

TANZANIA / JUDGMENT

PHALES PETRO VS NYANJI

Return of dowry1 final final final

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT SHINYANGA PC CIVIL APPEAL No. 26633 OF 2024 (Arising from the Ruling of the District Court of Bariadi in Civil Revision No. 20196/2024 and originating from Civil Case No. 55/2024 of Somanda Primary Court) PHALES PETROAPPELLANT VERSUS NYANJI MATONDO SALEHE1ST RESPONDENT LUGOBI SALEHE GIGUNA.....2ND RESPONDENT

JUDGMENT

28th January, & 21st March, 2025. Massam, J: - The briefs facts of the case are that the appellant filed a civil case No 55/2024 at Somanda Primary Court claiming, against the 2nd respondent for the refund of dowry which was sixteen head of cattle (16), Tshs 5,000,000/= being disturbance costs, and Tshs 14,000,000/= being costs incurred by him to send his wife to school. After full hearing of the case the trial court awarded him sixteen heads of cattle plus Tshs 5,000,000/= being the disturbance costs. Following that award the appellant filed execution by attachment of the house of Magembe Masaka (deceased) and 1st respondent is an administrator of her estate. 1 Again, before the attachment is done, the 1st respondent filed Civil Revision No 20196 of 2024 at Bariadi District Court challenging the decision of Somanda Primary Court. In its findings the District Court nullified all proceedings, judgement and orders issued in Civil Case No 55 /2024. Dissatisfied with the said findings of the District Court, the appellant has preferred this appeal armed up with four grounds of appeal, namely:

1. That, the District Court of Bariadi while exercising its Revisionary Jurisdiction erred in law and fact for entertaining and determined an application for revision on a wrong party.
2. That, The District court of Bariadi while exercising revisionary erred in law and fact for granting orders which were never sought by the first respondent.
3. That, the District court of Bariadi while exercising its revisionary jurisdiction erred in law and fact for holding that the probate cause No. 11/20222 of Mhango primary Court had been closed /come to an end while the matter was still pending in court. 2

4. That, the District Court of Bariadi while exercising its revisionary jurisdiction erred in law and fact for faulting the order of Somanda Primary Court of returning dowry while the same was never contested in the same court. During the hearing of this appeal, the appellant enjoyed a legal service of Mr. Mokami Allan Robi Learned advocate while respondents were represented by Geni Vitus Dudu also the learned counsel. On 28th January 2025 by consensus both parties prayed before this court to hear this appeal by way of written submission and the court granted their prayer for the schedules as follows, the appellant to file submission on 12/2/2025, reply on 26/2/2025, rejoinder on 5/3/2025 and the judgment on 14/3/2025 and court orders were complied with. Arguing, on the 1st ground of appeal that, the District Court of Bariadi while exercising its Revisionary jurisdiction erred in law and fact for entertaining and determining an application for revision on a wrong party on his reply Mr. Robi, stated that the names of the appellant in Civil Case No.55/2024 were PHARES S/O JEREMIA and not PHALES S/O PETRO. However, on revision the Bariadi District Court entertained and determined basing on a wrong party to wit: - PHALES S/O PETRO, a party which was never reflected in the decision of the Somanda Primary Court. He cemented his argument by referring the case of in CRDB 3 BANK PLC (Formerly CRDB) VS. GEORGE KILINDU (Civil Application No.110/2017) [2020] TZCA 361 and in the case of INTER-CONSULT LTD VS. MRS. NORA KASSANGA AND ANOTHER, (CIVIL APPEAL NO. 79 /2015) [2029] TZCA 164 (4TH FEBRUARY 2019) held that, “citing of all these new names for the appellant without leave or order of the court is a fatal irregularity which affected the competency of the entire appeal”. Coming to the second ground of appeal that, the District Court of Bariadi while exercising its Revisionary jurisdiction erred in law and fact for entertaining and determining an application for granting orders which were never sought by the 1st respondent. Mr. Robi said that removal of the injunction order and attachment of house under Plot No.9 Block A Sokoni area within Bariadi District, quashing and set aside the decision and orders in Civil Revision No. 20196/2024 of Bariadi District Court, were never sought by the 1st respondent. He said that basing on the common phrase “there is no free lunch in America”. The same is a principle well laid out under order VII Rule 7 of the Civil Procedure Code (cap 33 R.E 2022), I quote “Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other 4 relief which may always be given as the court may think just to the same extent as if it had been asked for.” Also, Mr. Robi cited the case of INTERNATIONAL COMMERCIAL BANK LTD VS. JADECAM REAL ESTATE LTD, CIVIL APPEAL NO.446/2020, COURT OF APPEAL AT DA ER SALAAM, MLYAMBINA. J, had this to say under pages 29, 30 and 31 of the decision on “Whether a trial court can grant reliefs which are not prayed for in the plaint under the Blanket prayer “Any other reliefs”. The answer was in the negative. He referred us to Order VII rule 7 of the Civil Procedure Code Cap 22 R.E 2022), where he stated that,” It is not in dispute that general damages were not one of the reliefs the respondent asked to be granted before the trial court neither did any of her witnesses specifically pray for general damages in their testimonies. Finally, he said that the orders which were never prayed for but so granted by the District Court of Bariadi in Civil Revision No. 26633/2024 were improper. Responding to the third ground of appeal, that the District Court of Bariadi

while exercising its Revisionary jurisdiction erred in law and fact for holding that the probate cause No.11/ 2022 of Mhango Primary Court had been closed / come to an end while the matter was still pending in court. 5 Mr. Robi reiterated that, the probate cause No.11/2022 of Mhango Primary Court had not been closed when the District Court of Bariadi was exercising its revisionary powers and the claims of refunding dowry from the respondents were valid and are still valid. Answering the 4th ground of appeal that, the District Court of Bariadi while exercising its revisionary jurisdiction erred in law and facts for faulting the order of Somanda Primary court of returning dowry while the same was never contested in the same court. Mr. Robi said that in Civil Case No.55/2024, respondents did not contest to return the dowry. Good enough the 1st and 2nd respondents conducted a joint family meeting signed and dated on 22/08/2024 where they agreed to return the dowry. Again, the appellant is a Sukuma who married from the Sukuma tribe under Sukuma customary laws, which allows refund/return of dowry after dissolution of marriage. He supported his argument by referring The Declaration of local customary law order, GN.NO 279 OF 1964, whereby under rule 37A, B reads; - “Baba wa binti au mrithi wake anaweza kutakiwa kurudisha mahari wakati ndoa inapovunjika” “mtu anaweza kudaiwa kurudisha mahari ni yule aliyepokea mahari au mrithi wake”. 6 Finally, he prayed this court to allow this appeal with costs, the decision and orders of the District of Bariadi be quashed and set aside and upheld the decision and orders of Somanda primary Court in Civil Case No.55/2025. On his side, Mr. Dudu advocate responded on the first ground of appeal that there is no error committed by court when exercising its revision power, the revision based on proper party, since the name of the appellant PHARES S/O PETRO is his name, he pleaded the same in his counter affidavit as he sworn as PHARES S/O PETRO not PHARES S/O JEREMIA. Additionally, Mr. Dudu said that PHARES JEREMIAH and PHARES PETRO refers to only one person and the appellant has never refused service on the ground that he is not Phares Petro and the correct name of the appellant should be amended to his wish but such irregularity is not a fatal and is curable by deleting the word “PETRO” and insert the word “JEREMIA”. He prayed the Honourable Court to apply the Doctrine of “finger litigation or The principle of misnomer”. The said doctrine was used by the court of appeal in the case of Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd, Civil Application No. 113 of 2011, CAT (unreported) wherein the Court of Appeal endorsed the 7 holding in the case of Evans Construction Co. Ltd. versus Charrington & Co. Ltd. and Another (1983) 1 All E R 310 where it was held: - “...As the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holdings Ltd and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued...it would be just to correct the name of the respondent. Applying the same doctrine, the Court of Appeal in Christina’s case, supra, the Court of Appeal held: - “We are satisfied that it is just to correct the name of the Respondent from Coca Cola Kwanza Bottlers Ltd. to Coca Cola Kwanza Ltd”. Moreover, Mr. Dudu said that it is undisputed that respondent pointed the correct person/ party in the original case but what is disputed is correctness of the name of the appellant instead of being named PHARES S/O PETRO he was named PHARES S/O JEREMIA. Regarding to the 2nd ground of appeal. Mr. Dudu said that the main complaint by the

applicant was about correctness, legality or propriety of the decision and orders of the Primary court and hence the the Primary Court was said to be illegal as it based on a claim (claim of dowry) which is not maintainable in law and declared nullity and all orders issued has no leg to stand. 8 Coming to the 3rd ground of appeal. It was submission of Mr. Dudu that the Probate Cause No. 11/2022 had been closed by the administrator and the administrator distributed the estate to all legal heirs on 07/08/2023 though form no 5 and 6 which were filed in court on 23/07/2024 after completed his duty of distributing the estate. Finally, Mr. Dudu responded on the 4th ground of appeal that appellant is not aware on contradiction between the Law of Marriage Act, specifically section 71 which does not allow return of dowry where the marriage has been contracted while on the other hand under 37 A of the Declaration of Local Customary Law Order, G.N. No. 279 of 1963, allows return of dowry after dissolution of the marriage. Moreover, Mr. Dudu said that question that can be posed at this stage is which law between the two is applicable? He said that the answer is provided under section 11(4) of the JUDICATURE AND APPLICATION OF LAWS ACT, CAP 358 R.E.2019 which unambiguous provides that, I quote “Notwithstanding the provisions of this Act, the rules of customary law and rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act.” Again, Hon. F.H. MAHIMBALI, J in the case of Amon Mwita Gimacha versus Boniphace Matiko Marwa, Pc Civil Appeal No.16 of 2022, Musoma sub registry, cemented on which law should apply after 9 he faced a contradiction between the Law of Marriage Act and Kurya’s custom, has this to say, I quote: - “Though return of dowry may have been a Kurya’s custom, but that is not a legal position in the country. Since this country is led or administered as per constitution, laws, Rules and... then any rules of customary law which is repugnant or inconsistent with our laws then it ceases to apply”. Moreover, Mr. Dudu said that pointed position of law, though returns of dowry may have been sukuma’s custom but that is not a legal position in our country. Finally, Mr. Dudu prayed this court to dismiss this appeal with costs and the decision and orders of the District Court of Bariadi to be upheld. I have systematically crossed through the trial tribunal records on the evidence given, and the arguments by both parties at the appeal level, and the issue for consideration is whether this appeal has been brought with sufficient cause. In determining the same this court will be guided with provisions under Section 110 and 111 of the Evidence Act, Cap. 6 R.E 2019 provides that, 110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. 10

- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. On whom burden of proof lies,
111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. The above principle of law was also stated by the legendary authors of Sarkar on Sarkar's Laws of Evidence, 18 Edn. M.C. Sarkar, S.C. Sarkar, and P.C. Sarkar, published by Lexis Nexis, posted the following comments at page 1896, "... the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is usually incapable of proof" Also

