IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., GALEBA, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 169 OF 2019

NACKY ESTHER NYANGE ..... APPELLANT

VERSUS

MIHAYO MARIJANI WILMORE ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, Dar es Salaam Registry, at Dar es Salaam)

(Kitusi, J.)

dated the 27th day of September 2018
in
Civil Appeal No. 24 of 2018

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JUDGMENT OF THE COURT

15th March, & 16th August, 2022

KOROSSO, J.A.:

This is the second appeal. In the Resident Magistrate's Court of Dar es Salaam at Kisutu, the appellant (then the petitioner) sued the respondent in Matrimonial Cause No. 38 of 2015 claiming the following reliefs: a decree of divorce; to be given sole legal and physical custody of the children and respondent have occasional visitation or access rights; to be paid by the respondent spousal maintenance of USD 2000.0 per month for the period of ten years from the date of divorce; payment of USD 3000.00 per month from the respondent for child

support up until each child reaches the age of 18 years; payment from the respondent of arrears for child maintenance and spousal maintenance at the rate stated from the date of separation on 1/9/2014 up to the date of the divorce decree; payment from the respondent for school fees and medical expenses for the children as the need arises; order for the respondent to allow the appellant and the children to remain in the matrimonial home until both children reach the age of 18 years; an order for equal division of matrimonial properties; an order prohibiting the respondent from withdrawing funds from the children's bank accounts without approval of both parties; costs; and any other reliefs as granted by the court.

To ease understanding of the context founding the instant appeal, it is apt to present its background albeit in brief, as revealed by the evidence adduced at the trial. The appellant and respondent were wife and husband who celebrated their civil marriage in Minnesota, United States of America on 26/12/2006. The marriage was blessed with two issues named Malaika Nyange Wilmore, a girl born on 11/09/2005, and Jacques Edward Wilmore, a boy born on 15/7/2009. The appellant and respondent by consent, separated in September 2014, with an agreement for the respondent to give the appellant USD 1000.00 per

month for the maintenance of the appellant and the children. However, the respondent defaulted to pay it for the months of September, October, and November. This led the appellant, in August 2015 to knock on the doors of the Resident Magistrate's Court of Dar es Salaam, at Kisutu with a petition seeking reliefs specified above.

In the petition, the appellant alleged various matrimonial transgressions on the part of the respondent that included infidelity, cruelty, physical and verbal abuse, neglect, and affronting her family members. In particular, the appellant alleged that the respondent committed adultery with someone named Yasmin Chali and that he had also deserted her from September 2014 to the time of filing the petition. The appellant alleged that essentially the marriage was irreparably broken down. An interim order was issued by the trial court for maintenance at the rate of USD 500.00 per month. In her evidence, the appellant alleged the amount granted for maintenance was insufficient to offset the family's monthly budget as she spent USD 900.00 as wages for house helpers and that the other essential items budget was Tshs. 1.2 million per month.

At the trial, the appellant (PW1) adduced that she and the respondent had acquired various assets during the subsistence of their marriage. These included a house built on Plot No. 361 G Hekima Street, Mbezi Beach (suit house), which is in the name of Mariam Marijani Wilmore, the respondent's mother. However, according to the appellant, she contributed to its acquisition through performing domestic duties and thus it was a matrimonial property. The appellant also claimed part ownership of shares in various companies of which the respondent had shares together with the money in the bank accounts which were in the name of the respondent. She claimed that they had been acquired during the subsistence of the marriage. Moreover, she expounded further that since she had the custody of their two children from the time of their separation, she deserved to get their full custody. PW1 contended further that respondent suffers from mood swings and irritable behaviour that impacted negatively on the children causing them psychological effects which should disqualify him from being granted their custody.

The respondent, born of a father of American citizenry and a mother who is a Tanzanian citizen, on his side conceded that the marriage could not be salvaged. He denied allegations of committing

matrimonial lapses as presented and stated that Yasmin Chali was a business partner and not his paramour. He described the appellant as a spender of money indiscriminately, and one addicted to night parties and outings notwithstanding the fact that she is a mother with children who needed her care. The respondent stated that when he got tired of the appellant's intolerable habits, acting on his lawyer's advice, he signed an agreement in which the appellant agreed to be given what she had stated was her dream vehicle, a Land Rover Discovery Registration No. T385 DCB which cost him USD 115,000.00 and was worth more than three vehicles he owned. Of the three vehicles he owned, one was gifted to him by Fadhili Nkya, the second vehicle he had purchased using money from a loan from his mother, and the third, the Range Rover Evoque Registration No. T 504 DVB, he had purchased for his mother and thus argued that the said three vehicles were not matrimonial properties.

The respondent further stated that the appellant had no shares in his companies, but he had given her USD 40,000.00 to start up her own business dealing with decorations and events organization. He stated that the appellant was employed as a banker and that she never spent her earnings to support the family responsibilities and he was the

sole provider of all essential household requirements. He also testified that he had paid for the appellant to study abroad which invariably improved her academic and job qualifications. With respect to the house situated at Mbezi Beach where the family lived, the respondent contended that it did not belong to him although the swimming pool was constructed when they were living there.

