

TANZANIA / JUDGMENT

YAHAYA M

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IN THE HIGH COURT OF TANZANIA (DODOMA SUB REGISTRY) AT DODOMA (PC) CIVIL
APPEAL NO. 15250 OF 2024 (Arising from the decision of District Court of Dodoma at Dodoma in
Consolidated Civil Appeal No. 65 of 2023 and Civil Appeal No. 70 of 2023 dated 13/12/2023 before
Hon. Tungaraja, SRM, Original Chamwino Urban Primary Court in Matrimonial Cause No. 50 of
2023 dated 23/08/2023) YAHAYA M. MSALALI.....APPELLANT
VERSUS FATUMA I. GONGO.....RESPONDENT

JUDGMENT

Date of last order: 31st October, 2024. Date of Judgment: 06th December, 2024. E.E. KAKOLAKI, J.
In this 2nd appeal the appellant is seeking to reverse the decision of the District Court of Dodoma
at Dodoma in Consolidated Civil Appeals No. 65 1 and 70 of 2023, delivered on 13th January, 2024,
varying the decision of the trial court in Matrimonial Cause No. 50 of 2023 before Chamwino
Urban Primary Court issued on 09/08/2023. He has expressed his discontentment in twelve
grounds as reduced down in the petition of appeal reading thus:

1. That, the Honourable District Court Magistrate erred in law and in fact in deciding on the matter of maintenance which was neither part of the grounds of appeal at the district court nor was among the issues raised.
2. That, the Honourable District Court erred in law and in fact in dismissing the cross appeal (Civil Appeal No. 70 of 2023) of the Appellant herein.
3. That, the Honourable District Court erred in law and in fact in fact in generalizing the right of the elder wife without evidence nor affording her a right to be heard.
4. That, the Honourable first appellate court erred in law and in fact in faulting the trial court in division by percentage whereas the same was not one of the grounds of appeal. 2
5. That, the Honourable first appellate court erred in assuming that, in determining the appeal is tantamount of re-hearing the case, which read to misdirection as to the gist of appeal and its decision.
6. That, the Honourable Senior Resident Magistrate was biased to the Appellant in assessing his health and age against him and resulted to unfair decision.

7. That, the Honourable District court erred in law and in fact in distributing as matrimonial assets properties which were not jointly acquired by the parties.
8. That, the Honourable District Court erred in law and in fact in making distribution of the matrimonial properties against the law and/or evidence on record.
9. That the Honourable District Magistrate erred in law and in fact in distributing the House at plot 3 Block 22 Majengo to the respondent herein while the same was not a matrimonial property.
10. That, the Honourable District Court Magistrate erred in law and in fact in deciding in favor of the Respondent herein against evidence. 3
11. That, the Honourable District Court Magistrate erred inn law and in fact in deciding the appeal in favor of the respondent herein which had no merit.
12. That, the Honourable District Court Magistrate erred in law and in fact in not faulting the matrimonial proceedings which was against the law. On the strength of the above raised grounds of appeal the appellant is urging this Court to allow his appeal by setting aside the decision and orders of the District Court of Dodoma, allow appellant's cross appeal in the 1st appellate court, costs of the appeal and any other order or relief the Court might deem fit to grant. Subsequent to the appellant's appeal the respondent also preferred a cross – appeal raising two grounds of appeal in following terms:
 1. That the District Court having relieved the appellant with a burden to provide maintenance for the three children due to the appellant's health reasons erred in law and fact by not granting the respondent a big share of the six matrimonial houses jointly acquired by the parties to assist the respondent with the responsibilities of maintenance of three children. 4
 2. That both lower courts erred in law and fact by not including some of the assets in matrimonial assets. In view of the above grounds in the cross appeal she is praying this Court to order for more shares of the matrimonial properties so as to enhance her capacity to maintain herself and the three issues and an order granting other reliefs the Court will deem fit to do. Briefly the appellant's appeal has a chequered history. Before their love turned sour in 2023, parties herein who contracted their marriage under Islamic rites in the year 2008 the respondent being the second wife, were leading a peaceful life at their matrimonial home in a house located at Block 22 No. 3, Majengo street within Dodoma city. The appellant (83 years) who sired the respondent (42 years) three beautiful boys, was responsible for providing his family in all aspects of life from shelter, food, education, clothes, health care services and other basic needs, until March, 2023 when he stopped providing maintenance to his family and later on in June, 2023, as a means to force her wife move out of the matrimonial home to another house built at Mji Mwema area within Dodoma city and stop conducting coconut rice pancakes (vitumbua) business. As the respondent was adamant to heed to the two options, the appellant sent people to unroof the iron 5 sheets and ceiling board in the said house, the result of which the said family had to

