IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO 12 OF 2021

JANETH WILLIAM MWASAWALA.....APPELLANT

VERSUS

SEBASTIAN JOSEPH BULALY.....RESPONDENT

EX PARTE JUDGEMENT

OPIYO, J.

The Appellant is dissatisfied with the decision of the District Court of Kinondoni at Kinondoni in Matrimonial Cause No. 95 of 2020. She has preferred appeal in this court on 3 grounds, which are:-

1) That the trial court erred in law and fact by failing to consider the principle of Matrimonial property division and not dividing matrimonial property.

2) That Magistrate erred in Law and fact by failing to consider the maintenance of third issue by respondent.

3) That the magistrate erred in Law and facts in disregarding the matter of custody and maintenance of children as prayed in the petitioner's petition for divorce.

In this matter appellant appeared in person. The appeal was heard *ex parte* after all attempts to serve the respondent being difficult as he is living in Dodoma and appellant could not reach him. The service was finally ordered to be made by way of publication. The appellant reported to have published summons in the Government gazette of 20th May, 2022 and supplied a copy to respondent's father who is residing here in Dar Es Salaam. But still the respondent did not appear. As a consequence of failure to appear even after publication, the court ordered for the appeal to proceed *ex parte* against him on 25/5/2022. The matter was subsequently heard orally on 1st June, 2022.

In support of her appeal the appellant intimated that she was also entitled to the matrimonial properties that they jointly acquired including a house at Bunju A, Msikitini Street House No. 3 as it has been identified in recent postcode process. She submitted that she contributed in the purchase of the property in 2004. They subsequently started construction of the house therein in 2006. They moved there 2014 after completion of construction. But she had to leave her marriage because of the torture she had to endure as she explained at trial. She argued that the trial Magistrate did not consider the issue of distribution of the said property at all when dissolving their marriage.

On the 2nd and 3rd ground she submitted that the trial court decision was not fair because after issuing divorce decree it did not consider her prayers on custody of children. That left this issue unattended leading to suffering of the children especially the younger one. The children were left hanging not knowing direction to take. That, as of now two children has moved to her place which is a single rented room where

she had to move to after divorce and their father is not providing for them for anything. She lamented that, if her right to distribution of matrimonial property was considered, she would at least have means of supporting her children to avoid pathetic situation she is in now of sharing a single room with two relatively grown up children who have been forsaken by their father. She continued to state that the younger child is not even allowed to visit her, and if she does, the father threatens to refrain from paying her school fees. She argued that, this situation is a consequence of court's failure to make order in relation to custody and maintenance of children when it dissolved their marriage. She therefore prayed for appeal to be allowed by court marking orders in relation to division of matrimonial property and custody and maintenance of children.

Before moving to disposition of grounds of appeal, I feel pertinent to appreciate brief account of the background to this matter. As per records, the appellant had filed a Matrimonial cause No. 95/2020 at Kinondoni District Court praying among other things for divorce decree, an order for equal distribution of matrimonial properties, full custody of the third child and maintenance of the issues of marriage.

The matter proceeded ex parte after the respondent failed to appear or file reply to the petition. After detailed narration of the amount of mistreatment, cruelty she explained to have endured in her marriage, the court found that the marriage was broken down irreparably. It consequently issued a divorce decree. The court declined to issue orders relating to division of matrimonial properties and maintenance and custody of children. The court reasoned that, with the testimony of

appellant, the then petitioner, being centred on mistreatment she went through rather than issues of matrimonial properties, children and custody, all she wanted was a divorce not anything else. The court only granted that, what it thought was the only thing she wanted, leaving all the other consequential orders aside.

The decline on part of the court to make orders in relation to division of Matrimonial properties, custody and maintenance of children is what resulted to the current appeal with appellant claiming error on part of the court for not determining those issues. She seems contented with dissolution of marriage. It is only the two issues that remained unattended to by trial court that still discomforts her, forming her reason to be in this court today on appeal. The issue is whether the trial court was right to decline determination the matters relating to division of Matrimonial properties, custody and maintenance of children when it granted divorce?

It is a common understanding that the court is under a duty to effectively and finally determine the matter before it. That is achieved by framing issues for determination emanating from the pleadings and answering all the issues involved. This matter was heard *ex parte* therefore; the only pleading that was available was petitioner's petition. That means the issues that were to shape court's decision were to emanate from petitioners prayers only for full determination of the matter. From the trial court proceedings no issues were framed before commencement of hearing. When the matter was called on 2/12/2022 the Magistrate ordered that issue were to be set on 7/1/2020. When again the matter came on 7/1/2021 the court ordered for the issue to be

set if respondent files his answer. Therefore, as respondent never filed his reply, issues were never framed until commencement of hearing *ex parte* on 23/3/2021. In my considered view, such failure to frame the guiding points for determination is where the trial court started misguiding itself on the extent of issues it ought to have given answers to in his decision. It is evident that, the appellant had requested for more reliefs not just the divorce decree as the trial court had put it.

