IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And NGWEMBE, J.A.)

CIVIL APPLICATION NO. 285/ 01 OF 2023

MARIAMU JUMA MOHAMEDI..... APPLICANT

VERSUS

MARIAM NASSORO KIPINDUKA .....1ST RESPONDENT

HALIFA HAMISI UNGAUNGA .....2ND RESPONDENT

(Application for Revision arising from the decision of the High Court of Tanzania (District Registry) at Dar es Salaam

(Mlyambina, J.)

dated the 17th day of May, 2019

in

PC Civil Appeal No. 63 of 2018

.....

RULING OF THE COURT

05th & 13th November, 2024

NGWEMBE, JA.:

Mariamu Juma Mohamedi, moved the Court by way of notice of motion citing section 4 (3) of the Appellate Jurisdiction Act (Cap 141 R.E. 2019), Rules 4 (2) (b) and 65 (1) (2) (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by an affidavit affirmed by the applicant. The motion is premised on the ground that, the applicant being the only lawful wife of the 2nd respondent, invites the Court to call for and examine, revise and quash the proceedings, judgments and decree of the High Court in PC Civil

Appeal No. 63 of 2018. The reason predicated in the notice of motion and in the supporting affidavit indicates that the applicant was deprived her right to be heard when her alleged matrimonial properties were ordered by the courts below to be equally divided between the respondents.

The applicant further averred that, the two (applicant and 2nd respondent) are husband and wife since 1996 to date. After cohabitation for some years, finally they celebrated their marriage in Islamic faith on 5th day of June, 2002, which marriage was blessed with four issues whose names and dates of birth are provided for in paragraph 4 of the affidavit. During their marriage, they allegedly jointly acquired various matrimonial properties listed in paragraph 6 of the affidavit.

It is also stated in paragraphs 7 & 8 that, in the course, on 3rd September, 2021 the 2nd respondent disclosed to the applicant that all along he was involved in a legal dispute with the 1st respondent in respect of division of matrimonial assets. Their dispute commenced at Mbagala Primary Court in Matrimonial Cause No. 39 of 2017, whereby, Mariam Nassoro Kipinduka (1st respondent) sued the 2nd respondent for divorce and equal division of matrimonial properties. After determination of the dispute, the suit was dismissed for being unmerited. Being dissatisfied with that decision, the 1st respondent successfully, appealed

to the District Court of Temeke in PC Civil Appeal No. 50 of 2017. The District Court declared the two disputants were presumed husband and wife as they had cohabited for more than two years. Consequently, the District Court proceeded to order equal division of matrimonial properties between the two. Being dissatisfied, the 2nd respondent unsuccessfully appealed to the High Court in PC Civil Appeal No. 63 of 2018. The learned judge (Mlyambina, J) confirmed the decision and orders of the first appellate court.

It is also in record that immediate thereafter, the 2nd respondent lodged notice of appeal dated 28th May, 2019 intending to challenge the impugned judgment of the High Court to the Court. Moreover, the 2nd respondent unsuccessfully applied for review in Miscellaneous Civil Application No. 6 of 2019 which application was dismissed on 30th September, 2020. Also, the attempt to seek leave of the High Court to appeal to the Court in Misc. Civil Application No. 541 of 2020 was unsuccessful as it was dismissed on 29th July, 2021, thus, making the judgment and decree of the High Court in PC Civil Appeal No. 63 of 2018 remain unchallenged and executable.

The applicant alleges that, she was unaware of the existence of that matrimonial dispute, but she became aware after being informed by the 2nd respondent. In paragraph 6 of the affidavit of the applicant,

mentioned are several properties she has an interest to protect, which were subjected to equal division between the respondents. Therefore, she lodged the instant application after being granted extension of time in Civil Application No. 418/01 of 2021 dated 10th March, 2023. As alluded to above, the essence of this application is to invite the Court to revise the judgment and decree of the High Court based on the reasons that: she is the only lawful wife of the 2nd respondent; their marriage is blessed with four children and jointly have acquired various matrimonial properties which will be affected by the court's decision; the applicant was deprived her basic right to be heard on those properties subject to equal division between the respondents.

The application is conceded by the 2nd respondent but vehemently contested by the 1st respondent as she alleged to have cohabited with the 2nd respondent for enough time to acquire the status of husband and wife under presumption of marriage. Further she averred in her affidavit in reply that, during their cohabitation, they acquired properties subject to equal division between them.

When the application was called on before us for hearing, the applicant was represented by Dr. Dominic Daniel, learned advocate and the 1st respondent procured legal representation of Mr. Josephat Sayi

Mabula, while the 2nd respondent entered appearance in person unrepresented.

Arguing on the application, Dr. Daniel adopted both the grounds in the notice of motion, supporting affidavit and the written submissions filed on 23rd June, 2023. In brief elaboration, he submitted that the attached documents in the affidavit of the applicant proved that the applicant and 2nd respondent are the sole husband and wife celebrated their marriage under Islamic faith which marriage is blessed with four issues. He further argued that the matrimonial properties are for themselves and their four children. Therefore, the decision of the District Court which decision was upheld by the High Court has direct effect to the applicant's rights to those properties. Therefore, the applicant seeks to challenge the decisions which deprived her rights on those matrimonial properties unheard.

Mr. Mabula contested the application by first adopting the contents of both affidavit in reply and the written submission filed on 20th July, 2023. He further submitted that the two respondents were husband and wife under presumption of marriage.

The second issue which the learned counsel raised was on whether there is a presumption of marriage in the subsisting marriage.

He responded that under Islamic faith, it is possible because in Islamic faith, a man is allowed to marry up to four wives. In the circumstances, the two respondents were presumed husband and wife.

Responding on unawareness of the applicant on the existence of the dispute between the respondents, he quickly responded that it was the duty of the 2nd respondent to inform the applicant (his wife). He even challenged the authenticity of the marriage certificate together with the birth certificates of the four children. He thus implored the Court to dismiss the application and uphold the decision of the lower courts save that of the Primary Court of Mbagala.

The 2nd respondent adopted his affidavit in reply lodged on 30th October, 2024 which content is in support and supplements the applicant's complaints.

In brief rejoinder, Dr. Daniel clarified that the marriage certificate between the applicant and the 2nd respondent was verified by RITA and BAKWATA as shown in the affidavit of the 2nd respondent. Also, Dr. Daniel insisted that once there is subsisting marriage, the allegations of presumption of marriage does not arise because what the respondents were doing, in the absence of marriage, did not amount into a presumption of marriage rather was adultery contrary to Islamic faith.

Finally, he urged the Court to grant the prayers sought in the notice of motion.

It is glaringly clear from both affidavits and submissions that the issues for determination revolve in two grounds, to wit: whether the applicant had any right to be heard before the division of the alleged matrimonial properties; and whether the division of the alleged matrimonial properties between the respondents affected the applicant.

After a careful synchronization of the above situation and after perusal to the record of application, we share with the submission of the learned advocate for the applicant that, the 1st respondent knew that the 2nd respondent was married to another wife. At page 39 to 40 of the record of application, it is quite clear that the 2nd respondent was married to another wife "*Mdaiwa ana mke*" and it is also amplified during trial that "*Mdaiwa ana mke mwingine na mimi*" meaning the 2nd respondent herein was married to another wife and herself (the 1st respondent). In another glaring testimony, the 1st respondent stated that "*Alikuwa mume wangu mtarajiwa. Aliniahidi kunioa*" meaning the 2nd respondent was her expected husband as he promised to marry her.

Considering wholistically, the evidence adduced during trial, it was a glaringly clear knowledge to both respondents that, at the time they

commenced their relationship, the 1st respondent knew quite clearly that the 2nd respondent was married. The question of whether she knew that the said other wife is the applicant or another woman, is a question of facts. As it appears in the record, the affidavits of both the applicant and 2nd respondent together with their attachments, leaves no slight doubt that the two were married under Islamic faith on 5th June, 2002 and were awarded a marriage certificate No. 36069 by Sheikh Mohamed Mshindo. It is equally noted in the affidavit of the 2nd respondent that they have four children whose birth certificates are attached in the affidavit.

Despite the fact that Mr. Mabula disputed the genuineness of both the marriage certificate and birth certificates of the children, unfortunately he did not counter with opposing documentations contradicting those certificates. In the absence of different evidence to the contrary, we take those certificates are the only documents verifying the lawful marriage of the applicant and 2nd respondent and the birth certificates of their children.

Having resolved in affirmative the issue of whether the applicant was married to the 2nd respondent and that the 1st respondent knew that the 2nd respondent is married to the applicant, the remaining pertinent

question is whether the applicant was affected by the order for equal division of the matrimonial properties between the respondents.

We find imperative to underscore from the record those assets which are subject to division and compare with the applicant's alleged matrimonial properties. Tracing at page 38 of the record of appeal, at trial, the 1st respondent mentioned the properties subject to equal division as: two plots of land at Chamazi; one house at the rear of the market (Soko); a plot with a hut at Dovya; a plot bought from mama Bonge; plot at Msongola at the rear of the 2nd respondent's guest house; another plot at Saku. Equally at page 39, she mentioned two guest houses at Chamazi Zimbwini. Those landed properties were subject to equal division between the respondents. At the same time the applicant in her affidavit at paragraph 6 mentioned all landed properties recorded by the 1st respondent together with other landed properties alleged matrimonial properties. In the circumstances, we find that the decision of the 1st and 2nd appellate courts in respect of equal division of the alleged matrimonial properties affected the applicant who was neither a party to the dispute nor was afforded right to be heard and defend her interest.

Since the 1st respondent knew the existence of the applicant as alluded above, the division of the alleged properties acquired jointly

during their presumption of marriage could not be divided without the involvement of the applicant. It appears therefore that the applicant was not afforded the right to be heard (*Audi alteram partem*) on those assets. In fact, nowadays, courts demand not only that a person should be given a right to be heard but that she be given an adequate opportunity to be heard so as to achieve the quest for a fair trial. We cannot have better words than what we stated in the case of **Mbeya - Rukwa Autoparts & Transport Ltd v. Jestina George Mwakyoma,** (Civil Appeal 45 of 2001) [2001] TZCA 14 (9 August 2001) that:

> *"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: Audi alteram partem. It is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away".*

In this country, natural justice is not merely a principle of law, it has become a fundamental constitutional right enshrined in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. It includes the right to be heard amongst the attributes of equality before the law. In our decision in the case of **Abbas Sherally & Another v. Abdul S.**

H.M. Fazalboy, Civil Application No. 33 of 2002 (unreported), we observed that:

> *"The right of a party to be heard before adverse action is taken against such 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 decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice"*

From the above decisions and many more, it is now settled that a decision reached without regard to the principles of natural justice and or in contravention of the Constitution, is void and of no effect. In respect to the instant application, the applicant being a lawful wife of the 2nd respondent had every right to be heard in every deliberation touching her alleged matrimonial properties. We have arrived to this conclusion for the obvious reason that the 1st respondent who was the petitioner at trial court was well aware, as alluded above, that the 2nd respondent was married to the applicant. Therefore, she ought to have known that any division of the matrimonial properties would affect the applicant's interests unheard.

Consequently, we invoke revisional powers vested to the Court in terms of section 4 (2) of the Appellate Jurisdiction Act read together with Rule 4 of the Rules to allow the application and proceed to nullify the entire proceedings, judgment and orders of the courts below as they offended the basic principles of natural justice on right to be heard.

In the event, and for the interest of justice, whoever is interested may commence the trial afresh by observing the principles of natural justice. We make no order as to costs.

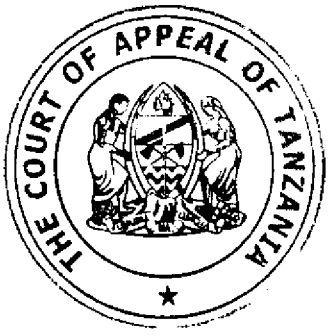
DATED at **DAR ES SALAAM** this 13th day of November, 2024

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Ruling delivered this 13th day of November, 2024 in the presence of Dr. Dominic Daniel, learned counsel for the Applicant, Mr. Joseph Mbonimpa, learned counsel holding brief for Mr. Joseph Mabula, learned counsel for the 1st Respondent and 2nd Respondent who appeared in person, unpresented is hereby certified as a true copy of the original.



A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL