IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 212 OF 2019

(Arising from the judgement of Kinondoni District Court in Matrimonial Cause No. 20/2019 delivered on 21.08.2019)

Selemani Athumani Mbaga .....Appellant

VERSUS

Gloria Kyussa Korosso .....Respondent

JUDGEMENT

Date of last order: 19.05.2020
Date of Judgement: 30.10.2020

EBRAHIM, J.:

Having been dissatisfied with the decision of the District Court, the Appellant has lodged the instant appeal raising six grounds of appeal of which he is basically complaining on the division of the properties, high maintenance allowance and custody of children.

Gathering from the record in the proceedings, the Appellant and the Respondent started cohabiting in 2004 when they were living in Gaborone. They were blessed with three issues, Amani Mussa Mbaga-13 yrs; Imani Maria Mbaga – 11yrs; and Tumaini Oscar Mbaga – 9 yrs. In year 2012 they

returned to Tanzania. The Appellant went to reside in Mwanza where he is working as a Director with a construction company called Afri- Cost Investment Company; and the Respondent is residing in Dar Es Salaam. The proceedings reveal further that when the couple returned to Tanzania matrimonial squabbles began and in September 2016, the Respondent left matrimonial home together with all three issues.

In giving his testimony, the Appellant **(PW1)** told the trial court that during their marriage they acquired house furniture, two motor vehicles i.e. Toyota Noah- T127 CTV and Toyota Hilux; two plots located at Ujiji Municipality Kigoma plot Nos. 95 and 97; and plot no. 648 located at Lindi town, beach area with Lindi Municipality. Responding to cross-examination questions, the Appellant stated that he is paying monthly maintenance allowance to the tune of Tshs. 1,000,000/- and he is the one paying for school fees for all three issues. He denied to have a house under construction at Mbweni but admitted to have a Plot No. 129 Block 7 at Bunju area of which he said he sold it in year 2018. He also said that he sold Toyota Hilux for Tshs. 4,000,000/-.

At the trial, the Respondent testified as **DW1.** Among other things, she told the court that when they moved back to Tanzania, they rented a

house at Tegeta so that they can be close to their house they were building at Mbweni for her supervision. The Respondent testified also that when the Petitioner was in Mwanza, he would be gone for three to five months and give Tshs. 20,000/- as maintenance for the children and Respondent. In 2014, she took a job with Dar Properties and also started to pursue her carrier in interior design. She further tendered lease agreement, receipt for school fees at Alpha High School and a letter from the school in showing that she was the one taking care of the children. She listed the properties acquired during the subsistence of their marriage as Plot No. 11 Block 6 Mbweni JKT which the Appellant bought from his friend Hashim Ibrahim and it has a title deed. She also listed a Plot located at Mabwepande which is in the name of the Appellant and their children Aman and Iman; a 20 acres farm in Bagamoyo; Plot No. 147 Block 7 located at Bunju; Toyota Hilux T 476 CYC and Toyota Noah T. 127 CTV.

After evaluating the evidence from both parties, the trial magistrate ordered custody of all three children to be with the Respondent with visitation right to the Appellant; the Appellant to pay monthly maintenance allowance of Tshs. 500,000/- together with all medical and educational expenses for all their three children. The trial court further distributed the

motor vehicle with registration no. T476 CYC Toyota Hilux to the Petitioner; and motor vehicle with registration no. T127 CTV Toyota Noah to the Respondent. As for the landed properties, the trial court ordered distribution to the ration of 60% to the Appellant and 40% to the Respondent on Plot No. 95 and 96 situated at Kibirizi area in Kigoma; Plot No. 648 situated at Mabano Beach in Lindi; Landed Property at Kinondoni area, Mabwepande with Registration No. K/M/P 79; and Plot No. 129 Block 7 Bunju, Kinondoni. All with directive that valuation of all properties be conducted by authorised Government Valuer.

This appeal was argued by way of written submission. The Appellant was represented by advocate Buberwa; whilst the Respondent preferred the services of advocate Mwinyimvua.

In determining this appeal, I shall not reproduce the submissions by the parties. I shall however refer to them in the course of traversing substantive issues.

Before I begin to address the raised issues in this appeal, I must point out that this is the first appeal. That being the case therefore, this court has an obligation to revisit the evidence on record and have its own findings of facts if any and decision thereon while cautious of the fact that it is the trial

court that had an opportunity to observe the witnesses. This position was stated in the case of **Japan International Cooperation Agency (JICA) V Khaki Complex Limited**, Civil Appeal No 107 of 2004(unreported) while borrowing the principle used in the case of **Peters v Sunday Post Limited** (1958) EA 424 where Sir Kenneth O'Connor, P. the then Court of Appeal for Eastern Africa after considering **Watt v Thomas** (1947) AC 484 stated at page 429 -

> *"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellant court itself have come to a different conclusion".*

As alluded earlier on, the grounds of appeal are mainly into two issues namely, division of matrimonial properties and custody of children which goes together with maintenance allowance.

Counsel for the Appellant in submitting on the issue of custody of children, argued that since the children are above the age of seven years, the trial court ought to have examine the children with the view of establishing

their interests of who do they wish to live with. He cited the case of **Gladness Jackson Mujinja Vs Sospeter Crispine Mkene** [2017] TLS 217 where this court was of the views that in hostile situations it is necessary to order appearance of children for observation and examination regarding their welfare in assisting the court to make correct decisions. He further referred to the case of **Mariam Tumbo Vs Harold Tumbo** [1983] TLR 293 which also expressed the importance of independent opinion of the child if he/she can express her/himself.

Counsel for the Appellant further faulted the trial court for failure to analyze evidence on how did the Respondent managed to pay for the school fees.

As for the issue of maintenance, he submitted that the trial court did not adhere to the established principles in inquiring to the means of both parents and take into account the customs of the parties and prevailing conditions.

Responding to the submission by the Counsel for the Appellant, Counsel for the Respondent firstly distinguished the facts of the cited cases of **Gladness Jackson Mujinja's case** (supra) with the circumstances of the

case that in the cited case, the trial court relied on the text messages; whilst in this case, the Appellant/Petitioner failed to convince the court how he would take care the children who he had deserted. As for the **Mariam Tumbo's case (supra)**, Counsel for the Respondent also distinguished the facts on the basis that in the cited case there was allegations that the Petitioner(wife) was enticing the children and unduly influencing them by claiming that the children were running from terror inflicted by their father. He referred to **section 129(1) of the Law of Marriage Act, Cap 29 RE 2002** on the duty of a man to maintain his children whether in his custody or someone else's.

As for the issue of paying Tshs. 500,000/- as maintenance allowance, Counsel for the Respondent argued that the records show that the Appellant is an Engineer based in Mwanza and the same was not controverted.

In rejoinder, Counsel for the Appellant reiterated what he submitted in chief in challenging the issue of custody. He came up with the issue of non-admissibility of the Lease – Agreement not being duly stamped in terms of **Section 47(1) of Stamp Duty Act, Cap 189 RE 2019.**

As for the order of amount of maintenance, he insisted that the case of **Festina Kibutu Vs Mbayangajimba** [1985] TLR 44 has set the principle that the court should hold an enquiry to the means of both parents in order to arrive at a just decision.

I have dispassionately gone through the rival submissions by both parties as well as going through the evidence on record. In determining this appeal, I shall be guided by principle of the law in civil litigations that ***'he who alleges must prove'*** – as clearly provided in **section 110(1) and (2) the Tanzania Evidence Act, Cap 6 RE 2002;** and also illustrated in the case of **Tatu Mohamed VS Maua Mohamed,** Civil Appeal No. 31 of 2000(unreported); and the case of **Attorney General and Others Vs Eligi Edward and 104 Others**, Civil Appeal No. 86 of 2002. All in all, a person with a legal burden also bears evidential burden.

First of all, both parties did not dispute on the decree for divorce. The Appellant stated that the Respondent left the matrimonial home in 2016 together with all their three children. He gained temporary custody of children in February, 2019 i.e. after almost more than 2 and a half years. In essence all that time all three children were cared by the Respondent. The Appellant stated further that he is working in Mwanza as a Director

and residing in a Company's house. He has however not told the court or availed to the court the location or the whereabouts of where he is actually living and under which circumstances in proving his ability to take care of those children.

Indeed, it is the position of the law that the best interest of the child shall be primary consideration in all action as elaborated in the case of **Halima Yusufu Vs Restituta Celestine Kilala** [1980] TLR 76 read together with **section 4(2) of the Law of Child Act, 2009** which I find inspiration from that: *"the court should have regard into not disturbing the life of an infant by changes of custody; and that the best interest of the child shall be the primary consideration in all action".*

Counsel for the Appellant has put great reliance on the holdings of the cases of **Gladness Jackson Mujinja's case** (supra) and **Mariam Tumbo (supra)** that the wishes of the infants be considered. Nevertheless, the principles in the cited cases served the purposes and circumstances of those cases in accordance to the facts before the court. In those cases, in one case the court was availed with text messages to prove custody; and in another case there was allegations of terror and inducement by parties to children; whilst in our case there was clear

evidence that the Appellant has not been living with the children since the Respondent moved out of the matrimonial home. More-so while the Appellant is claiming that there is no evidence to prove that receipt had no name of the Respondent; hence she was the one paying the school fees; the Appellant has neither tendered any receipt or document to show that indeed he paid for their 1st issue; or that for all those three years he was sending money for maintenance of the children living with the Respondent. If at all, the testimony by the Appellant is self -defeating as it shows that he indeed abandoned his family for almost three years and it was the Respondent who was taking care of them. The Respondent stated in her testimony that after being deserted by the Appellant she took on a job with Dar Advertisement and returned to her carrier of interior designing to maintain her family. She even tendered a letter from Alpha High School – Exhibit D2 and a receipt in showing that she paid for the school fees – Exhibit D3.

As for the Appellant's Counsel new raised issue of stamp duty, the same does not invalidate the undisputed fact that, indeed the Respondent leased a house to stay with her children.

From the above observations therefore, I fortify my stance with the position of the court in the cited case of **Halima Yusufu Vs Restituta Celestine Kilala (supra)** in insisting the primary consideration of the welfare of the children and that court should have regard in changing the custody of the children. I also derive inspiration from the provision of **Section 26(1)(b) of the Law of Child Act, Act No. 21 of 2009** that where parents of the child separate or divorce, a child shall have a right to live with a parent who in the opinion of the court is capable of maintaining the child in the best interest of the child. The Appellant has miserably failed to even prove where he lives and how would he care for those children who are still very young and in constant need of parental care, maintenance and guidance. It is on that background, I find no basis of reversing the decision of the trial court on the custody of the children.

As for the maintenance allowance, **Section 129(1) of the Law of Marriage Act** provides that;

> "(1) *Save where an agreement or order of court otherwise provides,* ***it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person****, either by providing them with such* ***accommodation, clothing, food and education*** *as*

may be reasonable having regard to his means and station in life or by paying the cost thereof." (Emphasis supplied)

In my considered views, on reading the above provision of the law, when it comes to the issue of maintenance of the children, there is no hard and fast rule in assessing maintenance costs on the issues. The Court has to give regard to **the means and station in life** but it is not the only criteria to be looked upon. Other factors have also to be considered like **cost of living, and/or welfare of the Children**. The case of **Jerome Chilumba V Amina Adam** [1989] TLR 117 outlined some guidelines on assessment of those costs.

It is undisputed fact that the Appellant works as an Engineer and he is a Director. In-fact, by being ready to have custody of all three children, he is also ready to perform his legal duty of maintaining his children including but not limited to education, health, food and clothing. Furthermore, the Respondent who has custody of all three children shall have more responsibility of the children which cannot be monetarily quantified. The Appellant also admitted when responding to cross examination questions at page 12 of the typed proceedings that he is paying almost Tshs. 1,000,000/- per month as maintenance

allowance. In that regard and looking at the prevailing economic situation and the kind of life of children, I find that the trial Court correctly ordered the maintenance allowance of Tshs. 500,000/- per month. Thus, I find no any other justifying reason to interfere with the assessment that was made and I leave it undisturbed.

Coming to the issue of matrimonial properties acquired in the subsistence of marriage; in tackling the issue of division of matrimonial properties between spouses, court is obliged to put into consideration the extent of contribution by each party towards acquisition of the said matrimonial assets and other factors as provided under **section 114(1), (2) and (3) of the Law of Marriage Act, CAP 29 RE 2002**. The section reads:

"114(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, ***to order division between the parties of any assets acquired by them during the marriage by their joint efforts*** *or to order the sale of any such asset and the assets division between the parties of the proceeds of sale.*

(2) *In exercising the power conferred by subsection (1), the court shall have regard;*

(a) to the custom of the community to which the parties belong;

(b) ***to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets***;

(c) NA; and

(d) *to the needs of the infant children, if any, of the marriage, and subject to those considerations,* ***shall incline towards equality of division.***

(3) For the purposes of this section, references ***to assets acquired during a 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.*** (Emphasis added).

Counsel for the Appellant has vigorously contested the division of a motor vehicle namely Toyota Hilux on the basis that the same has already been sold. He also contested on the division of a Plot No. 129 Block 7 located at Bunju on the reason that the same was acquired before the marriage. In cementing his argument, he cited the case of **Samwel Olung'aigogo and two Others V Social Action Trust Fund and Others**, [2005] TLR pg 343; and he also referred to **section 60(a) of the Law of Marriage Act, Cap 29 RE 2002** on rebuttable presumption that if the property is in the

name of the husband or wife, such property belongs to that person in exclusion of his or her spouse. He contested also that since the Respondent was a house wife, the trial court erred to distribute the said properties in reliance to the established principle on the celebrated case of **Bi Hawa Mohamed Vs Ally Sefu** [1983] TLR 32 whilst there was no proof of extent of contribution economically and monetary.

Beginning with the issue that the motor vehicle Toyota Hilux with Registration No. T476 CYC has already been sold, I hasten to agree with the Counsel for the Appellant that Respondent is well aware that the said motor vehicle has already been disposed of as per her own testimony at page 22 of the typed proceedings. Thus, since the same was not in the possession of the Appellant, ordering its distribution as a matrimonial asset is rather absurd as it is not even known when it was disposed and for how much. I accordingly, I reverse the order of the trial court on the distribution of the said motor vehicle, Toyota Hilux with registration no. 476 CYC. Again, the Respondent testified in court that they started cohabiting in year 2004 and that was when the Appellant went to her parents. The Appellant testified that he bought the plot in Bunju in year 2001 before he started living with the Respondent. Such contention has

not been controverted. Therefore, I also allow that ground of appeal and on the basis that the said Plot No. 129 Block 7 located at Bunju is not a matrimonial asset subject to division.

As for the extent of contribution, the law i.e. **section 114(2)(d) of the Law of the Marriage Act** clearly state that in considering the division of matrimonial property, the court ***shall incline towards equality of division.*** This position has been well expounded by my sister Judge Sameja (as she then was) in the case of **Christian John Msigwa V Neserian Justine Lukumay**, Civil Appeal No. 178 of 2017 (unreported) where it was held that:

"...in case of separation, divorce, or annulment of marriage, women or man shall have right to an equitable sharing of joint property delivering from marriage..." I subscribe to that stance.

The position of the extent of contribution by the spouse irrespective of monetary and economic contribution as put by the Counsel for the Appellant was stated in the cited case of **Charles s/o Manoo and Another Vs Apolina w/o Manoo Kasare** [2003] TLR 425 where the Court of Appeal held inter alia that:

"That a wife cannot be discounted from the business of her husband ***even if she makes no direct monetary contribution to it****; her wifely services during the life time of her late husband from 1967 to 1992 would in itself entitle her to a share in the properties acquired"* (emphasis is mine)

The above positions are expansion of the principle held in the celebrated case of **Bi Hawa Mohamed (supra)** where the Court of Appeal of Tanzania recognised the magnitude of contribution of the spouse to the welfare of the family as an essential component of economic activities of a man or woman in acquisition of matrimonial or family assets. In holding further, the Court of Appeal construed the "joint efforts" and "work towards the acquiring of assets" have to be construed as embracing the domestic "efforts" or "work" of husband and wife.

It follows therefore, the assertion by the Counsel for the Appellant that the Respondent being a house wife did not prove her extent of contribution as a misconception as her contribution as a mother, wife and other domestic chores and obligations cannot by any stretch of imagination be quantified in maintenance of the welfare and wellbeing of the family.

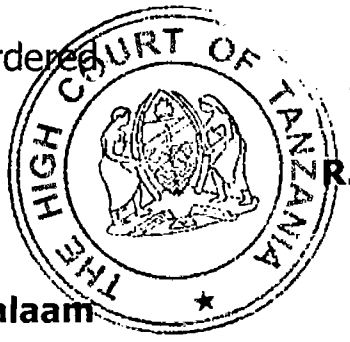
That being said, again, I find the ratio of distribution by the trial court is justifiable and I leave it undisturbed.

That being said, save for the reversing of the order of distribution of the motor vehicle Toyota Hilux with registration no. T. 476 CYC; and declaring a Plot No. 129 Block 7 Bunju, Kinondoni as not a matrimonial asset but a sole property of the Appellant; the remaining orders of the trial court are left undisturbed. In upholding the decision of the trial court on the issue of custody of children and I find it prudent to grant the Appellant with visitation rights to their children upon informing the other party within at least 48 hours prior to the visit or reasonable time depending on the circumstances. The Respondent is not allowed unreasonably to withhold the right of the Appellant to visit their children and have temporary custody during school holidays, public holidays and the like. Further, in case of changes of circumstances which render either party unfit to have the custody of the children; the other party may move the court to rescind its earlier order.

The appeal succeeds to that extent only.

Following the relationship of parties that this is a matrimonial matter, I give no order as to costs, each party to bear its own.

Accordingly ordered.



R.A. Ebrahim

Judge

Dar Es Salaam

30.10.2020