IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 60 OF 2020

ROSE NGONYANI..... APPELLANT

VERSUS

CHILE NGONYANI..... RESPONDENT

(Appeal from a decision of Kinondoni District Court at Kinondoni)

(Hudi- Esq, RM.)

dated 17th January, 2020

in

Matrimonial Cause No. 95 of 2018

JUDGEMENT

30th September & 26th November 2020

ACK. Rwizile, J

Preceded by concubinage, parties to this appeal finally got into holy matrimony. It was on 28th December 1996, when they tied knots in St. Peter's Church in Dar-Es-Salaam. Their otherwise happy marriage, blessed with three children, lasted for nearly two decades before it turned vinegary.

The appellant left her matrimonial home some years before filing an action in the District Court, on grounds of desertion, cruelty, assaults and adultery. The appellant therefore, petitioned for divorce, division of matrimonial assets, custody and maintenance of two children of marriage (medical care, education expenses and clothing) and costs. In an elaborate ruling, the District Court, upon hearing the same, issued a decree of divorce, gave 20% of the assets jointly acquired to the appellant, custody was given to the respondent and therefore no maintenance order to her. The decision however, was not acceptable to the appellant, hence this appeal.

Before this court she has advanced four grounds of appeal; **one** that the learned trial magistrate failed to appreciate evidence of Pw1 and Pw2 in contradicting evidence of Dw1 and Dw2 before arriving at the decision. **Two,** the learned trial magistrate erred in law and fact by allotting 20% and 80% share of the assets without considering the appellant's contribution towards acquiring the same, as she worked in the company. **Three,** that the learned successor magistrate decided the matter basing on the evidence taken before him, and giving little consideration to the appellant's evidence taken in his absence. **Four,** that the trial court erred in law and fact for failure to consider as matrimonial asset, shares of the respondent in the company.

Mr. Magoti learned counsel appeared for the appellant while for the respondent stood Mr. Byarushengo learned counsel. The appellant was the first to address the court. He was of the submission on the first ground that evidence of Pw1 and Pw2 established her contribution towards acquiring matrimonial assets. He said, the evidence of Dw1 and Dw2 was in conflict on when the company (Muhima Co. Ltd) was established.

According to the appellant's evidence, he submitted, the company is a family asset and so subject of division. It was submitted further that their marriage lasted for 18 years and therefore the appellant's contribution is clear as it was held in the case of **Bi Hawa Muhamed vs Ally Seif** [1993] TLR 32. In his view, if recourse was taken in **Bi Hawa's** case, the appellant's share in matrimonial assets is somewhere above 30%. According to Mr. Magoti, the above is enough to disposal of the first and second grounds.

Citing the case of **Inter-consult Ltd vs Mrs Nora Kassanga and another**, Civil Appeal No. 79 of 2015. The leaned advocate was of the view that the successor magistrate did not comply with order XVIII R.10 (1) of the Civil Procedure Code (CPC). Elaborating this point on the third ground of appeal, he submitted that before taking a partly heard case, the learned trial magistrate had to assign reasons. It was said, since there is no re-assignment order, the law was not complied with. The court was asked to examine the proceedings at page 42-44 and the case cited above.

Submitting on the last ground, it was opined that shares of the company were not divided. It should be held according to the appellant that shares in the company though owned by the respondent, they are a family asset which was acquired jointly. Therefore, the same are subject of division. He prayed, this appeal be allowed.

I said before that Mr. Byarushengo appeared for the respondent. When responding to the first ground, he was of the view that the trial court clearly analysed the evidence thereby arriving at the proper decision. He submitted, that the appellant was a house wife.