suffer from bad weather by then as well as psychological torture, before the respondent's endurance came to an end when successfully knocked the doors of Chamwino Urban Primary. Before the trial Court in Matrimonial Cause No. 50 of 2023, the respondent successfully sued the appellant for divorce decree, custody of the three issues aged 14, 6 and 04 years old and their maintenance in which the appellant was ordered to provide Tshs. 100,000/ per month per child plus paying for their health services, education and other children rights as provided under section 8(1) of the Child Act, [Cap. 13 R.E 2019]. as well as the division of jointly acquired properties. Her other claims for division of six (6) houses, three motor vehicles, Tshs. 20,000,000/- as hand shake money and the milling and grinding machines which she claimed to have been acquired and/or improved under joint efforts were dismissed for want of proof contribution towards their acquisition while approving as matrimonial properties jointly acquired, one house in Block 134 Ndachi B centre, Mnada Mpya, two motor vehicles Toyota Noah make Reg. No. T638 DUE and Toyota IST Reg. No. T510 DYX and two houses at Mji Mwema which the appellant requested the trial court not to include then in the division so that they are left in the 6 respondent's ownership. Save for the two houses at Mji Mwema which the appellant prayed the court to be left the respondent's ownership, the rest of the properties jointly acquired were all divided to parties in percentage after consideration of each parties' contribution towards acquisition, the appellant getting 70% shares while the respondent remaining with 30% shares. Additionally, 5% of the total value of the house in which the respondent lived in and maintained for 15 years was awarded to her. As to the claimed hand shake amount of Tshs. 20,000,000/- though found not to have been proved on the reason that divorce petition was initiated by the respondent on her own volition, having considered the fact that the respondent was going to start a new life as well as appellant's health condition at the time, the trial Court ordered him to pay her Tshs. 5,000,000/-. The respondent who seemed to have been dissatisfied with the division of matrimonial properties only, contested the same by way appeal to the District Court of Dodoma in Civil Appeal No. 65 of 2023 containing three grounds of appeal namely one, trial court failed to include milling and grinding machines in the matrimonial properties jointly acquired by the parties, second, none inclusion of five (5) houses, three (3) at Majengo area and two (2) at Chang'ombe extension area both within Dodoma City as parties' 7 jointly acquired properties and third, disproportionate division of matrimonial properties without assignment of reasons for such disparity. The said decision displeased not only the respondent but also the appellant who opted to cross-appeal vide Civil Appeal No. 70 of 2023, assailing the trial court's decision, one, for granting the respondent 30% share out of the properties declared matrimonial properties without appreciating existence of the first wife to the appellant and her interests in the said properties and second, issue of an order for payment of hand shake money 'kitoka unyumba' in neglect of the appellant's health status and financial capacity since it is the respondent who petitioned for divorce. It transpired that, at the hearing both appeals were consolidated and argued together by the parties in which the appellate court in addressing the grounds of appeal raised, framed three issues for determination of parties' controversies. The same were coached thus:

