

IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 67 OF 2018

(Arising from Civil Appeal No. 27 of 2018 before hon. Mwankenjela, RM dated 09.08.2018, Originating from Matrimonial Cause No. 23 of 2018 at Morogoro Urban Primary Court)

Robert Leo DaudAppellant

VERSUS

Secilia Makingo BungaRespondent

JUDGEMENT

Date of last order: 09.06.2020

Date of Judgement: 27.10.2020

EBRAHIM, J.:

The Appellant herein was the Respondent in Matrimonial Cause No. 23 of 2018. In that case the Respondent herein (Secilia Makingo Bunga) petitioned for divorce, division of matrimonial properties, custody of children and maintenance allowance. Proving their cases, both parties brought one witness. After hearing the evidence from both sides and considering the tendered exhibits, the trial court granted a decree divorce as prayed; ordered the house to be the property of the children; put the

custody of the children to the Appellant with visitation rights to the Respondent; and ordered the Appellant to pay the Respondent compensation to the tune of TZS. 300,000/.

Aggrieved by the decision of trial court, the Respondent appealed to the District Court of Morogoro at Morogoro. The first appellate court revisited the evidence on record and derived to the conclusion that the house is a matrimonial property. The appellate magistrate further considered the contribution of the spouse in line with the principle stated in the case of **Bihawa Mohamed V Ally Sefu** [1983] TLR 32 and the position of the law under **section 114(2)(b) of the Law of Marriage Act, Cap 29 RE 2002** on the extent of contribution of each party. The appellate magistrate distributed the said house among the parties to the ratio of 60% to the Appellant and 40% to the Respondent. He further placed the custody of the youngest child, Abelnego Robert to the Respondent until he attains 10 years old; and the Appellant was ordered to maintain him. Parties were also ordered to make arrangements so that the other two children could visit the Respondent.

The Appellant was aggrieved by the decision of the District Court, hence the instant appeal raising four grounds of appeal which can be condensed into two on the distribution of the house; and custody of children.

This appeal was argued by way of written submission. The Appellant was represented by advocate Ludovick Nickson; and the Respondent appeared in person.

Submitting in support of the grounds of appeal, Counsel for the Appellant argued the 1st, 2nd and 3rd grounds of appeal together.

His submission was based on the position of the law that 'he who alleges must prove'. He cited the provisions of **section 110(1) and 111 of the Tanzania Evidence Act, Cap 6 RE 2002** and referred to the cases 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. Counsel for the Appellant submitted further that at the trial, the Respondent did not prove the house was jointly acquired but the Appellant proved that the house was obtained prior the presumption of marriage between the parties. Referring to the cited case of **Bi Hawa Mohamed V Ally Sefu (supra)**, counsel for the Appellant argued that the Respondent being a

house wife could not have been entitled to 40% because such extent of contribution was not proved.

Concerning the custody of the 3rd child, counsel for the Appellant referred to **sections 125(1) and (2), 126, 127 and 128 of the Law of Marriage Act, Cap 29 RE 2002 and The Law of the Child Act 2009** on the position that the child will remain in the custody of the parent or relative where he/she can get proper welfare. He commented that the Respondent has no settled life as she lives between Morogoro and Dar Es Salaam. He prayed for the appeal to be allowed.

Responding to the arguments by the Counsel for the Appellant, the Respondent contended that the issue of division of matrimonial property is not a matter to be proved under **sections 110(1) and 111 of the Tanzania Evidence Act**; but it is a fact that they acquired the said property when living together as wife and husband as proved in the District Court. She cited the provisions of **section 114(1) and (3) of the Law of Marriage Act** to cement her argument. She stressed that the Respondent contributed towards acquisition of the house situated at Kihonda, Morogoro during the subsistence of their marriage, hence she is entitled to share as

per the principle stated in the case of **Anna Kanugha Vs Andrea Kanugha** (1966) (HCD).

Submitting on the issue of custody of children, the Respondent referred to the provisions of **section 125(2) of Cap 29 on the custody of the children** and his/her welfare and concluded that the custody of all children should be with the Respondent (mother).

In rejoinder, Counsel for the Appellant had nothing substantive to add as he repeated what he stated in his submission in chief.

I have dispassionately gone through the rival submissions by both parties as well as going through the evidence on record. I shall begin with the issue of division of matrimonial property.

Going by the evidence on record, both parties agree that when they started cohabiting, they rented a room. The Appellant stated that he purchased the plot before started living with the Respondent in 2006. Again, evidence shows that they moved to the disputed house in 2007 and were blessed with their 1st issue in 2008. These pieces of evidence show clearly that by the time the disputed house was being built, the Respondent was already cohabiting with the Appellant. Counsel for the

Appellant has insisted that the Respondent has failed to prove the extent of her contribution as required by law. He stated also that since she was a house wife, the ratio of 40% is too high.

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).

Applying the above principles of law to our instant case, it is clear that much as I would not say with certainty on the monetary contribution, the contribution of the Respondent as a wife cannot be understated as it seems to be suggested by the counsel for the Appellant in his submission. Equally the same is evident that the Respondent is entitled to a share as per the principle stated in the cited case of **Anna Kanugha Vs Andrea Kanugha (supra)**.

The above notwithstanding, much as I associate myself with the principles held in the cited case of **Bihawa Mohamed (supra)** and **Eliester Philemon Lipangagela Vs Daud Makuhuna**, Civil Appeal No. 139 of 2002, (HC), still the extent/ratio of division is also looked on the extent of contribution in money, work and or property.

I acknowledge the noble work done by the Respondent as a house wife. Nevertheless, when adducing her evidence in court she said that they built the house together and she has even renovated the house by putting grills and the gate. However, there is no gainsaying that it was the Appellant who was working and hence had a substantial contribution towards acquisition of their property.

It is always very difficult to order division of matrimonial assets. However, it is my considered view that it is worth considering the Appellant's continuing responsibility of maintaining the welfare of the issues and the big contribution he had done from acquisition of the plot, building a house and maintaining welfare of the family. It is on those circumstances; I revise the ratio of distribution to 80% to the Appellant and 20% to the Respondent. The said house should be valued and endorsed by the Government valuer and either party can buy the share of the other party upon agreement. In a case where a party wishes to sell his/her share, the first right of refusal shall be availed to the other party.

As for the granting of custody of children, I am inspired by the holding of 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** *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.

As records would reveal, after the hell broke loose, all three children remained in the custody of their father for three years until the Appellant initiated the proceedings for divorce. The appellate court considered the fact that the 3rd child was still under the age of seven years (**section 125(3) of Cap 29** – rebuttable presumption that a child under seven years should stay with his mother) placed a custody of such infact child with the Respondent. It is indeed undeniable that after the rift in the family, all three children were living with their father, the Appellant. More-so there is no any registered concern in court apart from the words from the Respondent counsel's submission, which are submission from the bar, that the children under the custody of the Appellant are ill-treated. In that case and considering the circumstances of the Respondent, I find it befitting for all children to continue to be under the custody of the Appellant so as they can be well cared for and maintain their bondage. In essence, I uphold the decision of the trial court on the issue of custody.

In the upshot and from the above background, I allow the appeal only to the extent explained above as follows:

1. The division of the matrimonial house shall be to the extent of 80% to the Appellant and 20% to the Respondent.
2. Either party can buy the other party upon agreement between them.
3. I uphold the decision of the trial court on the issue of custody of children and I further find it prudent to grant the Respondent 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.
4. The Appellant is not allowed to unreasonably withhold the right of the Respondent to visit their children and have temporary custody during school holidays and the like.
5. Further, in case of changes of circumstances which render either party unfit to have the custody of the child; the other party may move the court to rescind its earlier order.

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



Dar Es Salaam

27.10.2020

A handwritten signature in black ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim

Judge