the same principle cherished in the case of Anthony M. Masanga vs Penina (Mama Mgesi) & Lucia (Mama Anna) Civil Appeal No 118 CAT (unreported) it was held that” Let’s begin by re-emphasizing that the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by provision of section 110 and 11 of the Law of Evidence Act Cap Revised Edition, 2002” 11 Moreover, the same was emphasized in Hemed Said v Mohamed Mbilu [1984] TLR 113 to the effect that "the person whose evidence is heavier than that of the other is the one who must win” Starting with the first ground of appeal that the District Court of Bariadi while exercising its Revisionary jurisdiction erred in law and fact for entertaining and determining an application for revision on a wrong party. Mr. Robi advocate said that the names of the appellant in Civil Case No. 55/2024 were PHARES S/O JEREMIA and not PHALES S/O PETRO. However, on revision the Bariadi District Court entertained and determined basing on a wrong party to wit:- PHALES S/O PETRO, a party which was never reflected in the decision of the Somanda Primary Court. However, Mr Dudu advocate responded that the name of the appellant PHARES S/O PETRO is his name, he pleaded the same in his counter affidavit as he sworn as PHARES S/O PETRO not PHARES S/O JEREMIA. I have exhausted submission from both parties and going through the records. It is undoubted that the plaint filed on 5/06/2024 shows that the name of appellant in Civil Case No 55/2024 were Phares Petro, but also when the same filed counter affidavit in Civil Revision No. 12 20196/2024 he sworn as Phares Petro. Unfortunately, the name of Phares Jeremia appeared in the copy of judgement in Civil Case No. 55 of 2024. Now, the appellant is one who instituted the civil case and was registered in the name of Phares Petro, but at this stage is denying his name and if there was different name appeared in the copy of judgement he was supposed to apply for rectification of the names in the said judgement to the trial court and not to bring the same as the ground of appeal. Also in the record nowhere it was shown that he refused any document from the court like summons or any other documents for the reasons that the name written was not his name or it was required to be corrected his failure of doing so make this court to find the same as afterthought. In the premises I agree with the respondent’s counsel that the remedy was to insert proper name to the copy of the judgement as it was done in the case of Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd(supra) the Court of Appeal held: - “We are satisfied that it is just to correct the name of the Respondent from CocaCola Kwanza Bottlers Ltd. to Coca Cola Kwanza Ltd”. However, I disagree with the appellant’s counsel that irregularity was fatal and even the case of CRDB Bank PCL vs George (supra) cited by the appellant’s counsel is 13 distinguishable with the case at hand because there was no new name of appellant inserted in the case. From above findings. I find the first ground of appeal to have no merit and it is dismissed. Coming to the second ground of appeal that the District Court of Bariadi while exercising its Revisionary jurisdiction erred in law and facts for entertaining and determining an application for granting orders which were never sought by the 1st respondent. Mr. Robi said that removal of the injunction order, quash attachment order and quashing and set aside the decision of the trial court were never sought by the 1st respondent. Nevertheless, Mr. Dudu said the main complains by the applicant was about

correctness, legality or propriety of the trial court decision and not otherwise. In dealing with that ground there is no dispute that it is trite law that, reliefs not founded on the pleadings and which are not incidental to the main prayers sought in the plaint should not be awarded. See: Kombo Hamis Hassan v. Paras Keyoulous Angelo, Civil Appeal No. 14 of 2008; Dew Drop Co. Limited vs. Ibrahim Simwanza, Civil Appeal No. 224 of 2020 and Abraham Israel Shuma Muro v. National 14 Institute for Medical Research & Another, Civil Appeal No. 68 of 2020 (all unreported). Having gone through the submission from both parties and examine the records. The District Court nullified the trial court decision because the claims of return of dowry is not maintainable in law. Thus all orders issued by the trial court no has leg to stand. I disagree with Mr. Robi that the reliefs of removal injunction order, quash attachment order, quashing and set aside the decision of the trial court decision were not sought because those reliefs are incidental to the main application and after nullifying the trial court decision means all orders issued must die the natural death and even the case cited International Commercial Bank Ltd vs. Jadecam Real Estate Ltd (supra) is distinguishable with the case at hand because the orders granted was incidental to the main application. From the above observations. I find the second ground of appeal misplaced and it is dismissed too. Responding to the third ground of appeal, that the District Court of Bariadi while exercising its Revisionary jurisdiction erred in law and fact for holding that the Probate cause No.11/ 2022 of Mhango Primary court 15 had been closed / come to an end while the matter was still pending in court. Mr. Robi said that, the Probate Cause No. 11/2022 of Mhango Primary Court had not been closed when the District Court of Bariadi was exercising its revisionary powers and the claims of refunding dowry from the respondents were valid and are still valid. However, Mr. Dudu argued that that the Probate Cause No. 11/2022 had been closed by the administrator and the administrator distributed the estate to all legal heirs on 07/08/2023 though Form No. 5 and 6 were filed in court on 23/07/2024 after completed his duty of distributing the estate. I have scrutinized submission from both parties and passing through the trial records. Let me put clear that Probate cause No 11/2022 is not the essence of this appeal rather Civil Case No 55 of 2024 and therefore even the records of the probate case is not in our hand at this juncture. However, the records of the revisionary court shows that on 23/7/2024 the 2nd respondent went to the court with some heirs and submitted form no V and VI and some of heirs attended and confirmed that they were satisfied with the distribution and they all signed, then the file was closed officially on 23/7/2024. It is well settled that the proceedings of the court are presumed to be accurate and authentic such that they represent what really transpired in court. See the case of Alex Ndendya Vs Republic, Criminal Appeal 207 of 2018) [2020] TZCA 688, Masalu Ipiringa vs Republic (Criminal Appeal No 263 of 2019) [2003] TZCA 17401, Felick Kilipasi vs Republic (Criminal Appeal No 260 of 2021) [2023] TZCA 17941, Security Group T. Limited vs Steven Gerson Kizinga (Consolidated Civil Appeal No 386 of 2020 & 50 of 2021) [2024] TZCA 107 and the Halfan Sudi Vs Abieza Chichili [1998] TLR 527 in which, the Court of Appeal, relying on what it earlier stated in Shabir F. A. Jessa Vs Rajkumar Deogra Civil Reference No. 12 of 1994 (unreported) held: "A court record is a serious document; it should not be lightly impeached" Guided by the authorities above. Coming to our case the records shows that the

