IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 12 OF 2023

(Arising from Matrimonial Cause No. 02/2021 of the District Court of Nyamagana)

JUMA DERESU MALUNGA ----------**APPELLANT**

VERSUS

SUSAN DANIEL MWENDI----------**RESPONDENT**

JUDGEMENT

June 13th & 6th July, 2023

Morris, J

On 5th July 2021, Susan Daniel Mwendi filed Matrimonial Cause No. 02 of 2021 against Juma Deresu Malunga in the District Court of Nyamagana. She was pursuing her husband for divorce; division of matrimonial property; and maintenance of issues of their marriage. The trial court found that the marriage between them had broken down irreparably. It issued decree of divorce. Consequent to the divorce, the court ordered division of matrimonial properties between the parties; the appellant to pay the respondent monthly maintenance of Tshs. 500,000/=; and the appellant to have access to children through visitation during holidays only.

Juma Deresu Malunga, the appellant above, was dissatisfied with the foregoing judgement. He has now knocked the doors of this Court, lusty for justice. Through services of Mr. Deocles Rutahindurwa, learned advocate, the appellant raised seven grounds of appeal. However, grounds 3 and 6 were abandoned during hearing. The respondent was represented by advocate Lenin Njau. The appeal was argued by way of written submissions.

Amongst the spared grounds, the appellant is challenging the trial court's jurisdiction. He bases his opposition on the argument that it adjudicated the matter in the absence of a certificate from the Marriage Conciliation Board (MCB). Further, he faults the trial court for giving the respondent reliefs not prayed for; and for failing to consider extent of parties' contribution in acquisition of matrimonial assets. In addition, he was aggrieved by its order awarding custody of children to the respondent and restricting his visitation right in disregard of children's wishes and custom of his community; and ordering monthly maintenance without considering appellant's income.

Submissions of parties for and against the above grounds are considered in the course of determining this appeal. The issue which is

being addressed by this Court is whether the appeal is merited; and if so, which ground(s) is/are allowed. Regarding the first ground, the appellant is questioning the jurisdiction of the trial court for lack of MCB certificate. The counsel for the appellant submitted that, in term of sections 101 &106 (2) of ***the Marriage Act***, Cap 29 R.E. 2019 **(the LMA)** no person can petition for divorce without prior referring the dispute to MCB and that the board must certify that it has failed to reconcile the parties. To him, the subject certificate should accompany the petition. He made reference to ***Hassan Ally Sandal v Asha Ally***, Civil Appeal No. 246 of 2019; ***Patrick William Magubo v Lilian Peter Kitali***, Civil Appeal No. 41 of 2019; ***Yohana Balole v Anna Benjamin Malongo***, Civil Appeal No. 18 of 2020 (all unreported).

Further, he contended that in this matter the petition was accompanied by certificate from Buhongwa MCB. However, the same was never tendered as exhibit during hearing. This omission, according to the appellant, excluded it from forming part of court record. He argued that, faced with similar situation, the Court of Appeal nullified the proceedings of trial court in the case of ***Patrick William Magubo*** (*supra*). It was, thus, his conclusion that non production of the certificate

rendered the trial court to lack jurisdiction. Accordingly, the entire proceedings become null and void.

In reply, it was submitted by the respondent that the certificate from Buhongwa MCB accompanied the petition. And that, during trial the appellant raised a preliminary objection concerning the certificate which was overruled. Further, the respondent argued that both parties do not dispute having attended to the said Board.

I have considered submissions of both parties equably. From the outset, I am inclined to deliberate on the role of MCB. The justification is straightforward. Therefrom, crops a very fundamental point of law. The prime role of the board is; as its name runs, to conciliate the disputes between spouses. Issuance of certificates is inconsequential. Indeed, the certificate is the product of actual process of conciliation. In my considered view, this is the import of section 104 (5) of ***LMA***. Hence, before certifying that it has failed to conciliate the disputants before it; the board must engage in the real conciliatory activity of having spouses resolve their marital differences.

The above legal requirement is so fundamental. **First**, it goes to the objective of why MCBs were established in the first place. **Secondly**,

it is intrinsically a jurisdictional issue because the court, as the general rule, cannot adjudicate on a matrimonial dispute unless such certificate is attached to the petition. Reference is made to section 106 (2) of ***LMA***. **Thirdly**, it signifies that parties have gone to court as a last resort.

In the instant matter, three aspects are not disputed in this regard. *One*, that the certificate from Buhongwa MCB accompanied the petition. *Two*, the appellant had raised a preliminary objection on the same issue but it was decided in favour of the respondent. *Three*, at page 25 of the trial court proceedings, the present appellant (testifying as DW1) stated that Buhongwa MCB failed to reconcile them.

Reading the case of ***Patrick William Magubo*** (*supra*) I appreciate the holding that lack of MCB certificate integrates in the court's jurisdiction. Nevertheless, I distinguish it from the present case on a manyfold foundation. Whereas in ***Magubo's case*** the certificate was neither attached to the petition nor tendered in evidence, in the present matter, it was attached to the petition.

Further, the case under reference, allegedly involved the appellant who was not summoned to or by any reconciliation board. In the matter at hand, not only that he was summoned but also, he attended the MCB

proceedings. More so, while the appellant's statement in ***Magubo's case*** was not challenged during cross examination, in the current appeal parties were contemporaneous with one another in this connection.

In addition, existence or otherwise of the certificate, as I have said earlier, was unsuccessfully challenged by the PO. To me, cumulatively, parties had no issue with the existence of the certificate in the trial court's record. Further, pleadings of parties raised no issue in this connection. They were, thus, bound accordingly. I hold, therefore, that trial court had jurisdiction to try this matter, in its peculiar circumstances. The first ground of appeal lacks merit.

Regarding the second ground, the appellant is faulting the trial court over maintenance fees granted to the respondent who had neither pleaded it nor prayer for the same respondent. It was the submissions in favor of this ground that the court is not father Christmas who charitably goes around the street haphazardly dishing out gifts to persons. And that parties are bound by their pleadings. The court was invited to refer to the cases of ***Captain Harry Gandy v Gasper Air Chatters Ltd*** [1956] E.A.C.A, 139; and ***Charles Richard Kombe T/A Building v Evaran Mtungi & 2 Others***, Civil Appeal No. 38 of 2012 (unreported). Both

cases, according to the appellant, reinforced it a principle that, parties are bound by their own pleadings. In reply it was submitted by the respondent that in matrimonial cases matters of children cannot be left unattended.

I have taken trouble to pass through the record in order to verify the parties' allegations hereof. As correctly argued for by the appellant, no prayer for the maintenance was made in petition. That is, PW1 - the petitioner (now respondent) never prayed before trial court for an order of maintenance. This court is of the view that, with respect, the trial court fronted and adjudged the question of maintenance without being moved to determine the same. It just erupted as an afterthought. I hold that the trial court erred in this regard.

Maintenance of issues of marriage particularly after the marriage is dissolved is fundamental and cannot be taken lightly. It requires adequate attention. See, for instance, decision of courts in ***Basiliza B. Nyimbo v Henry Simon Nyimbo*** [1986] T.L.R. 93; ***Festina Kibutu v Mbaya Ngajimba*** [1985] T.L.R.42; ***Juma Kisuda v. Hema Mjie*** (1967) HCD n.188; and ***Abdalah Salum v Ramadhani Shemdoe*** [1968] HCD n.129; or [1967] HCD n. 55.

However, it is also law that the court is not the litigants' mother. It cannot, therefore, grant what they have not specifically asked for. Refer the case of ***Dr. Abraham Islael Shuma Muro v National Institute for Medical Research***, Civil Appeal No. 68/2020; and ***Abel Maligisi v Paul Fungameza***, PC. Civil Appeal No. 10/2018 (both unreported). Further, in law, parties are bound by their respective pleadings to prevent the opposite party from being taken by surprise. This, on the basis that the respondent herein had neither pleaded nor prayed maintenance in the trial, the appellant enjoyed no chance to reply or counter such aspect. Therefore, the 2nd ground of appeal is merited. I allow it.

In favour of the ground that the trial court erred by dividing matrimonial properties without considering contribution of each party, it was submitted that this omission was illegitimate. The appellant argued that it is paramount for the court to consider the nature and extent of contribution by each spouse towards acquisition of matrimonial assets prior to dividing them. The argument was based on the allegation that the respondent claimed to had contributed in the acquisition of the assets vide her salary, loans from banks and business but she tendered no evidence

to prove the same. The appellant, thus, faulted the trial court's division pattern in the absence of clear proof of the respondent hereof.

It was submitted in reply, however, that the appellant got substantial share in matrimonial assets. That such division amounted to oppression against women. He referred to the ***Convention on Elimination of all forms of Discrimination Against Women*** (***CEDAW***); and ***the Protocol to the African Charter on Human and Peoples' Right***. Further, it was submitted that the respondent played both roles as a wife and mother of wedlock-children. The domestic chores notwithstanding, it was submitted further that she was also employed. All-combined, therefore, she contributed on acquisition of matrimonial assets.

I have adequately considered submissions of both parties. For me to determine the tenability of this ground, the Court will have to evaluate the evidence on record. I am mindful of the relevant principles governing this kind of appeal. That is, this being the first appeal it substantially takes a form of rehearing. Accordingly, the court enjoys the mandate to re-appraise, re-assess and re-analyse the evidence before it. Thereafter, it

may arrive at its own conclusion on the matter based on reasons given thereof.

This Court is guided further by the holdings in cases of ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017 ***Kaimu Said v Republic***, Criminal Appeal No. 391 of 2019, ***Makubi Dogani v Ngodongo Maganga***, Civil Appeal No. 78 of 2019; ***Mwenga Hydro Limited v Commissioner General Tanzania Revenue Authority***, Civil Appeal No. 356 of 2019; and ***Diamond Motors Limited v K-Group (T) Ltd***, Civil Appeal No. 50 of 2019 (all unreported).

In view of the foregoing position, I have re-evaluated and reassessed the evidence of both parties toward acquisition of listed as matrimonial properties. The respondent stated to had contributed through her salary, loan and business. During cross examination, nothing on record suggests that she was cross examined concerning her salary, loan or business. It is the law that when the matter is left uncontroverted through cross examination, it is presumed as being admitted. Followed hereof are cases of ***Patrick William Magubo*** (*supra*); ***Nelson s/o Onyango v Republic***, Criminal Appeal No. 49/2017; ***Paul Yustus***

Nchia v National Executive Secretary Chama cha Mapinduzi and Another, Civil Appeal No. 85 of 2005 (all unreported).

Therefore, the evidence that the appellant had contributed through her salary, loan and business was unchallenged. More so, the appellant faults the trial court on such conclusion while he also did not produce requisite evidence to contradict her assertions. For instance, it is recorded that the appellant testified that he largely acquired the assets solely by using his employment terminal benefits and loans. Nevertheless, he did not tender evidence to prove such sources. The appellant to, thus, rely on the argument that the respondent did not specifically prove the sources of her income while he as well omitted to exactly do the same (prove his income); is to stretch the scale of justice beyond measure. That is, if he wished the trial court to award him a lion's share of the properties, he should have assisted the court accordingly.

For the stated reasons above, I will not interfere with the trial court's findings on distribution of matrimonial properties. The relevant ground fails on such basis.

The other ground is that the trial court erred by placing the custody of issues of marriage to the respondent with a condition that they can

meet their father during holidays. It was submitted in favor of the appeal that, as per section 125 (2) of ***LMA***, when the court decides on the custody of children; the paramount consideration shall be the welfare of child/children. Further, subject to that, the court shall have regard to wishes of the child/children where he/she is of age to express the necessary independent opinion. In addition, it was submitted that, two issues of marriage are aged 19 and 21 years. For the reason, now that they have the requisite age of majority, their wishes should have been considered prior to being placed under respondent's custody.

The reply from the opposing party was that, it was wise for the trial court to place custody of the children under the respondent. That the said court considered that they would not be exposed to toxic life which might prevent them from learning good manners. The respondent also submitted that the appellant did not plead to be given custody of the said children.

After considering the submissions by both parties and record, two things caught my attention. I will state them. **First**, in evidence nothing was testified regarding the fact that staying with their mother; the children will not be exposed to toxic life. The respondent simply prayed to be given

custody as she was previously living with the children. The submissions by counsel for the respondent regarding toxicity of life came from bar. No evidence on record suggests that the life of the children would be adulterated under their father's custody. It is the sturdy law that submissions are not evidence. Refer to ***Registered trustees of Archdiocese of Dar es Salaam v The Chairman, Bunju village Government***, Civil Appeal No.147of 2006; and ***Ison BPO Tanzania Limited v Mohamed Aslant***, Civil Application No. 367/18 of 2021 (both unreported).

Second, in his reply to petition, the appellant evasively denied the prayer by the respondent for custody of children. Moreover, in his evidence, he never prayed for the custody of children nor did he pray for the court to call the children to record their wishes. The counsel for the appellant, in arguing in favour of one of the grounds above, reminded me that the court cannot grant something not prayed for by a party. He, indeed, sew his own web which nets him squarely in this subsequent argument. As the English would put it, you cannot eat the cake and have it. This ground fails on such footing. To hold otherwise, the court will be

blowing it hot and cold at the same time. It would be illegitimate. Justice is a single-faced object.

Nonetheless, concerning right of the appellant to visit or meet the children, though it was not submitted by the counsel for the appellant, in reply the respondent argued that the appellant was granted unlimited access to the children. In view of the children's age, I am inclined towards, as I hereby do, quashing the trial court's order for visitation only on holidays. In lieu thereof, I order that the appellant is free to visit the children at any time without affecting the welfare of the children. For that reason, the 5th ground of appeal partly succeeds: only in respect to the right of the appellant to visit and/or meet the children.

On the last ground, the appellant is faulting the trial court's decision of awarding maintenance of children monthly without considering the appellant's income. This ground of appeal should not detain me. As I have herein decided, the trial court erred to award an order of maintenance not prayed for. This relief is equally an ectopic remedy. The same rationale and reasoning given earlier in this judgement are adopted hereof. The 7th ground of appeal is, thus, sustained.

On the basis of what is elucidated above, this appeal succeeds on the 2nd, 5th and 7th grounds (maintenance of children and right of visitation). I proceed to quash and set aside order of the trial court on maintenance of children and extend the right of the appellant to visit or meet the children at any time without affecting their welfare. The rest of the grounds are not merited. This being a matrimonial appeal, parties shall bear own costs. I so order. The right of appeal is fully explained to the parties.

C.K.K. Morris

Judge

July 6th, 2023