THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

PC. MATRIMONIAL APPEAL NO. 2 OF 2022

(Originating from the District Court of Mbeya in Matrimonial Appeal No. 28 of 2020 in original Matrimonial Cause No. 52 of 2020 of Uyole Primary Court.)

between

BRYSON MBADIME .....APPELLANT

VERSUS

HELEN DAUDI SILWAMBA ..... RESPONDENT

JUDGMENT

Date of last order: 21st July, 2022

Date of judgment: 11th August, 2022

NGUNYALE, J.

This matter originates from the Primary Court of Mbeya at Uyole in Matrimonial Cause No. 52 of 20120 (the trial court). In that case, the respondent herein, petitioned to the trial court claiming for reliefs of divorce, division of matrimonial properties, custody and maintenance of the three issues of the marriage who were born during the subsistence of the marriage, before it went on the rocks.

The material background and essential facts of the matter as obtained from the record of appeal giving rise to the present appeal indicate that, the appellant and the respondent celebrated their marriage under Christian rites on 15th November, 2008. During the subsistence of their marriage, they were blessed with three issues of marriage and they jointly acquired various properties. The appellant owned one house before marriage with the respondent.

The respondent stated that, they lived a happy marriage life with no difficulties until 2019 when they had a case in court. Since 2019 the appellant deserted the matrimonial home by taking some of his belongings.

On his part, the appellant admitted that he was duly married to the respondent and to have deserted the matrimonial home but was not ready to divorce the respondent. He admitted also to have a motorcycle, bicycle, unfinished house, domestic articles and M Pesa business. Regarding the other house the appellant asserted that the respondent contributed installation of electricity only.

After hearing the parties, the trial court ruled that the marriage of the parties had irreparably broken down and issued a decree of divorce. All

assets were declared as matrimonial properties liable for division and issues of marriage was placed in custody of the respondent.

Aggrieved, the appellant appealed to the District Court on two points of law, **one**; that assessor's did not give their opinion as required by section 7(1)(2)(3) of the Magistrates' Courts Act, **two**; that evidence was not read over to witnesses after being recorded. Also, the appellant challenged including the house acquired before their marriage in matrimonial assets. The first appellant court found that the assessors were fully involved. It varied equal distribution of the house built before marriage to 70% to 30%. Custody of children was again placed to the respondent.

Still aggrieved, the appellant has knocked doors of this court basically on equal grounds which were raised in the District Court.

When the appeal came for hearing the appellant was represented by Mr. Mkumbe, learned advocate whereas the respondent appeared in person. The appeal was argued through written submission.

On issue of assessors' opinion, Mr. Mkumbe submitted that assessors did not give their opinion as required by section 7(1)(2)(3) of the Magistrate's Courts Act [Cap 11 R: E 2019]. He added that the issue touches on jurisdiction of the court but the District Court disregarded it.

Regarding the house acquired before marriage, he submitted that it did not constitute matrimonial property because the appellant acquired it with his deceased wife hence it remained the appellant's own property hence not subject for division.

Regarding custody of children, Mr. Mkumbe submitted that the respondent has no financial ability to take care of them and their opinion was not sought before placing them to the respondent. He added that under section 26(1)(b) of the Law of Child Act, children have right to live with parent who has capability of raising and maintaining them. It was further submission that they were able to give their opinion but the court did not seek one. He cited the case of **Gladness Jackson Mujinja v Sospeter Crispine Makene** (2017) TLS LR 217 to support the argument that where children can express their opinion the court should not rely on evidence of hostile parents.

In reply the respondent submitted that the assessors gave their opinion and participated in the trial court.

On division of property, it was submitted that the court considered efforts contributed by each party towards acquisition of the properties in accordance with the requirement of the law. On custody of the children, it was submitted that it was placed to her considering welfare of the

children and that so far there is no complaint from the children or appellant that the respondent has failed to maintain them.

During rejoinder, Mr. Mkumbe submitted that contribution toward acquisition of matrimonial property is a matter of evidence and in this case, there was ample evidence that the appellant owned the house before their marriage with the appellant.

After hearing arguments of both parties, it is now the duty of this court to determine the appeal by considering the competing arguments made in line with the grounds of appeal. However, before doing that I find it appropriate in the circumstances of the case to preface some deliberation on basic tenets which will guide the court in determining the appeal.

The first one, relates to the court sitting on a second appeal. As a general rule the second appellate court should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principles of law or procedure, or have occasioned a miscarriage of justice. There is a considerable body of case law in this. See, for instance, **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v A.H. Jariwala t/a Zanzibar**

Hotel [1980] TLR 31 and **Martin Kikombe v. Emmanuel Kunyumba**, Civil Appeal No. 201 of 2017.

The issue of assessors' opinion takes the court to the relevant law which is Rule 3 (1) and (2) of the Magistrate's Court's (Primary Courts) (Judgment of Court) Rules, 1987 GN No. 2 of 1988. It provides as follows

> *3 (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the Magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.*
>
> *(2) If all the members of the court agree on one decision, the Magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members*

The above law does not require the assessors to give their opinion for the obvious reason that they are members of the court. After they have completed hearing the evidence from the parties, the Magistrate has to consult with them in order to reach a decision of the court. Situation akin to the present was disused in the case of **Neli Manase Foya v Damian Mlinga** [2005] TLR 167. The court held that;

> *The assessors are members of the court and sign the judgment as such, and not for the purpose of authenticating it or confirming it. In answer to the second point of law, assessors are neither required to give their opinions, nor to have their opinions recorded by the Magistrate.*

In the present appeal the judgment of the trial court was signed by all members of the court which implies that it is a court decision. The complaint that they were required to give opinion is not here or there as it is not the requirement of the law for assessors to given their opinion rather the Magistrate is supposed to consult them without recording their views. This first ground is therefore without merits.