1. Whether the appellant proved contribution to the controversial matrimonial properties.
2. Whether the appellant's share is generous in the eyes of the law and,
3. Whether the appellant did not deserve kitoka unyumba in the circumstances. 8 Having considered both parties' submission regarding the raised grounds of appeal including an invitation by the appellant's advocate to apply the provision of section 116 of the Law of Marriage Act. [Cap. 29 R.E 2019] (the LMA) on assessment of maintenance and section 114 of LMA, on the extent of each parties' contribution towards acquisition of jointly acquired properties, the learned appellate magistrate deeply dwelt into and discussed at length the issue of custody and maintenance of the issues of marriage which never formed part of the grounds of appeal by either party, after consideration of the Law of the Child Act and the UN Convention of the Rights of a Child, 1990 and African Charter on the Rights and Welfare of the Child, 1999 in which Tanzania is a state party, on the need of the court to consider best interest of the child in all actions concerning the child. With that noble duty in the appellate court's mind, she went on questioning as to why the respondent tried to hide himself on the reason of sickness regarding the issue of maintenance of children while carrying a large share of blame of the reasons as to why the respondent petitioned for divorce after unroofing the house she was living in and subject her to abusive language, the acts which she construed to amount to cruelty as per section 107(2)(c) of the LMA. On the same touch, she queried as why the provisions of section 9 116 of the LMA should not be invoked under the circumstances where it was uncontroverted fact that, parties had contracted their marriage under Islamic rites with no traditions but rather its well-known principles set under the Quran as to what a divorced woman is entitled to, hence the findings that the respondent was entitled to award of kitoka unyumba, in response to the 3rd issue above raised since the trial court had wrongly interpreted the term Khului and its application. And added that, the appellant was exercising what it termed mfumo dume, for the man to decide as to when and why divorce should be preferred. The appellate court went on discussing respondent's contribution toward acquisition of matrimonial properties and whether her share was generous in the eyes of the law, in response to the 1st and 2nd issue as raised above. Having considered the principles as enunciated in the cases of Bi Hawa Mohamed Vs. Sefu [1983] TLR 32 and Mariam Harold Tumbo Vs. Harold Tumbo [1983] TLR 293 where domestic chores were considered as work toward acquisition of matrimonial assets, the appellate court was moved by the undisputed facts that the respondent took care of the family for all 15 years including nursing the appellant who in most of time was ailing plus tear and wear that comes from the wedlock for bearing three children 10 to him, sufficiently counted for her contribution towards acquisition of the said properties. It therefore failed to contemplate as to how and why should she be apportioned 30% of the properties which even its share is not specifically stated as to what she had to get, hence a finding that there was no logic for the trial court using percentage in division of the said properties as it burdened parties for requiring them to conduct evaluation of said properties first in order to determine the said percentage for each item/property. On the same beats though not part of the grounds of appeal, the appellate court also glanced at and considered at the

maintenance order issued to the appellant by the trial court in relation to the submissions made by parties concerning appellant's capacity to generate income due to his ailing health and found that, his health status could not be used to circumvent the parental duty rested on his shoulders in terms of section 129(1) of the LMA to maintain the three issues of marriage as the amount ordered by the trial court did not even suffice to provide for maintenance of a single child let alone the trio. In view of the above findings, the appellate court having taken into consideration the provisions of section 129 of the LMA and ordered the amount of Tshs. 100,000/- per child to be increased so as to proportionately reflect appellant's station of life, proceeded to vary 11 the trial court's decision on division of matrimonial properties by ordering and awarding to the respondent the house located at Ndachi area so as to enable her reap some means to cater for her maintenance and fees for the children while relieving the appellant from the duty of maintenance pressed on him by the trial court on the reason that, he should concentrate on his ailing health. The other properties awarded to her were the house on Plot No. 3 Block 22 Majengo to shelter her and her children and the Motor vehicle make Toyota IST Reg. No. T 510 DYX, while the remaining four houses two at Majengo area and two at Chang'ombe extension and the Motor vehicle Toyota Noah make with Reg. No. T638 DUE including the milling and groundnuts machines, awarded to the appellant. As to the interest of the elder wife it was found that, the same were secured on the ground that, the respondent acknowledged to have own a total of 10 house in which only six

