IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

MATRIMONIAL APPEAL NO 3 OF 2021

(Originating from Matrimonial Appeal No. 19/2021 at Dodoma District Court. Original Matrimonial Cause No. 36 of 2018 at Chamwino Urban Primary Court)

PROSPER JULIUS KAVISHE.....APPELLANT

VERSUS

PRISILA EDMOND MTOSHU..... RESPONDENT

JUDGMENT

21/3/2022 & 28/7/2022

KAGOMBA, J

The appellant, Prosper Julius Kavishe, being aggrieved by the judgment and decree of the District Court of Dodoma at Dodoma (henceforth "the first appellate court") in Matrimonial Appeal No. 19 of 2019, delivered on 28th August, 2020, has appealed to this Court basing on the following grounds:

1. That, the first appellate Court erred in law and fact for granting the house situated at Msalato street in Dodoma City to the respondent.

2. That, the first appellate court erred in law and fact for failure to determine the proper contribution made by the parties in acquisition of matrimonial properties.

3. That, the first appellate court erred in law and fact for mixing children of marriage and division of matrimonial properties.

4. That, the judgment entered by the first appellate court is bad in law for not being signed.

Briefly, the marriage between the parties which was celebrated under Christian rites in 2003 went concretely sour in 2019 and even when the respondent petitioned for divorce at Chamwino Urban Primary Court (henceforth "the trial court"), its granting was not a contested matter. Consequently, the decree of divorce was granted by the trial court.

Facts reveal that during subsistence of the marriage, the former couple were blessed with three issues as well as two houses, among other things, to thank God for. One house is located in Moshi, Kilimanjaro and the other one is at Msalato street within Dodoma City. In the distribution of matrimonial properties, the trial court ordered, among other things, that the house in Moshi be allocated to the appellant while the Msalato house be shared between the appellant and respondent at the ratio of 60% - 40% respectively. It was also ordered that all children should continue to stay with the respondent, who was to be given maintenance of Tsh. 100,000/= per month.

The respondent was not happy with the above trial court's decision and therefore appealed to the first appellate court, opposing the order to sell the house. She thought it was not right to do so because parties had three children, two of whom were under 18 years. It was the respondent's claim that while the trial court gave the house in Moshi to the appellant, it ought to have let the respondent stay at the Msalato street house with the children.

In the first appellate court, the appellant also opposed the trial court's decision to give the respondent a 40% share of the matrimonial house for a reason that her contribution of Tsh. 3,000,000/= (sic) towards the building of the said house was smaller than the awarded 40% shares.

The first appellate court found that the trial court's decision on division of the matrimonial house at 60% to 40% ratio, as aforesaid, was not well grounded in light of the fact that the appellant was awarded a house in Moshi, and that both parties had contributed to the acquisition of the two houses. It was the decision of the first appellate court that for justice to prevail, guided by the provision of section 114 of the Law of Marriage Act, [Cap 29 R.E 2019] (henceforth "**LMA**") and case law, the respondent should get the house at Msalato Dodoma and the appellant should get the house in Moshi. The first appellate court upheld the division of other matrimonial assets as per trial court's judgment. This decision of the first appellate court is what has upset the appellant, leading to this appeal.

During hearing of the appeal, Ms. Maria Ntui, learned advocate appeared for the appellant while the respondent was represented by Mr. Boneventura Njelu, learned advocate.

To argue on the first ground of appeal, Ms. Ntui submitted the following three main points to expound her contention. **Firstly**; she said that it's the respondent who, during trial, prayed that both houses be sold contrary to the appellant's wishes. Hence her claim, during appeal, to be given the Msalato house came as an afterthought. **Secondly**; the respondent's wishes, that after selling both houses the proceeds thereof be divided between the parties is what was granted by the trail court; hence she could not be heard appealing against what she prayed for. **Thirdly**; by claiming to be given the Msalato house, the respondent raised a new claim during appeal which she didn't do during trial. For these reasons, Ms. Ntui submitted that a decision to give the Msalato house to the respondent, is to render injustice to the appellant. She prayed that the said house be considered to remain with the appellant or both houses be sold and proceeds thereof divided as was decided by the trial court.

On the second ground of appeal, Ms. Ntui submitted that section 114(2) of the **LMA** required the court to consider the extent of contribution of each party towards acquisition of the matrimonial properties to be divided. She argued that the first appellate court failed to consider the evidence that it's the compensation for a demolished mud house previously owned by the appellant before marriage which was used to build the Msalato house. She

argued that even the respondent, acknowledged that she found the appellant with a plot at Msalato.

Ms. Ntui further argued that, according testimony, the appellant was a Merson and an entrepreneur who contributed more to the acquisition of the matrimonial properties. She challenged the respondent's testimony that she took a loan of Tsh 3,000,000/= (sic) and contributed it in building the Msalato house, saying that there was no any documentary evidence to support respondent's claims. She argued that, even if there was such a contribution by the respondent, it would be stiller than the appellant's.

With regard to the acquisition of the Moshi house, Ms. Ntui submitted that the said house which is a mud house in a village, was built on a plot given to the appellant by his parents. She argued that the respondent's prayer to have both houses sold resembled a Biblical story in "**1 Kings 3:16-28**" of mothers who were claiming for a child, each saying it was hers but one of them agreeing to the King's testing proposal to have the child divided apiece for each, because she had no pain over the child as she was not the real mother. The learned advocate enjoined this court to follow the Wisdom of King Solomon who was able to know the real mother and gave her the child accordingly.

On the third ground of appeal, Ms. Ntui submitted that the first appellate court did not analyze well the evidence, in line with the provision of section 114(2)(d) of the **LMA**. She argued that the first appellate court

was required to base its decision on the contribution of each spouse and not the custody of children since the properties in question are matrimonial properties and not children' properties. She prayed this court to re-divide the properties according properly to the law.

On the fourth and last ground of appeal, Ms. Ntui submitted that the impugned judgment of the first appellate court was not signed by the presiding magistrate, hence bad in law for contravening the provision of Order XX rule 3 of the Civil Procedure Code, [Cap 33 R.E 2019] (henceforth the "CPC").

Mr. Boneventura Njelu, learned advocate for the respondent opposed the appeal. He submitted that the respondent did object the division of properties which gave the appellant a house in Moshi plus shares in the Msalato house. He argued that when the respondent married the appellant, none of them had a house. He said that the appellant had only a plot at Msalato. He said, the respondent took a loan which was used to develop her husband's Msalato plot. He clarified that, since it's the compensation which was used to build the current house, it is therefore the respondent who gave value to that plot and thus enabling it to fetch that compensation.

It was Mr.Njelu's further submission that there is no evidence in record to show how much the appellant contributed to the house that was demolished and compensated but there is evidence on the respondent's contribution vide the loan she took to build that house.

With regard to the house in Moshi, Mr. Njelu expressed his surprise that the trial court gave it to the appellant without considering the contribution of the respondent since the house was given to the couple as a gift for their marriage. He argued that since the contribution of the respondent was not disputed, the first appellate court was right to give the Msalato house to the respondent. He also found wisdom in the decision to allocate the house in Moshi to the appellant. He argued that since the house is built in a clan land, it was easier and correct for the said house to be given to the appellant for security reason. He therefore found no merits in the first ground of appeal.

On the second ground of appeal, it was Mr. Njelu's reply submission that the first appellate court considered the contribution of each party. He maintained that the respondent had a huge contribution to the Msalato house, hence the first appellate court was right in its decision.

Regarding the third ground of appeal, Mr. Njelu submitted that the judgment of the first appellate court didn't state that the division of properties is based on custody of children. He therefore said that the third ground of appeal also was devoid of merit.

On the fourth and final ground of appeal, Mr. Njelu conceded that the judgment does not meet the requirement of the law for not being signed by the presiding magistrate. He however prayed the court to find out whether the original judgment in court's records is unsigned. He concluded by praying

this court to dismiss the appeal and uphold the decision of the first appellate court.

When Ms. Ntui was accorded her right to rejoin, she reiterated that the respondent prayed the trial court to order the sale of both houses as she would rent a house to live in with her children. Ms. Ntui pointed out that the respondent's advocate had not contradicted that fact. She therefore prayed the court to either allocate the Msalato house to the appellant or uphold the decision of the trial court by ordering its sale and respective 40% to 60% sharing of the proceeds thereof.

Ms. Ntui reiterated her submission in chief with regard to parties respective contributions to acquisition of Msalato house and added that the fact that the respondent found the appellant already with a mud house at Msalato was not disputed.

Ms. Ntui further rejoined that it is on record that the custody of children was considered in the division of matrimonial properties, which she said it was wrong.

Regarding the unsigned judgment, Ms. Ntui maintained that the provision of Order XX rule 3 of the CPC be observed. She therefore prayed the court to allow the appeal and quash the decision of the 1st appellate court.

The court, after having heard the rival submissions by both parties and having perused the records of the lower courts, finds that there are two related issues to be determined in this appeal. The issues are; whether the first appellate court rightly divided the matrimonial houses according to the law and if not, what should be the proper division according to the law.

Before embarking on determination of the central issues in this appeal, there are two observations to be stated to put record straight. **Firstly**; as correctly observed by the first appellate court, the trial court did not order sale of either of the two houses in dispute; rather the trial court left the decision to sell the Msalato house to the wisdom of the parties themselves. On page 8 of the judgment of the trial court, it is stated:

> '*Mahakama hii inaamuru nyumba iliyopo Msalato ya waliokuwa wanandoa igawanywe kwa asilimia 60 kwa arobaini, kwa maana ya SM apate asilimia 40 na SU asilimia 60*'.

[**literary translated thus**; This court orders that the house located at Msalato be divided to the former spouses by 60% to 40%, whereby PW should get 40% and DW 60%]. No order to sell the house was stated here.

For the avoidance of doubt, the trial court went ahead to state on the same page of its judgement as follows;

'Mahakama hii imeona sio busara kusema moja kwa moja nyumba hiyo iuzwe kwa kuwa hilo linaweza kuamuliwa na wadaawa wenyewe'

[**literary translated thus**; This court finds it unwise to straightly order the sale of that house since a decision to sell it can be made by the parties themselves.]

Secondly, according to the trial proceedings, the amount of loan which the respondent testified to have contributed into Msalato house, is Tshs. 300,000/= and not Tshs. 3,000,000/=. The typed judgement of the trail court also states, on page 3, the same amount of Tshs. 300,000/= which the respondent borrowed from SACCOS. The amount of Tshs. 3,000,000/= which was used by the first appellate court as the contribution by the respondent, and which Ms. Ntui stated in her submission before this court is unfounded and therefore incorrect.

In determining this appeal, it is imperative to firstly revisit the decision of the trial court to appreciate the evidence on record. I am of the view that proper analysis of evidence adduced during trail is important in deciding this matter appropriately.

From the proceedings and judgments of the lower courts, it is evident that both courts knew the law governing the division of matrimonial assets is the **LMA** particularly section 114. It is also evident that both courts

properly found that both parties did contribute to the acquisition of the two houses in dispute. As such, this court can only worry about the interpretation of the evidence adduced in conformity to the cited law.

Section 114(1) of the LMA empowers courts to order division, between the parties, of any assets acquired by them during the marriage. The catch phrases in relation to the issues raised in this case are; 'between the parties' and 'assets acquired during the marriage'. The trail court firstly determined that the marriage was irreparably broken down, then granted the decree of divorce and proceeded to divide the assets jointly acquired. In dividing the assets, the trial court had in mind the provision of subsection (2) to section 114 which provides:

'In exercising the power conferred under subsection (1), the court shall have regard to-

(a) ***the customs of the community to which the parties belong****;*

(b) ***the extent of the contributions made by each party*** *in money, property or work towards the acquiring of the assets;*

(c) N/A in this case

(d) ***The needs of the children****, if any, of the marriage, and subject to those considerations,* ***shall incline towards equality of division****'.*

[emphasis added]

Now, the evidence adduced during trial revealed that the parties are Chaggas, from Moshi where customarily a son is given a plot by his parents to build his house, normally within the clan land. Evidence shows that the appellant in this case was given a plot where the house was built in Moshi before the marriage. The trial court considered the provision of 114 (2)(a) of the **LMA** quoted above, and abstained from tempering with the customs of the Chagga tribe. Hence preferred to leave that house to the appellant.

Consideration of the customs of the Chagga community was very proper to be done by the trial court because that is what the law directs. However, in so doing the trial court committed one error. It did not consider the provision of subsection (3) to section 114 of **LMA**, which provides:

> *'(3) For the purpose of this section, reference 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'.*
>
> [emphasis added]

Evidence adduced during trial shows that despite the plot in Moshi being given to the appellant by his father before marriage, the parties built the house on the said plot during subsistence of the marriage. The respondent testified that she contributed to the building of the said house.

She did not elaborate about how she contributed. However, her assertion that she contributed to the acquisition of the said house was not controverted by the appellant. It is trite law that the appellant's silence in the face of the respondent's assertion is considered an admission of fact. For this reason, the respondent was entitled to a share in the said house.

According to trial proceedings, the respondent prayed to the trial court to either order sale of the house or divide the corrugated iron sheet and other recoverable building materials equally between the parties. Probably, the division of the building materials was not the best proposal and could be deemed to fit in the Biblical narration in **1 Kings 16-28** which Ms. Ntui referred to this court, yet it did not extinguish the respondent's right to the share in the said house in so far as the house was jointly acquired. I shall revert to address what I consider to be an appropriate modality of sharing this house, in due course. Suffice it to say that the trail court erred in not giving the respondent her share when it ordered the division of properties.

With regards to the Msalato house, the trial court ordered the sharing of the same between the parties by 40% to the respondent and 60% shares to the appellant. The court did not clarify how 40% and 60% sharing would be done. Obviously, this decision would bring serious challenges in its execution, especially if each party would like to re-marry and stay there. I find this decision impractical.

The first appellate court having considered the contribution of both parties in both houses flatly allocated the Msalato house to the respondent and the Moshi house to the appellant. In her submission, Ms. Ntui argued extensively that the respondent prayed to the trail court to sell both houses and divide the proceeds of sale to the parties, hence the trial court acted on a new prayer by the respondent. I totally agree with Ms. Ntui. The respondent did not pray to be given the Msalato house during trial. She prayed for an order of sale of the house so that parties can share the proceeds of sale. Her prayer to the first appellate court was indeed an afterthought.

The decision of the first appellate court is further challenged for not properly considering the contribution of each party in its division of assets. Evidence adduced in court during trial shows that the appellant had a plot already before marriage. He had a shop at Msalato where he was doing business. It can be said that proceeds of that business were utilized to build that house.

Evidence shows further that the only monetary contribution by the respondent towards the acquisition of the Msalato house is Tshs. 300,000/=. Since the basis for the first appellate court to measure the contribution of the respondent was a mistaken fact that she contributed Tshs 3,000,000/= while in fact the amount was Tshs. 300,000=, the decision reached based on that faulty consideration is, *ipso facto*, faulty and prejudiced the appellant.

Another obvious mistake committed by the first appellate court in its decision is to treat the two houses in Moshi and Msalato as the same in terms of value. Apparently, the only common feature between the two is the name "house' which they share. Otherwise, evidence adduced during trail revealed that the house at Moshi is a mud house and inferior to the house at Msalato. Having observed that the monetary contribution of the respondent for the Msalato house was Tshs. 300,000/= and despite there being no concrete proof of the contribution of the appellant, it remains to be appreciated that Tshs. 300,000/= would not be able to build a house worth that name.

A further analysis of the evidence would show that, other things being equal, the contribution of the appellant is value of the house minus the contribution of the respondent. This assumption is very logical in view of the fact that no evidence was adduced during trial to show that there was another person who contributed to the acquisition of the house in question.

Therefore, for what the house is described in evidence, the contribution by the appellant appears to be far more than that of the respondent. It is also appreciated that the respondent being a wife, is considered to have also contributed in non-monetary form. All in all, the weight should have been given to the appellant's contribution.

Since the two houses are different, with the Msalato house being built of cement blocks while the Moshi one being a mud house, the division done by the first appellate court by allocating the Msalato house to the respondent

and the Moshi mud house to the appellant has obviously resulted into injustice to the appellant who appears to have contributed more to their acquisition. In my considered view, justice will not be achieved by each party taking one of the houses. As the houses are apparently of different values, there should be a different modality of division, which is what I shall strive to do.

Having considered the impracticability of the decision of the trial court in its 40% to 60% sharing of the Msalato house and the denial of right to the respondent to have a share in the Moshi house; I think the right way to go under this protracted division of matrimonial assets is to order sale of Msalato house. This is what the respondent had prayed in the trial court, and it is the option Ms. Ntui for the appellant has prayed before me as an option. Apparently, parties should be comfortable with the sale of the Msalato house as a common place, having tested the other bitter options.

Section 114 (1) of **LMA** empowers courts, in this type of proceedings, to order division of matrimonial assets between the parties after the granting of decree of divorce. Section 114(2)(d) of **LMA** requires courts to consider the needs of children. Guided by these provisions, it is my determination that the Msalato house be sold and proceeds thereof be divided between the parties according to their respective contributions.

From the analysis of evidence herein, it is my view that the ratio of 40% which was given to the respondent as her contribution for Msalato

house is on the higher side. As I have demontrated, the monetary contribution of Tshs. 300,000/= would not come near to building a house worth that name. Even in absence of valuation report for the Msalato house Tsh. 300,000/= may hardly make a 10% of the cost of the house that was described in evidence. It therefore follows that the rest of the monetary contribution, about 90% came from the appellant. However, considering the fact that the respondent as a former wife of the appellant had an indirect contribution too as per decided decisions, I uplift her contribution to 30% all other things considered. This means, this court estimates the appellant's contribution to be 70%. It is therefore decided to sell the Msalato house and proceeds of sale be divided at the ratio of 30% to the respondent and 70% to the appellant.

That decided, I turn to the Moshi house. I agree with the decision reached by the trial court not to order sale of the said house in respect of customs. However, since there is a right of the respondent in that house, the appellant is ordered to pay the respondent money equivalent to the current value of a half of the iron sheets used in that house in Moshi. The appellant may pay that amount of money from the proceeds of sale of the Msalato house or from appellant's other lawful source.

According to section 114(1) of **LMA**, division of matrimonial assets is done between the parties and not to the children. However, the parties being parents they have a duty to shoulder their parental responsibilities even in the face of a broken marriage. For this reason, Since it has been decided

:hat the respondent shall take custody of the children, and on top of the ɔrder for maintenance which is still in force, the appellant shall pay for rented ɜccommodation for his children until when they reach the age of majority.

Having determined the issues in this case as above, the appeal has merit and is therefore allowed to the extent shown. In the circumstances of :his case, I refrain from ordering costs.

It is ordered accordingly.

Dated at Dodoma this 28th day of July, 2022

ABDI S. KAGOMBA

JUDGE