Probate case No. 11 /2024 was closed on 23/7/2024 and during hearing of revision the said probate was already closed as shown in the court records .According to that I have no any reason not to believe the same. In the premises I agree with the respondent counsel that the said probate case was already closed during the hearing of revision. So according to that I find that the third ground of appeal is unfounded and is dismissed for want of merit. 17 Tackling the 4th ground of appeal that, the District Court of Bariadi while exercising its revisionary jurisdiction erred in law and fact for faulting the order of Somanda primary court of returning dowry while the same was never contested in the same court. Mr. Robi said that in Civil Case No.55/2024, respondents did not contest to return the dowry and under sukuma customary laws allows refund/return of dowry after dissolution of marriage. See rule 37A and B of the Declaration of local customary law order, GN. NO 279 OF 1964. However, Mr. Dudu responded that under section 71 of Law of Marriage Act, does not allow return of dowry where the marriage has been contracted and under section 11(4) of the Judicature and Application of Laws Act, CAP 358 R.E. 2019 which said that the customary law shall not apply in regard to any matter provided in the Law of Marriage Act. I have exhausted submission from both parties and going through the trial records. Though return of dowry may have been a sukuma's custom, but that is not a legal position in the country. Since this country is led or administered as per constitution, laws, rules and then any rule of customary which is repugnant or inconsistent with our laws, then it ceases to apply. Section 71 of the Law of Marriage Act clearly states in dowry status to the contracted marriage; 18

71. A suit may be brought for the return of any gift made in contemplation of a marriage which has not been contracted, where the court is satisfied that it was made with the intention on the part of the giver that it should be conditional on the marriage being contracted, but not otherwise. As per position of this law, only when a marriage has not been contracted, then any gift including dowry issued in contemplation of that marriage is refundable. Otherwise, the said sukuma's customary on return propagated by the appellant cannot stand in our courts in the line with section 71 of the Law of Marriage Act. Furthermore, Section 11(4) of the Judicature and Application of Laws Act, Cap 358 R:E 2091, has a clear provision on this that "Notwithstanding the provisions of this Act, the rules of customary law and rules of Islamic law shall not apply in regard to any matter provided for in the Law of Marriage Act." In our jurisdiction, suit on refund of dowry are not new. Similar position was dealt with the case of Generosa Ndimbo vs. Blasidus Yohanes Kapesi (1988) TLR 73, Mohamed Ndwata vs Hamis Omary (1988) TLR 137, Wilboad Bugando vs. Pius Wilbard, Pc. Civil Appeal No. 36 of 2022, High Court-Bukoba, Tembo Mkonda vs. Msulwa Gizengi, PC. Civil Appeal No. 16 of 2022, High-Shinyanga. Turn to the case at hand, the appellant contracted marriage with a daughter of 2nd respondent in 1999 under Sukuma customary rites and 19 they were blessed with three issues and the fact that they did not contest to refund the dowry is not an issue. In my considered view, the District court rightly reached that findings as per position of the law. I agree with Mr. Dudu, that returns of dowry may have been sukuma's custom but that is not a legal position in our country. In the premises I find the 4th ground unfounded and it is dismissed too. Consequently, I uphold the decision of District Court in Civil Revision No.

20196/2024. I find that the appeal is meritless. I dismiss it with costs. It is so ordered. DATED at SHINYANGA this 21st day of March, 2025. R.B Massam Judge 20

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