

**IN THE COURT OF APPEAL OF TANZANIA  
AT DODOMA**

**(CORAM: KEREFU, J.A., MWAMPASHI, J.A. And ISMAIL, J.A.)**

**CIVIL APPEAL NO. 1072 OF 2025**

**HUSSEIN AMIN TEJA ..... APPELLANT**

**VERSUS**

**FRIDA FREDRICK MCHAURU ..... RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,**

**Temeke One Stop Judicial Centre at Dar es Salaam)**

**(Sarwatt, J.)**

**dated 10<sup>th</sup> day of April, 2025**

**in**

**PC. Civil Appeal No. 1623 of 2025**

.....

**JUDGMENT OF THE COURT**

*21<sup>st</sup> April & 20<sup>th</sup> May, 2026*

**ISMAIL, J.A.:**

This is a third appeal, tracing its origin from Matrimonial Cause No. 6 of 2022, commenced in the Primary Court, at Temeke One Stop Centre (the trial court). The petition for divorce carried three main issues for determination. These are: dissolution of the marriage, division of matrimonial assets and, custody and maintenance of the children. The trial court dissolved the marriage, placed custody in the hands of the respondent, and the appellant was ordered to pay a monthly sum of TZS. 500,000.00 as maintenance. Regarding the matrimonial assets, the trial court ordered that, the jointly acquired assets be valued, sold and the net

proceeds (after settling liabilities) be equally shared between the parties. Befuddled by the decision, the appellant preferred an appeal. The District Court that sat on appeal dismissed it for want of merit. His unrelenting effort saw him go to the High Court where he registered a partial success, as the maintenance cost was whittled down from TZS. 500,000.00 to TZS. 300,000.00. He is now before us, challenging the concurrent decisions of the lower courts.

The facts, as gleaned from the record of appeal reveal that, the parties got married on 14<sup>th</sup> May, 2016. They were blessed with two children aged 6 years and 2.5 years at the time of filing the petition for divorce. Their marriage life was embroiled in squabbles that significantly brought the relationship into a wane. So irreconcilable were the differences that they inevitably bred the court proceedings for dissolution of the marriage. The grounds cited for that decision were: lack of happiness; emotional cruelty; denial of conjugal rights, and economic reasons that allegedly came with the respondent's employment which stopped her from performing domestic duties, such as, tending the children. This, the appellant alleged, compelled him to hire two house maids to raise children and perform other domestic chores. He also employed the respondent's personal assistants. These extra responsibilities pushed the appellant into

indebtedness that saw him owe his creditors a whopping TZS. 483,614,675.00.

Besides seeking dissolution of the marriage, the appellant implored the trial court to grant him custody of the children and division of matrimonial assets which consisted of assortment of assets, including two pieces of land located at Tegeta in Dar es Salaam, two containers that house the respondent's bar business, and a motor vehicle make Toyota Alphard with Registration No. T851 DMQ. The appellant prayed to have the liabilities shared between the parties as they were contracted to finance domestic obligations.

Whereas, the trial court found the marriage irreparably broken down and acceded to the prayer for dissolution of the marriage, it admitted only a tiny fraction of the debts whose payment was to be done out of the proceeds of sale of pieces of land jointly acquired. Further, custody of children was placed in the hands of the respondent with the appellant gaining limited access. The appellant was ordered to pay maintenance of the children to the tune of TZS. 500,000.00. Not unexpectedly, this decision was not to the appellant's liking. His appeal to the District Court was, however, barren of fruit as the said court dismissed it in its entirety. He relentlessly instituted yet another appeal, this time to the High Court,

where all other orders were upheld, save for the quantum on maintenance which was revised downwards to TZS. 300,000.00 per month, instead of TZS. 500,000.00. Feeling that justice had not been served, the appellant launched the latest attempt. His appeal before us is predicated on five grounds of appeal coined in the following words:

