IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

PC CIVIL APPEAL NO. 41 OF 2020

(C/f Ngorongoro District Court, Civil Appeal No. 5 of 2019: Originating from Loliondo Primary Court, Matrimonial Cause No. 3 of 2019)

NORKILORIT KOYIE ..... APPELLANT

Versus

THADEI KOYIE ..... RESPONDENT

JUDGMENT

13th & 29th October, 2021

Masara, J.

1.0 INTRODUCTION

At Loliondo Primary Court (herein referred to as "the trial court"), the Respondent herein petitioned for a decree of divorce against the Appellant herein. After hearing evidence from both parties, the trial court agreed with the Respondent. It held that the marriage between the two irreparably broken down and granted a decree for divorce. The trial court did not make an order of division of matrimonial properties. The Appellant was dissatisfied. She preferred an appeal to the District Court of Ngorongoro (herein "the first appellate court"). The first appellate court dismissed the appeal, confirming the decision of the trial court. That decision did not please the Appellant, hence this second appeal premised on the following grounds:

a) *That, the 1st Appellate Court Magistrate mis-directed in law and fact by holding that the appellant was afforded opportunity to be heard by the trial magistrate;*
b) *That, the 1st appellate court Magistrate erred in law and fact for upholding the lower court finding and decision that the matrimonial properties were*

distributed to the appellant in accordance to (sic) Maasai customary laws; and

c) *That, the 1st Appellate Court Magistrate erred in law and fact by making assumption that the two issues born out of wedlock by the appellant proved adultery which is a ground for marriage break down irreparably between the Appellant and the Respondent.*

At the hearing of the appeal, the Appellant was represented by Messrs Shilinde Ngalula and Joseph Melau Alais, learned advocates, while the Respondent was represented by Mr. Hassan Kigulugulu, learned advocate. The appeal was heard through filing of written submissions. In addition to the grounds of appeal filed, the Court asked the learned advocates for the parties to submit on the legality of the divorce decree issued by the trial court in an unregistered customary marriage.

2.0 FACTUAL BACKGROUND

Between 1980 and 1982 (the exact year was not ascertained), the Respondent and the Appellant contracted a customary marriage. According to the Respondent, the two were blessed with five issues of marriage. The Appellant, on the other hand, stated that they were blessed with seven issues of marriage. Subsequently, the Respondent got married to two other wives. Between 1995 and 1998, the Appellant gave birth to two children out of wedlock. That act angered the Respondent leading to their separation. This separation persisted until 2019 when the Respondent preferred the petition at the trial court. The Respondent's main ground at the trial court was that he was embarrassed by the Respondent's adulterous acts with one Sakara Reteti. The Appellant denied the allegations stating that the two children were born between them. On hearing that defence, the Respondent suggested that a DNA

test be done to establish the paternity of the two children. That suggestion was strongly resisted by the Appellant.

According to the evidence, in 2008, the Respondent convened a family meeting where he made a distribution of his properties to his three wives. In the petition in the trial court, the Appellant denied to have been given any properties by the Respondent. She also insisted that a decree of divorce should not issue as she was still happy with the marriage.

As already stated, after hearing the parties, their respective witnesses and scrutinizing exhibits tendered, the trial court magistrate was satisfied that the marriage between the two had broken down irreparably due to adultery and long separation. He forthwith issued decree of divorce. Along the decree of divorce, the trial magistrate was satisfied that the Appellant got her share of the matrimonial properties in the distribution done by the Respondent according to Maasai customs. He therefore made no order of distribution of matrimonial assets.

3.0 APPELLANT'S SUBMISSIONS

In his submission, Mr. Ngalula admitted that, having perused the trial court records, he was satisfied that the Respondent was accorded the right to be heard. He therefore made no submissions on the first ground of appeal. On the second ground, Mr. Ngalula stated that the trial court was in error in not ordering division of matrimonial assets after decree of divorce was issued in accordance with to section 114 of the Law of Marriage Act, Cap. 29 [R.E 2019] (hereinafter "the LMA"). He contended that the first appellate court magistrate erred in confirming the trial court decision that the Appellant had no issue with contribution and distribution of matrimonial properties. Mr. Ngalula stated that such assertion cannot

be attributed to the Appellant as it came from the evidence of SU2, Jumanne Koiye, and a letter signed by Loisa Ngeleya. He found that decision misconceived referring to the proceedings of the trial court which shows that it was the Appellant's wish that upon granting divorce matrimonial properties be divided.

Further, Mr Ngalula fortified that the trial court erred in relying on the evidence of SM2, SM4 and SM5, who testified that matrimonial properties had been distributed to the Appellant and her co-wives in accordance with the Maasai customs. In his view, the above witnesses did not testify that they witnessed the properties being distributed to the Appellant rather they were testifying on how wives are distributed properties after marriage within the Maasai customs. He maintained that the evidence of SM2, SM3, SM4, SM5 and SM6 proved that the Respondent did not follow Maasai customs in handling matrimonial difficulties between the two. Mr. Ngalula referred the Court to the decision of the Court of Appeal in **Gabriel Nimrod Kurwijila vs. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 (unreported), which stated that before distribution of any matrimonial assets is made, courts should first consider the extent of contribution by the parties. The learned advocate was of the view that the two lower courts flouted this duty, since the Respondent failed to prove whether he distributed the matrimonial properties to the Appellant in compliance with the law.

Submitting on the third ground, Mr. Ngalula stated that the first appellate court erred in confirming the decision of the trial court that marriage had broken down irreparably due to adultery and separation for 24 years, while the Respondent admitted in evidence to have forgiven the Appellant

for the adultery she committed and that he was compensated in accordance with Maasai customs. Mr. Ngalula maintained that the Respondent had connived and condoned the adultery, thus he was estopped from raising adultery as evidence that the marriage had broken down irreparably. To support his assertion, Mr. Ngalula cited sections 85 and 86 of the LMA.

Submitting on the issue of the legality of the divorce decree, Mr. Ngalula was of the view that it is the requirement of section 43(5) of the LMA that in order for a customary marriage to be validated, it has to be registered. According to him, failure to register a customary marriage, the marriage is rendered invalid. To bolster his argument, he cited the case of **Ahmed Ismail vs. Juma Rajab** [1985] TLR 204. He faulted the first appellate court magistrate's finding that the marriage was valid under section 160 of the LMA. That the first appellate magistrate having held that the trial court erred in granting divorce, he fell in the same trap when he supported the decision of the trial court. Mr. Ngalula blamed the first appellate court magistrate for not revising the trial court proceedings as the same had no jurisdiction to entertain divorce matrimonial proceeding from customary marriage that was not registered. He called upon the Court to invoke its revisional powers to quash and set aside the whole proceedings and decisions of the two lower courts and make directions as it deems fit.

Before concluding his submissions, Mr. Ngalula raised another concern on the legality of the decision of the two lower courts. He submitted that the matrimonial dispute between the Appellant and the Respondent was not referred to a Conciliatory Board for reconciliation, as per the requirements of section 101 of the LMA, before it was referred to court for adjudication.

He averred that, although the trial court record contains a certificate from the Board, parties were not heard or reconciled before the said Board. It was his view that the said certificate on record was dubiously filed by the Respondent. That the same was not reflected in the trial court proceedings or in the decision.

4.0 RESPONDENT'S SUBMISSIONS

On his part, Mr. Kigulugulu, in response to the second ground of appeal, contended that according to the evidence of PW4 and the Respondent's other wives, it was proved that all the Respondent's properties were distributed to his wives equally in 2008. That section 114 cited by Mr. Ngalula does not apply in Maasai customs because, according to Maasai customs, wives are given properties as soon as they are married. He went further to state that where there is acquisition of properties during subsistence of the marriage, the wife, in whose boma the properties are acquired, is entitled to those properties to the exclusion of all other wives. According to Mr. Kigulugulu, a Maasai man who marries more than one wife remains with nothing as personal properties in Maasai society. He maintained that one wife cannot claim properties acquired by another wife. Conversely, Mr Kigulugulu submitted that the contention by the Appellant's advocate that the Respondent has not followed Maasai customary laws and practice in handling matrimonial difficulties is a new matter not raised in the trial court and thus cannot be raised at this appellate stage. To support his argument that matters not raised and discussed at the trial cannot be raised at the appellate stage, Mr. Kigulugulu referred to the case of **Hotel Travertine Limited and Two Others vs. National Bank of Commerce Limited** [2006] TLR 133. Relying on the evidence of SM4 and that of the Respondent's wives, Mr.

Kigulugulu was of the firm view that the Respondent had distributed his properties to each wife way back in 2008, according to Maasai customary laws, therefore the Appellant has nothing to claim.

Responding to the third ground of appeal, Mr. Kigulugulu contended that the evidence on record shows that the Appellant agreed that she had two children with a man other than the Respondent, and that the dispute was resolved customarily. He cited section 107(2)(a) of the LMA which refers to adultery as one of the grounds to prove that a marriage has broken down irreparably. Mr. Kigulugulu expounded that, as the Appellant admitted adultery, in case there was marriage between two, that ground sufficed to grant the decree of divorce. Similarly, the learned advocate added that the contention by the advocate for the Appellant that the first appellate court supported the findings of the trial court that marriage has broken down due to adultery and separation in accordance with sections 85 and 86 is found to be a new issue which was not raised in the trial court.

Regarding whether the trial court was justified to issue the decree of divorce, Mr. Kigulugulu was at one with Mr. Ngalula that, in terms of section 43(5) of the LMA, the trial court was not justified to issue the decree of divorce because the marriage between the parties herein, being a customary one, was not registered as per the dictates of the law. That according to the said provision, failure to register a marriage within 30 days renders such marriage invalid. The learned advocate referred to the case of **Ahmed Ismail vs. Juma Rajabu** (supra) to support his assertion. Mr. Kigulugulu called upon the Court to hold that there was no marriage between the Appellant and the Respondent since the purported

marriage was not registered as per section 43(5) of the LMA. He urged the Court to dismiss the appeal in its entirety.

5.0 THE APPELLANT' REJOINDER

In his rejoinder submission, Mr. Ngalula stated that the issue whether the Respondent applied Maasai customary laws and practice in handling the matrimonial difficulties and in distributing his properties is not a new issue as contended by Mr. Kigulugulu since the same was raised in the trial court through the evidence of SM4. Also, that the first appellate court in assessing the evidence of the trial court dealt with the same and came to a conclusion that matrimonial properties were distributed according to Maasai customs. Regarding the legality of the decree for divorce issued by the trial court, Mr. Ngalula agreed with Mr. Kigulugulu but did not agree with him on the consequences of non-registration of the marriage. In his view, the marriage between the two is valid in the eyes of Maasai customs since the evidence available confirms that the marriage was contracted customarily. Therefore, according to Mr. Ngalula, the dispute could not be handled and determined by ordinary courts for want of jurisdiction, since parties did not intend their marriage to be bound by the LMA. The same could be handled and settled under Maasai customary dispute settlement mechanism.

6.0 COURT'S DETERMINATION

I have sufficiently considered the trial court and first appellate records, the grounds of appeal and the submissions by the advocates for the parties. Two grounds of appeal and the issue of legality of the divorce decree issued by the trial court call for determination of this Court. I will first address the legal issue raised by Mr. Ngalula followed by the issue

relating to the legality of the divorce decree, I will thereafter address the two grounds of appeal.

Mr. Ngalula argues that the petition for divorce before the trial court was premature for failure to refer the dispute to a matrimonial conciliatory Board as per section 101 of the LMA. Mr. Ngalula, however, admits that the trial court record contains a certificate that the marriage was referred to a reconciliatory board. He, nevertheless contends that parties were not called to such board for reconciliation and that the certificate was dubiously filed by the Respondent. Mr. Kigulugulu did not address this matter in his reply submission, either deliberately or otherwise.

I entirely agree with Mr. Ngalula that the law requires that before preferring a petition for divorce before a court of law, parties should have referred their dispute for reconciliation to a Marriage Conciliatory Board. This is provided under section 101 of the LMA, which provides:

> *"No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties."*

The said legal position was also underscored in **Shillo Mzee vs. Fatuma Ahmed** [1984] TLR 112 and **Athanas Makungwa vs. Darini Hassan** [1983] TLR 132.

I have revisited the trial court records with respect to this issue. There is a certificate from Olorien Ward Conciliatory Board showing that the matrimonial dispute between the Respondent and the Appellant was referred for reconciliation but the Board failed to reconcile them. That certificate was issued to evidence that the dispute was not reconcilable. The trial court records do not reveal whether any of the parties disputed

that the dispute was referred to that Board for reconciliation. There was also no suggestion purporting to cast doubts on the authenticity of that certificate. Contrary to what Mr. Ngalula submitted, the Appellant did not contest that she was not summoned for reconciliation.

Mr. Ngalula's complaint calls for evidence from the parties to substantiate whether they were summoned and whether they attended in the Board for reconciliation. In the absence of such evidence, the complaint is merely a statement from the bar. Moreover, that complaint was raised in this second appeal and not in any of the two lower courts. I understand that this is a legal issue, which can be raised at any stage of the proceeding, but, as I have pointed out, the allegation calls for evidence which ought to be found in the trial court record. The Appellant did not even file an affidavit to that effect. Consequently, I find the complaint unsubstantiated.

On the issue regarding the legality of issuance of the decree of divorce by the trial court, I note that the issue had been raised by Mr. Kigulugulu before the first appellate court. In answer to the issue, the learned Resident Magistrate agreed with the learned advocate's submissions when she stated:

> *'I do agree with the learned advocate that marriage certificate is the primary evidence to establish that there was a valid marriage between the parties, but also Law of Marriage Act recognize customary marriage as one of the ways to contract marriage among the married couples and registration of that marriage as per section 43(5) of the Laws (sic) of marriage Act Cap. 29 R.E 2002. Make it customary (sic) marriage as good as other form of marriage in the eyes of the law. But I do also understand that to secure rights and liabilities of the partners who lived together for more than two years under the same roof and those two acquire the reputation of husband*

and wife in the eyes of the society Law of Marriage Act come with (sic) presumption of marriage under section 160 of the Law of Marriage Act ... I know what the court (referring to the trial court) *ought to do was to dissolve the marriage and not to grant divorce as the trial did; although whatever the case the dissolution of marriage or divorce does not hinder the court in determining the rights and liabilities of the parties and that is what this court continue (sic) on doing as first reason (sic) that their rights are protected under the law and also objection raised by the learned advocate Mr. Kigulugulu was not contended in a trial court (sic).'*

From the above, the learned first appellate magistrate was in agreement with Mr. Kigulugulu's submission that the trial court erred in issuing a decree of divorce, since the marriage between the Appellant and Respondent, though contracted in customary form, was not registered under section 43(5) of LMA. The learned magistrate further found out that the trial court ought to have dissolved the marriage by finding that there was no marriage between the litigants, but only that they lived under a presumption of marriage. However, she found this argument new, as it was not raised in the trial court and proceeded to dismiss the appeal by confirming the decision of the trial court which granted the decree of divorce. None of the parties herein challenged this finding of the first appellate court. It was raised by the court *suo motto.*

In their submissions on this issue, both advocates agree that the trial court erred in issuing the decree of divorce, since the marriage between the parties which was customarily contracted had not been registered. The learned advocates did not agree on the consequences for such failure. I agree with both advocates that registration of a marriage is a requirement of the law. Marriage certificate or an entry in the marriage register is prima facie evidence that a marriage was contracted.

In the appeal under consideration, there is no dispute that the Appellant and Respondent were married under Maasai customary law rites. The evidence of all five witnesses for the Respondent and eleven witnesses for the Appellant at the trial court shows that the two were married through Maasai customary rites. Equally, the fact that their marriage was not registered is also not in issue. What is in issue is whether failure to register the marriage that was contracted customarily nullifies the marriage. According to section 43(5) of the LMA, failure to register the marriage does not nullify the same. In essence, registration of marriage acts as evidence of its existence. The provision provides:

> *'When a marriage is contracted according to customary law rites and there is no registration officer present, it shall be the duty of the parties to apply for registration, within thirty days after the marriage, to the registrar or registration officer to whom they gave notice of intention to marry.'*

Along with the above provision of the law, in the cited case of **Ahmed Ismail vs. Juma Rajab** (supra), it was held:

> *'A marriage certificate, or an entry in a marriage register* ***is prima facie evidence of marriage*** *and s. 43(5) of the Law of Marriage Act 1971, imposes a duty on parties to customary law marriage to register the marriage; the plaintiff, who claims to be married to the defendant's daughter under customary law, failed to perform that statutory duty,* ***and he also failed to give any evidence to show that he was ever married as he claims****.'* (Emphasis added)

From the above decision, failure to register a customary law marriage does not invalidate the marriage, in case there is ample evidence that marriage was contracted customarily. The position was further elaborated in the case of **Ramadhani Said vs. Mohamed Kilu** [1983] TLR 309 as follows:

'It all goes back to the definition of a marriage. According to s. 9(1) of the Law of Marriage Act, 1971 (hereinafter called the Act) a marriage is the voluntary union of a man and woman intended to last for their joint lives. In this country, where the parties belong to a community or to communities which follow customary law, a valid marriage may be contracted according to the rites of customary law. ***Failure to give notice of the intended marriage, absence of "shangwe za harusi" or any procedural irregularity in the ceremony are not matters which would affect the validity of such a marriage if in all other respects it complies with the express requirements of the Act.*** *In this case, the appellant and Mwanaidi voluntarily contracted a marriage in customary form. ...'* (Emphasis added)

The customary law marriage that is not registered is also protected under section 41(f) of the LMA, which stipulates:

'A marriage which in all other respects complies with the express requirements of this Act shall be valid for all purposes, notwithstanding: -

a) N/A

b) N/A

c) N/A

d) N/A

e) N/A

f) failure to register the marriage.' (Emphasis added)

As I have pointed out earlier, there is no dispute that the Appellant and the Respondent contracted their marriage in Maasai customary law. The fact that it was not registered does not wash away the fact that they were duly married. Marriage can be proved either by certificate of marriage or where there is sufficient evidence of those who witnessed the marriage. In the case at hand, the evidence of both sides supported the fact that the two were married customarily. Mr. Ngalula was of the view that the

marriage was invalid. In my founded view, he misconstrued the above provision. Mr. Kigulugulu on the other hand was of the view that since the marriage was not registered, there was no marriage at all. That conclusion cannot be true. Those arguments aside, the point of contention is whether the trial court was justified to issue a decree of divorce on a customary marriage in absence of registration.

The finding of this Court is that both the trial magistrate and the first appellate magistrate were right in granting decree of divorce. As I have demonstrated above, marriage between the Appellant and Respondent was proved by evidence of all the witnesses who testified. Presumption of marriage as contemplated by the first appellate magistrate does not arise in the circumstances since a valid marriage was proven. It is therefore the finding of this Court that there was a valid marriage between the Respondent and the Appellant. As customary law has equal status with conventional law as provided for under section 11 of the Judicature and Application of Laws Act, Cap. 358 (R.E. 2019) and there being no doubts that parties herein were married in accordance with Maasai customs, I do not see anything wrong with the decision of the trial court which issued a decree of divorce. All the authorities referred to me do not support the contention made by the advocated for the parties herein or the position of the first appellate court magistrate. It is therefore this Court's decision that the decree of divorce was properly issued in order to dissolve the marriage of the parties herein which was legally contracted in accordance with Maasai customs.

This brings me to the 2nd ground of appeal which hinges on the division of matrimonial assets between the parties. At the trial court, the

Respondent stated that he distributed his properties equally to all his three wives in 2008. That the Appellant was given 100 cows, a grinding machine located at Olorien village, 43 goats and sheep, plough and four bulls for farming, 5 acres farm located at Magaiduru village, house or boma located at Magaiduru Village, plot located at Wasso and a shop. The Appellant's three elder children were given farms and cows as well. This was also proved by exhibit P2. This evidence was supported by SM2 and SM5, the Appellants' co-wives. That was also confirmed by SU2, the parties' child, who admitted that the distribution was made.

Further, SM4, the traditional Maasai leader (Laigwanan), supported the evidence that once a Maasai man gets married to more than one wife, he distributes the properties to all his wives. That apart, there was no cogent evidence from the Appellant about properties which she alleged that they were not distributed. Mr. Ngalula maintained that the division should have taken into consideration contribution of each party towards the acquisition of the said matrimonial properties. I agree with him. However, that approach was no applied, since the properties were distributed to the wives in accordance to Maasai customs as stipulated under section 114(2)(a) of the LMA. In distribution of matrimonial properties, various factors are taken into consideration, as per subsection 2 of section 114 of the LMA. One of the considerations is the customs of the community to which parties belong. The parties herein are Maasai, whose customs allow polygamy. The Respondent had 3 wives; therefore, their properties were rightly distributed among his wives in accordance with Maasai customs. In that respect, I find no good reasons to alter the findings of the two lower courts regarding matrimonial properties. I have also taken into

consideration the fact that the couple had been in separation for more than 20 years. The 2nd ground lacks merits as well.

