IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
MATRIMONIAL APPEAL NO.24 OF 2020

(Arising from Ilemela District Court in Matrimonial Cause Civil No. 03 of 2019)

NAOMI LUCAS MBUKI..... APPELLANT

VERSUS

RAPHAEL NKWABI ..... RESPONDENT

JUDGMENT

Date of last Order: 18.11.2020

Date of Judgment: 30.11.2020

A Z. MGEYEKWA, J

Raphael Nkwabi, the respondent, and Naomi Mbuki, the appellant respectively, were husband and wife. They were formally married in 2006. Out of that union, they owned some properties. It appears their marriage went on well all along until the year 2014 when the relationship started to go sour after the appellant's adulterous behaviour. Feeling

that he could not stomach unfaithful relationship any longer, the respondent decided to file for petition for divorce before the District Court of Ilemela.

On 20th April, 2020 the respondent successfully petitioned for separation in the District Court of Ilemela in which she prayed for the following orders:

(a) An order granting a decree for divorce.

(b) An order for distribution of matrimonial assets which the parties acquired jointly and equitable contribution.

(c) Costs of this petition upon the appellant.

(d) Any other relief (s) or/and order(s) the Honourable Court will deem equitable to grant.

After hearing both parties, the District Court Magistrate (Sumari, RM) issued an order for separation and distributed the matrimonial properties among the parties. The appellant was not happy with the distribution of the matrimonial assets she got. She thus preferred this appeal in the Court. The appeal is predicated on four grounds of grievance as follows:-

1. *That, the trial court erred in law and facts for distributing the matrimonial assets and the respondent was given the lions share.*

2. *That, the trial court erred in law and facts for failure to consider that the appellant contributed more in the acquisition of the matrimonial assets than the respondent.*

3. *That, the trial court erred in law and facts for failure to observe that the respondent was misappropriating and misusing the matrimonial assets.*

4. *That, the trial court erred in law and facts for excluding some of the matrimonial assets in the list of matrimonial assets.*

The appeal was argued before this court on 18th November, 2020 whereas, the appellant enjoyed the legal service of Mr. John Edward, learned counsel, and the respondent enjoyed the legal service of Mr. Erick Kahangwa, learned counsel.

Mr. John Edward opted to consolidate the first, second, and third grounds because they are intertwined. He chose to argue the fourth ground separately. The learned counsel started his onslaught by

attacking the first, second, and third ground of appeal which challenges the trial court for failure to distribute the matrimonial assets equally.

Mr. John Edward valiantly argued that the division was not in accordance with the law and did not base on equal share as a result the respondent was given a huge share without justifiable reasons. He stated that both parties are teachers. To support his submission he referred this court to page 8 of court proceedings. Mr. John Edward argued that PW1 and DW1 testified that the appellant (DW1) was running a business; a shop and she explained how she generated income out of the said business.

It was Mr. John Edward's contentious that the appellant had a bigger income compared to the respondent since she was paid a salary and took loans from the bank. He added that the source of income made the appellant and the respondent acquire the following properties; a house located at Nyamhongolo, a house located in Kakola, a plot at Fumagila, a house located at Bugalama and appellants shops at Bugalama, a plot at Ikigijo and a Vehicle T 965 BST. Mr. John Edward

blamed the trial court for not considering the contribution of both parties in dividing the said properties.

The learned counsel for the appellant continued to argue that the respondent house servicing the loan which he took and constructed the house at Bugalama. He added that PW1 and DW1 both confirmed that they planned to leave in the house located at Nyamhongolo. Mr. John Edward avers that the appellant proved her contribution which she made using her salaries and loan and invested her income in the construction of the matrimonial house located at Nyamhongolo.

Therefore, it was his considered view that it was not fair for the trial Magistrate to place the said house to the respondent because the respondent is the one who initiated the divorce without any reason. He added that there was no any proof of adultery or cruelty instead he claimed that the appellant was barren and DW1 testified that the respondent is residing with another woman. He insisted that the respondent's salary was servicing the Bugalama house thus he deserved the Bugalama house and the appellant Nyamhongolo house.

He continued to state that the trial court divided the plots located at Ikigijo and Fumagila to the respondent while the plot at Fumagila was cared for by both parties. He added that it is a big plot and they planted trees. He lamented that it was not fair for the trial court to divide the Fumagile land parcel (Exh. PE7) to the respondent while it has more value compared to the plot located at Ikigijo (Exh.PE8). Mr. John Edward referred this court to section 114 (2) (d) of the Law of Marriage Act, Cap.29, and argued that in the division of property the court was required to look at equality in dividing the matrimonial properties.

He added that in accordance with our customs and tradition the appellant considered the assets to bear the respondent's names she let it been written in the name of the husband the respondent is the one who bought the plot located at Fumagile and the appellant signed the sale agreement. He faulted the trial court for failure to consider the evidence of the appellant.

In relation to the division of shops, he argued that the shops were operated by the respondent and when he was cross-examined agreed that the business licence is in the appellant's names. The appellant

started to operate the said business before marriage thus, the court mistakenly included the said properties in the division of properties.

In regard to the two vehicles, Mr. John Edward argued that the parties bought the vehicles with registration No. T695 BST and T67 CKW whereas, the appellant was using the vehicle with registration No. T 695 BST and the respondent used the vehicle with registration No. T67 CKW. He added that but the trial court included the vehicle with registration No. T695 BST in the division of property in exclusion of the vehicle with registration No. T67 CKW and still T695 BST was subjected to equal shares without any explanation.

He lamented that this court has decided that equal distribution is vital and women "housewives" are considered for equal shares. He went on to state that the appellant was an employee, housewife, and business woman thus she was required to receive a bigger share. To bolster his submission he cited the cases, **Bi. Hawa Mohamed v Ally Seif** (1983) TLR and **Jesca Saimon v Hanorati Boniphace**, Matrimonial Appeal No. 05 of 2016.

Mr. John Edward did not end there, he stated that there were other properties which the respondent sold without notifying the appellant; a plot of 10 acres was sold and the appellant did not receive any share, one generator was taken by the respondent, fixed accounts valued Tshs. 48,000,000/=. He lamented that the appellant proved the existence of the account in KCB bank but the same was excluded from the division of property.

He went on to argue that the respondent misused the appellant's money. To buttress his argumentation he cited the case of **Omary Chikamba v Fatma M. Marunga** (1989) TLR 39, and said that a person who mismanaged the property deserves a lesser share.

On the strength of the above, the appellant's counsel prayed that the appeal be allowed with costs.

Responding, Mr. Erick Kahangwa opted to consolidate all grounds of appeal. He refuted that the appellant made a bigger contribution in the acquisition of the matrimonial properties with her source of income was salary, a business of shops. He argued that the appellant did not prove her claims. He referred this court to the trial court Judgment

specifically pages 12 and 13 where the appellant testified that she had a business of the retail shop, wholesale soda shop, and Mpesa and Airtell money business with a monthly profit of Tshs. 400,000 per month.

Mr. Erick Kahangwa went on to argue that during cross-examination on page 52 of the court proceedings the appellant failed to show any supporting documents to prove how she generated income and in 2015 she had no any business licence. He insisted that the appellant's evidence was weakened for failure to prove the existence of the said properties. He fortified his argumentations by referring this court to section 110 (1) of Evidence Act Cap.6 [R.E 2019] which states that who alleges must prove.

The learned counsel for the appellant disputed that the respondent was a teacher. He added that PW1 testified that he was working with Barick Gold Cooperation since 2002 and when cross-examined he said he is a technical mechanic and was teaching other people. He went on to state that the DW1 testified that she is a teacher with a take-home salary in a tune of Tshs. 645,000/=. He added that when she was cross-

examination she testified that in 2005 she received Tshs. 296,000/= and in 2012 she received a salary in the tune of Tshs. 478,000/=.

Mr. Erick Kahangwa valiantly argued that it is not true that in 2005 she received a huge salary than in 2012. He added that it is trite law that every witness is entitled to credence and must be believed unless there is a good reason for not believing the witness. To bolster his argumentation he referred this court to the case of **Godluck Kyando v R** (2006) TLR 363.

Expounding this principle in the case of **Njakuboga Boniface v R**, Criminal Appeal No. 4 of 2016, he stated that the Court of Appeal of Tanzania held that the demeaur of witness coherence of the testimony. Mr. Erick Kahangwa lamented that the appellant witness had no cogent evidence and was contradicting herself, thus the court found that she was not telling the truth. Saying that the appellant gave the respondent money is not true because PW1 after receiving his pension he bought the plots (Exh.PE7) and (Exh.PE8).

He strongly argued that DW1 tendered business licence (Exh. D1) and (Exh.D2) which was issued in 2019 but she failed to tender business

licence of previous years to prove that her ownership over the disputed shops and the trial court denied her evidence. It was his contentious that the respondent proved that he opened a shop in 2013 selling soda and running Mpesa Money business and the respondent evidence was not contested, whereas the appellant said she was running Airtel money business in 2013 while Airtel Money was not operating. He went on to argue that the appellant was supervising the business although the respondent provided the capital of this business.

