IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 28 OF 2020

(Arising from the Judgment of Kibaha District Court in Civil Appeal No. 10 of 2019 dated 22nd January, 2020 before Hon. J. MUSHI, RM – Original Matrimonial Cause No. 09 of 2019 – Mailimoja Primary Court)

WEDAELI PHILIPO MARWA ..... APPELLANT

VERSUS

JANETH ALEX CHUMA ..... RESPONDENT

JUDGMENT

13th May & 12th June, 2020.

E. E. KAKOLAKI J

This is a second appeal against the decision of Kibaha District Court in Civil Appeal No. 10 of 2019 which was entered in favour of the respondent. Being aggrieved the appellant registered her appeal in this Court canvassed with five grounds of appeal:

1. That the Honourable Magistrate erred in law and fact in its due diligence to satisfy itself on the existence or non-existence of the house at Morogoro.
2. That, the trial Court erred in law and fact by not considering the principle of equal distribution of matrimonial property acquired jointly while there was an evidence to prove the same.

3. That the Honourable Magistrate erred in law and fact for inclusion of the house of Picha ya ndege as part of the joint acquired property thus to be distributed as matrimonial property while the records clearly shows that the said house is not a matrimonial property.
4. That the Honourable Magistrate erred in law and fact for not considering the evidence produced by the appellant.
5. That the Honourable Court erred in law and fact unequal distribution of matrimonial properties without regarding the appellant's evidence.

The facts leading to this appeal briefly may be stated as follows. Parties were living as husband and wife since the year 2001 until 2007 when they parted each other before they had a re-union of a single day in 2016 where the second child's pregnancy was conceived and born on the same year. The first child was born year 2004 and she is in her secondary school education. Parties begot two girls aged at 14 and 3 ½ years who were at all times under care of their mother (respondent). When the parties parted each other, everyone was leading his/her own life as the appellant at different times was in Congo serving under international military missions. On 19/03/2019 the appellant lodged a Matrimonial Petition No. 09 of 2019 before Mailimoja Primary Court seeking for divorce decree, custody and maintenance of the two issues and division of matrimonial properties. The alleged matrimonial assets jointly acquired included houses at Morogoro and Chalinze, one acre of land at Chalinze, one shop frame and later in the proceedings a house at Picha ya ndege. The trial court issued a divorce decree and ordered custody of two issues to the appellant. Further to that it condemned the respondent to maintenance of the children by providing Tshs. 200,000/= per month and take care of their school fees, clothes and shelter. On the division of the properties allegedly acquired under

joint efforts, the houses at Picha ya ndege, Chalinze and a shop frame were awarded to the appellant whereas the house located at Morogoro alleged to have been demolished and a case pending in court together with the plot at Chalinze remained in the possession of the respondent. Aggrieved the respondent successfully challenged the trial court decision on division of properties through Civil Appeal No. 10 of 2019 - Kibaha District Court where the trial court's decision was varied. This time the alleged existing Morogoro house was ordered to be sold and its proceeds shared at the ratio of 60% of the value and 40% to the appellant and respondent respectively. The Picha ya ndege house remained in possession of the appellant whereas the Chalinze plot and the house thereat were awarded to the respondent. The appellant was discontented with the decision hence this appeal mainly challenging the award of the Chalinze house to the respondent and sharing of the Morogoro house which court was not sure whether it was existing or not.

When the appeal came for hearing both parties appeared unrepresented and prayed to have their appeal disposed by way of written submissions. In her submission the appellant argued the appeal on first four grounds only and dropped ground number five. I will also consider them in the same order in this judgement.

In her first ground of appeal she is faulting the appellate court for not satisfying itself whether the house of Morogoro (Makunganya) existed or not as there was claims that it was demolished and had a case pending in court before issuing the division order to them. She lamented that there was no any document tendered in court to prove that the said house was demolished nor was there any proof of the pending case in court. In opposition the respondent is of the different view in that the trial court

addressed that fact and satisfied itself that the said house was demolished after relying on the evidence that was tendered in court and that is why it so mentioned in its division order. And that there is no way the appellate court could have inquired on that finding as the appellant did not raise it during the appeal. It is true and I agree with the respondent that the trial court reached that conclusion after considering the evidence of the respondent that the said house was demolished, the evidence which was not challenged by the appellant during cross examination. As the finding of the trial court on that evidence was not appealed against by the appellant in the first appeal, I am of the view that she cannot be heard complaining on the same at this stage. This ground lacks merit.

On the second ground the appellant is complaining of the appellate court's failure to consider the principle of equal distribution of matrimonial property jointly acquired while there was ample evidence to prove the same. She puts it that going through the court record it was shown clearly that the appellant and respondent contributed to acquisition of their matrimonial assets which are the house of Morogoro, a piece of land at Chalinze and the house therein. She relied on the case of **Bibie Maulid Versus Mohamed Ibrahim** (1989) TLR 162, which insisted on the division of matrimonial assets by considering contribution of a party on earning them. The respondent is contesting that position by stating that going through the entire record there is nowhere the appellant adduced evidence to prove her contribution towards acquisition of the alleged matrimonial properties. He added that even where it is presumed that there was any contribution still the principle of equal distribution requires proof of contribution in terms of percentage. He said this was the position in the case of **Bibie Maulid** (supra) where it was held that:

"... performance of domestic duties amounts to contribution towards acquisition but not necessary 50%."

He submitted further that contribution of a party to the acquisition of matrimonial assets should be established by a party who allege to have contributed and not by mere words that there were marriage between the parties. I fully agree with the respondent that contribution towards acquisition of assets must be proved by evidence and not mere assertion that there was marriage existing. He who alleges must prove as per the requirement of section 110(1) of the Evidence Act, [Cap. 6 R.E 2019]. In this case when testifying the appellant just mentioned the alleged assets acquired jointly to be the house at Morogoro, piece or plot of land at Chalinze and the house therein, a motor vehicle pick up purchased in 2014 and motor cycle spare parts shop. As to when the said two houses were acquired the appellant was not able to tell the court so as to assist the court determine whether they were acquired during existence of marriage or not. When cross examined by the appellant on the period of subsistence of their marriage she said and I quote:

"Tuliishi 2001 hadi 2007 tulikorofishana lakini mahusiano yalikuwepo. Tulitengana 2007 alitafuta mke mwingine nikakosa uhuru acha huyu wa sasa...."

Literally that piece of evidence can be interpreted as follows.

"We lived together from 2001 until 2007 when we parted due to misunderstandings but the relationship was there. When we parted in 2007 she got another wife leave alone the current one who limited my freedom."

What I discern from that piece of evidence from the appellant is that their marriage lasted for 6 years. As to when the two houses were acquired it is the respondent's evidence that the Morogoro house was built in 2015 up to the lintel level before it was demolished. And the Chalinze house construction started in October 2018. All this evidence by the respondent was not put into question during cross examination by the appellant. It is also undisputed fact that at that period of time each party was leading his/her own life except that the respondent was responsible for maintenance of the two issues including education of the first child. Can any reasonable man conclude that under this period of time when the two houses were acquired the appellant had her own contribution? I think the answer would be no. It is not in dispute that in 2015 and 2018 the appellant had parted already with the respondent and was living at her home. I take it as a trite law that courts should establish first the extent of parties' contribution to the acquisition of matrimonial property before any decision on the division of matrimonial assets or properties is entered. This stand was given by the Court of Appeal in the case of **Gabriel Nimrod Kurwijila Vs. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 (unreported) when stated that:

> *"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution."*

That important duty of the court was not performed by both trial and appellate court, the duty which this court has endeavoured to do herein

above. Under that circumstances and considering the evidence adduced before the trial court anyone in my opinion would find as I hereby do that the appellant had no contribution in either acquisition or improvement of the said assets. I therefore hold that both trial and appellate court erred to consider and find the said two houses part of matrimonial assets subjects of division and proceed thereof to divide them. This ground has no merit too and is dismissed.

With regard to the third ground it is the appellant's lamentation that the appellate court erred to include the house of Picha ya ndege without a proof that it is a matrimonial property. That the said house was neither subject of disputed matters nor was there any evidence tendered in court to prove contribution on its construction. That the same was her personal property. She backed her stance with the case of **Anna Kanugha Versus Andrea Kanugha** (1996) TLR 194 where the court held:

> *"Personal property is liable for contribution in terms of section 114(3) of the Law of Marriage Act, 1971 when such property has been substantially improved during the marriage by the joint efforts of the spouses."*

She submitted further that court has to inquire first on the means of each party towards acquisition of the properties jointly and that she has the right to be treated fairly during. She relied on Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 and the case of **Rudolph Mushi Vs. Hassan R. Mshangama,** Civil Appeal No. 36 of 2012 (HC) which was not attached to the written submission.

In his response the respondent controverted the appellant's submission observing that the appellate court was justified to include the Picha ya

ndege house when affirmed the trial court's decision that made a finding that the same was a matrimonial house which finding she never challenged by way of appeal in the appellate court. On the point of contribution towards acquisition of that house, using the case of **Anna Kanugha** (supra) cited by the appellant the respondent argued that he adduced evidence which was appreciated by the trial court that he contributed Tshs. 5,000,000/= to support the improvement made in the Picha ya ndege house and that is why it arrived to the conclusion that it is a matrimonial asset subject of division. He added that it sounds strange for the respondent who did not appeal against that finding in the appellate court to challenge it here. He therefore prayed the court to find the ground meritless.

It is true as submitted by the respondent and held in the case of **Anna Kanugha** (supra) that in order for personal property to be liable to distribution as matrimonial asset evidence must be led to the effect that there was substantial improvement made on the asset/property during marriage by joint efforts of the spouses. In this case the respondent submits that he contributed Tshs. 5,000,000/= towards improvement of the impugned house whereas the appellant vehemently challenges that claim in that there is no any document tendered or witness summoned to prove that fact thus unfounded claim. As found out when considering ground number two the extent of spouse's contribution must be proved by evidence. In this case it is true and I agree with the appellant that no evidence was led by respondent to prove that he contributed to the improvement of that house which the appellant claim to be her father's property. Again there in no evidence by the appellant to prove that the said house belongs to her father. Since the evidence to prove respondent's contribution is so wanting apart from mere allegation that he contributed

Tshs. 5,000,000/=, I hold the view that the said house is the appellant's personal property and was not supposed to be subjected to division. It follows therefore that both trial court and appellate court erred in finding the said Picha ya ndege house a matrimonial asset subject of division. This ground has merit.

Lastly it is on the appellant's grievances that the honourable magistrate erred in law and fact for not considering the evidence produced by the appellant. She was of the submission in this ground that courts must assess the credibility of witnesses and determine their weight of evidence before giving a decision on a certain fact. That under section 110(1) of the Evidence Act, [Cap. 6 R.E 2019] whoever desires any court to pronounce judgment in his favour must prove that the facts he allege to have existing are in fact existing. She was of the contention that the evidence of the respondent was so wanting and therefore court could not have relied on it, thus the appellate court's act of relying on it without being corroborated was wrong. The respondent is of the different view that the appellate court could not have received a fresh evidence and therefore ascertain whether some facts were existing or not apart fron the available evidence on record. I think this point should not detain me. I have already determined on the disputed facts in particular on the inexistence of evidence proving the extent of contribution towards acquisition of properties which are subject of this appeal when determining ground one, two and three above. I therefore see no point to labour much of my efforts repeating what I have already determined. In short this ground lacks merit.

In the circumstances and for the foregoing reasons, I would partly allow the appeal on the third ground which I hereby do. The decision of the

appellate court on the division of properties is varied to the extent that the alleged existing Morogoro house is restored to the respondent in full. That means the appellant retains the house situated at Picha ya ndege and the respondent his house of Morogoro and house and plot at Chalinze. The rest of the decision of the appellate court remains undisturbed. That being a matrimonial cause I order no costs.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of June, 2020.

E. E. KAKOLAKI

JUDGE

12/06/2020

Delivered at Dar es Salaam this 12th day of June, 2020 in the presence of both the appellant and the respondent and **Ms. Lulu Masasi**, Court clerk.

Right of appeal explained.

E. E. Kakolaki

JUDGE

12/06/2020