I now turn to the 3rd ground of appeal which faults the decision of the two lower courts for relying on adultery as a ground that the marriage had broken down irreparably. Mr. Ngalula submitted that in terms of sections 85 and 86, the Respondent had connived the adultery after he was compensated cows and he had forgiven the Appellant; therefore, it was not right for him to rely on adultery in petitioning for divorce. On his part, Mr. Kigulugulu submitted that since the Appellant admitted to have committed adultery, it was proper for the trial court to rely on section 107(2)(a) of the LMA to find that the marriage had broken down irreparably.

It is the finding of this Court that there is no dispute that the Appellant committed adultery as testified by SM1 and SM2. The two witnesses testified that the Appellant committed adultery to a person known as Sakara Reteti which resulted to the birth of two children. According to SM1 and SM2, the said Sakara Reteti admitted and apologized. He was fined by "wazee wa mila". That was also evidenced by exhibit P1 which mentioned a cow and a calf as the compensation to the Respondent from the said Sakara Reteti. Sakara Reteti was also condemned to buy drinks for "wazee". Further, from the records, it is undisputed that the Appellant and the Respondent had not lived together for more than 20 years by the time of the divorce petition. They were separated since the 1990's. That fact was also admitted by the Appellant when she said she was not in good terms with the Respondent for 20 years.

In their judgments, both lower courts had concurrent findings that the marriage between the parties had broken down irreparably based on adultery and long-term separation. I have no reasons to differ with their findings. The evidence on record clearly shows that the Appellant conceded that decree of divorce should be issued in her letter dated 16/4/2019 on the ground that the Respondent had abandoned her and her children. Therefore, adultery was not the only ground cited by the trial court. The trial court found that the marriage between the couple had broken down irreparably not only on the basis of adultery but also based on separation that subsisted for more than 20 years.

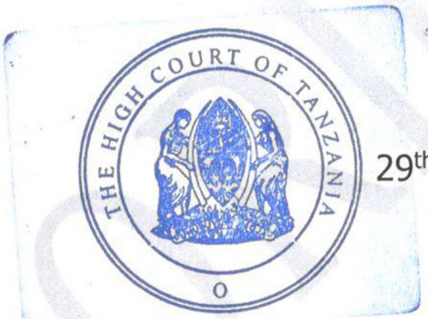
Mr. Ngalula suggests that the Respondent was not entitled to petition for divorce on the ground of adultery since he connived the same by forgiving the Appellant and her co-adulterer. He cited sections 85 and 86 of the LMA. However, Mr. Ngalula seems to have misconstrued the provisions of sections 85 and 86. In the alternative, he may have confused what connivance entails. Connivance in its simple meaning refers to an act of allowing an illegal act or take part in that act. The record does not support the assertion that the Respondent allowed adultery to persist. The mere fact that there was a meeting that punished Sakara Reteti who had indulged in adulterous acts with the Appellant, does not suggest that the Respondent connived the adultery. It may have been a traditional way of ensuring peace and harmony in the society. Punishment to an adulterer cannot, under any stretch of imagination, act as a bar against the Respondent to petition for divorce if he so desires. The act will still be evidence of a broken marriage. Therefore, sections 85 and 86 are inapplicable in the matter at hand, since the evidence does not show whether the Respondent connived nor condoned the adulterous acts.

As rightly submitted by Mr. Kigulugulu, according to section 107(2) (a) and (f) of the LMA, adultery and separation are evidence that a marriage has broken down irreparably. Taking into consideration the duration the two were separated, and considering the fact that the Respondent does not wish to continue with the marriage with the Appellant, divorce is the best way to end their marriage. Consequently, this ground of appeal also lacks merits.

7.0 CONCLUSION

In the up short, and from the above analysis, the appeal is devoid of merits. It is dismissed in its entirety. The decisions of both the trial court as well as that of the first appellate court are hereby confirmed as explained above. This being a matrimonial dispute, I make no orders as to costs.

Order accordingly.



Y. B. Masara
JUDGE
29th October, 2021.