IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB-REGISTRY
AT DAR ES SALAAM

CIVIL APPEAL NO. 74 OF 2021

(C/f District Court of Kinondoni at Kinondoni in Matrimonial Appeal No. 73 of 2020 Originating from Magomeni Primary Court in Matrimonial Cause No. 66 of 2017)

GILBERT FINIAS MANYERERE ..... APPELLANT

VERSUS

PASKAZIA DAVID KAKWAYA ..... RESPONDENT

JUDGMENT

Last Order: 11/08/2022

Judgment: 9/09/2022

MASABO, J.:-

The Appellant and the respondent contracted a Christian marriage on 06/12/2008. Their marriage subsisted up to 24/11/2017 when it was dissolved by Magomeni Primary Court (the trial court) in Matrimonial Cause No. 66 of 2017. At the dissolution of their marriage, they were blessed with two issues and had acquired the following properties:

i. One house located at Kibamba area, Plot No. 613, Block 'Q4' Title No. 115787 which was mortgaged to NBC Bank for a loan facility of Tshs. 40,000,000/=;
ii. Two houses in one piece of land located at Kibamba Mji Mpya No. 5390;
iii. Another house with apartment located at Kabungubungu.
iv. A plot of land located at Kiluvya;
v. 3 Motor vehicles make Canter, Fuso and Toyota Cresta;

vi. NMB shares worth Tshs 7,000,000/=; and

vii. Block/brick business.

Convinced that the marriage has irreparably broken down the court dissolved the marriage. It subsequently placed the issues under the custody of the respondent and ordered the Appellant to contribute Tshs 100,000/= monthly for maintaining them. As for the properties, the court ordered each party to remain with one house. The house at Kibamba and the plot at Kiluvya were given to their children. The mortgaged house was ordered to be sold and the proceeds be used to repay the loan facility and the remaining proceeds, if any, be divided between the parties. The Appellant herein was also awarded both motor vehicles and NMB shares.

Dissatisfied with the decision, the appellant herein appealed to Kinondoni District Court in Matrimonial Appeal No. 38 of 2017 whereby the court upheld the award of Tshs 100,000/= for maintenance fee but varied the division of assets. The appellant was awarded the house a Kibamba Mji Mpya, one plot at Kiluvya and the mortgaged house. The Respondent was aggrieved by the reversal. She appealed to this court in **PC Civil Appeal No 83 of 2018** which found faults in the trial court record and ordered a trial *de novo* specifically on the maintenance order of Tshs 100,000/= and the order for division of matrimonial assets.

During the trial *de novo*, the appellant, among other things, told the court that he sold the assets awarded to him in the first trial and in the first appeal

before Kinondoni District Court in Matrimonial Appeal No. 38 of 2017 as there was no any stay of execution, thus they were no longer existent. In support, he tendered sale agreements showing that the assets were sold out. At the conclusion of the *trial de novo*, the trial court maintained the award of Tshs 100,000/= for maintenance of the issues. Regarding distribution of matrimonial properties, it was held that the landed property at Kibamba which had two houses in one plot, the plot at Kiluvya and motor vehicle make canter were no longer existent as they were already sold by the Appellant. Hence, unavailable for distribution. Consequently, its order for division of matrimonial assets covered two assets only, that is, a house at Kibangubangu and a motor vehicle make Toyota Cresta which were ordered to be divided at a ratio of 80% to the Appellant and 20% to the Respondent.

Aggrieved by the decision the respondent appealed to first appellate court which raised the maintenance fee from Tshs 100,000/= to Tshs 250,000/=. As for the properties, it observed that since the missing properties were sold out by the Appellant after they were awarded to him in the matrimonial cause, it is true they were unavailable for distribution. However, it observed that, since the Appellant appropriated the proceeds earned from the sold properties it was only fair to award the remaining house at Kabungubungu and the motor vehicle make Toyota Cresta to the Respondent. Dissatisfied by this decision the Appellant preferred the current appeal on the following grounds:

1. That, the trial magistrate erred in law and fact in issuing a house located at Kabungubungu and Toyota Cresta to the Respondent alone without considering the Appellant's contribution to the said properties;
2. That, the magistrate erred in law and fact in ordering the Appellant to pay the sum of Tshs 250,000/= as maintenance without considering the fact that maintenance is duty of both parents.

Hearing of this appeal proceeded by way of written submissions. The Appellant was represented by Mr. Nickson Ludovick whereas the Respondent was represented by Mr. Mashaka Ngole, all learned advocates.

Supporting the first ground of appeal Mr. Ludovick submitted that, the first appellate court erred in issuing the house located at Kabungubungu and Toyota Cresta to the Respondent alone without considering the Appellant's contribution to the said properties. The court failed to appreciate that, the Appellant was the sole bread earner, head of family and main contributor to the required assets hence deserved a lion's share. In fortification he referred the court to section 114 (2)(b) of the **Law of Marriage Act** [Cap 29 of 2019] which directs that the division of matrimonial assets be based on the contribution by each party. Thus, since the appellant was the sole bread earner and the respondent was a mere house wife, he deserved a lion's share of the assets.

He further submitted that; from the record the Appellant proved his contribution while the Respondent did not. Therefore, he deserved a bigger

share. In addition, he reasoned that, the record shows that, one property was sold to discharge the mortgage and the reminder of the properties were sold during the subsistence of the marriage and some were sold after the decision of the first appellate Court in Matrimonial Appeal No. 38 of 2017 which vested the ownership of such properties in him.

In the alternative, he submitted that the disputed properties were not substantiated before the court. There was no any document to support their existence. Thus, it was not legally proper to take into consideration any evidence not tendered and admitted in the court of law.

On the second ground of appeal, Mr. Ludovick submitted that the trial magistrate erred in ordering the Appellant to provide Tshs 250,000/= for maintenance without considering the Appellant's income and the fact that such duty is vested on both parents. He added that, although the Appellant loves his children and is ready to provide for their maintenance, the sum of Tshs 250,000/= is beyond his financial muscle. In summation, he argued that as the statutory obligation to maintain children is vested on both parents depending on economic soundness, the court ought to have ordered the parties to equitably contribute as they are now equal in terms of income.

In further support of his submission that the order was based on a wrong assessment and evaluation of income generated, he cited Section 9(3) (b) the **Law of Child Act** [Cap 13 R.E 2019] and section 41 of the same law which stipulates the duty owed by the parent in respect of maintenance of

their children. He finally prayed that the decision of the first appellate court be quashed. The appeal be allowed and this court be pleased to restore the finding of the trial court which divided the two matrimonial assets by 80% and 20% to the Appellant and the Respondent, respectively.

In reply Mr. Ngole submitted that the Appellant lamentation is devoid of any merit. On the first ground of appeal, he submitted that the first appellate court cannot be faulted for issuing the house at Kabungubungu and the motor vehicle make Toyota Cresta to the Respondent. As the appellant had appropriated all the proceeds realized from the sold assets, it was fair and just for the first appellant court to reverse the finding of the trial court and award the assets to the Respondent. Elaborating his point, he argued that during the subsistence of marriage, the couple jointly acquired a house at high way in Kibamba CCM, a house on Plot No. 613 with No. Q4, a House at Mji Mpya, a Plot of land at Kiluvya Madukani, a house at Kabungubungu, NMB shares, block making business and three motor vehicles make Mitsubishi Canter, Mitsubishi Fuso and Toyota Cresta and all were existent during the first trial hence were partially awarded to the Appellant. After the judgment and decree in Matrimonial Appeal No. 38 of 2017 which placed most of these assets under the Appellant, he disposed them of by way of sell while the Respondent was still pursuing an appeal against such decision. He argued that, the failure to involve the Respondent, violated her right to give consent to the said disposal and was a deliberate move by the Appellant to circumvent justice should the decision in the appeal which was still pending be resolved in the Respondent's favour as it expectedly turned out.

He added that, the appellant conduct aimed to deprive the Respondent her right to benefit from the matrimonial assets acquired during the subsistence of their marriage.

Mr. Ngole's further argued that, the Appellant's proposition that he unliterally acquired the assets with no assistance of the respondent as she was a mere house wife is devoid of any merit and an afterthought. Also, it materially contradicts with the position propounded in the case of **Bi Hawa Mohamed vs. Ally Seif** (1983) TLR, 32 and the provisions of section 59 of the Law of Marriage Act as interpreted by the Court of Appeal in the case **of Thabita Muhondwa and Mwango Ramadhani Mainda** Appeal No. 28/2021.

Mr. Ngole argued further that, the first appellate court's decision to award the house and the motor vehicle make Toyota Cresta to the Respondent was prudent and fair under the circumstances. He then referred the court to section 114 of the Law of Marriage Act which sets out statutory standards for division of the matrimonial assets and underscores the extent and scale of contribution which includes among other things, contribution in the form of labour. Thus, the argument that the Appellant was the only bread earner hence entitled to a lion's share is baseless.

Regarding the 2nd ground Mr. Ngole argued that, the first appellate court properly assessed the monthly income generated by the Appellant at the time of breakdown of the marriage. Moreso, throughout the court battle, the Appellant has not been providing maintenance to his children. Thus, it is

pertinent that the court be guided by the provisions of section 8(1) of the Law of the Child Act read together with section 129, 130, and 131 of the Law of Marriage Act in ascertaining the Appellant's responsibility towards his children's needs such as education, health and other social costs.

In his rejoinder, Mr. Ludovick reiterated his earlier submission and maintained that the first appellate court erred in awarding the Respondent all properties while leaving the Appellant with nothing. He also reiterated that the award of Tshs 250,000/= for maintenance was too high.

After thoroughly going through the subordinate court's records and the parties' rival submissions which I have carefully considered, I will now discuss each ground of appeal starting with the first ground. In this ground, the Appellant is challenging the order of the first appellate court which awarded Respondent the two subsisting assets. His major arguments with regard to assets has the following two limbs. First, that the order left him with nothing as he has sold the rest of the asserts. Two, he deserved a lion's share as he singly acquired and developing the assets. The Respondent had no any contribution as she was a mere house wife hence, deserves a minute share if any.

Starting with the second limb, section 114(2) (b) of the Law of Marriage Act sets the ground on what should be considered as contribution for purpose of acquisition of matrimonial assets. According to this section, when determining the contribution of the parties towards acquisition of

matrimonial assets, the courts should consider the contributions made by each party. It states thus;

> "114.(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) n/a;
>
> (b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
>
> (c) n/a
>
> (d) n/a.

Applying this provision in the landmark judgment in **Bi Hawa Mohamed v Ally Sefu** [1983] TLR 32, the Court of Appeal emphatically stated that in distribution of matrimonial assets, a spouse's contribution in form of household works rendered during the subsistence of the marriage, including among others, household chores, bearing and rearing of children, making the home comfortable for the Respondent and the issues are to be regarded as a valuable contribution to the acquisition of matrimonial assets under section 114 of the Law of Marriage Act (Also see **Eliester Philemon**

Lipangahela v Daud Makuhuna, Civil Appeal No. 139 of 2002, CAT). The appellant's counsel appears to be lucidly misguided as the trivialization of house hold chores in assessment of the couple's contribution towards the acquisition of matrimonial asserts is no longer part of our law. As almost three decades have lapsed since it ceased to be part of our jurisprudence, it is certainly an archaic and dead position.

I may also add here that, even if this position was still applicable, it would hold no water in the present case. It is vividly clear from the oral testimonies and documentary evidence that the Respondent was not a mere house wife as purported by the appellant. She too was an entrepreneur. The records are clear that, the parties herein were entrepreneurs and were jointly operating their business. Exhibit D18 attests to this further. It shows that in April 2010, the couples jointly registered businesses in the name of J & Nyamkwara Investment. The joint proprietors of this business were the Appellant and the Respondent. It is beyond my imagination how the appellant, having produced this evidence in court, can justifiably claim that the respondent was a mere house wife. In my considered view, with this piece evidence and related evidence in record, the appellant is estopped from asserting that the Respondent was a mere house wife. In the foregoing, the submission that the respondent was only entitled to a minute share of 20% is without merit.

As for the second limb, admittedly, having been awarded the assets in Matrimonial Appeal No. 38 of 2017, the Appellant hurriedly disposed of the

assets. As correctly observed by the first appellate magistrate, much as there was no order for stay of execution, the hastily disposition of the assets entertains suspicions on the real intention of the Appellant. In my considered view, the argument that the disposition of the assets was meant to circumvent justice should the respondent win the case is not farfetched. Save for the mortgaged house which had to be sold to redeem the mortgage as it was due, it is unimaginable why the Appellant hastily sold the two houses at Kibamba and the plot at Kiluvya. It is to be noted for example that, the two houses at Kiluvya were sold on 28/8/2018 just 7 days from the date of the judgment in Matrimonial Appeal No. 38 of 2017 (delivered on 21/8/2018) which vested the said assets into the appellant.

Testifying in court during the retrial, the Appellant boldly stated that:

> "[Kiwanja cha Kiluvya] … nilikiuza mnamo tarehe 28/08/2018 baada ya kutokuwa na zuio lolote ambalo ….baada ya kupewa tuzo na Mahakama ya (W) Kinondoni niliuza nyumba nyingine iliyopo mtaa wa Mji Mpya niliuza mnamo tarehe 28/08/18 baada ya kupewa tuzo na hapakuwa na zuio lolote…"

Going by the Appellant's reasoning that he sold the house as there was no any order for stay of execution and considering that the first decision of the trial court which awarded the Respondent the house at Kibungubungu (the one she was occupying) was not reversed by the first appellate court, it is obvious that the Respondent could have, on similar ground sold the house and there would currently be no assets for distribution. The fact that she did

not the same and waited for the appeal process to end should not prejudice her. In the foregoing I am at one with the finding of the first appellate court that, the hastily disposition of the assets by the Appellant did not extinguish the Respondents right to an equitable share to the assets jointly acquired/developed during the subsistence of marriage.

As the Appellant appropriated all the proceeds to himself, I am of settled view that, it was fair, just and equitable for the first appellate magistrate to reverse the decision of the trial court and award the Respondent the two remaining assets. An adverse decision would have been prejudicial to the Respondent who would have been deprived of the share she deserved from the matrimonial assets. As stated earlier on, the record show that apart from the house hold works , the appellant was also involved in the business from which the assets were acquired/developed. Thus, when the first decision of the trial court and the decision of the first appeal court in Matrimonial Appeal No. 38 of 2017 were nullified and the file remitted for trial *de novo*, all the assets including the ones sold by the Respondent, notably the houses at Kibamba Highway, the house at Mji Mpya and the NMB shares etc ought to have been assessed and distributed accordingly. The trial magistrate's failure to take these assets into account when distributing the assets was a material error worth the reversal and the subsequent order by the first appellate court to the effect that the Respondent is entitled to the remaining properties which are: the house at Kabungubungu and a motor vehicle make Toyota Cresta as her share towards acquisition of the matrimonial properties. In the foregoing, the first ground of appeal fails.

The second ground of appeal is on the maintenance. The trial court awarded a monthly sum of Tshs 100,000/= while the first appellate court reversed and substituted this sum with Tshs 250,000/= which the appellant has found to be on the higher side. As per section 129 of the Law of Marriage Act, the duty to maintain children rests on their father. However, as correctly argued by Mr. Ludovick, this provision should not be rigidly applied. It has to be considered and applied conjointly with section 8 (3) of Law of the Law of the Child Act which strikes a balance by defining the shared responsibility owed by both parents. Unlike section 129, this provision explicitly states that, every parent shall have duties and responsibilities to provide guidance, care, assistance and maintenance for the child. Due regard must also have to the provision of section 44 of the Law of the Child Act which states that in determining the quantum to be awarded as maintenance fee, the court shall have regard to the income and wealth of both parents, any impairment of the earning capacity, ones' financial responsibilities, and the cost of living, among others.

Applying these provisions to the case at hand, I partially join hands with the appellant. As much as the law vest the duty to cater for the child's needs in the father, both parents must strive to maintain their children and ensure that they have the best attainable standard of life necessary for their mental and physical growth. A parent having custody of a child should not use it as a shield to discipline the other parent. In the present case, I find the award of Tshs 250,000/=to be higher considering that, on top of this amount, the

appellant was ordered to provide medical and educational needs to his children. In the light of the above, I find this ground to have merit. Accordingly, I allow it and restore the amount awarded by the trial court.

Based on what I have demonstrated, the appeal is awarded to the extent stated above. For clarity purposes, the judgment and decree of the first appellate court is varied to the extent that, the amount of Tshs 250,000/= payable as maintenance fee is reverses and substituted with the amount of Tshs 100,000/= awarded by the trial court. The rest of the orders shall remain intact. This being a family dispute I give no order as to costs.

Dated and delivered at Dar es Salaam this 9th day of September, 2022

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE