IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 68 OF 2022

SIXBERT BAYI SANKA.....APPELLANT

VERSUS

ROSE NEHEMIA SAMZUGI.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tanga
(Agatho, J.)

dated 30th day of July, 2021
in
Matrimonial Appeal No. 13 of 2020

.....

JUDGMENT OF THE COURT

28th April & 4th May, 2023

LILA, J.A.:

The question of distribution of a matrimonial asset, a house in particular, turns out to be the only issue to be addressed in this appeal. That is consequent upon the learned counsel for the appellant abandoning the first, second and third grounds of appeal before arguing the appeal. That issue forms the crux in the fourth ground of appeal which concern division of a house situate at Mbezi Magari Matatu Kilulu Road. That ground reads thus: -

> *"That the Honourable High Court Judge erred both in law and fact by deciding that the respondent*

financial contribution to the construction of the house through disbursement of the Bank loan from NMB without any documentary evidence to prove the same that the said loan was used for the house construction and the honourable magistrate failed to evaluate the evidence adduced by the respondent."

The background facts are quite clear and straight forward. It is common ground that the parties were spouses having contracted a civil marriage on 13/1/1995 and during the subsistence of their lovely union they were blessed with three children namely James Sixbert Bayi, Valentino Sixbert Bayi and Gilbert Sixbert Bayi who were, at the time the petition for divorce was lodged, aged 23, 20 and 11 years old, respectively. The appellant was an army man and the respondent was a nurse. In terms of income, the two courts below believed that the former earned more than the later.

At the hearing of the petition instituted by the respondent for divorce alleging cruelty, division of matrimonial assets and custody of children of the wedlock before Mbaramo Primary Court in Muheza District, it was contended by the respondent that they owned nothing at the time of the marriage but, during the subsistence of their marriage, they

acquired through joint efforts various assets including the house the subject matter of this appeal to which she contributed towards its construction financially as she was a nurse employed in the year 1993 and was earning income through monthly salary and also she secured a bank loan from NMB for that purpose. Other assets acquired included a plot, a three-acre farm, a Toyota carina and Suzuki motor cars, a motorcycle make Fekon, a cereal selling shop and home furniture and utensils in respect of which Mr. Baraka Sulus, learned advocate representing the appellant before us informed the Court that there is no issue about the manner they were divided between the parties as was the case with the divorce decree issued by the trial primary court.

The allegation of cruelty was seriously refuted by the appellant raising various accusations to the respondent whom he wanted back to the matrimonial home. He disputed the respondent's financial involvement in the construction of the house which he asserted that he constructed it using his salary, money he was paid when he went on mission in Sudan and retirement benefits. Elaborating, he said: -

> *"...Mali zote nilizonazo nilikopa kupitia mshahara, hela ya vitani mpaka nilipostaafu. Pesa yangu ilichangia kwa kujenga, magari yangu nilikuwa*

nanunua kwa hela yangu ya mshahara, mikopo na hela ya kustaafu."

The Primary Court, at the end of the trial, granted divorce, found the listed properties to be joint matrimonial assets and proceeded to divided them to the parties which orders were unsuccessfully challenged by the appellant before both the district court of Muheza and the High Court and which, as demonstrated above, are not being challenged before us save for the division of the house. The trial primary court had, upon evaluation of the evidence before it, granted 40% to the respondent and 60% to the appellant of the value of the house upon being sold.

Before the Court, Mr. Sulus adopted the written submissions he had earlier lodged in Court on 29/09/2021 without more and asked the Court to do justice to the parties upon consideration of the evidence on record. The respondent, who appeared in person and unrepresented, followed suit to the reply written submission she filed in Court on 24/4/2023. We shall refer to their contents in the course where we shall find relevance.

As it is plain that this is a third appeal, the Court's mandate to interfere with the concurrent findings of facts of the three courts below is restricted. This Court can only do so where there is a misapprehension of evidence by misdirection or non-directions which has occasioned a

miscarriage of justice or where there is violation of some principles of law or procedure. Reliance is placed on a plethora of decisions of the Court in which it has consistently pronounced itself so. (See **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31, **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T.L.R. 297 and **Neli Manase Foya v. Damian Mlinga** [2005] T.L.R 167 cited in **Martin Kikombe v. Emmanuel Kunyumba**, Civil Appeal No. 201 of 2017 (unreported). As a matter of insistence, we find it pertinent to recite what the Court said in **Neli Manase Foya** (supra), that:

> *"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."*

It is with that pointer that we should first gauge the merit of the appellant's complaint before us before we could proceed to examine the evidence on record and see if we can come up with our own finding different from that of the courts below. And, we would add that it is upon the appellant to vividly point out where, in the judgment, the presiding judge or magistrate committed any of the mishaps meriting this Court's interference with the findings.

