IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TEMEKE DISTRICT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 9 OF 2021

(Original Matrimonial cause No. 2 of 2021 of Kigamboni District Court before Hon. J.W. Mgaya - SRM)

LUCY DANIEL SANGA..... APPELLANT

VERSUS

EZEKIEL SAMWEL MURUMBE..... RESPONDENT

JUDGMENT

23/05/2022 & 08/06/2022

I.C. MUGETA, J

As the marital relationship of the parties to this case became toxic, it was referred to the district court by the appellant. That court issued a divorce decree, divided the matrimonial asset and gave custody of the children to the appellant. The parties had been blessed with three children and several properties. In this appeal, the contestation is on the division of the matrimonial properties. Four grounds of appeal were filed. However, on the hearing date, Mr. Ndanu Emmanuel, Counsel for the appellant, combined them to one complaint that the trial court erred to not divide the matrimonial assets equally.

The seriously contested division is that of the house on Plot No. 16, Block 5, Kibada Kichangani – Kigamboni, Dar es Salaam which was divided between the parties at the ratio of 10:90 to the appellant and the respondent respectively. This was after the learned trial Magistrate made a specific finding that the plot on which the house is built was acquired before marriage but was improved during the marriage, therefore, it is a Matrimonial asset.

Mr. Ndanu for the appellant is of the view that the division ought to have been in equal shares. His reasons for the argument are that while the respondent acquired the Plot before marriage, the house was constructed during substance of the marriage. That the appellant supervised the construction and borrowed money from banks to support the development. Further, that the appellant took care of the family all the time up to 2017 when she left the Matrimonial home as the respondent who is a businessman spent most of his time in Mwanza and Singida attending to his timber businesses.

In reply, Happy Daniel, counsel for the respondent, submitted that the 10% share awarded is fair and equal to the extent of contribution towards acquisition of the house by appellant and it covers both her financial and domestic works contribution. She argued that while it is true that the

respondent is most of the time away from home, he is, however, a responsible man who financially supported his family.

In rejoinder, Mr. Ndanu mainly reiterated his submission in chief.

The argument that the respondent spends most of his time in Singida or Mwanza, even though admitted by counsel for the respondent, is not borne out in evidence. I disregard it.

In this case, it is important to establish the time when the house was constructed because it matters in determining the extent of contribution of each couple. The learned Magistrate is not clear as to why she divided the house at the above stated ratios. Her assessment of the parties' contribution as a guide to her reasoning is somewhat obscured. My review of that judgment shows that after finding that the construction was before marriage, as hereinabove already stated, the learned magistrate, without analysis of the relevant evidence, held:

> *'...I am of the view that the petitioner contributed to the improvement of the house during marriage'.*

However, this is not the case. The learned trial magistrate failed to properly analyse the evidence relating to when the house was constructed and likened improvement to construction. The evidence on record shows that the house was not improved during marriage. That was in fact, the

period of its construction. It is the plot which was bought by the respondent before marriage per exhibits P5 and P6. My reasons for the conclusion as to when the house was built are as hereunder:

While the appellant's evidence is that it was constructed between 2012 – 2014, the respondent's evidence is that it was constructed from 2009 – 2010. As there are no documents from both sides to prove the time of construction, the determination of this issue relies solely on credibility of witnesses which I shall assess. In dealing with such evidence, I shall be mindful of the holding in **Goodluck Kyando V. R.** [2006] TLR 363 that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.

According to the appellant the house was constructed between 2012 and 2014. She is supported by Ngoma Bundala (PW2) who was a watchman at the construction site. The respondent's case is that the construction started in 2009 and was completed in 2010 before marriage. He is supported by Peter Samwel Mkami (DW2) who said the respondent is his sibling and he supervised the construction of the house. There is no dispute that the marriage was contracted in October, 2010.

It is my view that as the time of the construction of the house is concerned, both the appellant and the respondent are witnesses with interests to serve. Their respective evidence in that regard, therefore, cannot be relied upon unless it is corroborated with another evidence of a credible witness. I have already shown that the appellant was corroborated by Ngoma Bundala (PW2) and the respondent by Peter Samwel Mkami (DW2). The question for determination is, who is more credible between Ngoma Bundala and Peter Samwel Mkami?

In their evidence, Ngoma Bundala said he was the watchman at the construction site between 2012 and 2014. In his evidence, Peter Mkami said he supervised the construction between 2009 and 2010. I am inclined to believe the story of Ngoma Bundala and not that of Peter Mkami. My reason is that Ngoma Bundala was on site all the time and his evidence is undisputed. I disbelieve Peter Mkami because he just said he supervised the construction. His version, though possible, is highly improbable. He said he works as an entrepreneur. In order to be believed, under the circumstance of this case, he ought to have explained why and how he managed to regularly leave his place of business to supervise the construction. While Ngoma Bundala is an independent witness, Peter Mkami being the respondent's sibling cannot be said to be equally

independent. I, therefore, make a specific finding that the house was constructed after marriage on the Plot that the respondent acquired before marriage. The trial court was right to hold that it is a matrimonial asset but it erred to hold that it was constructed before marriage and improved during marriage. In view of the above analysis, the evidence on record is about construction not improvement.

The next issue for determination is whether the trial court was right to divide the house at the stated ratio.

Ngoma Bundala, whom I have held to be a credible witness, said that the petitioner was a regular visitor at the construction site which means she followed up the progress of the construction. According to the appellant, in 2012 and 2017 she borrowed Tshs. 7,250,000/= and Tshs. 8,600,360/= respectively from DCB to support the construction. Evidence of the loan was tendered as exhibit D1. The respondent testified that the 2012 loan money was used to buy a car T.229 CAX, RAV 4 and that of 2017 was used to instruct the respondent's personal house at Kibada Kisarawe II. However, he did not prove these allegations by tendering the registration card of the car to confirm the period of purchase nor he substantiated the claim that the appellant owns a personal property at Kisarawe II. I shall revert to the allegation of appellant owning a house at Kisarawe II later.

At this stage it suffices to say that I find that the money of each loan was used on the construction. I so hold because the appellant testified that the 2017 loan was used to finish the house. Her claim makes a lot of sense in light of the evidence of Ngoma Bundala (PW2) who testified that when he left the site in 2014, the house had no aluminium windows nor was it plastered. Consequently, I hold, that the appellant's follow up on the construction progress and injecting the said monies in the project is enough contribution. Further, as there is no evidence that the appellant failed to perform the usual domestic chores as a wife, giving her 10% share in the house is unfair.

Consequently, I hold that the award of 10% share in the house to the respondent is unreasonably low. I quash the order dividing the house and substitute it with an order for equal shares in the house.

The rest of the properties were not divided by the trial court. These are the motor vehicles, the domestic utensils and the furniture. The same are pleaded in paragraphs 9 (b) and (c) of the Petition and paragraph 8 of the answer to the petition. These two properties are not pleaded in the petition. However, they are pleaded in the answer to the petition (paragraph 8) where the respondent says the appellant had already sold them. I presume this to be correct. In case I am wrong, the respondent

testified that they are registered in the appellant's name and he did not lead evidence to establish his contribution towards their acquisition. Regarding the domestic utensils and furniture, like the trial court, I refrain from touching them as no evidence of their existence was led despite being pleaded in the pleadings.

I come back to the issue of the 2017 loan. The respondent testified that upon securing that loan the appellant built her own house at Kibada – Kisarawe II. This evidence is undisputed. However, that fact was not pleaded in the answer to the petition and no question about it was put to the appellant on cross examination. Evidence on a fact not pleaded is inadmissible under section 7 of the Evidence Act [Cap. 6 R.E 2019] for want of relevance. If admitted, it cannot be acted upon to prove the alleged fact. The foregoing notwithstanding, I hold that even if it was pleaded, the respondent has not proved his contribution towards its acquisition to warrant him a share therein.

In the event, I hold that the appeal as far as division of the matrimonial house is concerned has merits. It is allowed without orders as to costs. The orders of the trial court on the division of the matrimonial house is quashed. The Matrimonial house shall be shared equally. Other orders of

the trial court regarding maintenance and custody of the children are maintained as there is no complaint about them.

Before, I pen off, let me comment on some few things relating to the manner exhibits were tendered and marked and the framing of issues for determination. In **Juma Francis Majan V. Milliam George Lemah,** PC. Civil Appeal No. 2 of 2022, High Court – Temeke Registry (unreported), I had this to say regarding marking of exhibits:

> *'The trial magistrate marked the exhibits for the plaintiff as MGL1 – MGL5 and that of the defendant as JFM1 – JFM2. The Practice in all trial courts is that exhibits are marked as P1, etc for the plaintiff and D1, etc for the defendant. The more we record evidence consistent with the established practice the better. There is no need to reinvent the wheel'*

In this case the learned trial Magistrate marked the exhibits in her own vice versa peculiar style. Exhibits from the Petitioner were inconsistently marked as exhibits "S1" (the certificate from the marriage conciliation board); exhibit D1, (the loans agreements) and exhibit S2 (the children's birth certificates). In a complete reversal from the normal practice, exhibits for the respondent were marked as exhibits "P1" – "P6".

For sanity of court proceedings this mix up ought to be avoided. Exhibits for the prosecution/plaintiff/petitioner ought to be marked as P1 and so

on and for the accused/defendant/respondent as D1 and so on. Diversion from the usual practice of recording evidence and marking of exhibits is detestable for serving no useful purpose than causing confusion. The use of symbols in court record ought to be limited to and consistent with the established practices.

Another irregularity in the proceedings is about framing of issues. In this case no issues were framed before commencement of the trial. Under Rule 29 (2) of the Law of Marriage (Matrimonial Proceedings) Rules, trials in Matrimonial Proceedings follow the rules under the Civil Procedure Code [Cap. 33 R.E. 2019]. Therefore, framing of issues is mandatory and Order XIV rule 5. The learned trial magistrate framed one issue when composing the judgment: Whether the marriage has irreparably broken down. She answered it in the affirmed and proceeded, rightly so, to deal with the consequent matters of custody and division of the matrimonial assets. In terms of compliance with the law, the learned magistrate erred to hear the petition without framing the issues first.

In the case of **Tanzania Sand and Stones Quarries v. Omani Ebi** [1972] H.C.D 219 it was held:

'The omission by the trial court to frame an issue is not fatal unless it results in a failure to decide properly the point in question amounting to a failure of justice'.

In the circumstances of this case, the parties neither in their pleadings nor evidence did contest the dissolution of their marriage. The contention was on the division of the assets which is a consequent order and normally does not necessarily attract framing a specific issue on how to go about it. Under the circumstances, I hold, no party was prejudiced by the error and no failure of Justice was occasioned. I declare as valid the proceedings and judgment of the trial court.

I.C. MUGETA

JUDGE

08/06/2022

Court: Judgment delivered in chambers in the presence of John Msuya, advocate, holding brief for Emanuel Ndanu and Happy Daniel, advocates for the appellant and respondent respectively who are absent.

Sgd: I.C. MUGETA

JUDGE

08/06/2022