IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 16 OF 2021

(Originating from the Dongobesh Primary Court Matrimonial Cause No. 02/2020 and Mbulu District Civil Appeal No. 2 of 2021)

ANNA PHILMON.....APPELLANT

VERSUS

EDWARD ELISHA.....RESPONDENT

JUDGMENT

07.06.2022 & 19.07.2022

N.R. MWASEBA, J.

The appellant, Anna Philmon and the Respondent, Edward Elisha were lawfully married until 20th day of November 2020 when Dongobesh Primary Court dissolved their marriage after being satisfied that the marriage between the parties had broken down irreparably. The trial court went further and distributed the matrimonial properties including the house in dispute where the court ordered the respondent to receive 70% and the appellant to received 30% of the value of the house due to the contribution made by each other.

The said decision irritated the respondent who filed an appeal at Mbulu District Court where the trial court's decision was reversed and the appellant was given conclusive ownership of the house in dispute. Being aggrieved the appellant came to this court as the Second Appeal complaining over the said decision of the 1st appellate court.

The appellant lodged before this court seven (7) grounds of appeal as depicted from the Petition of appeal filed in this court. Based on those grounds of appeal she prayed for the matrimonial house to remain as the property of the child and not to be distributed among them.

When the appeal was called for hearing on 09.05.2022 the parties agreed to dispose of the matter by way of written submissions and the court granted their prayer. Mr Richard Manyota, learned advocate represented the appellant whereas Ms Jenipher John, learned advocate represented the respondent. I commend both parties for adhering to the schedules.

Submitting in support of the appeal Mr. Manyota argued that it is true the matrimonial property (house) was acquired before their marriage however, there are some developments which were made after the marriage that's why the said property falls under the properties which are subject to equal distribution between the parties. Further to that even the respondent did admit the contribution made by the appellant even before

the marriage, thus, it was wrong for the 1st appellate court to order the total ownership of matrimonial property situated at Plot No. 196 Block "C" located at Dongobesh Village to the respondent alone. To support his argument, he cited **Section 114 (3) of the Law of Marriage Act**, Cap 29 R.E 2019 and the case of **Bi Hawa Mohamed Vs Ally Sefu** (1983) TLR 32 and prayed for the appeal to be allowed and the decision of Mbulu District Court be quashed. He further prays that the matrimonial remain under a total ownership of their children.

Responding to what was submitted by the counsel for the appellant, Ms. Jenipher John on behalf of the respondent argued that there is no any share on the part of the appellant since she was married two years after the property had been bought by the respondent. She went on to state that the trial court proceedings revealed that the appellant admitted that she was married to the respondent in 2017, the plot was bought in 2015 and the house was constructed in 2016. On the part of the respondent, he told the trial court that he married the respondent while he was living in the said matrimonial property and nothing was improved during the subsistence of their marriage. More to that, she submitted that as the law allows individual ownership of the property even during the marriage then the marriage cannot operate to change ownership. She backed up her

argument by citing the case of **Stamili Suleiman Kibiga Vs TIB Development Bank and 3 Others**, Land Case No. 275 of 2017, HC-Arusha (Unreported) and **Maria Tumbo Vs Harold Tumbo** [1983] TLR 393.

It was her further submission that the respondent contributed a lot during the substance of their marriage including creating an account for the appellant's child one Happiness Edward Elisha where he deposited 3,000,000 million which he was ready to return to the appellant. Further, she challenged the request of the appellant that the property to be given to the children while the law is very clear matrimonial properties are not for children. In the end she prayed for the appeal to be dismissed for want of merit.

Having scrutinized the submission made by the counsels for both sides and going through the grounds of appeal, the main issue in controversy here is whether the appellant had any contribution to the acquisition of the house which was constructed before she married the respondent.

In determining this issue, the court will focus on all seven grounds of appeal which will be argued jointly as the appellant is mainly challenging the decision of the first appellate court for not considering her evidence regarding the acquisition of the said house. It is in record that the parties

herein contracted a civil marriage in 2017 but the said house was constructed in 2016. That means it was acquired before marriage. The guiding provision in this scenario is **Section 114 (3) The Law of Marriage Act,** which provides that:

> *"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."*

The same has been decided in numerous cases including the case of **Apolonia Kanome Vs Nestory Mponda**, (PC) Civil Appeal No. 11 of 2020 [2020] TLR 44 that; -

> *"Under section 114 (3) of the law of Marriage Act [Cap 29 R.E 2002] a property acquired by one spouse to the exclusion of the other spouse before the marriage or during the substance of the marriage will therefore as trite law not be responsible for distribution unless it has been substantially improved during the substance of the marriage by the other party or by their joint efforts. When these properties are substantially improved during the substance of marriage by the joint efforts of the spouse, they become liable for distributions as stated in the case of* ***Anna Kanugha Vs Andrea kanugha*** [1996] TLR 195."

See also the case of **Hidaya Ally Vs Amiri Mlugu**, Civil Appeal No. 105 of 208 [2015] TLR 329, **Eva Simon Kasongwa Vs David Edward Mwakalindile**, Matrimonial Appeal No. 11 of 2018[2020] TLR 271.

In our present case, the respondent testified at the trial court that he constructed the house before marriage and that no contribution was made by the appellant during the subsistence of their marriage except Tshs 300,000/= which was used for home outlays. He did not clarify on the status of the said house when they started living together. On her side, the appellant testified at the trial court that she contributed to the acquisition of the said property before and after their marriage as they started living together before contacting a formal marriage. She said they moved in the house when it was unfinished. It had neither doors, nor windowpanes nor electricity. She averred that she did wiring and electrical installation to the said house on her own money as an entrepreneur. Thus, she deserves to receive some contribution in respect of the said property.

It is unfortunate that the 1st appellate court did not well exercise its duty to re-evaluate the entire evidence. See the case of **Philipo Joseph Lukonde Vs. Faraji Ally Saidi** (2020) TLR, 576. For that case the framed issue is answered in affirmative.

Looking at the relief (s) sought by the appellant before this court, she prayed among other things for a maintenance of a child. The same was not among her grounds of appeal before this court and it was not even dealt with by the first appellate court though in the appellant's submission at the first appellate court, she complained about the noncompliance of the maintenance order. The trial court after deciding the custody of a little child it proceeded to hold that:

> *"Kuhusu matunzo ya Henry Edward itakuwa ni jukumu la mdai/baba wa mtoto kumtunza bila kujali yupo mikononi mwa mama yake na atapaswa kumtunza kwa malazi, chakula, elimu, na matibabu jukumu hili ni lake kwa mujibu wa sheria kifungu cha 129 (1) sheria ya Ndoa..."*

This order in my considered view is not executable because it is too general. It does not indicate how much the father of the child will be paying for those necessities. In the record there is no enough evidence which could have helped the trial court to reach a just decision as to the consideration of maintenance order as provided for under **Section 44 of the Law of the Child Act,** Cap 13 R.E 2019. Possibly, it is due to the fact that it was not among the prayers sought at the trial court. However, if the first appellate court could have executed its duty as the first appellate court, it could have exercised its revisional power to revise the

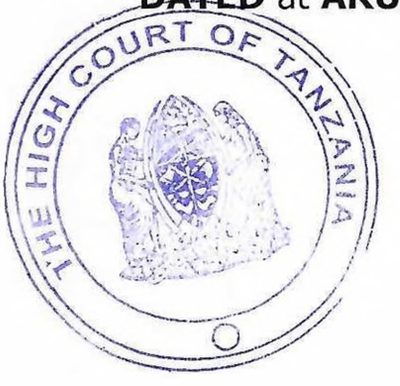
said order. This can not be left un attended by this court as it will be hard to be executed hence the rights of the child as per **Section 26 (1) of the Law of the Child Act** (supra) will be violated.

So long as this was not among the relief sought at the trial court, and there is no evidence enough to determine a maintenance order, I hereby quash the order for maintenance. The parties are at liberty to file an application on that relief at a proper forum.

In view of the foregoing, the appeal is found to have merits, the decision of the 1st appellate court is hereby quashed and set aside and the trial court decision is upheld save for maintenance order. Accordingly, the appeal is allowed with no order as to costs due to the relationship of the parties.

It is so ordered.

DATED at **ARUSHA** this 19th day of July, 2022



N.R. MWASEBA

JUDGE

19.07.2022