It was his further submission that DW1 had no any sale agreement to prove the purchase of two vehicles. He went on to state that the vehicle T 965 BST is in place but the vehicle T961 CKW its whereabouts is unknown and it was not among the listed properties. He refuted that a woman is considered more in division of property. He argued that the trial Magistrate did not exclude domestic work. Mr. Erick Kahangwa lamented that the appellant was paid more than IT was expected because her contribution was less.

With regard to the plot located at Nyaungwe and the issue of a generator, the learned counsel submitted that they were just imaginary

and that there was no proof since the appellant had no any sale agreement to prove her allegations and the respondent does not recognize the said plot. He added that the issue of a generator, DW1 had no evidence to prove if it was in place. Regarding the issue of a joint account, he stated that it was mere words since there was no proof that it was a joint account. He went on to argue that DW1 testified that there was a joint account with a balance of Tshs. 40,000,000/= while the actual balance in the respondent's account was Tshs. 11,000,000/. He added that when DW1 was cross-examined she admitted that the said account belongs to PW1 and the trial court in its judgment did not consider the appellant's testimony.

The learned counsel for the appellant refuted that the respondent was misusing the money since there is no evidence on record. He insisted that the appellant contributed less compared to the respondent. He lamented that there is no any provision in the law that allows for a person who contributed less to be awarded more. Mr. Erick Kahangwa fortified his argumentation by referring this court to the case of **Robert Aranjo v Zena Mwajbu** (1984) TLR 37.

On the strength of the above arguments, Mr. Erick Kahangwa beckoned upon this court to dismiss the appeal with costs.

In his rejoinder, the appellant's Advocate reiterated his submission in chief and added that the respondent did not testify about his income; salary pension was not proved and did not say what amount of pension he received., thus, the same is an afterthought. He added that DW1 salary changed, the variation of salary was in accordance to increase in salary. Mr. John Edward went on to state that the appellant testified that her capital business was due to her mother's retrial benefits and DW1 started her business before marriage whereas she did not include the business of Airtel money.

Insisting he stated that each year the appellant was renewing her business licence thus she tendered the renewed licence before the court while the respondent did not tender any evidence to prove his ownership over the said business. He insisted that the respondent admitted that he works at mines but he also teaches adult people on page 20 of court proceedings.

Mr. John Edward further refuted that DW1 was an incredible witness, the same is baseless. He went on to state that impliedly the respondent acknowledges that DW1 was supervising the business, she was in charge thus she was managing and controlling the business. Insisted that the vehicle with registration No. T967 CKW belonged to the parties and the respondent admitted to have given George Gakuba some money.

Mr. John Edward complained that the learned counsel for the appellant has raised a new issue that the money was as mortgage and there was no evidence to support his allegation that the said vehicle was involved in an accident. He insisted that thus the vehicle T967 CKW be included in the division of matrimonial properties. The learned counsel for the appellant valiantly insisted that he account in the respondent's name and they agreed to write the name of the respondents and both of them deposited monies for future usage thus excluding the same was a violation of the appellant's right.

In conclusion, Mr. John Edward urged this court to quash the trial court decision and allow the appeal.

So much for the submissions of the learned counsel for the parties. Having summarized the submissions and arguments by both sides, I am now in the position to determine the grounds of appeal before this court. In my determination, I will consolidate the first and second grounds because they are intertwined. They can and will be, determined together. The third and fourth grounds will be, determined separately.

Addressing the first and second grounds that the appellant is complaining that the trial court erred in law and facts for awarding the respondent a lion's share and did not consider that the appellant contributed while she contributed more in the acquisition of matrimonial properties than the respondent. In determining the first ground, I wish to consider the most crucial issue whether the division of matrimonial properties was fair or not.

It is clear that in the instant appeal the disputed issue revolves around the division of matrimonial assets. The Law of Marriage Act, Cap.29 [R.E 2019] guides the Court in the division of matrimonial properties, specifically, section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 114 (1) of the Act clearly states that 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 division between the parties of the proceeds of the sale.

Expounding the requirement of section 114 of the Act, I find that there are some exceptions to section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 114 (3) provides that:-

> *"114 (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****."* [Emphasis added].

From the above provision of law, it is clear that a property acquired during the subsistence of the marriage is presumed to be owned by both spouses equally until proven otherwise. For property registered in the name of one spouse acquired during the subsistence of the marriage, the law presumes that it is held in trust for the other spouse. As for

property held in their joint names, the presumption is that each of the spouses has an equal beneficial interest to the property.

In the division of such properties, each party has to prove his/her level of contribution, whether monetary or non-monetary. When these properties are substantially improved during the subsistence of marriage by the joint efforts of the spouse, they become liable for distribution as stated in the case of **Anna Kanungha v Andrea Kanungha** 1996 TLR 195 HC.

Based on the above provision of law and the cited authority, the issue for determination is whether the appellant contributed towards the acquisition or developing the house located at Nyamhongolo. The records reveal that the appellant testified to the effect that she and her Husband constructed a house located at Nyamhongolo. She testified that they acquired Plot No. 99 Block 3 at Nyamhongolo while they were engaged in 2006. The respondent testified that they acquired a building permit in 2010 (Exh.P6) and started to develop the said plot in 2011.

The respondent testified that he bought a plot located in Nyamhongolo area and constructed a house at Nyamhongolo The

evidence on record bears it out that, despite the fact that the respondent asserted that he bought the plot at Nyamhongolo and constructed a house therein, he equally testified that they constructed the said house together. I shall demonstrate.

When PW1 testifying at page 13 of the typed proceedings, the cross - respondent is recorded as saying:-

> *" **Nyamhogolo house is the house we had constructed our plan was to live in Mwanza in future**. I do live in Bugalama, however, whenever am in Mwanza I live at Nyamhongolo."* [Emphasis added].

When PW1 was cross-examined by the defendant's Advocate at page 22 of typed trial proceedings, he went on:

> *"... I bought the plot at Nyamhongolo at a price around Tshs. 400,000/=, I do not know the exact figure in my head. My target was to transfer in Mwanza **that is why we constructed the house**." [Emphasis added]*

The above evidence reveals that the appellant and the respondent constructed together the house located at Nyamhongolo together.

There is no evidence to show that the appellant constructed the said house in exclusion of the respondent. The letter of offer (Exh.P5) was issued on 21st September, 2006 when the parties were in a relationship, and the building permit was issued in 2010 when the parties were married.

The law clearly states that the property developed by both parties during their marriage is subjected to division among the parties. Therefore, it was not correct for the learned counsel for the respondent to insist that the house located at Nyamhongolo belongs to the respondent in exclusion of the appellant. Also, the respondent evidence that he started to construct the house in 2006 before marriage is not true because he was required to abide by the statutory requirement to obtain a building permit before starting to construct the said house. Regulation 124 (1) (c) of the Local Government (Urban Authorities) (Development Control) Regulations, provides that:-

> *" 124 (1) No person shall erect or begin to erect any building until he has –*

(c) ***obtained from the Authority a written permit to be called a 'building permit'.*** *" [Emphasis added].*

Guided by the above provision of law, the respondent's testimony that he started to construct the said house in 2006 before marriage and the building permit was issued in 2010 is unfounded.

Now the issue for consideration here is to what extent the parties made their contribution in constructing the house located at Nyamhongolo. The records reveal that the appellant testified that she made a contribution in constructing the house by using her salary and she took a loan. She also tendered a business licence issued in 2019. In my considered view, as long as there is proof that the appellant was employed, I can say that at least she proved that she has obtained the money from her salary.

The respondent's Advocate valiantly argued that the cross - respondent's salary did not suffice to enable her to construct the said house by herself. In my view, this is a minor flaw as long as it was not disputed that the appellant was employed and she received a salary, the same means that she was paid.

On the other side, the respondent did not convince the trial court how exactly he earned his income, saying that he was paid pension was not enough, he was required to prove how the said pension was used in constructing the house and to prove the existence of other business and prove the same by tendering respective receipts or documents. Therefore, in the end, I have considered the parties' testimonies and I am satisfied that both parties made an equal contribution in constructing the house located at Nyamhongolo.

Additionally, it is uncontested that the respondent acquired the plot at Kakola and he constructed a house at Kakola in 2001 before he got married. To substantiate his testimony he tendered a sale agreement (Exh.P3). On her side, Naomi testified that she developed and renovated the said two houses, and the cross - respondent did not object.

The respondent argued that the appellant had no right to raise her claims over the house located at Bugalama because she did not contribute anything towards the acquisition of the same. The records reveal that the construction of a house at Bugalama is uncontested that

the respondent constructed the said house in 2004 after obtaining a loan from Barick Ulyankulu. He substantiated his testimony by tendering a certificate of occupancy (Exh.4). Both parties testified to the effect that Raphael constructed the said house. Therefore, without a doubt, I rule out that the house located at Bugalama belongs to the respondent.

Regarding the two vehicles in my considered opinion, it was right for the trial court to divide the vehicle with registration No. T965 BST between the parties. Because none of them tendered a cogent document to prove that she/he bought the said car. The Exh. D5 is a motor vehicle with a registration card that bears the name of other people. The registration cards of both vehicles were not transferred to the appellant nor the respondent.

However, in my view the vehicle with registration No. T967 CKW was required to be subjected to division. I am saying so because it was not disputed that the said vehicle existed. It was not clear whether the said vehicle was mortgaged or it was sold or not. In my view, the same be divided between the parties in case there is proof that the said vehicle was sold then the appellant is entitled to shares.

Concerning the division of the two land parcels, in Fumagila and Ikigijo. I have scrutinized the court records and found that the respondent testified to the effect that he bought the land parcels in 2014 when the parties were married and he tendered an Exh.P7 and Exh.P8 to support his argumentation. On her side, the appellant testified to the effect that she contributed to buying the said land parcel since she is the one who gave her husband the money to buy the said plot. She also signed the document as a witness. When it comes to the division of matrimonial properties section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019] guides this court. The section state that:-

> *" 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."*

Applying the above provision of law, the property acquired during marriage by the parties' joint efforts is subjected to division. I believe the respondent bought the said plots since the same is in his name. However, the appellant played a role in acquiring the said plot, she

witnessed the sale agreement between the parties. The appellant made her contribution since she was there and witnessed the buying process, taking to account that the respondent did not object. In my considered view, the appellant's efforts were seen thus the plots were acquired by joint efforts of Rapahel Nwabi and Naomi Msuki.

Next for consideration is the third ground that the trial court erred in law and facts for failure to observe that the respondent was misappropriating and misusing the matrimonial assets. I have read the trial court records and found that the appellant's allegations were not supported by any cogent evidence. These are pure allegations thus the same were required to be supported by documentary evidence or other cogent evidence. The law clearly states under section 110 (1) odxf the Evidence Act, Cap. 6 [R.E 2019] that:-

> *" Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. "*

The above position of the law was also observed by the Court of Appeal of Tanzania in the case of **Abdul Karim v Raymond Nchimbi**

Alois and another, Civil Appeal No.99 of 2004 (unreported). It was held that:-

> *"... It is an elementary principle that he who alleges is the one responsible to prove his allegations."*

Borrowing a leave from the above authorities, it is clear that the burden of proof at the required standard is left to the person who alleges whereas the respondent did not prove

Last for consideration is the fourth ground, that the trial court erred in law and facts for excluding some of the matrimonial assets in the list of matrimonial assets. The appellant testified that she bought a plot at Nyehunge but she did not tender any document to prove her ownership and instead she blamed the respondent for selling the farm located at Nyehunge in 2019 without involving her. The appellant also claims that the respondent took away the generator from their matrimonial house without notifying her.

The evidence on record bears it out that, the respondent asserted that the said plot and generator were not in existence. Therefore, it was upon the appellant to prove her allegations. The issue of a joint account

which is in the name of the respondent was not proved. A joint account must bear the name of all parties who jointly opened the said account. The documents reveal that the said account was a personal account, it belonged to the respondent. Therefore the same cannot be subjected to division.

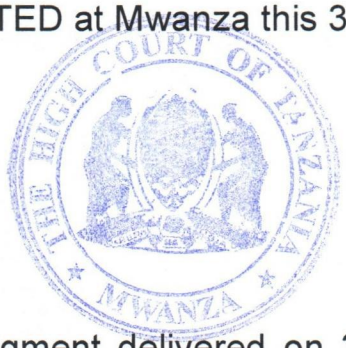
In the circumstances and for the foregoing reasons I partly allow the appeal to the extent explained above and issue the following orders:-

1. The house located at Bugalama is placed to the respondent.
2. The house located at Nyamhongolo the respondent is given 50% shares and the appellant is also given 50% shares.
3. One house of his choice at Kakola is given to the respondent and the other house at Kakola is placed to the appellant.
4. The land parcel at Fumagila the respondent to be given 70% of the market value and 30% to the appellant.
5. The land parcel at Ikigijo the appellant to be given 70% of the market value and 30% to the respondent.
6. Two Shops (Items) the appellant to be given 80% of items and 20% to the respondent.

7. Fixed Deposit Account belongs to the respondent.
8. I make no order as to costs, each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 30th November, 2020.



A.Z.MGEYEKWA

JUDGE

30.11.2020

Judgment delivered on 30th November, 2020 in the presence of the appellant and Mr. Erick Kahangwa, learned counsel for the respondent.

A.Z.MGEYEKWA

JUDGE

30.11.2020

Right to appeal fully explained.