IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 43 OF 2020

(Arising from Tandahimba District Court in Matrimonial Appeal No.7 of 2020 and originating from Matrimonial Cause No.18 of 2020 from the Tandahimba Primary Urban Court)

SWALEHE JUMA CHITANDA.....APPELLANT

VERSUS

ZAMIRA ALLY MOHAMED.....RESPONDENT

JUDGMENT

8 June & 6 August, 2021

DYANSOBERA, J.:

This owes its origin from Matrimonial Cause No.18 of 2020 of Tandahimba Urban Primary Court whereby the respondent had petitioned for divorce and division of matrimonial assets.

The background of the matter is that in 2005 at Newala District and in Mtwara Region, the appellant and respondent celebrated their marriage vide Islamic rites (though no certificate of marriage was produced by the parties at the trial court). During the subsistence of their marriage, the parties were blessed with three issues whose names and age at the time of the petition are Juma Swalehe (13 years), Huzwaima Swalehe (8 years old) and Swaifi Swalehe (5 years old). The parties, in the life time of the marriage, managed to acquire several matrimonial though they disagree how each party contributed to their acquisition. On 14.11.2019 the appellant divorced the respondent vide islamic 'talak'. By December,2019 the appellant had not resumed to his divorced wife, the respondent. Seeing that, on 15.02.2020 the

respondent went to the appellant with her father and uncle for purposes of dividing the matrimonial assets acquired by them during the subsistence of their marriage. The appellant told the respondent together with her parents that the respondent would not get anything since the respondent wrote a piece of paper and stating that she would not take anything when divorced by the appellant. The respondent's uncle read the piece of paper and found that the respondent did not write what the appellant told them but had written that she would not involve her father in case anything happens between her and the appellant. There was no settlement reached. The respondent referred the matrimonial dispute against the appellant to the National Muslim of Tanzania (BAKWATA) at Tandahimba. The body summoned the parties but failed to reconcile the parties and, accordingly, certified its failure to reconcile the parties as evidenced by the prescribed Form No. 3 made under section 101 of the Law of Marriage Act, Cap 29 R.E. 2019.Thereafter, BAKWATA certified that it had failed to reconcile the parties thus, the trial court admitted the matrimonial cause filed by the respondent.

After hearing the parties, the trial court granted a decree of divorce under section of 107(3)(a)(b) and (c) of the Law of Marriage Act (supra) and made an order on division of matrimonial assets whereby it ordered the appellant to pay the respondent money at the tune of Tshs.2,000,000/= as compensation for her contribution towards the acquisition of their matrimonial assets.

Apart from dissolving the marriage and dividing the matrimonial assets, the trial court also made an order on the custody and maintenance of their children. The record is, however, clear that these

reliefs were not included in the respondent's petition and, obviously, parties had no opportunity to address the court on both custody and maintenance. Nevertheless, the trial court placed the custody of three children under the appellant on account that all the children were living with the appellant and no dispute had emerged from the respondent.

The respondent was aggrieved by the decision and orders of the trial court. She filed her appeal to the District Court at Tandahimba in Matrimonial Appeal No. 7 of 2020 on six grounds of appeal. The District Court of Tandahimba allowed the appeal by quashing and setting aside the order of division of matrimonial assets. The learned Resident Magistrate divided the matrimonial house and piece of land in the following shares in percentage wise. The respondent was given a share of 30% while the remaining share of 70% was given to the appellant (including house and piece of land for both parties). Also, the District Court gave the parties three options on how to get their shares.

With respect to the custody and maintenance, the learned Resident Magistrate after hearing the wishes of the children under section 125 (2) (b) of the Law of Marriage Act, placed Juma Salehe Chitand and Huzwaima Salehe Juma in the custody of the appellant while Swaif Swalehe Juma Chitanda was placed under the custody of the respondent subject to her wish to change the custody upon attaining the age of 18 years.

This decision of the first appellate District Court aggrieved the appellant, hence this appeal which is premised on the following grounds of appeal:-

1. The trial magistrate erred in law and fact for divide (sic) the property which was acquired by appellant himself before marriage.
2. That, the trial magistrate failed to record and evaluate (sic) most of the evidence adduced by the appellant during the trial hence led him to make unfair decision.
3. That, the trial magistrate failed in both law and fact for failure to understand the contribution and power of both parties in acquisition of the matrimonial asset.
4. That, the trial magistrate failed in custody of children because the third child going to start standard I January 2020, it was (sic) could be better if the trial Court did given (sic) her (sic) to the appellant.

When this matter was called for on hearing on 8.6.2021 both parties appeared in person and were unrepresented and opted to dispose of this appeal by way of oral submissions (viva voce).

Supporting in support of the first ground, the appellant argued that the property in the division was his sole property which include solar, battery and simtank which he bought them in 2005 after obtaining a loan. The appellant submitted that he married the respondent on 14.5.2005.

With regard to the second ground, the appellant argued that his documents were not considered. According to him, he obtained the bed and wooden cupboard from the money compensated from adulterous act of the respondent. Thereafter, the respondent claimed talak and telling the appellant that she would claim nothing from him. In addition, the appellant submitted that when he divorced the respondent, he obtained a loan from NMB and at that time he was living with another woman. He stressed that on 11. 5.2013 the respondent went back to the matrimonial home after the appellant had obtained the house and a

farm. The appellant submitted further that he tendered the sale agreement in order to fortify his argument before the trial court.

It was in the appellant's submission on the third ground that he was a civil servant while the respondent was a house wife. He further submitted that he got most of the properties from the loan he got vide his civil service.

At last, the appellant argued on the fourth ground on the custody of their three children whose age ranges at 12, 9 and 6 years. He submitted that the primary court ordered all three children to be under his custody. But the trial court considered the social welfare of the third child and place him under the custody of the respondent for three months so that on January she could have started standard one.

In response, the respondent submitted that the appellant married her knowing her that she had not gone to school. And when she left the appellant, she did not leave with anything. It was her further submission that that they got all the properties jointly and the court confirmed. She urged this court to find the second ground with no basis. On the third and fourth grounds, the respondent argued that these grounds are baseless as well. She maintained that she was involved in buying and tilling the land. She asserted that there are other properties which were not included in the division though the court and the village leaders were involved in ascertaining the properties before the division.

With regard to the custody of the three children whose age is 15,9 and 6 years old, the respondent said that the academic performance of the last child went down after he was placed in the appellant's custody. She

was emphatic in her submission that the appellant is unable to take care the welfare of the children.

In a short rejoinder, the appellant emphasised that he bought the properties after he was compensated on the adulterous act of the respondent. He further submitted that he bought other properties after he divorced the respondent.

Having gone through the records of the trial court and the first appellate court, grounds of appeal and parties' oral submissions I think this appeal need to be disposed of by dealing with one ground of appeal to another but where need be I will join them. Thus, on the first ground of appeal, the appellant's complaint is based on the failure of the lower courts to observe his evidence that he acquired some properties himself before marring the respondent. According to the appellant he claims in his submission that the property in the division is his sole property which include solar, battery and simtank which he bought them in 2005 after obtaining a loan whereas he married the respondent on 14. 5. 2005.

The Law of Marriage Act, [CAP. 29 R.E. 2019] recognise properties acquired before the marriage by a party to the marriage as envisaged in section 58 of the Act. For easy of reference the provision of the law provides: -

"Subject to the provisions of the section 59 and to any agreement to

the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the

wife from acquiring, holding and disposing of any property."

Now, being aware with the position of the law. I find it is important to look at the record of the trial court if the appellant established any proof that the mentioned properties he bought before he married the respondent and if the means of buying them was though a loan. Unfortunately, the proceedings are not typed but with due diligence I mark them so as to make sure that justice is not prevented by any cause. A close look at page 12 of the handwritten proceedings of the lower court, the appellant gave his evidence as follows:

> "Mnamo mwezi 3/2005, wakati nikiishi Mundenkulu,nilikopa pesa 500,000/=Dukani kwa Parushanti,nikanunua Sola 150,000/= Betri N 100, kwa shilingi 100,000/=. Nilienda Newala nikanunua Simtank lita 500 kwa shilingi 120,000/=. Pesa iliyobaki Nililipa mahari ya shilingi 65,000/=. Nilimuoa mnamo tarehe 14/05/2005."

That was the evidence of the appellant. On the part of the respondent, before this court she claimed that; they got all the properties jointly and the court confirmed it. During trial the respondent claimed at page 7 of the said proceedings that they jointly acquired several properties including Solar and Simtank. On the part of the trial court, it considered those properties as jointly acquired though the trial court conceded that the respondent did not adduce evidence as to the extent of her contribution towards their acquisition. Despite that, she only claimed to be the peasant. Thus, in general terms the trial court recognised those properties as matrimonial assets jointly acquired by the

parties and thus proceeded to order a division in terms of compensation to the tune of Tshs.2,000,000/= to the respondent. Whereas, the first appellate court dealt with that issue and was of the view that the respondent mentioned the disputed properties without according more details on when and how they were acquired. Also, the first appellate court was convinced with the fact of the appellant did not cross examine the respondent on the evidence she adduced especially on the disputed properties. Basing on that view the District Court drew an inference the appellant accepted what the respondent had adduced. This reasoning of the first appellate court is seen at page 4 of the impugn judgment and for the best interest of justice is quoted as follows: -

> "In proving the matrimonial assets subject for matrimonial division, the appellant mentioned them without more detail elaboration on when and how they were acquired. Bad enough is the respondent did not cross examine the evidence adduced by the appellant by then she was PW1.
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> In law, opponent party fails to cross examine the witness whose evidence is against him/her, the court must make inference that he accepts what is said by the witness. If that is the case, then this court must consider that all assets mentioned by the appellant have been proved to be matrimonial assets acquired during the marriage."

At this moment, it is not disputed that the lower courts included the properties being disputed by the appellant as matrimonial assets. Thus, the issue in respect to this ground is whether the appellant proved on

the balance of probabilities that he owned those properties solely and before he married the respondent. According to his evidence he really told the trial court that on march, 2005 he bought a solar, battery and Simtank at Parushanti shop where he borrowed Tshs.500,000/=. I think the appellant did well though he ought to go further by producing receipts of purchasing the disputed properties which would have indicated the dates of purchase, name of the seller and purchaser. In addition, the appellant ought to call a material witness the shop owner who borrowed him money and sold the disputed matrimonial properties to him. This court have assisted the lower courts and this court to assess and determine whether such assets were brought and acquired by the appellant prior to the marriage. Since the appellant failed lead evidence to prove his assertions, this court finds nothing to impugn the concurrent findings of the lower courts that those items were assets jointly acquired by the parties during the subsistence of their marriage for, it is trite law that he who alleges bears the burden of proof in terms of the law relating to evidence.

In the light of the above reasoning, I find no reason to depart from what the lower courts decided in respect of the disputed properties which I also find them to be matrimonial assets of the parties. Also, I am persuaded with the argument made by the first appellate court that the appellant failed to cross examine the respondent when she mentioned the disputed properties as matrimonial assets. It is a settled law in our jurisdiction that failure to cross examine a witness to a suit/case implies acceptance of the facts being adduced by the counterpart. In view of the above evaluation and analysis I find the first ground devoid of merit.

As to the second ground, the complaint by the appellant is that the trial magistrate failed to record and evaluate most of the evidence adduced by the appellant during the trial which led to unfair decision. Indeed, nowhere the appellant submitted on the evidence which he thought was not taken by the trial court. So, if that is the case, I cannot dwell much on that issue. Regarding failure to evaluate his adduced evidence I think the appellant has not read properly the judgment of the trial court. At last paragraph of page 7,8 and 9 of the typed judgment of the trial court, it is apparently clear how the evidence adduced by the appellant during trial was evaluated and considered. Besides, there is no evidence in the record of the trial court to prove that the appellant used adulterous compensation to buy three bed and one bicycle.

In addition, no proof of documentary evidence that he took loan from NMB Bank of Tshs.5,500,000/= which was used to purchase two acres of land and plot of land and that the same loan used to erect the disputed house. Besides, the message written by the respondent does not entail the respondent not to claim anything from the appellant in case of divorce rather it entails that in case of divorce and in case anything happens it will be her concern and she would not involve her father Juma na Deni. In view of that message, I find the appellant to be in a wrong perception or understanding. Furthermore, it must be known that the divorce which the parties to this matter are referring to was is not a divorce in the eyes of law but it was parties' family undertaking which has no legal effect in the division of matrimonial properties. Therefore, anything acquired by the appellant after 3.8.2011 and before the respondent resumed to her marriage cannot be said where acquired when the parties were divorced but their marriage was still persisting.

The first appellate court re-evaluated the evidence gathered by the trial court and came to the conclusion that the appellant was a bread winner of his family where he spent in buying food and acquiring properties thus, it found the respondent was entitled a lion share. Besides, the learned appellate Magistrate also considered the presence of the other wife of the appellant and that is why it divided those properties at 70% shares to the appellant and 30% shares to the respondent.

More so, evaluation of evidence is done in order to judge or calculate the quality, importance, amount or value of the evidence adduced in court before arrival at the conclusion. See the case of **Nzogya Ramadhani v.** Criminal Appeal No.29 of 2017.Therefore, basing on the evaluation of the trial and appellate court I see no reason to depart from what they have decided. Hence, the second ground has failed for lack of merits.

Turning to the third ground of appeal where the appellant complain that the lower courts failed to understand the contribution and power of both parties in acquisition of the matrimonial asset. His complaint was greatly supported by his argument that he was a civil servant while the respondent was a house wife and most of the properties, he obtained from loans vide his civil service. The respondent countered that argument telling this court that she was involved in tilling the land and buying the plot. I think the argument raised by the appellant is baseless and discriminatory in nature by saying that the respondent was just a house wife. The lower courts have dealt with this issue of the extent of contribution in perfect and just manner. For instance, at page 9 of the typed judgment of trial court was guided by the case of Bi **Hawa Mohamedi v. Ally Seif** [1983] TLR 32. Likewise, the first appellate

court used the same case in regarding the contribution of the respondent. I am inclined to follow the position taken by the lower courts in regard to the extent contribution of each party towards the acquisition of their matrimonial properties which the appellant is disputing before this court. In substantiating my settled view, I would like to refer to the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No.102 of 2018 CAT-Tanga (unreported) where the Court wisely stated that: -

> "It is clear therefore that extent of contribution by a party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering".

In the light of that argument and the observation of the Court, I am of the settled view that the trial court and the first appellate court arrived at the right findings of fact on the extent of contribution in the acquisition of the disputed properties of each party to this matter. Their determination was founded on the evidence gathered from the very parties. I see no merit in this ground of appeal.

Lastly, I resort to the fourth ground. The fourth ground is centred on the complaint of the custody of the third child of the parties who was placed by the first appellate court to the respondent. Before going to the root of the complaint it is significant to note that the issue of custody of children of the parties in the present case was not among the prayers of the respondent as exhibited by the petition despite that the trial court ordered the custody of those children. I think making an order of

additional evidence is permissible in law as it was stated in the case of **Ismail Rashid v. Mariam Msati**, Civil Appeal No.75 of 2015 CAT. The measures taken by the first appellate District Court in taking additional evidence by hearing the opinions of the infant children is commendable as that is what the law requires. According to the record of the District Court, the children were called on 22nd day of October, 2020 and gave their opinions. The enjoined the court to observe that requirement. This ground also lacks basis. However, I make an order that a non-custodial parent is free to visit the child any time at his/her convenience with

In the end result and for the stated reasons, I find this appeal lacking any merit, it should be and is hereby dismissed.

Order accordingly.

W.P. Dyansobera

Judge

6.8.2021

This judgment is delivered under my hand and the seal of this Court this 5th day of August, 2021 in the presence of Zamira Ally Mohamed (respondent) but in the absence of the appellant (Swalehe Juma Chitanda).

Rights of appeal to the Court of Appeal are fully explained.

W.P. Dyansobera

Judge