- (6) were subjected to division in this matter. Regarding the order of custody of the children to the respondent, the same remained undisturbed to accord the appellant with the right of visitation so that children could continue bonding with their father. In the end each party was ordered to bear own costs. It is from that decision as hinted above both parties are aggrieved 12 hence the present appeal by the appellant and cross appeal by the respondent on the above stated grounds. At the hearing the appellant hired the services of Mr. Elias Machibya, learned advocate who appeared assisted by Ms. Catherine Wambura also learned counsel while the respondent enjoying legal services of Mr. George Vedasto, learned advocate and both parties were heard viva voce. In his address to the Court in favour of the appeal Mr. Machibya sought leave of the Court to merge the 2nd, 10th and 11th grounds of appeal and then the 4th, 7th, 8th and 9th grounds as well as the 5th and 6th grounds and argue them jointly and together, while arguing the rest separately, the prayer which was cordially granted. As for the respondent's cross appeal Mr. Vedasto canvassed each ground separately. Having considered the contending submissions by the parties and travelled through the impugned decision as well as the proceedings from both trial and appellate court and the trial court's judgment, for the reasons to be apparent soon I choose to start addressing the 1st ground of appeal by the appellant in which the complaint is that, the appellate court magistrate erred in fact and law to decide on the issue of maintenance which was neither part of the grounds of appeal nor one amongst the issues raised by the parties. 13 It was Mr. Machibya's contention that, the 1st appellate court decided on the issue of maintenance of children as reflected at pages 14 -16 of the impugned decision by ordering its increase before awarding the respondent the house located at Ndachi on the ground that,

she could obtain money therefrom to cover for maintenance of both herself and the three children. He said, before the said court the issue of maintenance of children never featured as one of the grounds of appeal nor discussed by either party. According to him, it is undisputed fact that the three issues were not appealed against, one, dissolution of marriage and issue of divorce decree, second, custody of children and third, maintenance of the said issues. To him therefore, the 1st appellate court's act of raising, discussing and deciding in the issue of maintenance of children not appealed against denied the appellant of his constitutional right of being heard before any adverse decision is entered against him. He insisted, the appellate court had no jurisdiction to raise and decide on the said issue suo motu raised without hearing parties first on the same hence prayed the Court to find the ground is meritorious and allow the appeal. In response Mr. Vedasto resisted the submission by the appellant arguing that, the 1st appellate court was justified to address the issue of maintenance of children and decide on it as the Court in terms of the provisions of section 4(2) of the Law of the Child Act is enjoined to consider the best interest of the child when deciding any action concerning the child or children whom in this matter regard ought to be paid to the children need in terms of section 114(2)(d) of the LMA. To him maintenance of children is a statutory matter when the Court is adjudicating on matrimonial matter in which under the circumstances of this case could not be avoided. Additionally, he argued, it is also the appellant who prayed the 1st appellate court to reassess the issue of maintenance of children in which the said Court in considering the prayer re-evaluated the evidence concerning the said issue and varied the trial court's decision after consideration of the provision of section 129(1) of LMA as seen at page 22 of the impugned judgment. In view of the above Mr. Vedasto was convinced and submitted that, it was wrong for the appellant to contend that the appellate court erred to decide on the issue of maintenance for being statutory one as there was nothing wrong to award to the respondent the house located at Mnada Mpya for provision of her maintenance and the three children after relieving the appellant with that duty. He thus prayed the court to find the ground unmerited and dismiss it. In rejoinder submission Mr. Machibya recanted the assertion by Mr. Vedasto 15 that, it is the appellant who invited the 1st appellate court to reassess the issue of maintenance of the children. According to him, appellant's submission as found at page 19 of the 1st appellate court's proceedings, was in response to the 3rd ground of the appeal on division of properties when responding to the contention by the respondent that, appellant was not maintaining his children hence a submission that the court should consider the provision of section 116 of LMA and be guided by section 114(1) of LMA in division of properties. He insisted the reference was extraneous as it was not in response to the raised ground of appeal so as to draw a conclusion that it formed part of the grounds of appeal, which in fact is not the case. Having dispassionately considered the rivalry submission by the parties concerning the issue of consideration and finally varying of the trial court's decision on the issue of maintenance of children, both parties are at one that the same was not raised by either party as part of the grounds of appeal despite of constituting the basis for division of the house of Ndachi to the respondent. Again, there is no issue when it comes to the interpretation of the provisions of sections 4(2) of the Law of

the Child Act and section 114(2)(d) of the LMA in adjudication of any matter or action concerning the child his/her best interests that the same shall be a primary consideration as well as his or her needs. It is also uncontroverted fact that, in the due course of deciding on the issue of maintenance of the three children in this matter in compliance with the law as cited above, the appellate court increased the amount to be paid for maintenance from Tshs. 100,000/- ordered by the trial court upwards and went further to relieve the appellant from the statutory duty of maintaining his issues of marriage imposed to him by the trial court as provided under section 129(1) of the LMA. For avoidance of doubt section 129(1) of the LMA reads: 129.-(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof. Now the issue for determination by this Court is whether the 1st appellate court was justified in raising suo motu and deciding on the issue of maintenance of children by increasing the amount and then took it as the basis for varying division of matrimonial properties without affording parties first with their right to be heard as claimed. I answer the issue in negative 17 in that the 1st appellate court was not justified in so acting. I will explain why? As correctly submitted by Mr. Machibya, the submission which I embrace, the issue of maintenance of children on who was responsible for provision of maintenance and the charged amount of Tshs. 100,000/- to be paid by the appellant per child each month was never appealed against by either party. In my humble view, either party who wanted the same to form part of his/her decision ought to have sought leave of the court to so do, but none advanced such prayer. Similarly, had the 1st appellate court thought that it was an important issue to be addressed and decided on in compliance with the provisions of section 4(2) of the Law of the Child and section 114(2)(d) of the LMA, I opine would have raised it suo motu and invited the parties to address it on the same before proceeding to make decision on it which no doubt affected the appellant for having the amount ordered by the trial court to be paid for each child as maintenance increased and relieved from the duty of maintaining his family without being heard. I disagree with Mr. Vedasto's proposition that, it is the appellant who invited the 1st appellate court to determine and decide in the said issue, instead I concur with Mr. Machibya in his submission that the purported invitation if any was in response to the 3rd ground of appeal by the respondent on the issue as to 18 whether the respondent was entitled to more shares on the ground that appellant was not providing or maintaining his family regardless of his sickness and other responsibilities placed in his shoulders. To bring into drawing board what was actually submitted, I find it apposite to reproduce the excerpt from appellant's reply submission before the 1st appellate court as found at page 19 of the typed proceedings reading thus: "we also think the share allocated is fair enough, there is an existing marriage to an elder wife and at page 6 she admitted to be second wife. At page 5, the appellant told the court in March 2023, alisitisha kutoa matunzo, the respondent has a lot of responsibilities to take care of, and is sick, we invited the court to take into account section 116 LMA, on assessment of maintenance and also section 114(2)(a) on the extent of contribution." From the above

