

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA MATRIMONIAL APPEAL NO 24521 OF 2024 (Originating from
Matrimonial Appeal No. 182023 of 2024 of the District Court of Mbeya at Mbeya and the Primary
Court Matrimonial Cause No. 35 of 2023) GADI
LWINGA.....APPELLANT VERSUS BETHSAIDA
MWAKYOMA..... RESPONDENT

JUDGMENT

Date: 12 December 2024 & 12 March 2025 SINDA, J. The respondent in this appeal filed Matrimonial Cause No. 35 of 2023 at Iyunga Primary Court (the Trial Court) against the appellant. At the end of the hearing, the Trial Court issued a divorce and ordered the division of matrimonial properties. Aggrieved with the decision, the appellant filed an unsuccessful appeal at the District Court of Mbeya at Mbeya (the First Appellate Court), which upheld the Trial Court's decision. 1 The appellant, aggrieved with the decision, filed a memorandum of appeal before this court, which contains four grounds of appeal as follows:

1. That the Honourable learned Senior Resident Magistrate erred both in law and facts by finding that grounds lack merits knowingly that the decision violates the principle of the fundamental right to a fair hearing (principles of natural justice, the principle of the right to be heard) Audi alteram partem.
2. That the Honourable learned Senior Resident Magistrate erred both in law and facts by relying on his insufficient evidence in balancing probabilities without adhering to and critically analysing the evidence on the contribution of each party.
3. That the Honourable learned Senior Resident Magistrate erred both in law and facts by reaching an unfair and injustice decision to the detriment of the appellants.
4. That, the Honourable learned Senior Resident Magistrate erred both in law and facts by considering the respondent's case. During the hearing of the appeal, both parties appeared in person unrepresented. The appeal was argued by way of written submission. The appellant argued the first, third and fourth grounds jointly. He stated that there was a violation of the principles of natural justice as the First 2 Appellate Court learned magistrate condemned the appellant without, according to him, the right to be heard. He submitted

that the First Appellate Court held that on the hearing date, the appellant contended that he rejected everything, which is not true. He added that there was no record of the courts showing that the rejection was heard by way of filing a written submission in proceedings or trial. He referred to the cases of Interbulk Limited vs. Aidaen Shipping Co. Ltd (1984) 2 LLU ods Rep. 66, the case of Mbeya-Rukwa Auto parts and Transport Limited vs. Jestina George Mwakyoma [2003] TLR 251, at page 265 and Abbas Sherally & Another vs. Abdul Sultan Haji Mohamed FazaIboy, Civil Application No. 33 of 2002 (unreported) to cement his argument. He averred that numerous decisions emphasised that courts should not decide matters affecting the parties' rights without giving them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. On the second ground of appeal, he argued that the court relied on his insufficient evidence in the balancing probabilities without adhering to and critically analysing the evidence on the contribution of each party. He referred to the case of Mary Agnes Mpelumbe vs. Sekha Nasser 3 Hamud, Civil Appeal No. 136 of 2021. He stated that the learned Resident Magistrate relied on his insufficient evidence and hence did not give him an opportunity to be heard before a court of law and relied on evidence from the Trial Court. No exhibits were presented in the Trial Court as evidence of the listed assets. He referred to page 7, paragraph 2 of the Trial Court judgement, which states that: “Mdaiwa akijibu hoja alisema kwamba nyumba aliikuta ni mali ya familia, shamba mafinga aliyewaunganisha ni mfanyakazi mwenzake na Mdai na hakuna nyaraka zozote....., Dar es Salaam hakuna kiwanja, gari alishauza ila mwenye gari bado hajalichukua, mashamba ya Ilomba yalifanywa viwanja na hakununua Mdai” He submitted that the above-bolded word needs exhibits to prove the contribution of each party. He couldn't bring exhibits because he did not get a chance to be heard to prove before the District Court. In her reply regarding the first, third, and fourth grounds, the respondent submitted that the appellant was given the right to be heard in both the Trial Court and the First Appellate Court. She stated that the subordinate courts gave the appellant a fair trial and had the right to appeal according to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). 4 In reply to the second ground, the respondent referred to the judgement of the Trial Court on the sixth paragraph of the second page and first paragraph of the third page, where the appellant stated that “we contracted the marriage 14th November 2010, we have 4 children, we have lived together by cooperating in many things of nurturing the family and paying school fees for children and other family activities” She argued that on his petition, upon saying “other family activities”, the appellant did not mention specific activities. She added that the specific activities that the respondent contributed as a mother and the respondent's wife to the matrimonial properties include doing domestic chores and caring for the family. She maintained that she took a loan from NMB Mbalizi of Tanzania Shillings Seven million (TZS 7,000,000) as per Exhibit PE2 to buy a plot of land to be used as a matrimonial property together with the appellant. Also, the said plot of land is among the properties which the Trial Court distributed after the divorce. She added that she also contributed to constructing the residential house at Isyesye as per Exhibit PE 1 documents from Isisye Ward Tribunal to show that the residential house at Isyesye is also a matrimonial property. 5 She stated that the