Regarding reading evidence to parties after finishing recording, also it was raised in the first appeal and the Magistrate did not make findings on it though, in this court the complaint is not on such aspect. As to whether it is the requirement to read evidence to parties after recording it, this takes me to rule 46 of The Magistrate's Courts (Civil Procedure in Primary Courts) Rules, G.N. No. 310 of 1964, henceforth "CCPR" which deal with taking and recording of evidence in primary court. Subrule 3 of rule 46 provides that;

> *3) The substance of such evidence shall be recorded in Kiswahili by the Magistrate, and after each witness has given evidence, the Magistrate shall read over his evidence to him and shall record any amendments or corrections. The Magistrate shall certify at the foot of such evidence, that he has complied with this requirement.*

Indeed, going by the above provision, the record has to indicate that rule 46 (3) was complied with. In this appeal the signature of the Magistrate and date is appended thereto certifying the same but there is no proof

that evidence was read over to witnesses in accordance with the law. This being a procedural irregularity the test is whether the appellant was prejudiced as provided for under section 37 (2) of the Magistrates' Courts Act [cap. 11 R: E 2022] which provides;

> *(2) No decision or order of a primary court or a district court under this Part shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, or any process or charge, in the proceedings before or during the hearing, or in such decision or order or on account of the improper admission or rejection of any evidence, unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice.*

In this appeal the appellant has not complained that his evidence was not recorded and have not questioned the authenticity of the proceedings of the trial court. This court was confronted with similar scenario in the case of **Garende Nyabange v Nyanzara Kyarata,** PC. Matrimonial Appeal No. 10 of 2020, HC at Musoma (Unreported), **Kahyoza, J.** made the following remark to which I find inspiration;

> *I am of the firm view that appellant did not establish that the omission to comply with rule 46(3) of the PCPR, occasioned any injustice as he did not complain about the authenticity of the record. Thus, I find that the violation of rule is 46(3) of the PCPR is not fatal. It is an irregularity, which is curable under section 37(2) of the Magistrates' Courts Act, [Cap.11R.E.2019].*

Therefore, failure to comply with rule 46(3) of the CCPR being a procedural irregularity the appellant was supposed to lead evidence that

he was prejudiced and injustice has been occasioned, which is not the case here. This ground to has no merits.

Regarding division of house acquired before marriage, it was submitted that it was supposed to be excluded while the respondent pressed that it constituted a matrimonial property. In this appeal there is no dispute that the house was acquired by the appellant before their marriage. Equally there is not doubt that the respondent contributed Tsh. 320,000/= for installation of electricity in that house. The question is whether by such contribution entitles the respondent a share in the house. Now under section 114 (3) of the Law Marriage Act [cap 29 R: E 2019] matrimonial properties included those owned before marriage, it provides that;

> *(3) 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.*

In the present appeal the appellant agrees that the respondent contributed money for installing electricity in the house. By any means the respondent had her hand in completion of the house as aforesaid. There is ample evidence to support that assertion from the appellant and the respondent. So long as the house in dispute under section 114 (3) of the LMA formed part of the matrimonial property the respondent is entitled to

a share. The fact the appellant built the house with her deceased wife is not tenable in law because it was the appellant who dragged the respondent into that house and the respondent laid her hands by making monetary contribution. The findings of the lower courts were reached after considering the law and circumstance of the case. The order of the District Court on share of the respondent therefore will not be disturbed.

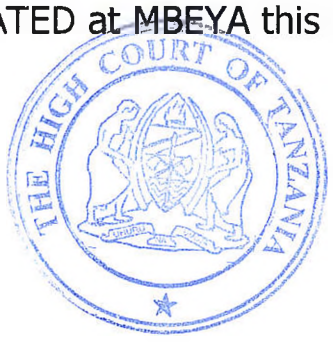
On custody of children of marriage, the issue will not detain me much, the complaint that the respondent has no financial ability to take care of them is not supported by evidence in record. There was no any evidence led by the appellant to show that the respondent is not a caring mother and is financially unable to take care of the issue of marriage. Besides, the appellant has a chance to face the trial court for variation of the order on custody of the children which will then consider the circumstances upon hearing both parties.

Appellant's main complaint is that the children's wishes, especially the first and second children who were above seven years old, were not solicited by the trial Court. The answer to this is obvious, the court is not bound by the wishes of the children. There is evidence that since the appellant deserted the respondent in 2019 children were living with the respondent which was almost for two years their view could not have made any

difference. For the reason already stated when dealing with the issue of custody of children, the room is still available to the appellant to have his children in his hand. The ground is adjudged unmeritorious.

Consequently, and for the reasons above stated, the appeal is devoid of merits. It stands dismissed in its entirety. The decisions of the two lower Courts remain unaltered. Considering this to be a matrimonial dispute, each party shall bear own costs.

DATED at MBEYA this 11th day of August, 2022



D.P. NGUNYALE
JUDGE