IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB - REGISTRY

(ONE STOP JUDICIAL CETRE)

AT TEMEKE

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 7 OF 2021

(Original Matrimonial Cause No. 35/2021 of the District Court of Kinondoni before Hon. E. A Mwakalinga – SRM)

SARAH KUMBWAEL SALEWI.....APPELLANT

VERSUS

ARTHUR MWITA CHACHA.....RESPONDENT

JUDGMENT

16/2/2022 & 19/4/2022

I.C MUGETA, J.

The appellant and the respondent celebrated their matrimonial union in Christian rite in 2011. Their marriage was blessed with two issues namely, Aiden Thomas Chacha and Azariah Samwel Chacha. Due to misunderstanding between them, the appellant petitioned for divorce, custody of Azariah Samwel Chacha and his monthly maintenance of Tshs. 1,000,000/=, an order that the parties' house at Mikocheni be transferred to their children and the respondent to pay medical and school fees for the children. After a full trial, a decree of divorce was issued, appellant was given 15,000,000/= as her share in the matrimonial assets while the respondent was given a house and custody of both children. The trial

court found that the house was acquired before marriage therefore it was not a matrimonial asset. The appellant is satisfied with the granting of divorce decree. However, she is aggrieved by the division of the matrimonial assets and granting of custody of all children to the respondent. She has, therefore, appealed to this court on six grounds that:

1. *The honourable magistrate erred in law and fact when she decided that at the time parties contracted their marriage the matrimonial house at Mikocheni with title no. 186310/30 was under the ownership of the respondent.*
2. *The honourable magistrate erred in law and fact when she decided that the respondent obtained a loan from his in-laws, the appellant's parent to facilitate repayment of his loan without any proof.*
3. *The honourable magistrate erred in law and in facts when she decided that the matrimonial house at Mikocheni is not a matrimonial property jointly acquired by the parties.*
4. *The honourable magistrate erred in law and fact in disregarding evidence adduced by the appellant in respect of the acquisition of the matrimonial house in dispute.*
5. *The honourable magistrate erred in law and fact when she failed to evaluate properly the evidence tendered and decided not to award the appellant any share in the Mikocheni matrimonial house and awarded her only shillings 15,000,000/= as compensation as a wife which was not prayed for.*

6. *The honourable magistrate erred in law and fact when she decided to place custody of the children of the parties to the respondent without any legal basis.*

The appellant is represented by Mrs. N.R. Tenga assisted by Grayson Laizer, learned advocates. The respondent enjoys the professional service of Mr. Nazario Michael, learned advocate. The appeal was argued by way of filing written submissions.

Obviously, grounds 1 – 5 are interrelated. Consequently, the learned advocate for the appellant argued them jointly under one complaint that the trial court erred in holding that the house at Mikocheni was not a matrimonial property. She admitted that the house was acquired before marriage but the respondent had mortgaged it with Stanbic Bank to secure loan of USD 250,000,000 and he defaulted repayment where the outstanding balance of Tshs. 230,000,000/= was paid by the appellant with her parent's help. Therefore, the learned counsel argued, after redemption of the mortgage by the appellant's efforts, the house became a matrimonial property. The learned advocate added that the said house was renovated and improved by the appellant who contributed Tshs. 6,000,000/=, therefore, it is subject to distribution between the parties as per section 114 of the Law of Marriage Act [Cap 29 R.E 2019] (the Act). To buttress her argument, she cited the case of **Gabriel Nimrod**

Kurwijila vs Theresia Hassani Malango, Civil Appeal No.102/2018 Court of Appeal at Tanga, **Yesse Mrisho vs Sania Abdul,** Civil Appeal No. 147/2016 Court of Appeal at Mwanza and **Bi Hawa Mohamed vs Ally Seif** [1983] T.L.R 32.

Regarding ground 6, the learned counsel submitted that the trial court erred in placing custody of the second child to the respondent. Her argument is that since the child used to live with her mother for all these years, changing custody will disturb his development trying to fit in a new environment. The learned advocate argued further that it is desirable that a child under the age of seven years be with her/his mother as expressly stated under section 26(2) of the Law of the Child [Cap 13 R.E 2019]. She submitted further that what matters when determining custody of a child is his/her welfare. To support this argument, she cited the case of **Ramesh Rajput vs Mrs Sunanda Rajput** [1988] TLR 96 and a book titled Bromley's Family Law, 11 Edition at page 398. She, therefore, prayed for custody of the second child to be with the appellant.

Disputing the appeal advocate for the respondent supported the decision of the trial court by arguing that the trial court was right when it held that the house at Mikocheni belonged to the respondent. He submitted that the said house was acquired by the respondent before marriage the fact

which was admitted by the appellant at page 21 and 29 of the proceeding. He argued that for a property to be matrimonial it has to be acquired during marriage by the parties' joint effort as stated under section 114(1) of Cap 29 R.E 2019. The learned advocate argued further that the appellant did not contribute anything and her claim that she discharged the mortgage was unjustifiable since she was not the one who gave the money but her parents. He contended that even the 6,000,000/= which appellant claimed to have spent renovating the house is not supported by evidence.

Submitting on ground 6, Mr. Michael argued that it is in the best interest of the second child to live with his father. He contended that the fact that the appellant realised that her child has speech impairment after two years proves how irresponsible she is. Further he said, placing custody to the respondent gives these two children a chance to meet and live together as siblings. Also, he argued, it will help him improve in his speech therapy due to advanced facilities in America.

In rejoinder appellant mainly reiterate what she submitted in the submission in chief.

I shall start with ground 1, 2, 3, 4 and 5 which address the question whether a house at Plot No. 30 Block B – Mikocheni is a matrimonial

property. It is not in dispute that the respondent acquired the house before marriage. It is also not disputed that the respondent mortgaged the house and defaulted paying the loan until when the house was redeemed by funds from appellant's parents who, according to the appellant assisted to repay the loan while the respondent alleges that they gave him a soft loan.

Was the money paid by the appellant's parents to redeem the mortgage a loan or assistance? It is important to determine this issue because if it is a loan to the respondent or assistance from the appellant's parents has impact on determining whether the property is a matrimonial asset.

The appellant and the respondent gave parallel stories. The appellant gave evidence that she wrote a letter to Stanbic Bank requesting for a loan debt relief and extension of time to repay the same which was granted and her parents reached out and assisted to repay the restructured loan. This is what the appellant said on re-examination at page 30 of the typed proceedings:

'It is my parents who assisted us in clearing the loan'

On his part, the respondent testified the opposite as reflected at page 46 of the proceedings:

'...we agreed to get soft loan from her parents. We ... agreed that ... we will pay back the loan. ... I had the obligation to pay back the money'.

I find the appellant's narration credible because she tendered evidence to show how she deposited the money to clear the debts. Some of the receipts shows that her parents deposited the money by themselves. Payment evidence is in exhibit P6.

As it was held in the case of **Goodluck Kyando v. R** [2006] T.L.R 363 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. In this case I have not believed the respondent in his testimony that he got a soft loan from his in-laws. The reasons are firstly, he has not substantiated his claim that he communicated with them to get the loan. As between 2019 and 2020 when the mortgage was redeemed he was in USA, how he contacted them ought to have been clarified. Secondly, he did not stipulate the terms of the loan like mode of payment. The two reasons create doubt on the loan agreement existence.

If I may digress here, in a letter the appellant wrote to the bank (exhibit P4) she promises to settle the debt by assistance of both sides parents who would provide Tshs. 100,000,000/= as a soft loan. Initially I thought this supports the respondent's argument. However, according to evidence

of both parties the respondent's parents did not pay a dime. This means the arrangement envisaged in exhibit P4 did not work out except for the bank's restructuring of the loan. In that regard, appellant is better placed to tell about what transpired between parents following the restructuring of the loan and her parent's decision to assist after the parent of the other side dishonoured the promise in exhibit P4, if at all it was made.

It is for the foregoing I hold that the money paid by the appellant's parents was not a loan but an assistance to redeem the mortgage.

It is common knowledge that matrimonial assets/properties refer to assets acquired during the subsistence of marriage by the joint effort of the spouses or those which were owned by one spouse but have been substantially improved by the other or by their joint efforts as per section 114(1) (3) of the Law of Marriage Act, [Cap 29 R.E 2019] (the Act). On account of the above finding that the house was redeemed by assistance from appellant's parents what is the status of the house after redemption?

It is my view that the appellant played a great role by her efforts to make sure the loan was paid off. I consider appellant's move of writing a letter to the bank and performing all activities associated with the mortgage like engaging her parents to assist until the loan was paid as her contribution for acquisition of this house. This fact, coupled with her performance of

domestic work like raising the second born in absence of the respondent is enough contribution.

The appellant also claimed to have renovated the house a fact which was accepted by the respondent. However, he disputed the amount which the appellant said she contributed, namely, Tshs. 6,000,000/=. I agree with the respondent that appellant did not prove in monetary form what she contributed on the renovation. Nevertheless, I am certain that she supervised the said renovation as the respondent was already in America. According to her, the renovation was made in 2018 while according to paragraph 5 of the answer to the amended petition the respondent left for America in 2016. The amount of time and energy spent on the supervision of the renovation work is her contribution. I, therefore, find that the efforts put by the appellant in redeeming the house transformed its status into a matrimonial asset.

For the reasons stated above I divided the house equally between the parties. If any party wishes to own the same in exclusion of the other, he/she shall buy out the other. The complaint that the house was unfairly distributed has merits.

As for ground 6 it is settled that when determining custody of a child a paramount consideration should be on the best interest of the child. It is

on record that the youngest child of the parties' lives with the appellant since he was born. Placing, his custody to the respondent means the child will be living in a new country and a totally new environment. This is unnecessary disturbance to the child considering that he is still below seven years of age. The reason given by counsel for the respondent to prove irresponsibility on part of the appellant is a fallacy, some children delay to speak and that cannot be necessarily associated with the mother's level of care. As the second child is below 7 years of age, I grant his custody, for the time being, to the appellant. Regarding his maintenance, it is a fact that the respondent lives and maintain the first child who is on medication full time. Therefore, appellant who works at FNB shall maintain him except for education costs which shall be borne by the respondent.

For the foregoing reasons, I quash and set aside the decision of the district court on custody of Azariah Samwel Chacha. He is placed under the appellant on the said maintenance arrangement. In case of later change of circumstances, any party can apply to the trial court for variation of the orders on custody and maintenance.

This appeal is allowed. No orders as to costs.

I.C. MUGETA

JUDGE

19/4/2022

Court: - Judgement delivered in chambers in the presence of Hamis Mfinanga advocate for the appellant and Josepha Tewa advocate for respondent.

Sgd: I.C. MUGETA

JUDGE

19/4/2022