appellant contradicted himself by saying that the house was the property of his family. She contended that the Trial Court asked him to submit proof of this, but he did not submit any documents. She insisted the case was determined fair, and the properties were distributed by determining each party's contribution to the marriage. In rejoinder, the appellant insisted that parties were not afforded the right to be heard in the First Appellate Court, and the proceedings are silent to that effect. With regard to the issue of each part's contribution, he submitted that the respondent came up with a bank statement showing a loan from NMB Mbalizi of Tanzanian Shillings Seven Million (TZS 7,000,000/=) to buy a plot of land and attached a copy of the bank statement as PE 2. He differed from the respondent's attachment because the attachment only shows the customer account statement. He added that the respondent took a loan for personal use, and the bank statement did not show how the respondent contributed to buying the plot. The appellant differed with the respondent's evidence in Exhibit PE1 as documents from the Isyesye Ward Tribunal show that they acquired the house at Isesye together. He added that the respondents misled the court, 6 and the said Exhibit PE1 was not to be admitted as evidence to the effect that the Isyesye Ward Tribunal deals with the issues of dispute settlement of marriage and not issues of land matters. He referred to section 101 of The Law of Marriage Act, [Cap. 29 R.E. 2019]. He further stated that Exhibit PE1 does not reflect the respondent's contribution as stated in the above provision. He added that the Isyesye Ward Tribunal was a reconciliation board to the matrimonial dispute. He prayed this court to allow the appeal. I have reviewed court records, grounds of appeal, and submissions filed by the parties. On the first, third and fourth grounds, the appellant complained that he was not afforded the right to be heard at the First Appellate Court. The right to be heard is among the fundamental rights that parties must be afforded during the hearing. In *Mbeya - Rukwa Auto Parts and Transport Ltd vs. Jestina George Mwakyoma Civil Appeal No. 45 of 2000* it was observed that; "In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law and stipulates in part; 7

- (a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na haki ya kupewa nafasi kikamilifu." In this case, I have reviewed the proceedings of the First Appellate Court and found that both the appellant and the respondent were afforded the right to be heard from pages 4 to 5 of the typed proceedings (the Proceedings). In that respect, I find the grounds lack merit. On the second ground, the appellant complained that the evidence was not properly analysed regarding the extent of each party's contribution. The distribution of matrimonial property is guided by section 114 (2)
- (b) and (3) of the Law of Marriage Act [CAP. 29 R.E. 2019] which stipulates: "In exercising power conferred by subsection (1), the court shall have regard to: 2(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially

improved during the marriage by the other party or by their joint efforts." 8 Also, in the celebrated case of Bi Hawa Mohamed vs. Ally Sefu [1983] T.L.R. 32. guided by section 114 of the LMA attempted to define what comprises "matrimonial assets", and the Court stated: - " In our considered view, the term 'matrimonial assets' means the same thing as what is otherwise described as family assets." I am aware of the legal position that, on a second appeal, the court cannot interfere with the concurrent findings of fact made by the lower court unless there are valid reasons to do so. This principle was established in the case of Bomu Mohamed vs. Hamisi Amiri (Civil Appeal No. 99 of 2018, unreported), where the Court of Appeal held that: " We are very alive to a well-established rule of practice that on a second appeal, the Court will not normally interfere with a concurrent finding of fact of courts below unless there are sufficient grounds to do so. These grounds will be things like misdirection, non-directions or misapprehension of the evidence." I have reviewed the proceedings and judgement of the Trial Court regarding matrimonial assets. The Trial Court, in the division of matrimonial assets, decided that in relation to the house at Isesye, the appellant had 65% and the respondent 35%. Regarding the motorcar, the appellant had 60% and the respondent 40%. 9 Concerning the plots at Mbeya and Dar es Salaam, farms at Mafinga, Mbozi and Sumbawanga be divided 50/50 between the appellant and the respondent. However, the proceedings do not reveal the extent of contribution proved by each party in their evidence, which led the trial magistrate to arrive at such a decision. I find this a serious irregularity that can cause a miscarriage of justice. I nullify the proceedings and judgment of the Trial Court in respect of the division of matrimonial properties. I order that the case file be remitted back to the Trial Court and tried afresh in compliance with the law before another magistrate regarding the extent of contribution of each party on the acquisition of that matrimonial asset before distribution. The appeal is allowed to that extent. Right to appeal is explained. DATED at MBEYA on this 12 Day of March 2025. A. A. SINDA JUDGE 10

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