She admitted so in her pleadings and when giving evidence. According to him, she has never been employed by Muhima company. The learned counsel went on submitting that without complying with order VI. R. 7 of the CPC, the petition changed stance from what she pleaded and gave evidence that she was employed by Muhima company. She also tendered an identity card showing she was an employee of the company. To support this point, he cited the case of **John M. Byombalirwa vs Agency Maritime International Ltd** [1983] TLR. 1

Mr. Byarushengo was of further submission that Pw1 and Pw2 departed from pleadings. In law, it was said, there is no new amount of evidence that should substitute the pleadings. This was the position according to him, in the case of **Registered Trustee of the Roman Catholic Archdiocese of Dar-Es -Salaam vs Sophia Kamani**, Civil Appeal No. 158 of 2015. He said as well, that evidence of Dw1 and Dw2 proved the company was established by the respondent's grandfather as per exhibits D1 and D2. He asked this court to find no merit in this ground of appeal.

Responding to the second ground, it was submitted that the trial court gave a fair share to the appellant based in the case of **Bi Hawa Mohammed** as cited before. To him, what matters is the contribution the appellant made as in the case of **Yesse Mrisho vs Sania Abdul**, Civil Appeal No. 147 of 2016 (CAT) unreported. Accordingly, he asked this court to dismiss this ground for lack of merit.

Submitting on the 3rd ground of appeal, it was his view that page 42 to 44 of the typed proceeding is clear. The trial successor magistrate, he added, gave reasons for taking the case. He held, since no party was prejudiced, this ground has no merit.

Lastly, learned advocate was quick to comment, that the petition did not plead anything about shares. Mr. Byarushengo claimed that the petition did not make any prayer in respect of shares of the company, she is prevented to raise the same now. In his side, he asked this court to abide by the ratio in the case of **George Celestine Mtikila vs Registered Trustees of Dar-es Salaam Nursury school and another** [1998] TLR 514.

Given a chance to rejoin, Mr. Magoti said that the proceeding at page 44-47, the appellant gave evidence that the company was established in 1997. This time, according to him, parties were already in matrimony. Further to that, he added, that the evidence procured dictate that the amount of contribution, though does not entitle the appellant 50% of the share, it should be exceeding 20% given to her. It was concluded that the amount given, was little enough to cause failure of justice.

Upon pondering submission of the parties, the court is bound at this juncture to re-evaluate the evidence, since this is the first appeal. It has been the case that the appellant was a house wife. Her pleadings put it that way. She gave evidence that she worked with Muhima Company. The only proof tendered is a batch of identity cards from the same company. Dw1 and Dw2 were of the evidence that, since she has never been employed by the said company, then these identity cards are not genuine.

I have to say at this point that holding an identity card of a company or any institution is in my view prima facie, that the bearer is an employee of the issuing institution. But for the purpose of proving whether one is employed by the said institution, more proof is needed. In the absence of a letter of employment or contract so to say, or payment slips showing that one received a salary or allowances, it cannot be held that the same is an employee. Even if it goes by assumption that the appellant was an employee of the company, which she did not prove, still she had to prove the extent that salary and other benefits arising from that employment contributed to the welfare of the family as a unit. There is no dispute that she did not contribute towards acquiring properties. The trial court having relied on the case of **Bi Hawa** gave her 20%.

It is now settled in law that division of matrimonial assets follows after proof of marriage. Section 114 of Law of Marriage Act, provides for things to consider when division of matrimonial assets is at issue. For easy of reference it states;

> *"114 (1) 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 assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*
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> *(2) In exercising the power conferred by subsection (1), the court shall have regard-*
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> *(a) to the customs 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) to any debts owing by either party which were contracted for their joint benefit; 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 the 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"

From the above it may be discerned, that contribution may not necessarily be in monitory terms only, property and work are also to be considered. Being a house wife therefore makes a contribution by house work which is an important factor to the family growth in both moral and material wellbeing. It has been clearly stated by the appellant and rightly so, that what she did, amounted to contribution worth compensation in such circumstances. This was also the position in the case of **Bi Hawa** where it was stated that;

The welfare of family is an essential component of the economic activities of a family, man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets, and that the "joint efforts" and 'work towards the acquiring of the assets' have to be

construed as embracing the domestic "efforts" or "work" of husband and wife"

There is no doubt that in all, the appellant contributed towards acquisition of the family assets. Parties are in agreement. What is in dispute is the amount of contribution. I have no speck of doubt that the trial court did not consider the evidence of Pw1 and Pw2 in comparison to Dw1 and Dw2 as it has been clearly stated and held by the trial court. Revising the evidence, it is important to note that apart from failure of the appellant to prove she was working in the company, her contribution that has been clear is being a house wife who performed house duties, which may not necessarily be 50% see **Bibie Maulidi v. Mohamed Ibrahim** (1989) TLR 162. In my considered opinion, there is no evidence to prove the appellant deserved a bigger share.

I have shown before that the law directs issues to consider when the dividing family assets, to include customs of the community to which parties belong, debts owing if any and most importantly, the children of marriage. I think, the trial magistrate was alive on those issues and I do not need to interfere with his finding in this aspect. But on the other hand, the trial court gave custody of the two issues to the respondent. In doing so he relied on the evidence of the defence in total disregard of whether or not in the absence of evidence to the contrary from the appellant the children were happy with what is happening at home.

It is in record that the appellant told the court that she heard her youngest child say is not happy to live with her step mother. At page 16 of the judgement, the trial court held;

In the present case, there is no evidence that the welfare of the issues of marriage is at stake rather than hearsay evidence petitioner was told by one youngest issue of marriage that, he is not happy to stay with respondent. This being hearsay evidence will not consider it. Again, since what I have on evidence is wishes of parents whereby each need the custody be placed on his or her side, since there is no evidence suggesting that, welfare of issues of marriage are at stake and also since I have no their opinion, I have no reasons to disturb with the arrangement but something to add is free access and visitation of the petitioner.

Taking it from where the learned trial magistrate left, he admitted that there was no material submitted before him, which would assist him decide properly which of the parents is better placed to have custody. In this, I have to comment with serious concern that the trial court failed its duty. From experience, parties in matrimonial proceedings put their wishes and interest first. This is clear in the evidence. Pw1 and Dw1 had to labour tooth and nail to fight for assets which categorically is for satisfying their own ego. That is why, none of them told the court how is he or she is better placed to live with their children. In other words, such matrimonial proceedings in many respects is not for securing the best interest of the children of marriage.

I have therefore to say, it is the duty of the trial court, when hearing a matrimonial proceeding where custody and maintenance is an issue, to take a more active role for the best interest of the children. This is important because, these powers are exclusively vested in the court.

If no evidence brought by the parties, it is therefore its duty to demand such evidence from them. Section 39 read together with section 26 of the Law of Child Act [Cap 13 R.E 2019], acts a safety valve by providing matters to consider before issuing or denying a custody order to include, **one** best interest of the child in its broad sense, **two** need for the child to live with his parent who in the opinion of the court is capable of raising and maintaining the child in his best interest, **three**, visit and stay with other parent whenever he desires unless such arrangement interferes with his schools and training program, **four**, the age and sex of the child, **five**, the views of the child, if the views can be independently given, **six,** the need for continuity in the care and control of the child, **seven,** any other matter that the court may consider relevant.

It follows therefore that the trial court did not inquire as the law directs as to whether the respondent is best placed to stay with the child. His discretion here was not guided by evidence. I have shown that the two children subject of this order were 16 and 10 years respectively, while the elder one who is alleged 21 is living with the appellant. Above all, the law required him to obtain their opinion which he did not try to look for and there is no indication that he feared there were circumstance which could impede him from obtaining their independent opinion. The trial court had all necessary tools to make such enquiry which according to the law, he may be seek the social inquiry report. Section 45 of the Law of the Child Act is good to that effect. It states as follows;

45.-(1) A court may order a social welfare officer to prepare a social inquiry report before consideration of an application to make an order for maintenance custody or access.

(2) The court shall, in making such order, consider the social inquiry report prepared by the social welfare officer.

Since the court had such powers and did not bother to use them, definitely it arrived at a wrong position in the custody order. It had no reason to presume that because there was no evidence showing the welfare of the child is not at stake, it presupposes the true position of the situation at the residence of the respondent. The hearsay evidence that the youngest child is not happy to live with a step mother ought to have been investigated to the hilt. Failure to do that may lead to a wrong conclusion which would in turn damage the life of the innocent child.

When concluding this point, I have to note with concern that like metals, children are malleable. Their treatment, especially at a tender age, must be strict and has to irresistibly aim at achieving their best interest. Courts therefore, as guardians of these rights, must make sure no stone, is left unturned when it comes to making such orders. At the outset therefore, it surfaces to say, the first and second grounds of appeal have been fully disposed of. I see not merit on the two grounds of appeal except the custody order.

The third ground of appeal poses a challenge to me. I say so because what the ground complains, is that the trial successor magistrate did not assess the evidence, which he did not record. Instead he applied the evidence of the respondent which he recorded.

But in the submission, the learned counsel attacked the decision of the court on ground that the successor trial magistrate did not record reasons for taking and hearing a partly heard case. He went saying, it is in contravention of mandatory provisions of order XVIII r. 10 of CPC. This ground I think has no merit. In the first scenario, it is not true that the trial successor magistrate decided a case on one sided evidence. His judgement is clear and has invited all evidence of the parties and arrived at a decision. I see nothing to fault the trial successor magistrate in this aspect. In the second scenario, as submitted by the appellant's counsel, before taking on the case by the successor it is reflected at page 44 of the typed proceedings, the cases was assigned to him following Hon. Mwingira's transfer. There was no complaint between the contending side. It is therefore absurd to have the same as complaint now. In my view, he complied with the law. This ground of appeal has no merit.

The last ground of appeal, hinges on a dispute that properties which were acquired before marriage, if any, are not subject of division, since they are not matrimonial assets. To be able to answer this question, recourse is to be taken in the provisions of section 114 (3) of the LMA, which provides;

> *(3) For the purposes of this section, references to assets acquired during the 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"*

Corollary to that, is section 60 of LMA which states as hereunder;

> *"Where during the subsistence of a marriage, any property is acquired-*
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> *(a) in the name of the husband or of the wife, there shall be a*

rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;

(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

The born of contention here is about the company shares. The respondent's evidence in the first limb states that the company does not belong to the family. The trial court rightly held so. The respondent showed that the company is not owned by the parties to this case. It cannot therefore, basing on the provisions of section 60 of the LMA, be taken to be a family asset subject of division.

But who owns the company? The respondent testified that the company was established by his grandfather. It was established before the appellant was married to the respondent. The same was however, said on cross examination by appellant's counsel at page 47 of the typed proceedings, that the company belongs to Chile Ngonyani and Henry Shumbi. He further testified that he, the respondent owns more shares than Shumbi.

In my view shareholding in company is a personal issue. Since the respondent own shares. It is taken that shares are like any other property.

In actual fact, despite the fact that they are owned by him, like the motor vehicle or a house that was held in person by the appellant, they are subject of division as the family asset. Even if the same was established before marriage as held in section 114(3) of LMA, there were improvements made. Shares fall in this category. Basing on that analysis, I hold that the 4th ground has merit. Although, I am in an agreement with the trial court that the company is not a family property.

But shares of the respondent like any other asset is a family matter. The shares, as all other properties, held by the trial court to be family assets should be subject of division. They should have included shares of the respondent in the company called Muhima and Co Ltd. Therefore, the same are to be shared at a rate of 20% to the appellant and 80% to the respondent.

Having said so, in a nutshell, this appeal partly succeeds as follows;

i. Family assets subject of division as held by the trial court have to include the respondent's shares in the company called Muhima and Co. Ltd
ii. The same should be shared as held at the tune of 20% to 80% to the appellant and respondent respectively
iii. The order for custody given to the respondent is quashed and set aside
iv. The appellant if she has interest to apply for custody and maintenance may do so in a separate suit in the Juvenile Court or any other court competent to try custody, access and maintenance matters
v. There is no order as to costs.

Recoverable Signature

X

Signed by: A.K.RWIZILE