As alluded to above, the bone of contention between the parties is division of the house situate at Mbezi Magari Matatu along Kilulu Road. In respect of that issue, the appellant's submission is very brief, that: -

> *"It is further argued that, whether the evidence adduced concerning the issue of respondent Bank Loan raised by the respondent, that as have submitted early that there is no evidence adduced by the respondent which show her bank loan contributed to the construction of the house and buying of motor vehicles, hence we find it appropriate for your honourable court to investigate over the same for the essence of substantiate (sic) the connection of the respondent's bank loan to the construction of the said house."*

We note, from the above excerpt, that the appellant is challenging the finding of the learned judge on the ground that there was no material evidence linking the bank loan secured by the respondent and her contribution towards the construction of the house. He is actually asking the Court to re-evaluate and analyze the evidence (to investigate) on the justification of the concurrent findings of the courts below. With respect we cannot do so for he has not pointed out whether there was misapprehension or any misdirection or non-direction of the evidence on the part of the courts below or any principle of law or procedure violated. Conversely, the record bears out clearly that evidence by both sides was put on the scale and weighed and made a finding that the respondent had contributed towards acquisition of the house. We accordingly refrain from interfering with the concurrent findings of the courts below on the house.

Without prejudice to the above, the appellant's sole ground of appeal and the submission thereof seem to suggest that, to prove her contribution, the appellant ought to have produced documents supporting her assertion of the loan she secured from the bank and receipts of the building materials she bought for use in the construction of the house. For one, the record is clear that the respondent tendered the bank loan document together with the certificate of marriage on 9/9/2019, the day

she testified and were received by the trial court as exhibits 1 and 2, respectively. And two, it is ridiculous to treat production of receipts as the only way of proving purchase of hardware materials for construction of the house hence her contribution. Without there being a need to cite an authority, oral, documentary and physical materials are taken cognizance by the law as forms of evidence which, if their credence is impeccable, would be sufficient for determination of a dispute. The trial primary court considered both the exhibits tendered and the parties' oral evidence and arrived at the conclusion it made. We would also add that it is one thing to buy building materials and another thing to ensure that they are really used in the construction of the house as it is also one thing for one to establish that he was financially liquid and quite another guaranteeing that the money was spent in the construction of the house. The same way building materials may be used for construction of a completely different house, the money may be used for other purposes. Section 114(1) of the Law of Marriage Act, 1971 empowers the court upon grant of divorce to order the division between the parties (spouses) of any assets acquired by them during the subsistence of marriage by their joint efforts. It provides, in part, that: -

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

The provisions enjoin or lay a burden to the parties to establish their respective contributions and joint efforts as regards acquisition of the asset which will enable the court to fairly and justly determine the extent of their contribution hence apportion their respective shares. On this, we fully associate ourselves with the High Court observation when dealing with the issue of division of matrimonial property in **Hamid Amir Hamid v. Maimuna Amir** [1977] LRT n. 55, that: -

> *"Where a dissolution of marriage is ordered, the question of distribution of matrimonial assets should not be settled until the extent of the contribution of each of the spouses towards the acquisition of the joint property is established."*

We also take cognizance of the fact that the parties contracted a civil marriage and it was not seriously disputed by the respondent that the marriage was thereafter blessed in Christianity norms. Marriage is

fundamentally considered to be a divine covenant founded on love, affection and trust between the spouses expected to obtain throughout their life. Considering the sanctity of marriage, a court cannot and should not blind itself to the realities of life that during subsistence of marriage spouses transact various social and economic activities without documentations hence the respondent cannot be blamed for not maintaining a record and/or keeping documents of all materials she bought so as to prove her contribution. After all, the appellant, too, did not produce any document to establish his purchase of hardware materials for the construction of the house so as establish his contribution towards the acquisition of the house. Instead, aware that proof in civil cases is on the balance of probabilities, both courts acted on the evidence by both sides establishing their respective contributions and, in our view, arrived at just findings that both parties contributed towards the construction of the house and apportioned the share at 40% for the respondent and 60% for the appellant.

Without losing site, the primary court ordered the house be sold and the proceeds thereof be divided as above. Much as we agree that the court had such mandate, yet sale should not always be a preference where either of the spouses is ready to buy out the other whereby

valuation of the house should be done and an interested and capable spouse may pay the other his or her share. The costs of valuation which should be equally shared by the spouses is normally deducted from the proceeds of sale before division. The parties ought to have been first given the right to exercise this option which we now order to be undertaken. Upon failure to exercise such right then sale of the house will be inevitable.

In fine, this appeal is devoid of merit and is dismissed except for the directives on the order for sale of the house. We make no order for costs.

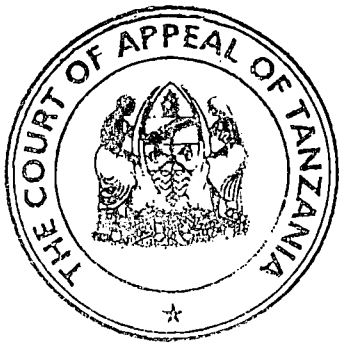
DATED at **TANGA** this 3rd day of May, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 04th day of May, 2023 in the presence of the Appellant and Respondent in person, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL