IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

PC MATRIMONIAL APPEAL NO. 17 OF 2022

(Arising from Matrimonial Appeal No. 16/2021, Originating from Matrimonial Cause No. 16/ 2021 primary court of Geita district at Nyankumbu)

BERTHER CHARLES.....APPELLANT

VERSUS

MAKOYE ATHUMANI ....RESPONDENT

JUDGMENT

30th May & 10th June, 2022
Kahyoza, J:.

This is a second appeal filed by **Berther Charles** against **Makoye Athumani,** her husband. The District Court heard **Makoye Athumani**'s appeal and ruled out that the primary court erred to grant a decree of separation instead of divorce, after it found out that marriage was broken beyond repair. Having found that marriage was broken beyond repair, the district court desisted from granting divorce and ordered the primary court to rehear the petition for divorce and grant reliefs as it deems fit. To be specific, the district court made the following order *"I make an order that*

the trial court shall proceed in discharging its functions under the law by determining the issue of divorce; and grant appropriate reliefs in accordance with the provisions of the LMA." Aggrieved, **Berther Charles** appealed to this Court.

Berther Charles raised three grounds of appeal which raise three issues as follows:-

1. did the district court err not to step into the shoes of the trial court and grant a decree of divorce?
2. did the district court err not to order division of matrimonial assets?
3. did the appellate court err to hold that the trial court erred to award maintenance pay of Tzs. 1,000,000/=?
4. did the trial court err to order the trial court to reconsider the petition for divorce?

The background of this matter is that **Berther Charles** petitioned in primary court for a decree of divorce and division of matrimonial property against **Makoye Athumani.** It is undisputed that **Berther Charles** and **Makoye Athumani** contracted a customary marriage in 1997 and they were blessed with 7 issues, out of which, only 4 issues are surviving. They acquired several assets, the list which is disputed. **Berther Charles** was a housewife and a business lady, supervising the family businesses. **Makoye**

Athumani was a businessman. **Berther Charles** contended that they lived peacefully until **Makoye Athumani** married another wife and accused **Berther Charles** of misappropriating family property. Charles denied **Berther Charles** conjugal rights.

In short, **Berther Charles** petitioned for divorce on grounds of cruelty, desertion and psychological torture. She alleged that, **Makoye Athumani** not only married a second wife but also brought that second wife to stay with **Berther Charles** in the same house and made her in charge of **Berther Charles.**

The trial court heard the parties and found that, the marriage was broken down beyond repair but abstained from disbanding it. It decided to grant a decree of separation to give them time to cool tamper. The district court upheld the trial court's finding that, on the strength of the evidence on record, marriage between **Berther Charles** and **Makoye Athumani** was broken down beyond repair.

Given the facts stated above, I set to determine the issues raised. The appeal was heard by way of written submissions. **Berther Charles,** the appellant, enjoyed the services of Mr. Deya, advocate while Mr.Nasimire advocate represented **Makoye Athumani,** the respondent.

Did the district court err not to step into the trial court's shoes and grant a decree of divorce?

It is not disputed that the district court found that, **Berther Charles** and **Makoye Athumani's** marriage was broken down beyond repair. It faulted the primary court's decision to grant an order of separation instead of a decree of divorce. The dispute is in respect of the consequence of district court's finding that the primary court erred to hold that marriage was broken beyond repair and desist from granting a decree of divorce.

The appellant's advocate submitted that the district court as the first appellate court, having found that **Berther Charles** and **Makoye Athumani**'s marriage was broken down beyond repair had a duty to enter the primary court's shoes, dissolved the marriage and grant a decree of divorce. He contended that the district court in exercise of its appellate jurisdiction had power to re-evaluate the evidence and come to its own conclusion. To support his contention, he cited the provisions of section 21(1) of the **Magistrates Courts' Act,** [Cap. 11 R.E. 2019] (the MCA) and **Martha Wejja V. Attorney General & Another** [1982] TLR. 35.

The respondent's advocate submitted that, the district court acted properly in that it had mandate to vary the decision of the primary court in terms of section 21(1) (b) of the **Magistrates' Courts' Act,** [Cap. 11 R.E. 2019] (the **MCA),** and it exercised its mandate by holding that the marriage in question had irreparably broken down and remitted the case to the trial court with direction that it had to discharge its duties according to the law. He supported the first appellate court's findings as it is common, after the decree of divorce is granted issues of division of property jointly acquired by the parties and maintenance come in. To buttress his position, the respondent's advocate cited **Fatuma Mohamend v/s Said Chikwamba** [1988] T.L.R 129 which provides that-

> *"The court shall have power, when granting or subsequent to the grant of separation or divorce, to order the division between the parties of any assets acquired by their joint efforts or order the sale of any such assets and the division between the parties of the proceeds of sale."*

The respondent's advocate concluded that the district could not lawfully step into the shoes of the primary court and that, it was justified in remitting the file to the primary court for necessary orders.

After hearing the rival submissions, I wish to state at the outset that the district court misdirected itself to remit the case to the primary court, after it found that marriage was irreparably broken instead of granting a decree of divorce. Being the first appellate court, the district court had mandate to review the evidence in an objective manner and arrive at its own findings of facts, if necessary.

It is trite law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, **Leopold Mutembei v. Principal Assistant Registrar of Titles; Ministry of Lands, Housing and Urban Development and the Attorney General,** Civil Appeal No. 57 of 2017, and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO,** (supra) that-

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

The district court erred not to make its own findings of facts and order accordingly. As pointed out there is no dispute that the marriage between **Berther Charles** and **Makoye Athumani** was broken down beyond repair. Both the trial court found that marriage had irreparably broken. Parties, **Berther Charles** and **Makoye Athumani** do not disagreement on that issue. Having considered the evidence on record, I have no sound reason to conclude otherwise than that, the marriage between **Berther Charles** and **Makoye Athumani** was irreparably broken on the ground of mental cruelty and denial of conjugal rights. **Berther Charles** alleged that **Makoye Athumani** threated to kill her. She reported the incident to police. **Makoye Athumani** neither did he cross examine **Berther Charles** on the issue that he threatened to kill her, nor did he deny that allegation. Failure to cross-examine implies acceptance.

The respondent's advocate does not contest that, the marriage between **Berther Charles** and his client had broken beyond repair but he argued that the district court was right not to grant a decree of divorce as after granting a decree of divorce, a court has to consider dividing matrimonial assets. He stated "once the decree of divorce is granted issues

of division of property jointly acquired by the parties and maintenance come in." He cited the case of **Fatuma Mohamend v/s Said Chikwamba** (supra) to support his position.

The respondent's advocate raised an issue of competence of the petition for divorce. He contended the petition that, **Berther Charles** petitioned prematurely for decree of divorce. He argued that the marriage conciliation board, which is Kahangalala ward tribunal did not indicate in the certificate that, it failed to reconcile **Berther Charles** and **Makoye Athumani.**

I find the argument of the respondent's advocate that, **Berther Charles'** petition for a decree of divorce was prematurely instituted without merit for the following reasons; **one**, the marriage conciliation board of Kahangalala ward tribunal certified clearly under paragraph four that it failed to reconcile parties. It reads-

> *"INATHIBITISHA kwamba baraza hili limeshindwa kabisa kuwapatanisha wanandao hawa wawili, yaani mme na mke kwa hiyo maoni ya baraza ni kuwa..."*

Two, the respondent's advocate raised an issue of competence of the petition of a decree of divorce for the first time before the second appellate court. It was not an issue before the trial court or before the first

appellate court, where his client was the appellant. It is a general principle that an appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court. For that reason, I dismissed the respondent's complaint raised via a backdoor. (See **Farida and Another v. Domina Kagaruki,** Civil Appeal No. 136/2006 (CAT unreported).

The respondent's advocate raised through a backdoor another irregularity that the primary court proceedings were a nullity for not complying with rule 46 of **Primary Courts Civil Procedure Rules** (the Rules). The rule requires a primary court to record the evidence in Kiswahili and after each witness has given evidence, the magistrate must read the evidence to him and record any amendments. It demands also, the magistrate to certify at the foot such evidence that he has complied with this requirement. The respondent's advocate submitted that the primary court did not comply with the requirement of rule 46 of the Rules.

I wish to restate that the respondent's advocate raised the issue that the proceedings are irregular **for the first time**, while replying to appellant's advocate submission. It is unprocedural. All in all, I did not find any merit in the argument. The handwritten proceedings show that the

trial magistrate indicated at the end of the witness' testimony the following abbreviation "**ISK**". The abbreviation "**ISK**" means "**I**mesomwa na **K**uonekana **S**ahihi". The abbreviation means the trial magistrate read the testimony to the witness and that there were no alterations. Thus, the trial magistrate did comply with the rule 46 of the Rules.

The respondent's advocate complained further that the respondent was not given an opportunity to cross-examine or address the court in terms of rule 47(2) and 45(2) of the Rules, respectively. The complaint is an afterthought because; **one**, the advocate did not raise it properly. He raised the complaint while responding to the appellant's submission. He skyjacked the appellant; **two**, the respondent's advocate raised the issue for the first time before a second appellate court; **three**, the complaint that the respondent was not accorded an opportunity to cross-examine was baseless. The typed proceedings at page 6 show that **Makoye Athumani,** the respondent cross-examined **Berther Charles**; and **four**, failure to give an opportunity to the parties to address the trial court at conclusion of the evidence did not occasion any injustice. Parties are not mandatorily required to address the court. The law states that, *the parties*

may, if they wish, address the court: the defendant first, and then the claimant.

The only merit I find in the issues raised via the backdoor, that is raised by the respondent's advocate while replying to the submission, is that the trial court allowed the appellant to provide additional evidence out of oath and without being properly recalled. The record shows that **Berther Charles** gave a list of properties acquired jointly without being on oath and after she and her witnesses had testified. That evidence is expunged from the record of the trial court.

I now, revert to issue whether the district court erred not to step into the trial court's shoes and grant a decree of divorce. I agree with the respondent's advocate that, a court after granting a decree of divorce, has to order division of matrimonial assets. However, I do not his argument that division of property jointly acquired by the parties and maintenance cannot be considered in subsequent proceedings to granting a decree of divorce. It is convenient and advisable to determine whether to grant a decree of divorce and after granting the decree of divorce to order division of matrimonial assets in the same proceedings. I know no law which bars proceedings of division of matrimonial assets to be instituted after

proceedings granting a decree of divorce are concluded. I find refuge under section 114(1) of the LMA and **Fatuma Mohamend v/s Said Chikwamba** (supra) cited by the respondent's advocate, where it was stated that-

> *"The court shall have power,* ***when granting or subsequent to the grant of separation or divorce, to order the division between the parties of any assets acquired by their joint efforts*** *or order the sale of any such assets and the division between the parties of the proceeds of sale." (Emphasis added)*

I am inclined to quash the findings of the first appellate court of remitting the case to the trial court to determine the issue whether to grant or not to grant a decree of divorce. I also proceed to set aside the findings of the trial court granting the decree of separation instead of divorce. The trial court misdirected itself. It trite law that a court cannot grant what parties did not ask for. **Berther Charles** did not petition for a decree of separation. The respondent's advocate supported the position that a court has no mandate to grant what a party did not ask for. To bolster his position, Mr. Nasimire advocate cited the case of **Fundi Ilanda vs. Ally Lwimba** [1984] TLR 55. **Berther Charles** petitioned for divorce and division of matrimonial assets. She never prayed for a decree of separation

as an alternative remedy. It was a misdirection for the trial court to grant the decree of separation. I set aside the trial court's decree of separation.

It is settled principle of law that a second appellate court can interfere with the finding of facts of the trial court where it satisfied that trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises. See the case of **Salumbugu v. Mariam Kibwana** civil Appeal no. 29/1992 (unreported).

Having quashed the first appellate courts order of remitting the case to the trial court to consider the petition of divorce and set aside the decree of separation passed by the trial court, I grant a decree of divorce. I grant a decree of divorce as by both courts found that the marriage between **Berther Charles** and **Makoye Athumani** was irreparably broken. I find that the marriage was broken down on the ground of mental cruelty and denial of conjugal rights.

I therefore, find merit in the first ground of appeal. The answer to the first issue determines the forth issue that is whether the trial court err to order the trial court to reconsider the petition for divorce. It is answered affirmatively. The district court having found that marriage had broken

beyond repair was duty bound to grant a decree of divorce. Thus, the district court misdirected itself to refer the matter to the primary court to consider whether to grant a decree of divorce.

Did the district court err not to order division of matrimonial assets?

Berther Charles complained that having found that, the marriage had broken down irreparably, the district court erred in law by its failure to order division of matrimonial assets. **Berther Charles**'s advocate submitted that section 114(1) of the LMA gives the trial court when granting or subsequent to granting for a decree of divorce to order division of matrimonial assets. He added that **Berther Charles** established what constituted matrimonial properties and prayed for 50/50 distribution.

The respondent's advocate vehemently opposed the proposed division of the matrimonial property. He faulted his learned advocate for not considering a number of factors, which are; **one**, the fact that the respondent had six wives; **two**, the fact that the appellant was given mandate to sell a matrimonial property in Mwanza and she sold them; and **three**, the fact that despite being given authority to sell a property in

Mwanza, she was duly compensated for her contribution in the growth of the respondent's Company.

Having considered the submissions, it is obvious that one of the thorns in the parties' fresh is division of matrimonial assets as well as which assets form party of matrimonial assets. There is no dispute that both courts below did not consider the issue of division of matrimonial property. I do not consider I will do justice to the parties to consider and determine the issue of division of matrimonial assets at this stage. It is trite law that the second appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court. See **Simon Godson Macha** (Administrator of the late Godson Macha) **v Mary Kimaro** (Administrator of the late Kesia Zebadayo Tenga), Civil Appeal No 393/2019, **Juma Manjano v R.** Cr. Appeal No. 211/2009, **Sadick Marwa Kisase v. R.** Cr. App. No. 83/2012 and George Mwanyingili V. R. Cr. App. No. 335/2016. In **Juma Manjano v R**. the Court held-

> *"As a second appeal court, we cannot adjudicate on a matter which was not raised in the first appellate court. The record of appeal at page21 to 23 shows that this ground of appeal was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athumani v. R*** *[2004] TLR 151*

the issue of whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised.....the Court has repeatedly held that matters not raised at the first appellate court cannot be raised in the second appellate court"

In the current case, the appellant raised the issue of division of matrimonial assets, which the trial court did not consider. The trial court was duty bound to consider the issue of division of matrimonial assets notwithstanding a fact that it did not dissolve the marriage but granted a decree of separation. The law, section 114(2) of the LMA allows a court to consider division of matrimonial assets even when it grants a decree of separation. It states-

114.-(1) The court ***shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division*** *between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale. (emphasis added).*

I desist from determining the issue of division of matrimonial assets, which was not canvassed by the trial and the first appellate courts. I order

the trial court to summon parties and consider the issue of division of matrimonial assets.

Did the appellate court err to hold that the trial court erred to award maintenance pay of Tzs. 1,000,000/ monthly?

Lastly, Berthar Charles, the appellant, faulted the first appellate court's decision to hold that maintenance pay of Tzs. 1,000,000/= was improperly assessed. To support the complaint, the appellant's advocate argued that section 115(1) allows a court granting a decree of divorce to grant compensation as it deems fit. He added that the respondent was a wealthy person, hence a maintenance pay of Tzs. 1,000,000/= was justified.

The respondent's advocate had the same views with that of the appellant's advocate that, the law empowers the court when ordering a decree of separation or divorce to grant maintenance. He quickly contended that the court is required when assessing the quantum of maintenance pay to consider terms specified under section 116 of the LMA. He argued that in assessing the quantum of maintenance, the court should consider the needs and means of the parties. To support his contention, he cited the case of **Festina Kibutu vs. Mbaya Ngajimba**, [1985] TLR. 42.

With all due respect to my learned friend, I abstain from determining the issue whether the appellate court erred to hold that the trial court slipped to award maintenance pay of Tzs. 1,000,000/ monthly. The reason for abstaining is simple, Berthar, the appellant, who was the petitioner never prayed for maintenance. She petitioned for divorce and division of matrimonial assets. A court is not mandated to jettison pleaded issues and jump to unpleaded matters and grant reliefs not prayed for. The Supreme Court of India in **Messrs Trojan & Co. vs RM N.N. Nagappa Chettiar** A.I.R 1953 SC 253, held that-

> *"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found.* ***Without an amendment to the plaint, the Court was not entitled to grant the relief not asked for*** *and no prayer was even made to amend the plaint so as to incorporate in it an alternative case." (emphasis added)*

The Supreme Court emphasized in **Bharat Amratlal Khotari v. Dosukhan s. Sindhi & Others**, A.I.R 2010 SC. 475, that-

> *"Though the Court* ***has very wide discretion in granting relief,*** *the court however, cannot,* ***ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."***

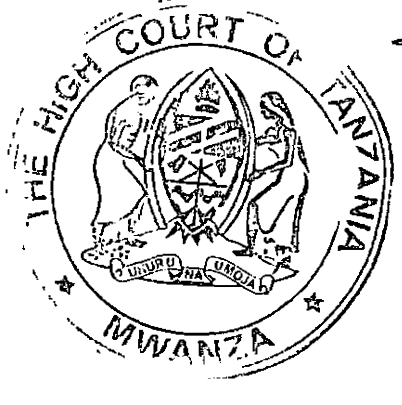
Having granted the decree of divorce, I leave it to the trial court consider the issue of division of matrimonial assets and there is no urge to consider the issue of maintenance pay.

In the upshot, I uphold the findings of the first appellate court that the marriage of **Berther Charles** and **Makoye Athumani** was irreparably broken. Consequently, I dissolve it and grant a decree of divorce. I further order, the trial court to summon the parties and consider the issue of division of matrimonial assets immediately.

Dated at **Mwanza** this 10th day of June, 2022.

J. R. Kahyoza
JUDGE

Court: Judgment delivered in the virtually presence of Ms. Berthar Charles, the appellant and Mr. Nasimire advocate for the respondent. B/C Ms. Jackline present.



J. R. Kahyoza
JUDGE
10/6/2022