- 1. That, the High Court erred when it failed to nullify the decision of the Primary Court when it found that the trial court acted on electronic evidence (exhibit RR-3) contrary to rules of evidence in Primary Courts, thereby rendering the proceedings a nullity.*
- 2. The High Court erred in upholding the trial court's decision that failed to properly assess and weigh the appellant's documentary evidence regarding his contribution in the acquisition of the matrimonial properties, relying instead, on the respondent's bare assertions not supported by any documentary evidence and, as a result, the division of assets and debts was unjust.*
- 3. That, the High Court erred in law and in fact for disregarding the appellant's loan agreement (exhibit RR-5) which clearly showed that the loan of TZS 228,000,000.00 was taken for the joint benefit of the parties, and by imposing an unduly high evidentiary burden upon the appellant beyond what is required under section 114 (2) (c) of the Law of Marriage Act,*

*thereby unfairly excluding the debt from consideration in the division of the matrimonial assets.*

- 4. The High Court erred in law and in fact by issuing a contradictory decree that ordered the respondent, instead of the appellant, to pay TZS. 300,000.00 per month as maintenance, thereby rendering the judgment inconsistent, confusing and unenforceable.*
- 5. The High Court erred in law and fact erred in law and fact by wrongly treating the appellant's complaint on the vagueness of the visitation order as a new ground, despite it having been raised in substance before the first appellate court. This led to unjust refusal to address a crucial issue, disregarding the practical challenges of enforcing the vague access terms, especially considering the parties different religious beliefs and best interests of the children.*

It is to be noted that, the counsel for the parties complied with the provisions of rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009, by filing written submissions to address us on the grounds of appeal. These submissions were adopted by Mr. Dastan Nyakamo, learned counsel who represented the appellant and the respondent who appeared in person, with nothing else to submit on. We propose to tackle the grounds of appeal following the sequence of the arguments by the parties. But as

we do that, we wish to register our dismay at the conduct of the parties, especially the respondent, of citing decisions most of which are not existent. The cited decisions carry case numbers which reference other cases. We feel that this is the height of imprudence that should be abhorred.

The gravamen of the appellant's complaint in ground one is that, the High Court ought to have nullified the entire proceedings when it found that, admission of exhibit RR-3 was in contravention of the laws governing adduction of evidence in Primary Courts. He contended that, whereas the Magistrates Courts (Rules of Evidence in Primary Court) Regulations, GN. No. 22 of 1964, do not recognize electronically generated or stored data as admissible evidence, the provisions of the Evidence Act [Cap. 6 R.E. 2023] and the Electronic Transactions Act [Cap. 442 R.E. 2023] are not applicable in the Primary Court. Mr. Nyakamo contended that, expungement of the exhibit, as done by the High Court, was not the right course of action. He argued that, this was a fatal jurisdictional error which would not be cured by simply expunging the exhibit. The learned counsel referred us to a trio of the decisions of the High Court and implored us to be inspired by them. These are: **Christina Thomas v. Joyce Justo Shimba** [2021] TZHC 3401; **Valence Paulo Shayo v. Jacline Wilson**

**Kimaro** [2021] TZHC 2798; and **Hamza Mrindoko Msofe v. Flora Mbonea Mmbaga** [2024] TZHC 5702. In all these, he argued, the High Court held that primary courts lack jurisdiction to admit electronic evidence.

In reply, the respondent was valiantly opposed to the contention by the appellant. She argued, initially, that the exhibit whose admission is castigated, was introduced by the appellant himself during the trial proceedings. She contended that, having done so, she is estopped from challenging its admissibility or using it as a ground for nullification. This, she contended, was consistent with a Latin maxim *allegans suam turpitudinem non est audiendus*, meaning that, a person cannot be heard to allege his own wrong doing. She urged us to be persuaded by the reasoning in **Republic v. Mohamed Abdallah** [1987] T.L.R. 62; **Sabena Technics Dar Ltd v. Michael J. Luwunza** [2020] TZHCLD 95; and **Letshego Bank Tanzania Ltd & Another v. Furaha Lamson Siame**, Civil Appeal No. 12 of 2023 (HC). The respondent argued further that, a party who contributes to an irregularity cannot later complain about it on appeal.

On the course of action, she argued that, even where there are procedural errors in the admissibility of evidence, such errors do not

necessarily vitiate a trial unless there is a miscarriage of justice. The respondent argued that, nullification is a remedy that is exercised cautiously and only where it is established that the irregularity caused injustice or affected the merits of the case. She found nothing to lead the Court to that course of action.

As the respondent contended, the document whose expungement has been chastised by the appellant, was introduced at trial by none other than the appellant himself. As he did that, he ought to have known that, rules of evidence in primary courts do not permit admission of electronic piece of evidence. In law, an exhibit that has been admitted into evidence can be expunged during the trial or on appeal, if there was a material procedural defect during its admission. The procedural defect cited in this matter is the act of having it admitted, while it is known that the same was in the form of electronic evidence, but admitted using rules of evidence applicable in primary courts to which electronic evidence is completely alien. In the fitting circumstances, the right procedure would require having the procedure governed by the Evidence Act or the Electronic Transactions Act both of which are, however, not applicable in primary courts. What this means is that, had the error been detected before its admission, the right course of action would be a refusal to admit

it. Where the exhibit finds its way into the record, the higher court, sitting on appeal, can rightly order that it be crossed off the record. This is what is called expungement. This allows the case to stand on the remainder of the testimony and the court would have its work cut down to merely evaluating the residue of the evidence, make sense of it, and decide if it is enough to sway the decision in favour of the person who adduced it. If the expunged evidence is the only testimony available, then the case will have no legs to stand on and, inevitably, the same will crumble.

It is our conviction that, the High Court was within its powers to confine its order to the exhibit whose admission was discrepant, and it would be foolhardy to nullify the entire proceedings just because one exhibit found its way irregularly. We are of the settled view that, the decision of the High Court to expunge exhibit RR-3 was the right call. We resist the urge to hold otherwise, and we find this ground of appeal unmerited and we dismiss it.

Next is ground two of the appeal in which Mr. Nyakamo decries the High Court's decision to uphold the trial court's decision, that allegedly failed to assess and weigh the documentary evidence on financial contribution towards acquisition of the matrimonial assets. He contends that, the respondent's bare assertions on the contribution were given

prominence while the appellant's documentary evidence on the acquisition was left to play second fiddle. He invoked section 117 (1) of the Evidence Act [Cap. 6 R.E. 2023] which obligates the alleger to prove existence of the facts he asserts. He referred us to the decision of the Court in **Abdul Karim Haji v. Raymond Nchimbi Alois & Another** [2006] TZCA 22.

Mr. Nyakamo further contended that, exhibit EE-7 reveals the financial contribution but the testimony does not prove that the contribution of the spouses was 50 – 50. He also criticized the court for not factoring in the debts contracted by the appellant while, such debts were contracted jointly and the sums generated therefrom were consumed for family needs. This, he argued, was a contravention of section 114 (2) of the Law of Marriage Act [Cap. 29 R.E. 2023] (the LMA). The learned counsel was also critical of the lower courts' failure to consider the financial injection into the bar business, turning it into a matrimonial asset eligible for distribution between the spouses. He urged us to reverse the findings and order a lawful and fair re-evaluation of matrimonial assets and debts.

This contention has been scoffed at by the respondent, who contended that, the appellant failed to establish the nexus between his financial documents and the acquisition of the specific matrimonial properties. She premised her contention on the reasoning in **Hatimali**

**Adamji v. Esmail Adamji** [1981] T.L.R. 188 in which it was held that, documentary evidence must be directly linked to the property in dispute and cannot stand in abstraction. She saw no fault in the court's refusal to accord weight to the records she alleges were unsupported. On the contrary, she argued, her testimony proved her direct involvement in the acquisition of property. The respondent contended that, the court considered all the factors and that, eventually, the distribution it ordered was fair, equitable and consistent with the law.

As Mr. Nyakamo contended, rightly so, in our view, the law casts the burden of proof on the person who alleges the existence of what he alleges. This is a cherished position set out in rule 1 (2) of the Rules of Evidence applicable in the Primary Court. It is also the requirement under the provisions of the Evidence Act. The learned High Court Judge took cognizance of this requirement and held the view that, while it is true that the respondent did not tender any documentary proof to substantiate parity contribution towards the acquisition of the property, the appellant did not lead any evidence to prove that his share of contribution exceeded that of the respondent, either – see pages 218 and 219 of the record of appeal.

We need to emphasize that, in determining a share that a spouse is entitled to in the jointly acquired property, proof of extent of contribution is important. This is in terms of section 114(1) (b) of the LMA. We have underscored this position in a multitude of decisions – see, for instance, **Method Amon Kinde v. Christina Kasawa Masendeko** [2026] TZCA 559. Where, as in this case, a party claims that his extent of contribution is higher than that of his counterpart, the burden of proving that he has an edge over the other is cast on him. Our unflinching review of the record of appeal did not find any semblance of evidence to show that, the appellant contributed more and that, he deserves more in the distribution than the respondent. We hold that, it is the latter who should have impressed the court that, on account of his contribution, he deserved more than what he was awarded by the trial court.

As the learned Judge of the High Court reasoned at page 218 of the record of appeal, the only testimony that evidences the acquisition of the Tegeta plots is exhibit EE7. This testimony is silent on who contributed what, besides showing that these plots were jointly acquired and bore names of both parties as tenants in common in equal shares. On whether the appellant deserved a slice in the investment into the bar, the learned Judge reasoned at page 219 of the record of appeal that, the requirements

of section 114 (3) of the LMA were not conformed to. She took the view that, exhibit RR-5 which purported to prove that, a loan was taken, fell short of establishing that the same was taken for the parties' joint benefit. We subscribe to this reasoning. The appellant ought to have gone further than merely asserting that he took a loan, without showing that, whatever he alleges that went into the existing bar business substantially improved it to make it eligible for distribution.

Based on all this, and the learned Judge's thorough analysis of the parties' contending positions on this ground, we are not persuaded that the High Court failed to properly assess and/or weigh the evidence adduced by the appellant in this respect. It is simply that the documentary evidence that the appellant clung on had an underwhelming effect that could not support his contention. We find nothing flawed in the learned Judge's conclusion. In our considered view, the complaint in this ground is baseless and we reject it out of hand.

Ground three challenges what the appellant contends to be the learned Judge's failure to take into consideration the loan agreement (exhibit RR-5) which showed that the sum of TZS. 228,000,000.00 was taken for the joint benefit of the parties. The appellant has also taken an issue with the learned Judge's alleged imposition of a high evidentiary

burden beyond what is required under section 114 (2) of the LMA. The appellant's counsel argued that, such omission was an unfair exclusion of the said debts from a pool of matrimonial liabilities, and a violation of section 114 (2) of the LMA, which requires courts to consider any debts owing by either party and contracted for their joint benefit. He, for instance, singled out the loan agreement between the appellant and Hiteshkumar Kaushik Bhai Bhatt in which the purpose of the loan was stated to be for domestic use. He also urged the Court to revisit the record of appeal in which he testified on how the respondent neglected her domestic and parental responsibilities, forcing him to employ child care providers and personal assistants whose salaries were paid out of the borrowed money. Mr. Nyakamo urged us to be guided by the decisions of this Court in **Harold Seklete Levira & Another v. African Banking Corporation Tanzania Ltd (Bank ABC) & Another** [2022] TZCA 754; and **Catherine Honorati v. CRDB Bank & 2 Others** [2023] TZCA 17985, wherein it was held that, written agreements reflect the truth between the parties and prevail over verbal assertions as they express clear intentions of the parties.

The respondent's argument is, expectedly, divergent. She argued that, what the appellant produced were the loan agreements without any

evidence of disbursements, withdrawal slips or such other documents. She contended that, there was no tangible evidence beyond mere assertions. In her contention, mere agreements without any proof of performance counts for nothing. She beseeched us to find similarity of the factual setting in this matter to what obtained in **Yohana Mathew v. Elizabeth Israel**, Civil Appeal No. 2 of 2012 (unreported), in which it was allegedly held that, a party who alleges a subsisting liability must furnish clear evidence of its existence, such as repayment schedules or demand notices, and that, without such proof, the alleged debt cannot be considered.

The respondent has also cast aspersions on the authenticity of the debts, arguing that the same were unverified, uncorroborated and inconsistent with evidence. She also contended that, no evidence was adduced to link the loan to acquisition or improvement of the matrimonial assets. On this, she referred us to the cases of **Paul Andrew v. Monica Andrew**, Civil Appeal No. 222 of 2018; and **Hemed Omari v. Khadija Hassan**, Civil Appeal No. 188 of 2017 (both unreported).

The respondent threw yet another jab, when she contended that, the loans were taken without her consent, and urged us to reject them, the same way the Court guided in **Zakaria Ismail v. Salma Zakaria**, Civil Appeal No. 20 of 2018 (unreported) wherein we held that, unilateral

debts incurred without the spouse's consent and unrelated to family welfare cannot be shared as matrimonial liabilities. She scoffed at the contention that, the learned Judge imposed an unduly high burden of proof on the appellant.

The law recognizes that estranged spouses may contract debts during the subsistence of their marriage and that, when they do, such debts be disclosed and, the court that sits as a trial court in the matrimonial proceedings, is enjoined to have regard to them. This is the import of section 114 (2) of the LMA, and the appellant is right when he contends that, that is what the law stipulates. It states as follows:

- "(2) In exercising the power conferred by subsection (1), the court shall have regard to -*
- (a) N/A;*
  - (b) N/A;*
  - (c) **any debts owing by either party which were contracted for their joint benefit; and***
  - (d) N/A. [Emphasis is added].*

The pertinent question that needs our consideration is whether the appellant did enough to prove, not only that he contracted debts, but whether such debts were contracted for the joint benefit of the spouses.

Further to that, we think, need would also arise to satisfy the trial court that, such debts were known to the other spouse, in this case the respondent and, if she consented to their contracting.

Mr. Nyakamo has pegged his contention on exhibit RR-5, the loan agreement. This exhibit has been scathed by the respondent and concurrently held by the lower courts to be deficient in proving the existence of any debt and, if so, whether its contracting fitted the description that the law demands. While we may not have any qualms about the existence of the loan agreement, we fully subscribe to the reasoning by the lower courts, especially the High Court, and the respondent's contention that, that alone, is not sufficient to prove: **one**, that the sum reflected in the loan agreement was disbursed. **Two**, that having been disbursed, the said sum or part of it, was spent on an undertaking which was of joint benefit to the spouses. This is where the call for a bank statement, proof of disbursement of pay in slips that prove withdrawals or transfers becomes mightily important.

We hold the view that, it is not enough to allege that, he and a certain Mr. Hiteshkumar Kaushik Bhai Bhatt entered into a financing arrangement through a loan, for, it is one thing to agree to lend some amount to a borrower, but quite another, to actualize the parties' desire

as agreed in the loan agreement. We are not convinced, one bit, that exhibit RR-5 is sufficient to conclude that money changed hands from the lender to the appellant. We are not persuaded, either, that the evidence on the existence of the alleged debt was verified and corroborated. A mere frame work, which is what exhibit RR-5 is, cannot prove that, a debt was contracted, if no other corroborating evidence exists to show that the sum reflected in the agreement was realised by the borrower.

There is yet another hurdle for the appellant to surmount. This is in respect of whether, the debts (if at all they were contracted), were for the joint benefit of the spouses. The appellant's counsel has singled out the cost of hiring the maids and personal assistants as one of the expenditure channels. As he did that, nothing of significance was adduced to show the salary structure of those employees and the duration in which such payments were effected. On improving the business that the respondent started, the appellant has not come out clean on how much was spent and in which way. This has placed us in a position that has denied us of the opportunity to come up with the exact figure, out of the contracted debt, that was sunk in any of their joint undertakings.

Equally plausible, is the contention by the respondent, which is a legal requirement, to the effect that, a spousal consent is imperative

whenever debts are incurred by one of the spouses, especially where the debt is to be incurred for issues which are exclusively for the borrower's benefit, meaning that, the debt is unrelated to the family welfare. In the instant case, the appellant has not sufficiently adduced evidence to show that the debts incurred had any component of family welfare. In such a case, consent of the respondent was necessary, and its absence has the effect of excluding it from the liabilities which should be shared between the spouses. It is in the totality of all this, that we find this ground of appeal hollow and we dismiss it.

In ground four, Mr. Nyakamo's misgivings reside in the contradictions between the judgment and the decree on who should pay the maintenance cost. Whereas the judgment imposed the obligation on the appellant, the decree imposes that obligation on the respondent. In the appellant's contention, this was a substantive error and that, his attempts to rectify it under section 106 of the Civil Procedure Code [Cap. 33 R.E. 2023] (the CPC) were thwarted by the court administrators who took the view that the court was *functus officio*. He also took an issue with the imposition of that sum without any social welfare inquiry, and failure to take due cognizance of the guiding principles as enunciated in **Festina Kibutu v. Mbaya Ngajima** [1985] T.L.R. 42 in which it was held that

maintenance orders must be reasonable, and must take into account the financial capacity of both parents. He contended, as well, that sections 8 (1) and 44 of the Law of the Child Act [Cap. 13 R.E. 2023], were not given due consideration as the respondent's earning capacity was not considered in ordering maintenance. He urged that the appellant be relieved from maintaining the elder of the issues while the younger is placed in the appellant's custody.

The respondent has slammed the appellant's contention in this ground of appeal. The respondent's criticism is in the procedure applied by the appellant to right the wrong done in the decree. Her contention is that, such anomaly, a clerical error, is rectifiable not through an appeal, but through invocation of section 96 (now section 106) of the CPC. It would not require a reversal of the decision which is what an appeal is all about. She firmly contended that, no clerical errors can vitiate judicial decisions. She urged us to be guided by the decisions of **Ngoni-Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman** [1959] E.A. 577; and **Tanzania-China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] T.L.R. 70, and dismiss this ground of appeal.

Initially, we agree that the disquiet on the variance between what is in the judgment and the content of the decree is justified. Each document places a responsibility on the opposite party. This anomaly has also been acknowledged by the respondent who contended, however, that the remedy lies in section 106 of the CPC and not through an appeal process. The respondent's exposition is correct and we subscribe to it. The error which only requires that the word "respondent", appearing in the decree, be substituted with the word "appellant", is a mere clerical error, curable through a mere application under rule 106 of the CPC to move the court that extracted the decree to address the anomaly.

The learned counsel for the appellant has contended that, his attempt to move the court to rectify the error was met with resistance from an unnamed court official. We do not think this is a plausible reason. But even assuming that that was true, was the court official's stance a court decision from which an appeal would lie? We think it is not, and hold that the route preferred by the appellant is irregular and untenable.

The next segment of the ground decries the unjustified reduction of the maintenance cost from TZS. 500,000.00 to TZS. 300,000.00. The appellant feels jittery about the manner this was done. It was, in his contention, a subjective approach which defies the law. It should be noted

that, in varying the order, the learned Judge reasoned, at page 220 of the record of appeal, as follows:

*"The record at the trial court indicates that there is no evidence which was adduced by the parties to prove their earning capacity other than a statement made by the appellant .... As there is no clear evidence on the earning capacity of the appellant and considering that the respondent has earning capacity and can contribute towards the maintenance of the children, this court varies the order of maintenance and thus orders the appellant to provide TZS. 300,000/= per month as maintenance."*

It is incontrovertible, in our view that, the learned Judge attempted to fix the trial magistrate's error by committing yet another error of not having a solid legal foundation for settling on TZS. 300,000.00 and not a lesser sum or a higher sum. It is clear that, section 8 of the Law of the Child, imposes a responsibility on the parent, guardian or a person to which custody has been granted, to provide for basic needs of the child such as shelter, food, clothing and education. Where marriage between the parents is dissolved this takes the form of maintenance. The granting of a maintenance order is legally guided, and the relevant provisions are sections 44 and 45 of the said Act, whose substance is as reproduced hereunder:

"44. *A court shall consider the following matters when making a maintenance order:*

(a) ***the income and wealth of both parents of the child or of the person legally liable to maintain the child;***

(b) *N/A;*

(c) *N/A;*

(d) *N/A;*

(e) *N/A.*

45.-(1) ***A court may order a social welfare officer to prepare a social inquiry report before consideration of an application to make an order for maintenance, custody or access.***

(2) ***The court shall, in making such order, consider the social inquiry report prepared by the social welfare officer.***" [Emphasis added]

Clearly, and this is the appellant's complaint, no assessment was made on his financial ability on the basis of which a quantum would be set. The learned Judge lashed out at the trial Magistrate's subjective approach to the matter but, when we expected that the anomaly would be addressed, the learned Judge was only troubled by excessive part of the order. This means that, the guiding principles under the law were given

a wide-berth, and we think this is a little specious. We, in consequence, find merit in this ground. We order that, the matter should be remitted to the trial court for a specific purpose of ascertaining the income and wealth of both parents of the child, consistent with the law before it arrives at the figure that the appellant should be obligated to pay.

The bone of contention in ground five is that, the learned Judge treated the appellant's complaint on visitation order as a new ground of appeal, whilst this complaint constituted a ground in the appeal to the 1<sup>st</sup> appellate court. In the appellant's contention, the learned Judge's holding was a procedural mischaracterization which denied him the right to be heard on this crucial point, contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, as underscored in **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy** [2005] TZCA 105.

Mr. Nyakamo is of the contention that the visitation order failed to consider sensitive personal and religious dynamics of the parties. These, he argued, ought to have informed the crafting of custody and access arrangements. He emphasized that, a visitation arrangement must be clear, enforceable, and considerate of practical and ethical implications. On custody of the children, he was of the contention that the social welfare report clearly stated that, the elder child expressed his willingness to stay

with the appellant but the trial magistrate was unfazed. In his contention, the whole import of section 45 of the Law of the Child Act was rebuffed. On the younger of the children, the appellant was of the contention that, he has been responsible for ensuring that she attends a regular speech therapy to address her speech disorder and that, her stay with the respondent is disruptive of the arrangement. He, in conclusion, urged us to allow the appeal.

The respondent has leapt to the learned Judge's defence. To begin with, she has raised a contention that, this is a new ground that does not warrant the Court's attention. She based her contention on the decisions of the Court in **Hotel Travertine Ltd & 2 Others v. National Bank of Commerce** [2006] T.L.R. 133 and **James Funke Gwangilo v. Attorney General** [2004] T.L.R. 161. She was of the view that, the High Court was right in holding the ground as new.

Regarding the visitation order, the contention is that the High Court was spot on in its decision, and that, section 125 (2) of the LMA gives discretion to the court to have regard to welfare of the child in granting custody. The respondent contended that, the arrangement, as it currently is, has no issues and that, the appellant can always apply for change of arrangement in case of any issues. She argued that, at no point in time

was the children's welfare in jeopardy or the visitation order compromised. She implored the Court to dismiss the appeal.

This ground is equally unmerited. Our review of the record of appeal takes us to pages 78 and 79 at which the petition of appeal to the 1<sup>st</sup> appellate court is found. The petition carried five grounds of appeal and in none of such grounds was the question of the visitation order raised. It would be odd for the High Court, sitting on second appeal, to venture into an issue which the lower court did not have the opportunity to canvass.

In many a time, this Court has maintained that, new grounds that seek to introduce factual issues which were not a subject of litigation in the lower court or tribunal are a jurisdictional issue from which an appellate court should keep off – see, for instance, in **Abdul Athuman v. Republic** [2004] TLR 151; **Sadick Marwa Kisase v. Republic** [2013] TZCA 389; **Hassan Bundala @ Swaga v. Republic** [2015] TZCA 261; **Omary Saimon v. Republic** [2019] TZCA 470; and **Yusuph Masalu @ Jiduvi v. Republic** [2018] TZCA 222. It follows that, the High Court would be enjoined to determine the appellant's new ground if the ground was on a point of law – see: **Julius Josephat v. Republic** [2020] TZCA 1729; and **John Madata v. Republic** [2020] TZCA 154. This means that, the High Court realized that it was not properly seized to determine the

new point and we see nothing fallacious in its decision. We, therefore, see no merit in this ground and, accordingly, dismiss it.

In consequence, save for what he held in respect of ground five of the appeal, we find the appeal barren of fruit and we dismiss it. This being an appeal arising from a matrimonial matter, we make no order as to costs.

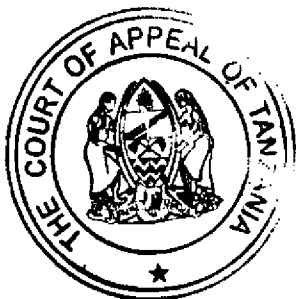
**DATED** at **DODOMA** this 20<sup>th</sup> day of May, 2026.

R. J. KEREFU  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

M. K. ISMAIL  
**JUSTICE OF APPEAL**

Judgment delivered virtually this 20<sup>th</sup> day of May, 2026 in the presence of Mr. Danstain Goshoko Nyakamo, learned counsel for the appellant, respondent in person - unrepresented and Mr. Shafii Kassim Court Clerk; is hereby certified as a true copy of the original.



*A. S. Chugulu*  
A. S. CHUGULU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**