IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 129 OF 2019

(Arising from the Judgment of District Court of Ilala in Civil Appeal No. 27 of 2018, date on 26th of day of August, 2019 before Hon. F. Mujaya **RM**, Original Matrimonial cause No. 269 of 2018 Ukonga Primary Court)

MWAJUMA OMARI LUSIZI ..... APPELLANT

VERSUS

SELEMAN KONGE MBATA ..... RESPONDENT

JUDGMENT

29th May & 26th June, 2020

E. E. Kakolaki, J

This is a second appeal by the appellant from the decision of the Ilala District Court in Civil Appeal No. 27 of 2018 the decision which was entered in favour of the respondent. The appeal is contested by the respondent. Both parties appeared unrepresented on the 31/03/2020 and by consent agreed to be disposed the appeal by way of written submission. Filing schedule was issued by the court in the following order; the appellant to file submission in chief by 17/04/2020, reply submission by the respondent by 04/05/2020 and rejoinder if any by the appellant on or before 11/05/2020. The matter was fixed for mention on

12/05/2020 with view of fixing the judgment date. On the 12/05/2020 when the matter came for mention only the appellant appeared in court and had complied with the court's order as a result the matter was adjourned to 29/05/2020 to avail the respondent with an opportunity to tell the court what befell him that he failed to comply with the court's orders. Unfortunately on the 29/05/2020 once again the respondent failed to enter appearance in court as a result as judgment date was to be fixed to 26/06/2020, thus considering appellant's submissions only.

Briefly the background story that gave rise to this appeal goes as hereunder. The parties contracted Islamic marriage in 1999 after cohabiting for two years from 1997. They were blessed with two issues namely Konge Seleman a secondary school student and Kuruthum Seleman a primary school pupil. They both lived a joyful life until 2018 when they divorced after the respondent had filed a matrimonial petition for divorce, division of matrimonial properties and maintenance of issues before Ukonga Primary Court in Matrimonial Cause No. 269 of 2018. After issuing divorce decree the court proceeded to order division of matrimonial assets in which the appellant was awarded 15% of the value of the house located at Kipunguni within Ilala District in Dar es salaam Region. There remaining 75% was awarded to the respondent who additionally was ordered to pay Tshs. 40,000/= per month to the appellant as maintenance costs for the two girls whose custody was placed under their mother. Aggrieved with that decision the appellant appealed to the District Court of Ilala in Civil Appeal No. 27 of 2018, the appeal which was dismissed for want of merits. Disgruntled she is now before this court expressing her dissatisfaction with the first appellate court equipped with four grounds going as follows:

(1)That, the Appellate Court erred in law and in fact by reaching to unfair and unequal decision by relying on the decision of the trial court on the division of the matrimonial properties which were affirmatively confirmed by the trial court itself that were jointly acquired by the parties.

(2)That, the Honourable Appellate Court erred in law and in fact for assuming facts which were not proved in the trial court.

(3)That, the Honourable Magistrate erred in law and in fact for awarding small amount of maintenance to be provided by Respondent compared to the actual costs of life.

(4)That, the Honourable Magistrate erred in law and in fact by not considering evidence and testimony tendered by the appellant and her witnesses.

The appellant argued the first and third grounds separately and combined the second and fourth ground and argued them jointly. Submitting on the first ground the appellant contended that the appellate court erred to uphold the decision of the trial court that denied the appellant equal division of jointly acquired matrimonial properties. That the parties had for 19 years jointly acquired different kinds of properties such as a house at Kipunguni B, a plot measuring 15 acres, house utensils and furniture. That the law mandates the court under section 114(1) and (2) (b) of the Law of Marriage Act to divide matrimonial properties basing on the contribution of each party the mandate which was not exercised by the appellate court she lamented. She said the only contribution which the court considered is the appellant by buying bricks after selling her plot inherited from her father and disregarded her contribution through domestic chores and ensuring

the wellbeing of the family. That domestic contribution is well stated in the case of **Bi Hawa Mohamed Vs. Ally Seif** (1983) TLR 32 (CA).

On the third ground it was her contention that the amount Tshs. 40,000/= awarded by the trial court and upheld by the appellate court for maintenance of the two children is too small as compared to the actual living costs. That apart from paying for their education and health care she complains that the court did not order for other children's needs such as shelter and clothing something which is contrary to the provision of section 44(d) and (e) of the Law of Child Act, [Cap. 13 R. E 2019]. The provision provides that in considering maintenance the court shall consider living cost of the area where the child is residing and other children rights under the Act. Being a biological father the respondent has to maintain his issues she submitted.

On the second and fourth grounds the appellant submitted that the appellate court did not consider appellant's evidence on her contribution towards acquisition of matrimonial properties which was corroborated by other witnesses which was in compliance with section 110(1) of the Law of Evidence Act, [Cap. 6 R.E 2019]. That instead it assumed facts which were not existing that the only appellant's contribution was on the bricks she bought which is contrary to the findings of the trial court that considered the matrimonial obligation or domestic activities as part of contribution made by the appellant. She finally prayed the court to appreciate her contribution towards acquisition of matrimonial properties and divide them equally between the parties and furthermore order for maintenance of issues which is equivalent to the living costs.

I will start with the second and forth. It is true as submitted by the appellant in her second and forth grounds of appeal that the appellate

court assumed facts which were not existing in that appellant's contribution was on the bricks she bought which is contrary to the findings of the trial court. Revisiting the trial court's records there in nowhere stated in evidence that the appellant bought bricks as her contribution towards acquisition of the house in dispute. The only contribution which the trial court appreciated was domestic chores. It follows therefore that the appellate court erred when failed to consider the appellant's contribution in terms of domestic works she performed for 19 years of existence of their marriage as her contribution to the acquisition of matrimonial or family assets as held in the case of **Bi Hawa Mohamed Vs. Ally Seif** (1983) TLR 32 (CA).

Having so found I now come to consider the first ground which almost is a replica of the second and forth grounds. That the appellate court relying on the trial court decision reached into unfair and unequal division of matrimonial properties. The trial court in its decision divided the value of the Kipunguni B house at a ratio of 15% and 75% to appellant and respondent respectively the decision which was upheld by the appellate court when dismissing the appellant's appeal. It is the appellant's contention that the appellate court having considered the appellant's contribution in terms of domestic works ought to have given her equal share of the division of the acquired matrimonial properties. The only question to ask apart from the house is, is there any other matrimonial property proved by the appellant to have been existing? In this question I am of the opinion that the trial court exhausted it when analysing the evidence tendered. There is no proof of existence of any other jointly acquired property apart from the house of Kipunguni B. It follows therefore that it is the only property that falls under division.

Now what share is the appellant entitled according to her contribution which in on domestic works and I would add bearing and rearing children and giving peace of mind to the loved husband for all those 19 years that enabled him to keep on working and earning more money for the family wellbeing. When dividing the trial court gave her 15% which in my opinion is unfair as rightly submitted by the appellant. The respondent remained with 75% and it is not known to whom the remaining 10% was divided to. Considering the appellant's contribution as explained herein above I am of the opinion she deserves more than what was apportioned to her. This ground has merit.

Lastly is on the third ground in which the appellant is faulting the appellate court for upholding the trial court's decision on maintenance of the two issues whose custody was placed under the appellant. She claimed that Tshs. 40,000/= per month is not enough at all even for feeding the children as the living costs is very high and the respondent has financial capacity to provide more than that. And further that the trial court did not order for provision of other basic needs such as shelter and clothing. I think this ground need not detain me much as the same was not raised during the appeal in the appellate court. It has surfaced now as an afterthought. The appellant ought to have advanced it at that stage and not now. Thus the ground lacks competence.

That said, and for the foregoing reasons, I allow the appeal on the first, second and forth ground. The decision of the Ilala District Court in Civil Appeal No. 27 of 2018 is quashed and the orders thereto set aside. The trial Court's decision on division of the house of Kipunguni is varied. The appellant is hereby awarded 40% of the value of the house and the

Respondent remains with 60%. The rest of the decision remains undisturbed.

No order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of June, 2020.

E. E. KAKOLAKI

JUDGE

26/06/2020

Delivered at Dar es Salaam today on 26/06/2020 in the presence of the appellant and **Ms. Lulu Msasi** Court clerk and in the absence of the Respondent.

E. E. Kakolaki

JUDGE

26/06/2020