composing the same.

In this issue, I will not discuss much since it relates with the first ground of appeal which has already been determined. The grant of decree of separation was among the prayer in the petition. The court having

determined the marriage was broken down; it is required to grant the decree of separation.

It is the requirement of the law that, subsequent to the grant of decree of separation the court may proceed to grant ancillary reliefs involving division of matrimonial assets, custody and maintenance of children as provided under section 110(1) of the LMA.

The records of the trial court reveal that after the issues were framed, the evidence was adduced by both sides to reflect the issues and prayers sought in the petition.

It is definitely that, some of the relief granted was not among the issues framed by court and agreed by both sides. However, it is now the settled principle that, the omission to frame issue can be cured if the parties were able to give evidence to address the issue according to their pleading.

This was stated by the Court of Appeal in the case of **Chantal Tito Mziray & Another v. Ritha John Makala & another** (Civil Appeal 59 of 2018) [2020] TZCA 1930 (31 December 2020) quoting with approval the case of the case of **Jahari Sanya Jussa and another v. Salehe Sadiq Osman**, Civil Appeal No. 51 of 2005 and reaffirmed in **George Minja v. The Attorney General**, Civil Appeal No. 75 of 2013 (both unreported). In the former decision the Court stated that;

the omission to frame issues at the beginning of a trial is not necessarily fatal, unless upon examination of the record it can be shown that as a result of that omission the parties were denied opportunity to adduce evidence or to address the point or having gone to the trial no knowing what was at stake thus affecting the merits of the case and thus occasioned a failure of justice.

In the present matter, the records of the trial court reveal that the parties had adduced evidence on the reliefs granted by the trial court.

I therefore find that the omission did not occasion any miscarriage of justice to the parties. This ground also lacks merit and it is dismissed.

Lastly, I will now address the fifth ground of appeal where this court is called to determine whether the trial court was proper to grant decree of separation for three years, as it will instigate much hostility and affect the upbringing of their issues.

On this ground I will not detain much myself as it partly touches on other grounds already determined which were addressing the issues of separation and custody of children. As intimated earlier on, the trial court was justified to grant the reliefs sought. Therefore, this ground is also devoid of merit and it is dismissed.

In the upshot, the omission found in the decision of the trial court did not go to the root of the matter and prejudice the parties. Hence, the appeal is entirely devoid of merit and it is hereby dismissed. Considering the nature of this matter, no order as to costs is provided.

It is so ordered.

Dated at **Dar es Salaam** this 26th October, 2023.

G. N. BARTHY

JUDGE

Judgment delivered in the presence of Ms. Lucy Nambuo for the Appellant and in the presence of Mr. Gasper Sabuni for the Respondent.

J. MSAFIRI

ACTING DEPUTY REGISTRAR

26.10.2023