excerpt there is nothing indicative that, the appellant was contesting the trial court's order of entrusting him with the duty to maintain the issues of marriage or the ordered amount of Tshs. 100,000/- to be paid to each child monthly to entitle the appellate court to proceed reevaluating the evidence concerning that aspects, apart from challenging respondent's 19 submission that, the share of 30% of matrimonial properties allocated to her was insufficient. Much as there was no appellant's contest or his invitation to re-assess the decision made by the trial court regarding the duty charged on him to provide for maintenance of three issues of marriage and the amount to be paid per month for each child, I find the 1st appellant court went astray to suo motu raise and deeply go into determination of such matter which was not subject of appeal as the settled law is that, a party has a right to be heard before an adverse decision is entered against him. The principle on the right to be heard before any adverse decision is entered against a party even if the same position would have been obtained had the party been heard, is restated in a countless number of decisions one of which is the case of Abbas Sherally and Another Vs. Abdul Sultan Haji Mohamed Fazalboy, Civil Application No. 133 of 2002 (CAT-unreported) when cited the case of General Medical Council Vs. Spackman, [1943] A.C 627 where the Court observed thus: "The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice. For example, in the case of General Medical Council Vs. Spackman, [1943] A.C 627, Lord Wright said: "If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision." (Emphasis supplied). The principle of law in General Medical Council (supra) as cited in Abbas Sherally and Another (supra) was also followed with approval by the Court of Appeal of Eastern Africa in the case of Hypolito Cassiano De Souza Vs. Chairman and Members of the Tanga Town Council [1961] E.A 377 and the Court of Appeal in the case of DPP Vs. I. Tesha and Another [1993] TLR 237. 21 In light of the above cited cases, it is clear to this Court that denial of the right to be heard vitiates the proceedings even in a situation where the same decision would have been arrived at had the party(ies) been heard on the merits of the matter at issue for only one good reason that, his natural right to be heard would be considered negated before his rights are taken away. Similar stance was taken by the Court of Appeal in the case of M/S Flycatcher Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG, Civil Appeal No. 142 of 2017 (CAT unreported) where the Court after being satisfied that the decision was arrived at without according parties with the right to be heard on the issue at contest and before nullifying the proceedings had this to say: "Failure to accord the parties the right to be heard on the propriety of the power of attorney in question denied the parties the right to be heard on the issue and we are satisfied this anomaly is fatal and vitiated the proceedings and Ruling. See, Dishon John Mtaita Vs. DPP, Criminal Appeal No. 132 of 2004 and Scan Tan Tours Ltd Vs. The

Registered Trustees of the Catholic Diocese 22 of Mbulu, Civil Appeal No. 78 of 2012 (all CAT-unreported)” (Emphasis added) Applying the above referred principle to the circumstances of this, since the 1st appellate court considered and decided to relieve the appellant from his duty of maintaining his three issues of marriage as imposed to him by the trial court and ordered increased amount for maintenance of the said issue before parties could be heard on the matter, I hold such act vitiated the proceedings and entire judgment by rendering the same a nullity as in this matter it is the appellant who was prejudiced by the orders emanating from findings of the court on such issue. The first ground, I therefore hold is meritorious and disposes of this appeal hence no need to venture into determination of the rest of the grounds of appeal. In view of the above the appeal is allowed as the proceedings and judgment of the District Court of Dodoma in Consolidated Civil Appeals No. 65 of 2023 and 70 of 2023 are hereby quashed and set aside with subsequent orders to the judgment. The case file is remitted back to the District Court of Dodoma for rehearing of the appeal before another competent magistrate. Since the matter has been pending for some time, it is ordered that the appeal be disposed of the soonest. 23 I order each party to bear own costs. Ordered accordingly. Dated at Dodoma this 06th of December, 2024. E. E. KAKOLAKI JUGDE 06/12/2024. Court: The Judgment has been delivered at Dodoma today on 06 th day of December, 2024, in the presence of Mr. Elias Machibya, advocate for the appellant, Mr. Ditrick Mwesiga, advocate for the Respondent, the respondent in person and Ms. Veradina Matikila, Court clerk. Right of appeal explained. E. E. KAKOLAKI JUGDE 06/12/2024. 24

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