As a first appellate court I am entitled to appreciating, look at or re-evaluate evidence and reach own findings of fact. This is entitlement of an appellate court where there is misdirection and non-direction on the evidence or the lower court have misapprehended the substance, nature and quality of the evidence See the case of **Peters v. Sunday Post Ltd. (1958) EA 424**. In that case it was held that:-

> *"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."*

In the case of **Selle and another v. Associated Motor Boat Com Ltd. and others [1968] EA 123 C. at page 126** the same principle came out clearly in the following words:-

> *"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally..."*

From the above authorities, it is evident that the duties of a first appellate court is to subject the whole evidence to a fresh thorough analysis and draw fresh conclusions therefrom; but taking cognisance of the fact that it never had chance to examine the witnesses. Based on the above well-articulated principle, it is noted from the trial records that the prayers by the appellant, the then petitioner included equal division of matrimonial properties as well as maintenance and custody of

children especially the younger one. It is also illustrious that the prayer of division of matrimonial property was not left unattended by the appellant in her testimony during trial. It did not lack evidence in support to call for this court's caution in terms of Peter's case above. It is just that the trial court failed to appreciate the weight of the facts proved.

In fulfilling her desire to be granted the reliefs of division of matrimonial property, the appellant had put effort at trial to explain how she contributed to the acquisition of the matrimonial properties. She explained a number of economic activities she was engaged in that earned her some income she financially contributed to the acquisition of the house in question. She started by saying that at the time of their marriage she was a nurse and the respondent was a driver. It is the respondent that made her leave that job. But even after that she did not sit idle, she attended a course on hotel management field and marketing which consequently earned her jobs at Beach Komba Hotel and the Guardian newspapers respectively. She did not end there; she continued to explain a number of activities she had engaged in for the purpose of supporting her family during subsistence of their marriage. All these were in vouch to prove her financial contribution towards acquisition of matrimonial properties and family wellbeing. In law, that was an addition of what she was entitled to from the matrimonial properties even if her contribution was merely through her performance of domestic chores that is undisputed to any wife. The land mark case of **Bi Hawa Mohamed v Ally Seif (1983) TLR 32** had already rewarded mere performance of domestic chores in the division of matrimonial properties. In my view, the trial court was therefore not supposed to

end with granting divorce decree only in this matter. This is because; the court upon granting the decree of divorce is empowered under section 114 of Cap. 59 to order for distribution of matrimonial properties. The section provides that:-

> *"(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*
> *(2) In exercising the power conferred by 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) any debts owing by either party which were contracted for their joint benefit; and*
> *(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division"*

From re-evaluation of evidence, it is my finding that the appellant proved her contribution in the acquisition of matrimonial properties, which is paramount in the situation. She is therefore, entitled to a share more than what would have been awarded for her performance of domestic errands. It was therefore an error on part of the trial court to deny her that on the argument that all she wanted was a divorce decree only. If it was the case, she could have categorically stated or could have not bothered to enumerate he contribution.

From the records, the matrimonial property identified in this case is the house at Bunju A, Msikitini Street House No. 3. It is ordered that she be entitled to 40% of the said house. Thus, division of the house as the only property identified is rated at 40% and 60% for appellant and respondent respectively.

On the issue of custody and maintenance of children, it is the finding of this court that it was not well dealt with during trial. Apart from being in the prayers, appellant refrained from saying much about it in her testimony. I will therefore, approach this issue with the necessary caution because it had no enough evidence from the records to support it. However, I understand that in matrimonial proceedings such issues are considered consequential reliefs in terms of section 94 of the law of Marriage Act (supra) in which a court upon granting a declaratory decree may also grant a consequential relief without risking an objection on the ground that it is a declaratory decree of divorce only that was sought or that no consequential relief was claimed in the first place. See also section 110(1) of the same act which provides that:-

> "At the conclusion of the hearing of a petition for separation or divorce, the court may-
> (a) if satisfied that the marriage has broken down and, where the petition is for divorce, that the break down is irreparable, grant a decree of separation or divorce, as the case may be, together with any ancillary relief.

With the above provision in mind I was set to say something about custody of children, but could not have evidence to rely on such determination. I made a small inquiry from the appellant on the ages of the said children. She said the two are of the age of majority and only one is about 14 years now and still schooling. In my view, the two who are of the age of majority are big enough to choose who to stay with and because there was no evidence of respondent ever denied them access to him or refusing to stay with them, this court finds no reason to give order of custody regarding them. They are at liberty to choose who to stay with. In regard to the younger one, whom I was told is in boarding school, as she is above the age of seven years, thus, above rebuttable presumption under subsection 3 of section 125 of Cap. 59, let her wishes contemplated under section 125 (2) (b) of the same Act in choosing where to stay prevail. The principles of best of a child are well stated under section 125 (2) (a) of the same Act. The section stipulates that in deciding as to whose custody the child should be place her/his best interest become of primary consideration followed by wishes of parent and the wishes of the child and customs of the community to which the parties/ parents in this case belong to. In the Law of the Child Act, Cap. 13 RE 2019, dominance of child's best interests is also emphasized (see section 4(2) and section 37(4) of the Act, to name a few.

No evidence on record to enable the court to decide this matter conclusively, but because it is on record that, the alleged child is already in the custody of the respondent who is taking her care including paying for her school fees, for continuity of the care always contemplated under the law, I see no reason to disturb the arrangement that already seems

to be working for her best interest. The appellant also stated in appeal to have accommodation constraints for the time being, giving her full custody of the child may not be in the best interest of the child. The appellant is however given full access to the child. Her access as a co-parent having a role to pray in the child's upbringing is to be respected all the time. Having access to both parents also broadens child's child best interest which is paramount in the situation. That said, the appeal is allowed to the extent explained with no order as to costs.

M. P. OPIYO,

JUDGE

21/6/2022