IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN DISTRICT REGISRY BUKOBA
AT BUKOBA

MATRIMONIAL CAUSE APPEAL NO. 5 OF 2018

HILDA RWEJUNA.....APPELLANT

VERSUS

PHILBERT MLAKI.....RESPONDENT

JUDGMENT

13/11/2020 &16/12/2020

KAIRO, J.

This matrimonial appeal touches on the key aspect of division of matrimonial properties under the law of marriage in Tanzania. Two of the glaring issues among others, are: **One**; whether the properties/assets, to be specific, in this case, "the land" acquired by one spouse and registered in the name of spouses' child amounts to matrimonial properties subject to division. **Two**; whether joint effort doctrine can be invoked to properties acquired by one spouse during the period of separation of the couples to entitle the same to be called matrimonial properties.

The brief material facts of this case can be discerned as hereunder: The record has it that the Appellant; Hilda Rwejuna petitioned for a decree of divorce and division of matrimonial properties against the Respondent Philbert Mulaki before Bukoba Urban Primary Court. After the decree of divorce was granted and order of division of matrimonial property issued, the Appellant was not amused by the said division and thus preferred her first appeal to the District Court of Bukoba. The court made its own findings and eventually dismissed the same for want of merit. The Appellant was further aggrieved and she is now before this this temple of justice to challenge it.

The Appellant raised seven grounds of appeal which this court found imperative to reconstruct them as follows for easy understanding:

1. *That the appellate magistrate went wrong to dismiss the appeal with costs basing on erroneous ground.*

2. *That it was a misdirection by the appellate court to support the findings of the trial court without re-evaluating the evidence of both parties which indicated that the Appellant had made substantial contribution towards acquiring both the back house and the Kishanda Village matrimonial properties in Muleba District thus entitled to a share.*

3. *That, the judgment of the first appellate court is a nullity for being signed and delivered by the Hon.S.L.Maweda,RM on behalf of Hon.C.S.Uiso-RM contrary to law.*

4. *That it was wrong for the appellate court to uphold the decision of the trial court that the front house was acquired jointly while it was solely bought by the Appellant in the name of their son and built it alone, as such the Respondent has no share on it.*

5. *That in the light of ground no.4 the appellate magistrate erred in law to uphold that the Respondent made a contribution towards acquiring the front house and that he is entitled to be allocated two rooms in that house as his share.*

6. *That the appellate court went astray to order costs in a matrimonial dispute. Besides the court didn't specify who should shoulder the said cost.*

7. *That the appellate court misdirected itself to uphold the finding of the trial court that the Appellant has not contributed as she was under separation with the Respondent since 2004.*

By the parties' consensus, the court ordered this appeal be disposed by way of written submission. Both parties did abide to the scheduled order to which I commend them for that. The Appellant was self-represented while the Respondent enjoyed the service of Advocate Rogate Eligi Assey.

The Appellant in her written submission informed the court that she will argue grounds no.1, 2, 4, 5 and 7 together and the rest ie no. 3 and 6 will be argued separately.

Going through their submissions the gist of the Appellant's discontent is centered on the share given to the Respondent for the front house claimed to have been acquired solely by her. The Appellant submitted that when purchasing the same in September 1997 she used the name of their son; one Abert Mlaki and backed up her contention by the sale agreement she tendered and admitted by the trial court as "exhibit A1". She argued that section 60 of LMA Cap 29 recognizes separate property ownership regime during the subsistence of the marriage. She was also to the effect that not every property acquired during subsistence of marriage is a joint property. The Appellant further submitted that the seller of the plot in question where the front house was built; one Charles Peter appeared before the trial court and testified for her as witness no.2. She went on that there was no any evidence tendered by the Respondent to prove his contribution in building the front house apart from tendering the original sale agreement which was admitted as "exhibit ADII" she alleged to have been stolen from the Appellant and forged it by changing the name of Albert Mulaki to his name; Philbert Mulaki.

She went on that the exhibit she tendered at the trial court is crystal clear she was a buyer of the property while the Respondent signed as witness no.3 on the part of the buyer. She was to the effect that the relationship of the Respondent and herself in the sale transaction was that of a buyer and witness and husband and wife. She therefore concluded that the first appellate court was in error to uphold the decision of the trial court which ruled out that the plot was acquired jointly by the Appellant and

Respondent and thereby allocating two rooms in that house to the Respondent as his share.

Submitting on the issue of contribution to the back house, the Appellant argued that it was an error in law for the first appellate court to concur with the trial court that there was no any contribution of the Appellant to the back house on the pretext it was acquired and built when the Appellant and the Respondent were under separation. She further elaborated that section 114 of LMA provides the principle underlying the division of matrimonial assets to be one of compensatory in nature and it does not matter whether what is compensated is direct monetary contribution, domestic services or wifely services. She cited the land mark case of **Bi Hawa Mohamed vrs Ally Sefu**(1983)TLR at pg 32 where the court said that *"the joint effort and work towards acquiring of assets have to be construed as embracing the domestic efforts or work of the husband and wife "* He also referred the court to the case of **Charle s/o Manoo Kasare and Another vs Apolina w/o Manoo Kasare**(2003)TLR pg 425 and 426 where the court had this to say *"The 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 1972 would have entitled her to share in the properties acquired."* She further cited the cases of **Mariam Tumbo vrs Harold Tumbo** (1983) TLR at pg 293 and 294, **Pulcheria Pundugu vs Samwel Huma Pundugu**(1985)TLR at pg 7 and 8 to back up her arguments.

In view of the above submission, the Appellant maintained her stance that the court made wrong finding that the back house was built while the Appellant was under separation with the Respondent without taking into account that separation is not divorce as the marriage was still subsisting during that time. He cited the case of **Dotto d/o Malamla vs Lukeleshe Lyaku** (1981)TLR at pg 29, where his Lordship Lugakingira observed: *"Separation whether voluntary or by a court order, whether wrong may have committed it is not automatic to divorce"*

With regards to the issue of evaluation of evidence, it was the Appellant's position that if the appellate court would have properly re-evaluated the evidence tendered at the trial court, it would not have arrived to a such decision. She further elaborated that the appellate court did not evaluate the evidence concerning contribution to both front and back houses and other matrimonial assets located at Kishanda village in Muleba. She referred the court to the case of **Hassan Mzee Mfaume vs Republic** (1981)TLR pg 167 wherein it was held that "*a judge on first appeal should re-appraise the evidence because an appeal is in effect of rehearing of a case"*

Submitting on ground no.3, the Appellant stated that the appellate court judgment is a nullity and has no legal effect whatsoever for being signed and delivered by the Hon.S.L. Maweda-RM on behalf of his predecessor Hon.C.S.Uiso-RM. Besides, S.L.Maweda simply signed without stating if he was a "successor" and further did not assign reasons for signing the said judgment. To her, such an omission mean he did so without jurisdiction

and thus was in contravention of mandatory provisions of section 2 and 5 of the Civil Procedure Code (Cap.33 R.E 2002) as amended by GN.no.223 of 2010 of the Civil Procedure Code (Ammendment of the first schedule) Order, 2010 which requires the judgment to be signed and delivered by the successor magistrate and not otherwise. She however, conceded that the Civil Procedure Code (supra) is not applicable in matters originating from the Primary court but according to the Judicature and Application of laws Act, Cap 358 R.E 2019, the High court and District court could apply Civil Procedure Code where there is *lacuna*. She cited the case of **Donatus Yustad@Begumisa vs The Republic**, Criminal Appeal no.365 of 2016 at pg 9.CAT BK (unreported).

Amplifying the 6th ground of appeal, the Appellant challenged the granting of costs by the appellate court arguing that this case is a family dispute. She elaborated that commonsense dictates that every party in a matrimonial dispute should bare his or her cost not only for the purpose of harmonious relationship but also to foster proper taking care of the children marriage and avoiding inflammation of ill feelings to the detriment of the parties who were once married. She cited the case of **Ester Siliacus vs Siliacus Marchiory;** Matrimonial cause appeal no.2/2017 at pgs 10 where Kairo, J abstained from granting costs basing on the reason that the matter concerned family dispute.

In reply, the Respondent's counsel Mr.Assey submitted that the appellate court made a proper re-evaluation of the evidence adduced by the parties and came to proper finding that the Respondent had made contribution to

the front house. That even if the land was purchased in the name of the child but it was purchased during subsistence of marriage.

With regards to other properties at Kishanda Village in Muleba, the Advocate contended that the same were neither raised at the trial court nor at the appellate district court. Besides, there was no evidence tendered in that respect. He added that even though the first appellate court is required to re–hear the case but it does not mean to admit new evidence or raising new issues that were not dealt with by the trial court or. He was to the effect that the Appellant has confused the position in the case cited of **Hassan Mzee Mfaume v R** (supra) as it does not fit in the circumstances of the case at hand. The Advocate insisted that the Appellant has raised new matters and evidence on appeal while the appellate court has the duty to re-evaluate the evidence which is already on record. He cited the case of **Richard Joseph Chacha vs the Republic**, Appeal no.209/2014, Court of Appeal at Mwanza which ruled out that new evidence which the court did not deal with is not allowed at the appellate stage.

Responding on the allegation that the Respondent stole a sale agreement and made a forgery by inserting his and removed the name of their son, the Respondent's counsel submitted that he bought the plot where the back house is built and he tendered it at the trial court. He further amplified that there was no evidence of stealing it or loss report tendered by the Appellant insisting that the circumstances warranting receiving new evidence does not fit the case at hand.

The Respondent's Advocate also submitted that this court has no reason to interfere with the concurrent findings of two lower courts. He referred the court to the case of **Bushangira Ngoga vs Manyanda Maige** Civil Appeal no.18/2000, High Court of TZ, Mwanza (Unreported).

He went to submit that he is aware of the position in **Bi Hawa Mohamed case and Charles Manoo (Supra)** cited by the Appellant that for the purpose of division of matrimonial assets, the wifely and domestic services are sufficient contribution. However, the Appellant deserted the Respondent for 13 good years since 2004. That the Respondent bought the land in 2006 and built the house while the Appellant was not doing any wifely activities. As such she made no contribution whatsoever. He argued that **Dotto Malamla's** case is distinguishable as the issue at hand is not separation but division of matrimonial property and the extent of contribution to the acquisition of the same.

The Advocate went on to argued that the pleaded assets at the trial court were two (2) houses and house hold properties adding that the properties at Kishanda were never mentioned at the trial court. Besides, the house hold properties cannot be present after 13 years.

Responding on ground no.3, the Respondent submitted that it was a total misconception of the provisions of order XX rule 2 and 8 of Civil Procedure Code (supra).He elaborated that, the judgment was written and signed by the predecessor Hon.Uiso who composed it and eventually read over by Hon.Maweda who pronounced it as required by law. The Respondent quoted part of the judgment which embodies the signature of the

predecessor and the reason of being read by the successor magistrate to verify that the law was complied with. He thus concluded that the ground has no base.

As a response to ground no.6 Mr.Assey contended that awarding cost is the discretion of the awarding court. He argued that there is no law the Appellant has cited which governs the award of cost or otherwise. That what the Appellant has stated is her views and not the position of the law, praying the court to dismiss the appeal for want of merit.

In rejoinder the Appellant reiterated what she had earlier submitted to which this court feels no need to reproduce them to avoid tautology. However, I will sum up briefly; the Appellant insisted that the appellate judgment was a nullity. On the point of raising new issues, the Appellant has thrown blames to the trial court for not recording the proceedings properly claiming that some of the testimony was not recorded. The Appellant disputed that there was no new evidence brought at the appellate court rather they were claims on the issues dealt with at the trial court. She clarified that, pg.1 and 2 of the trial court judgment reflects the claim of stealing of the original sale agreement which was in the hands of the Respondent. She further stated that as she had tendered the copy of sale agreement at the trial court while the original was in the hands of the Respondent, then tendering the original at the appellate stage doesn't amount to tendering of new evidence. She cited the case of **A.S.Sajani Vs Cooperative and Rural Development Bank**(1991)TLR at page 44 Court of appeal had this to say *"Since the Appellant had during the trial*

mentioned the contents of particularly the letter of 24th October 1994 it cannot be said that the two letters were fresh evidence or additional evidence, rather they were documentary of what had been given orally"

The Appellant, further came up with new ground in her rejoinder that the judgment of the primary court is also a nullity for want of assessor's opinion, signature of magistrate and assessors contrary to section 7(1), (2) and (3) of MCA Cap.11 read together with rule 3(1) and (2) of GN no.2 of 1988 of the Magistrate Courts (Primary courts)(Judgment of court)Rules.

Having keenly considered the long submissions of both parties and the entire records in this appeal the question to be determined by this court is whether this appeal is based on founded grounds.

The law is settled that this court being the second appellate court is not supposed to interfere/disturb the concurrent finding of facts of the two lower courts unless there is misdirection of law resulted to miscarriage of justice. See **Bushangila Ngonga's case**(supra) relied on by the Respondent.

It is clear from the record of the trial court that the properties which were pleaded by the Appellant and litigated by the Respondent were two houses described as front and back house as well as households. I will therefore confine my discussion on only those listed and no more.

The Appellant tendered exhibit A1 at the trial court which was a copy of sale agreement to prove that she bought the plot of the front house herself and it was registered in the name of their child one Albert Mulaki. The

reason of tendering the copy was stated to be because the original one was in the custody of the Respondent. The Respondent did not object the tendering of the same and the court therefore admitted it. In that exhibit the Respondent signed as a witness. I paused to ponder the rationale behind the couples (husband and wife) purchasing the plot in the name of their child. In my views, the reason is that the couples wanted to exclude the said property from the list of matrimonial properties and placed the ownership in the hands of their child; Albert Mulaki. Whatever effort that was put to improve or develop it whether joint or separate was intended to eventually benefit their child not any of the parties who were husband and wife. In that regards therefore, I hold without hesitation that the said house (front house) was not a matrimonial property. Where the property is purchased by husband and wife in the name of their child/children, that asset cannot be said to be a matrimonial property subject to division. I am fortified in this stance by the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurwijila vrs Theresia Hassani Malongo,Civil Appeal No.102 of 2018,CAT at Tanga** (Unreported) wherein the Court when confronted with a similar matter came up with the stated stance. According to record, the property was purchased in year 1997 when their son Albert Mulaki was 5yrs old as testified by the Appellant. In my view, since he is now of mature age (above 18 years), there is no need of putting the said property under guardianship instead he should be left to manage it himself.

The only remaining asset to be determine its division is the back house. I concur with the concurrent finding on the available evidence that there was no evidence of contribution of the Appellant in acquiring the back house which was built by the Respondent when they were under separation. This is because the underlying principle as per section 114 of LMA of 1971, Cap 29 with regards to the division of matrimonial properties is to the effect that a couple is being compensated to the extent of what he/she contributed. The law also recognizes acquisition of property jointly or separately by a couple before or during subsistence of the marriage as provided for under section 60 of LMA (supra). However, if one puts effort in improving or developing it, and eventually the marriage becomes to an end, every party will be compensated to the extent he or she contributed. The extent of contribution therefore is the question of evidence. **See Gabriel Nimrod Kurwijila vrs Theresia Hassani Malongo(Supra)**. The courts have further recognize and resolved to be sufficient contribution the evidence of domestic services/work or even advice given during acquiring or developing the property as opposed to direct monetary contribution towards acquiring it. [See a large family of cases in **Bi Hawa Mohamed vrs Ally Sefu(**Supra**), Charle s/o Manoo Kasare and Another vs Apolina w/o Manoo Kasare(**supra**), Mariam Tumbo vrs Harold Tumbo(**supra),**Pulcheria Pundugu vs Samwel Huma Pundugu**(supra)].All these cases were also relied upon by the Appellant.

As per the record, it is not in dispute that the back house was acquired when parties were under desertion. The record further reveals that

desertion/separation started in year 2004 and the Appellant bought the plot in year 2006 and built the house therein separately. At the trial court and up to this court the Appellant has totally failed to prove how she contributed towards acquiring the back house. The separation lasted for about 10 years. It was neither stated whether during the said time they cooperated in whatever way nor shown who was taking care of the children of the marriage. I am aware that separation is not divorce since the marriage still subsist as rightly submitted by the Appellant. I am also aware that a property purchased by one party during subsistence of marriage could be contributed by the other party in its development to entitle him/her portion/division to the extent of the contribution done. However, I am hesitant to rule out that the Appellant contributed to the acquisition of the back house in these circumstances as the property at issue was acquired during the time when the Appellant left a matrimonial home and was leading her own life. The reason not farfetched: that since contribution is a question of evidence, then the Appellant was to tell the court how did she contributed in those ten years of desertion. Was it by cooking or washing the husband clothes, giving any advice or doing any wifely obligation so as to prove that she contributed towards acquisition of the property at issue. Such evidence would also guide the court on the extent of contribution. But the records are silent. The vice versa would also be my position in a similar circumstance if the Appellant would have acquired her own house in those ten years of separation.

It should be understood that the court in determining division has to address two issues: first whether a party contributed and second the extent of the contribution by adducing evidence in that regard. [Refer **Gabriel Nimrod Kurwijila vrs Theresia Hassani Malongo(Supra)]**. Having resolved that no evidence was adduced in that respect, I see nothing to fault the concurrent finding on facts of the lower courts with much respect to the Appellant. The property acquired during separation would only amount to matrimonial property subject to division if there is proof of contribution by the other party. In that regard, the circumstances of this case suggest that Appellant did not contribute anything to the back house and therefore she has nothing to be compensated therein.

There were households pleaded by the Appellant. Neither the trial court them nor the District court divided them. The Respondent in his submission contended that the household properties couldn't have stayed for all that long period of more than 10 years. The Appellant mentioned them as *Motorcycle, TV, Refrigerator, Table, six chairs, Five Mattresses, spoons, plates and pots* (Pg 5 of trial court proceeding). These were not valued and she left them in 2004 when she went under separation. The Respondent on his part did not dispute its existence nor that the items were jointly owned. His concern is only on the passage of time since they were left having in mind that the items were in use. However, in my conviction, the same were being enjoyed by the Respondent alone for all the time of separation, as such the Appellant needs to be given her share as well, as they were jointly owned. Though the value of the items was not stated,

nevertheless, I am prepared to grant the Appellant her share which I will shortly do hereunder, basing on the court's wisdom as far as the value of the items are concerned.

As for the ground no.3, the Appellant argued that the first appellate judgment is a nullity for being signed by Hon.Maweda who read it. I wouldn't want to be detained with it as the ground is legally without merit. According to record, Hon Maweda neither composed the judgment nor signed it. What he did was to pronounce it after giving reason of the absence of Hon.C.Uiso who had heard the appeal and composed the said judgment. In that regard therefore, her argument is a misconception of Order XX rule 2 and 8 of Civil Procedure Code (supra) with due respect.

With regards to ground no. 6 which concerned the cost ordered by the first appellate court, the Appellant has argued that ordering costs in matrimonial disputes is not allowed. First and foremost, it should be understood that cost ordering is the discretion of the presiding judge or magistrate. Practice has shown that some courts do not order costs in labour, family and probate matters. Essentially where a court is to exercise discretion, there is a legal requirement that the same should be exercised judiciously. That is to say reasons must be accorded. Prudence dictates that matrimonial disputes are not fit cases to order costs unless there is a tangible and plausible ground to so order. In the matter at hand, the first appellate court accorded none in his order, thus this court has found to be an omission which calls for correction.

In the final analysis, the court has found merit in this appeal and declare and orders as follows:

1. The order dividing the front house by giving two rooms to the Respondent and the rest of the rooms to the Appellant is hereby quashed and set aside as the same was acquired on behalf of their son one Albert Mulaki.

3. The back house is declared to be the sole property of the Respondent.

4. The Respondent is ordered to compensate the Appellant Tshs. 500,000/= for house hold properties left in his hands during separation.

5. The order of paying costs to the Respondent is hereby quashed and set aside and none is awarded cost in this appeal as well.

Appeal allowed to the extent explained above.

It is so ordered.

L.G. Kairo
Judge
16/12/2020.

R/A Explained.

L.G. Kairo
Judge
16/12/2020.

Date: 16/12/2020

Coram: Hon. J. M. Minde, DR

Appellant: Present

Respondent: Present

B/C: Gosbert Rugaika

Court: This matter was set for judgment today. I deliver the said judgment in the presence of parties this 16/12/2020. Let them supplied with copies.

J. M. Minde
DEPUTY REGISTRAR
16/12/2020