Juliana Leus Ngonyani (DW1), an employee of the Ministry of Land, testified that the house was in the name of Mariam Marijani Wilmore (the respondent's mother) and stated that a title deed is conclusive proof of ownership of land. According to the respondent, properties that are jointly owned with the appellant are the domestic appliances and cars, and if she wanted a share of everything he owned, the appellant should also seek to share his debt amounting to Tshs. 1.9 billion.

The respondent contested the prayer for spousal maintenance stating that the appellant was gainfully employed with a good position while he was unemployed. Regarding maintenance of children, he challenged the amount prayed for stating it was unreasonable, however, he undertook to pay the statutory stipulated minimum rate.

Another issue in which parties differed was on matrimonial assets and their division thereof. The respondent disputed the existence of most of the assets listed by the appellant as jointly acquired. He admitted to only one motor vehicle as a jointly acquired property, that is, Land Rover Discovery Reg. No. T 385 DCB. He also disputed joint ownership of company shares, house, and bank accounts arguing that the appellant had her own bank accounts which had not been included in the appellant's list as matrimonial assets. The respondent had no qualm about the appellant being given domestic and household appliances, rejecting the need to distribute them amongst the parties.

The respondent also strongly denied the appellant's allegations that he was not fit to take care of the children stating that the appellant is a person with low moral standing who relishes attending to parties and having a good time at oddly hours of the night leaving the children unattended and at risk especially since one of them is asthmatic. Thus, he prayed to be given custody of both children.

On 22/9/2015, the trial court upon hearing the rival parties and finding it not to be a contentious issue between them, granted the

divorce as prayed. Thereafter, the trial proceeded to determine other sought reliefs.

Upon hearing the adduced evidence from the parties, the trial court granted the custody of the two children to the respondent, while the appellant was granted visitation rights. The children were given the right to visit their mother anytime. The appellant was awarded one motor vehicle, the Land Rover Discovery Registration No. T 385 DCB. It was also ordered that the respondent keep the remaining three cars whilst the claim for spousal maintenance was dismissed. The appellant was aggrieved by the trial court's decision and appealed to the High Court whereby the appeal was dismissed in its entirety with costs.

Discontented, the appellant has preferred an appeal to this Court through a memorandum of appeal predicated on eight grounds that fault the High Court decision which compressed, we find to generate the following five grievances: **One**, the propriety of giving custody of the children to the respondent. **Two**, improper distribution of the various properties allegedly acquired during the subsistence of the marriage. These included shares held in various companies and director's fees; the house on Plot No. 361 G, Hekima Street, Mbezi

beach Kinondoni District; money in various bank accounts; and domestic and household appliances. **Three**, the propriety of the granting costs to the respondent in a matrimonial proceeding. **Four**, the first appellate court's failure to evaluate each and all the grounds of appeal, and **five**, dissatisfaction with the first appellate court's decision to find in favour of the respondent.

At the hearing of the appeal before us, the appellant was represented by Mr. Frederick Werema and Mr. Nuhu Mkumbukwa, both learned Advocates while Mr. Kelvin Kayaga, learned Advocate, entered appearance for the respondent.

Mr. Mkumbukwa's submissions commenced with his adoption of the written submission along with the list of authorities filed by the appellant on 10/9/2019 and 9/3/2022 respectively. Amplifying on grievance number one, the learned counsel faulted the learned High Court Judge for not applying the established principle of the best interest of the child when determining who among the parties should be granted custody of minor children. He argued that since the issues born of the marriage of the appellant and respondent were under the age of 18 years and under the custody of the appellant at the time of

deciding the case, the High Court should have found that in granting their custody to the respondent, the trial court erred since it was an interruption of their lives.

According to Mr. Mkumbukwa, the trial court misdirected itself by giving weight to the financial capacity of the respondent to deny the appellant custody of the two children, an issue he argued, that various decisions of the Court have settled not to be the determining factor when granting custody of children. He argued that the appellant's evidence did show how she cared for the children, evidence which was supported by that of PW7. Furthermore, he argued, that prior to the hearing of the divorce petition, the parties had agreed that the custody of the children remain with the appellant. He contended further that there was no evidence that showed that the appellant had no financial capacity to care for the children since even the respondent had testified that he had supported the appellant to establish a company which shows she had adequate financial means. According to the appellant's counsel having regard to the fact that the respondent is not a citizen of Tanzania, it is in their best interest for the children to remain in the custody of their mother who can raise them in the culture and practices they are used to.

In response to grievance number one, Mr. Kayaga argued that the legal framework for marriage and child rights demands that when addressing issues of children, including custody, the best interest of the child should be accorded paramount consideration as provided in section 125 (2) of the Law of Marriage Act [Cap 29 R.E 2019] (the LMA) and sections 4 (2) and 26 (2) of the Law of the Child Act [Cap 13 R.E 2019] (the LCA). He maintained that established guidelines to guide the court when considering the best interest of the child should be followed. The learned counsel argued further that in the instant appeal, since non-consideration of the opinions of the children was not discussed in the first appellate court, it should not be an issue in this Court. Similarly, in the absence of the opinions of the children on record it was not the duty of the High Court to seek for them as guided by section 36 (2) of the LCA, he argued.

The learned counsel contended further that a scrutiny of the record of appeal reveals that in determining who should be granted custody of the children, the appellant failed to prove that she was more suitable and that it would be in the best interest of the children to be put under her custody. After consideration of all relevant factors, it was

the trial court's finding that granting custody to the respondent will be in the best interest of the children.

We have carefully examined the record of appeal, the contending oral and written submissions by the parties, and the commensurate authorities cited by the parties which we very much appreciate. In our determination of grievance number one that faults the trial and first appellate courts' failure to invoke the principle of the best interest of the child when granting custody of the two children of the marriage to the respondent and only considering the respondent's means, we find it apt to begin by briefly discussing the principle itself.

The principle of the best interest of the child is embodied in our laws. Section 125 (2) (a), (b) of LMA articulates that in deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant, and subject to this the court shall have regard to the wishes of the parent, the wishes of the infant, where he or she is of an age to express an independent opinion and the custom of the community to which the parties belong. In the LCA, section 4 (2) states:

> *"The best interests of a child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies".*

With regards to custody of children, section 26 (1)(b) of the LCA states:

> *"live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child."*

Moreover, section 37 (4) of the LCA requires the courts when granting custody to primarily consider the best interests of the child. In applications for custody, the best interest of the child is determined in consideration of such factors as; the age and sex of the child, the independent views of the child, the desirability to keep siblings together, continuity in the care and control of the child, the child's physical, emotional and educational needs, the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent (see sections 26 and 39 (2) of the LCA and Rule 73 (a) to (i) of the Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 (hereafter referred to as the Juvenile Court Rules).

Our perusal of the record of appeal has revealed that the first appellate Judge when determining the issue of the custody of the children at page 718 stated that:

> *"I will resolve this issue by making my own assessment of the evidence. While the appellant had been discredited for not taking good care of the children, the respondent made an impression that he holds them so close to his heart to the extent that not only that he spends over them but he goes out of his way to know their friends as well as their best games. These in my view are the attributes that qualify the respondent to have custody of the children, and the fact that he has the means, adds to the rationale*".

As can be discerned from the above excerpt from the judgment of the High Court, clearly, the High Court reassessed the evidence and was aware of essential matters to consider when determining the custody of the children. Further, on page 715 of the record of appeal, the High Court Judge stated thus:

> *"... I note that the parties agree on two key principles.* ***The first is that in determining the question of custody of the children the***

court should always aim at achieving what is in the best interests of those children... [Emphasis Added].

We are of the view that as argued by the respondent's counsel, the findings of the High Court Judge shown above undoubtedly reveal that the provisions of section 4(2) of the LCA and sections 125 (1), (2), (3) and (4) of the LMA requiring consideration of the best interest of the children in the determination of custody of children is what guided the High Court in its determination of the issue under scrutiny in the first appeal. It was upon applying the relevant principles, that the High Court thus placed their custody in the hands of the respondent, their father. Similarly, consideration of the respondent's means was an additional and not the primary factor as argued by the appellant's counsel. We thus find nothing to fault the first appellate court on this issue. Therefore, the first ground fails.

The appellant's complaint in the second grievance is against the trial and first appellate courts on the propriety of the distribution of various properties alleged to have been acquired during the subsistence of marriage. Properties alleged to be matrimonial properties included various shares the respondent allegedly held in various companies, the

suit house which the family lived in at Mbezi, and motor vehicles as already alluded to above. It is noteworthy that at the hearing of the instant appeal, the Court was informed by counsel for both parties that there is a pending matter in the Court for determination of the ownership of the House on plot No. 361 Block G House No. 30, Hekima Street, Mbezi Beach area (suit house) in **Nacky Esther Nyange Vs Mrs. Mariam Marijani Wilmore**, Civil Appeal No. 207 of 2019. In the circumstances, we are of the firm view that proceeding to determine any matter related to the suit house at this juncture will not serve the interest of justice particularly, since the said case is not before this panel for determination.

In the circumstances, in the instant appeal, we shall refrain from determining the complaint on whether the house on plot No. 361 Block G House No. 30, Hekima Street, Mbezi Beach area is property acquired during the subsistence of marriage between the appellant and respondent and subject to distribution in the instant appeal. We are of the firm view that such determination should await proof of ownership of the suit house which we have been informed and have taken judicial notice that it is before this Court pending hearing and determination.

Regarding the appellant's disgruntle on the failure of the trial and first appellate courts to properly distribute shares owned by the respondent and the directors' fees granted to the respondent, Mr. Mkumbukwa contended that there was evidence adduced in court that the respondent had shares in four companies that were acquired with the appellant during the pendency of their marriage. He argued that the respondent was also granted fees as a director in various companies during the pendency of their marriage. He thus faulted the trial and first appellate courts for holding that the appellant's contribution was negligible under the circumstances and consequently fail to properly consider the appellant's contribution in the acquisition of those shares notwithstanding the available evidence showing that the appellant's contribution was through domestic and wifely services she undertook. He argued that had the trial and first appellate courts considered this fact they would have found that under the circumstances, the shares were in essence rendered matrimonial property and entitling the appellant to get some contribution therefrom.

When confronting the argument that the household had various house helpers who undertook domestic duties, the learned counsel rejected the contention and argued that this should not detract from

the appellant's contribution to the acquisition of the matrimonial properties through expanded wifely duties however negligible they might be. To underscore his stance, he cited the decision of the Court in the case of **Charles Kachare and Another Vs Apolina Kasare** [2003] TLR 425 and **Bi Hawa Mohamed Vs Ally Sefu** [1983] T.L.R. 32.

The learned counsel further faulted the trial and the High Courts' failure to order that the appellant be given the Range Rover Evogue Registration No. T504 DBV, which was a matrimonial property and the respondent had handed it to his mother when the marriage became sour, and the appellant had initiated court processes subject to the instant appeal with the intention to defeat any claims sought by the appellant related to the vehicle.

The appellant further challenged the respondent's claims that the claimed motor vehicle was gifted to his mother arguing that there was nothing presented in court to establish this contention, such as a gift or transfer deed to prove the disposition and the pass of the title of the motor vehicle to the mother. He argued that the motor vehicle was part of matrimonial properties acquired during the subsistence of their

marriage. Mr. Mkumbukwa also faulted the trial court for relying on the certificate of registration of the vehicle without deciding on how it was obtained, arguing that the High Court also fell into the same trap by also not considering when the change of hands to the respondent's mother took place.

The other component of the second grievance related to the money in various bank accounts belonging to the respondent. According to the appellant's counsel, the trial and the High Courts failed to properly distribute the same to the appellant, notwithstanding the fact that the money therein was jointly acquired. The learned counsel contended that this was further amplified by the trial court's rejection of the application for disclosure of accounts without advancing any plausible reasons to justify such rejection. He contended further that the rejection did prejudice the appellant to get her share of the said money and thus faulted the High Court for failure to rectify the said error occasioned by the trial court. He thus prayed that the Court considers and allows this grievance.

The respondent's counsel response to grievance number two was first, that there was no evidence adduced in court on how the appellant

contributed to the acquisition of shares of the companies the respondent had. He argued that the appellant neither showed the annual returns for the relevant companies whose shares were under scrutiny nor the number of paid-up shares to show the viability and returns of the alleged shares acquired by the respondent during the subsistence of the marriage. The learned counsel also challenged the relevance of the case cited by the appellant, **Charles Kachare and Another** (supra) arguing that it is distinguishable since in the instant appeal the actual contribution by the appellant was unclear.

Addressing the concern on the money in the respondent's bank accounts, Mr. Kayaga argued that the appellant failed to disclose requisite information on the relevant amounts in the bank accounts and how the appellant contributed to them and thus argued that the complaint has no merit for lack of evidence or information to substantiate claims.

On the motor vehicles, the learned counsel for the respondent argued that the motor vehicle was intreated by the appellant, that is, Range Rover Evogue Reg. No. T504 DBV even though registered in the name of the respondent's mother, Mariam Marijani Wilmore. He argued

that the vehicle did not belong to the respondent and was not a matrimonial asset. The learned counsel further contended that the appellant was given by the respondent during the pendency of their marriage a motor vehicle of her dreams, Land Rover Discovery 4 T385 DCB. A vehicle which the trial and first appellate courts ordered to be handed to the appellant and thus had no right to seek for other vehicles which do not belong to her.

In tackling grievance number two on the failure by the High Court to properly evaluate evidence related to various alleged matrimonial properties, having heard and considered the oral and written submissions and the cited authority, and having refrained from determining on the suit house for reasons already stated hereinabove, what is left for our determination is complaints related to impropriety in the distribution of respondent's shares in various companies, motor vehicles and money in the bank accounts alleged to be in the name of the respondent.

Indeed, in the distribution of matrimonial properties the first appellate court laid down what was to guide its determination on page 715 of the record of appeal stating as follows:

> *"... Secondly, the paramount factor to guide the court in ordering division of matrimonial assets is the contribution of the parties in the acquisition of those assets. I entirely agree with the parties that the settled law on those areas is as agreed by them."*

We agree with the above finding regarding what should guide courts in the distribution of matrimonial properties. Undoubtedly, as held by this Court in **Bi Hawa Mohamed** (supra), the power of the Court to divide assets is derived from section 114 (1) of the LMA that:

> *"the assets envisaged thereat must firstly be matrimonial assets; and secondly, they must have been acquired by them during the marriage by their joint efforts."*

The above statements shall guide us in the determination of the complaint before us.

As regards the motor vehicle Range Rover Evogue Reg. No. T504 DBV, the first appellate court addressed the appellant's contribution in its acquisition and found that this was not proved and thus affirmed the finding of the trial court regarding its status. Both the trial and High Courts have held that the registration of the motor vehicle, Range Rover

Evogue Reg. No. T504 DBV was in the name of the respondent's mother, Mariam Marijani Wilmore desisted from making any orders on its distribution. In deciding so, the trial and first appellate courts were of the view that there should be no orders for distribution on assets whose registration title was not in the name of either party to the suit.

In tackling the above complaint, having gone through the record, as found by the trial and first appellate courts, there is no doubt that the said motor vehicle Range Rover Evoque Reg. No. T504 DBV is registered in the name of Mariam Marijani Wilmore as registered on 3/10/2014, a fact not contested by the appellant. Indeed, the fact that Mariam Marijani Wilmore is not a party to the instant appeal, essentially, we agree with the holdings of the trial and first appellate courts, that it will not be in the interest of justice to make any determination on the said motor vehicle. The fact that the title to the motor vehicle is not in the name of any of the parties to the instant appeal means at this juncture there can be no determination on whether it was a matrimonial asset acquired during the pendency of the marriage and thus subject to distribution to the parties. Essentially, the argument that there was no deed of transfer or gift, or that the transfer was effected after divorce proceedings have been initiated does not change the fact that

the motor vehicle was in the name of the respondent's mother at the time of the trial.

Without a doubt, the argument that the transfer to the respondent's mother's name is a matter which may be advanced in a proper suit determining the proprietorship of the same and not in this appeal is a matter requiring careful consideration. Thus, like the trial and first appellate courts, having carefully considered all the rival arguments and the underlying circumstances, we have decided to refrain from determining the distribution of the same. We shall also not disturb the holdings of the lower courts regarding the distribution of the other three vehicles Pajero Reg. No. T409 CHF, Toyota RAV4T870 DTB, Mustang T805DCY were ordered to remain with the respondent, and Land Rover Discovery 4 T385 DCB was ordered to remain with the appellant since it was not a subject to complaints in this appeal.

The other component of grievance number two related to the first appellate court's failure to recognize the appellant's share in the respondent's ownership of shares in various companies and the money in various bank accounts and distribute them as matrimonial assets to the parties accordingly. It is pertinent to reflect on how the High Court

addressed this matter. On page 717 of the record of appeal, the High Court Judge observed:

> *"I now turn to the shares and money kept in the respondent's bank accounts. The appellant proved neither the existence nor the amount or value of these assets, let alone her contribution towards their acquisition, so there is simply no basis for making a decision in this respect. The respondent's account that he made his money through hard work and grit is very plausible, in my view, the learned Principal Resident Magistrate correctly rejected the appellant's assertion that she was entitled to a share thereof."*

Clearly, as shown by the above excerpt, the essence of the argument by the learned counsel for the appellant was that since the respondent had shares in various companies and money in the bank acquired during the existence of the marriage between them, then they should be recognized as matrimonial properties and distributed between them accordingly. He urged the Court to take into consideration and recognize the appellant's domestic and wifely services as contributions towards their acquisition and faulted the trial

and first appellate courts for finding the appellant's contribution negligible to warrant her to get anything from them.

Suffice to say, according to PW1, the respondent owned shares in Logistical Company Ltd (450), Umoja One Ltd (10000), and Uhuru One Ltd (75000). The respondent denied having owned those shares.

The distribution of matrimonial property is guided by section 114 (2) (b) and (3) of the LMA which stipulates:

> "*In exercising the power conferred by subsection (1), the court shall have regard to:*
>
> *2(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
>
> *(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.*"

In the celebrated case of **Bi. Hawa Mohamed (supra),** guided by section 114 of the LMA attempted to define what comprises "matrimonial assets" and the Court stated: -

" *In our considered view the term 'matrimonial assets' means the same thing as what is otherwise described as family assets."*

Under paragraph 1064 of Lord Hailsham's HALBURY'S LAW OF ENGLAND, 4th Edition, p. 419, it is stated-

"The phrase 'family assets' has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of capital nature, such as matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife."

The substance of the argument put forth by the learned counsel for the appellant gives rise to the question of what constitutes matrimonial property to warrant distribution to spouses where the need arises.

Suffice to say the learned High Court Judge agreed that on the authority of **Bi Hawa Mohamed case** (supra) domestic chores amount to contribution and the question to consider is the extent of the contribution and how much it entitles a party to a share. Having stated that, the High Court Judge delved into the matter, taking account of the fact that the parties employed two house servants who drew a salary of Tshs. 900,000/= per month concluding that this meant that the appellant had less to do in the form of domestic chores. The allegations by the respondent that the appellant was a spender, he found supported by the fact that the appellant testified that the overall household monthly budget was Tshs. 12 million.

In respect of the shares in the companies and money kept in the respondent's bank accounts the High Court Judge stated:

> *"The appellant proved neither the existence nor the amount or value of these assets, let alone her contribution towards their acquisition, so there is simply no basis for making a decision in this respect. The respondent's account that he made his money through hard work and wit is very plausible in my view and the learned Principal Resident Magistrate correctly rejected*

the appellant's assertion that she was entitled to a share thereof."

It is important to remember that when considering the contribution of the parties to the acquisition of property within the matrimony, in civil cases, the burden of proof lies on the one who alleges, a position as stipulated in sections 110 (1), (2) and 112 of the Tanzania Evidence Act, [Cap 6 R.E 2019] (the Evidence Act) and restated in the decision of this Court in **Anthony M. Masanga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 and **The Registered Trustees of Joy in the Harvest Vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017 (both unreported).

Having gone through the evidence on record and the submissions before us with regard to the shares of the companies and the money in the bank accounts in the name of the respondent, we are inclined to agree with the respondent's counsel's argument that the appellant failed to prove on the balance of probability the existence of the shares and the money in the bank accounts to prove that it was matrimonial property or her contribution to acquisition. In paragraphs 9 (b) (i), (ii) (iii) and (iv) of the Amended Petition, the appellant claimed the

respondent to have shares in Uhuru One Company Limited, Logixical Company Limited, Umoja One Company Limited and Telesis Tanzania Limited and in paragraph 9(d) (i)-(v) highlighted monies in various bank accounts at Stanbic bank, Kenya Commercial Bank (TZ) Ltd, Dar es Salaam Branch and United Bank of Africa (T) Limited in the name of the respondent.

In our scrutiny of the record of appeal, the evidence which referred to the shares in the companies and the money in the bank accounts in the name of the respondent as pleaded by the appellant included the testimony of PW1 who alluded to the fact that the records with BRELA showed that the respondent was one of the two shareholders in Logixical Company Ltd and in Umoja One Ltd, which at the time had four shareholders, the respondent had 10000 shares. He also alluded to the fact that the respondent was one of the three shareholders in Impact Associate Ltd with 33 shares while in Umoja One the respondent had 75000 shares and in Telesis Tanzania Limited, Umoja One was one of the shareholders and the respondent was one of its directors. PW1 also stated that the annual returns for the companies were not current, and returns were presented for all the companies he had no information on whether in Umoja One Ltd there

were any paid-up shares and there was no status update for any of the said companies. PW2 stated that he knew the respondent as a business partner and shareholder in Uhuru One Ltd and Umoja One Ltd, and that he had resigned and surrendered his shares in both Uhuru One Ltd and Umoja One Ltd at the end of 2015. He testified further that Telesis Company was sold to TIGO. He also alluded to various payments that the respondent received as a shareholder of the named companies. PW2 could not recall whether the shares held by the respondent were paid up.

The petitioner (PW7) alleged that the respondent was the custodian of the family money and property in terms of shares in companies and bank accounts which she named to be family investments. Although she stated she was unaware of the number of shares owned by the respondent. She was unable to give any other evidence to support the contention saying that the briefcase with all the relevant documents had been taken by the respondent. She also testified that she is a businessperson and owns a small business in event coordination and is a banker. She conceded that all the bank accounts she had alluded to were not joint accounts and she had no access to them. As for her, she adduced that, as an employee of NMB,

her salary was Tshs. 2.0 million per month. While in her testimony in chief, PW7 had nothing concrete on her contribution to the acquisition of the shares and money in the bank accounts apart from the general statement above that they were family investments managed by the respondent, when cross-examined, at pages 355 and 356 of the record of appeal she stated:

> "*Family investment means investment which we did together. My contribution to those bank accounts was there but I can't tell exactly. I can't tell what kind of shares Mihayo had but were worth a lot. I am not a shareholder in any of those companies. I never contributed anything but what was done by Mihayo is mine.*"

Clearly, the appellant although able to show that the shares and the money in the bank accounts were acquired during the marriage, PW7 was unable to show her contribution. It is clear from her evidence that there was money expanded from the investments which enabled her to study abroad and to maintain the family budget which she acknowledged was quite high. PW7 also clearly showed that within the marriage apart from the salary she received from her job she also had an ongoing business which also added to her income.

It suffices therefore that we affirm the concurrent finding by the trial and first appellate courts that the appellant failed to prove her contribution to the shares and the money in the enumerated bank accounts in the name of the respondent. In addition, we do not think that the rejection of the appellant's application for disclosure of the respondent's accounts did in any way prejudice the rights of the appellant as claimed. This is especially where the principles guiding disclosure of information on bank accounts to noncustomers is considered in line with what was held in the case of **Tournier s National Provincial and Union Bank of England** [1924] 1KG 461, which laid down four conditions (Tournier principles) that should lead a bank to disclose bank account information to third parties.

Additionally, in the instant appeal, we are of the firm view that the appellant failed to show or prove her contribution to the acquisition and maintenance of the shares in the companies and money in the bank accounts in the name of the respondent. The cases cited by the appellant such as **Charles Kasare** (supra) and **Mariam Tumbo Vs Harold Tumbo** (HCT) (1983) T.L.R. 293, are distinguishable in that the circumstances differ. In the instant case, the conjugal and housekeeping roles of the appellant and the content and extent of the

said property were not clearly established. The cheques and emails tendered cannot be said to have established the existence of the money since even according to PW3 and PW4 most of the shares were not paid up and had been sold at the time of the trial and there was no evidence to show the amount in the bank accounts. In the end, we find no merit in grievance number two.

In expounding grievance number three on the propriety of granting costs to the respondent in a matrimonial proceeding, the learned counsel for the appellant argued that the appellant being condemned to pay costs and the first appellate court's failure to interfere with such an order was erroneous especially since no reasons were expounded for such an exceptional order. He argued that this was in contravention of section 90 (1) of the LMA which pronounces that, costs in matrimonial proceedings shall be at the discretion of the court, with a proviso, that a woman shall not be ordered to pay the costs of her husband or former husband unless the court is satisfied that she has sufficient means of her own to make such an order reasonable.

According to the appellant, the above provision presupposes that a court, when ordering a wife to pay costs to a husband in matrimonial

proceedings, must assign reasons expounding on sufficiency in her means. In the instant appeal, the counsel argued that the High Court failed to comply with section 90 (1) of LMA since the appellant, a wife was ordered to pay costs. The decision in the case of **Adriano Gedarm Kipalile Vs Esther Ignas Luambano**, Civil Appeal No. 95 of 2011 was referred to augment the contention. He thus urged the Court to quash the said order and order each party to bear its own costs as is the usual practice in similar cases.

The respondent counsel's response was that grant of costs is the discretion of the courts as duly exercised in the instant case. He thus argued that the order was given by the trial court and confirmed by the first appellate court after having considered all the obtaining circumstances.

In tackling this issue, we find it pertinent to begin by reproducing section 90 of the LMA which reads:

> *"90 -(1) Costs in matrimonial proceedings shall be in the discretion of the court:*
>
> ***Provided that, a woman shall not be ordered to pay the costs of her husband or former husband unless the court is***

satisfied that she has sufficient means of her own to make such an order reasonable.

(2) At any stage of a matrimonial proceeding, the court may, in its discretion, order a man to furnish security for the payment of the costs in that proceeding of his wife or former wife." [Emphasis Added]

In the present case, undoubtedly, the trial court did not make any order as to costs also discerned from the commensurate decree on pages 536 and 538 of the record of appeal respectively. It is the first appellate court that upon dismissing the appeal in its entirety proceeded to order costs and reflected thus in the decree in appeal on pages 719 and 721 of the record of appeal respectively. While we agree with the appellant that looking at the proviso to section 90(1) of LMA it guides a court granting costs not to order a woman to pay costs of her husband or former husband unless the court is satisfied that she has sufficient means to warrant such an order, clearly, the starting point is the fact that costs in matrimonial proceedings are within the discretion of the court. Whether or not the woman has sufficient means to be ordered to pay the costs, without doubt, will be dependent of the obtaining

circumstances, and accordingly, each case shall be adjudged by its peculiar circumstances. In the case of **Richard William Sawe Vs Woitara Richard Sawe**, Civil Appeal No. 38 of 1992 (unreported), the Court discussed the proviso related to costs in the LMA and stated:

> *"The law leaves open the issue of costs. In other words, the law gives the Court discretion to decide on how the costs of the proceedings should be borne by the parties; and no doubt in exercising that discretion the court shall have regard to all the circumstances of the case."*

Certainly, it is settled law as also expounded in section 90(1) of LMA that costs of, and incidental to all civil actions are awarded at the discretion of the Court. In the case of T**anzania Fish Processors Limited Vs Eusto K. Ntagalinda**, Civil Application No. 6 of 2013 (unreported), the Court emphasized that costs, ordinarily, follow the event, unless otherwise decided.

In the instant case, we find that the trial court, upon having refrained from granting costs, and in view of the proviso to section 90(1) of the LMA it would have been proper before condemning the appellant to pay costs, for the first appellate court to have narrated the circumstances, such as satisfaction with the financial means of the

appellant. In the absence of any explanation within the context of the proviso, we are of the view that the first appellate Judge did not exercise his discretion judiciously when he ordered the appellant to pay the costs. Consequently, we find that this complaint has merit, and we thus quash the order for the appellant to pay the costs of the appeal.

This brings us to the last complaint, faulting the first appellate court for failure to evaluate each and all the grounds of appeal. To bolster his argument the appellant's counsel cited the case of **Tanzania Breweries Limited Vs Anthony Nyingi** [2016] TLS 99, where the Court held that where a court decides to reject a party's argument it must demonstrate that it has considered it and provide reasons for rejecting or accepting it, which he argued, the High Court failed to do in the instant appeal. The learned counsel concluded by urging us to quash the decision of the High Court and allow the appeal with costs.

In response, the learned counsel for the respondent argued that the High Court decision was reached upon the trial court's exercise of its discretion and having considered what was on record before it in terms of evidence. He urged us to consider the circumstances of the instant appeal when evaluating the evidence and submissions before

the Court. He contended further that as revealed by the record of appeal, the High Court Judge summarized the evidence and framed issues arising from the grounds of appeal and in essence, all the grounds of appeal were considered and dealt with contrary to the complaints by the appellant. He implored us to find grievance number four to be misconceived and devoid of any substance to warrant our consideration.

In the determination of this complaint, we proceeded to scrutinize the record of appeal particularly the judgment of the High Court and the grounds of appeal before it. As can be discerned from the memorandum of the appeal of Civil Appeal No. 24 of 2018 filed on 17/1/2018 before the High Court of Tanzania, Dar es Salaam Registry, it comprised 12 grounds faulting the trial court. The grounds of appeal were paraphrased thus to read: Propriety in granting custody and maintenance of the two children to the respondent and non-consideration of respondent's abusive manners to the appellant (grounds 1, 3 and 5). Non-consideration of maintenance claims during the pendency of matrimonial proceedings between parties (ground 2). Failure to consider the appellant's contribution to the development of suit house (grounds 4, 6, and 7). Failure to make an order for

disclosure, discovery, and inspection of bank accounts (ground 8). Failure to properly distribute motor vehicle Range Rover Evogue Reg. No. T504 DBV and other vehicles which were allegedly jointly acquired by parties though in the name of the respondent's mother (grounds 9 and 11). Failure to consider evidence on shares in companies as matrimonial assets for distribution amongst parties (ground 10); and propriety in the divorce petition being decided in favour of the respondent (ground 12).

We have revisited the judgment of the High Court and found nothing to support the appellant's contention that all the grounds of appeal were not fully addressed and determined. This is because first, after summarizing the evidence adduced in the trial court, the High Court Judge reproduced all the grounds of appeal on pages 709 and 710 of the record of appeal. Second, the first appellate court summarized the submissions by counsel of both parties for each of the grounds as submitted, see pages 711 to 715. Third, in his determination of the grounds of appeal, the first appellate Judge set out what would guide him, starting with the key principles the parties had agreed on relating to custody of children and division of matrimonial assets and his duty to re-evaluate evidence as the first appellate court. Fourth, in

determining the division of matrimonial properties, the house, shares in the companies, and money in the bank accounts, in essence, it meant he dealt with grounds 4, 6, 7, 8, 9, 10 and 11. Thereafter, the High Court considered complaints related to propriety in giving custody of their two children to the respondent, thus addressing grounds 1, 4 and 5. In addressing ground number two, the High Court Judge deliberated on all issues relating to the custody of the children. Indeed, ground number 8 was discussed in passing upon a summary of issues raised by both sides, moreover, the High Court Judge seemed not to differ with the holding of the trial court hence not requiring much pondering on his part.

Certainly, what is clear is that all the grounds of appeal were discussed either directly or in passing by the High Court Judge. Ground 12, although not listed above, it was a complaint expressing a general grievance of the appellant for the trial court's failure to consider her contribution to the acquisition and development of the matrimonial assets and acts of cruelty such that the trial court granted custody of the children to the respondent. With respect to counsel for the appellant, the above complaints were properly addressed by the learned first appellate court when addressing grounds 4, 6, 7, 8, 9 and

11. As for granting custody of the children, the issues were fully discussed by the High Court Judge when determining grounds 1, 4 and 5. In our view, therefore, ground 12 was fully taken care of by the first appellate court as shown hereinabove and we are inclined to agree with the learned counsel for the respondent that the complaint is misconceived.

The second component to this grievance, challenging the High Court for deciding the appeal in favour of the respondent, having regard to our finding above, we agree with the learned counsel for the respondent that the lower courts correctly dismissed the case after having evaluated the evidence and on the balance of probability found that the case for the appellant was weak. Clearly, as stated in the case of **The Registered Trustees of Joy in the Harvest** (supra), the burden of proof does not shift. In the instant case, the appellant failed to prove her claims.

In the premises, considering our findings above that all the grounds of appeal before the High Court were fully dealt with, we are in tandem with both the trial and first appellate courts' finding that the

appellant failed to prove most of her claims on the balance of probabilities.

In the end, for the foregoing reasons, the appeal stands dismissed to the extent shown herein. Each party bears its own costs.

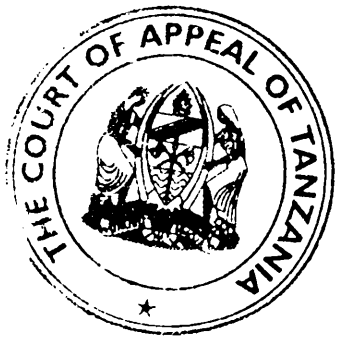
DATED at **DAR ES SALAAM** this 11th day of August, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 16th day of August, 2022 in the presence of Mr. Eric Denga advocate for the appellant who also holds brief for Mr. Kelvin Kayaga, learned Advocate for the Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL