IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO 31 OF 2022

(Appeal from the decision of District Court of Kinondoni at Kinondoni in Civil Appeal No.8 of 2021 delivered by Hon. E.A.Mwakalinga, SRM on 8th July, 2021 and originated from Matrimonial Cause No.167 of 2020 of Kimara Primary Court)

ERICK SHABANI HANTE..... APPELLANT

VERSUS

NANCY GEORGE MASAWE..... RESPONDENT

JUDGMENT

19th September & 3rd October, 2022

A.P. KILIMI, J.

This is an appeal by Erick Shaban Hante who is dissatisfied with the decision of the Kinondoni District Court in Civil Appeal No.8 of 2021, originated from Matrimonial Cause No.167 of 2020 of Kimara Primary Court

The brief background of this matter is that, the parties herein contracted a Christian marriage on 17/12/2005. The dispute between them underway in 2020, when the respondent took the matter to the Marriage reconciliation Board whereat it was proved futile. The appellant then took the matter to Kimara Primary Court, seeking for divorce and division of matrimonial properties. The trial court granted divorce and also ordered division of matrimonial property. Dissatisfied with the decision of the trial court, the appellant appealed to the District Court of Kinondoni, faulting the trial court in the division of purported matrimonial house in equal percentage. The District Court affirmed the said decision. Dissatisfied with the first appellate court's decision the appellant lodged this appeal basing on two grounds as shown hereunder:

1. That, the court erred in law by failure to clearly and categorically analyze the whole of the appellants evidence adduced at trial and apply wrong principle of division of matrimonial property without considering and analyze first the contribution of each couple hence rendered into an erroneous decision.
2. The court erred in law for disallowing the appeal without taking any consideration on the substantive evidence adduced by both parties in the trial court regarding proof of ownership of property.

At the hearing of this appeal Mr. Mwombeki Kabyemela learned counsel appeared for appellant while Mr. Othman Omari learned advocate represented the respondent.

Mr. Mwombeki submitted that the division of matrimonial properties should be done in considering the extent of contribution toward acquisition of the said properties, this is the gist of the law in section 114(2)(b) of Law of Marriage Act Cap. 29 R.E.2019. He further said that by virtue of this section the principle was also intensified in the case of **Bi. Hawa Mohamed v. Ally Seif** (1983) TLR 162 and also the case of **Bibie Maulid v. Mohamed Ibrahim** (1989) TLR. where the court observed that in division there must be evidence to show the extent of contribution of each couple. The extent of contribution is a question of evidence not assumption, to cement his view he cited another case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Marongo** Court of Appeal at Tanga in App. No. 102 of 2018 unreported.

Mr Ishengoma also submitted that, matrimonial property cannot be divided equally where there is no evidence proved of contribution to such extent, The Respondent at the trial court did not say anything or tender any evidence showing how she contributed. Also said the decision of the trial

court merely decided division of the house to be 50% each without saying how it was reached. Therefore, he sees the court was contrary to the principle of law.

In reply, Mr. Omari for the respondent submitted that, the dispute in this appeal is only on the division of the house. He further defined matrimonial home as per section 2 of Law of Marriage Act Cap. 29 R.E.2019 that matrimonial house is the house built for husband and wife to reside together. Referring all cases cited by counsel for appellant he insisted that, it is true the court need to stick on evidence on contribution to acquire properties and this was evidenced at page one of judgment of primary court which contended that in their life of marriage they were blessed to acquire one house situated at Temboni Kimara and her contribution is to build the house, because she found the appellant with only a plot and the appellant did not object.

Mr. Omari further addressed this court to look on the evidence of Sophia Averice Mrungi (SM2) who testified at the trial that she knew the couple since they started to build, also the appellant did not object, but also at page 6 the appellant confessed that they had a house at Kimara Temboni and her wife build it.

Mr. Omari added that the consequence of failure to cross examine by the appellant amount to the truthfulness of the fact said. To fortify this view he cited the case of **Tegemea Madido v. Zakharia Chaula** decided at High court of Tanzania at Mbeya in PC. Civil Appeal No 13/2021.

Finally, Mr. Omari urged this court must see that at first that, the said house is matrimonial property and it is undisputed of both parties that it was joint effort, only the dispute is percentages of distribution, there is no dispute joint effort need evidence, but even the appellant himself did not adduce evidence on how he acquired the said the plot.

In his rejoinder Mr. Mwombeki insisted that at the trial no evidence tendered to show the extent of contribution in order the respondent be awarded 50%, therefore he commented that the trial court reached the said award erroneously.

This is the second appellate court. It is a trite law that where there are concurrent findings of facts by two courts, the second appellate court should not disturb the findings, unless, it is clearly shown that there has been a misapprehension of evidencing a miscarriage of justice or violation of some principle of law or procedure as it held in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores V A.H Jariwallatla**

Zanzibar Hotel [1980] TLR 31 and **Bushanga Ng'oga V. Manyanda Maige** [2002] TLR 335.

In considering the argument by the parties and the grounds of appeal which were argued together by the learned counsel, one issue appears conveniently to be determined by this court and that is nothing but whether the two courts below finding is justified as per principle of law.

It is a trite law that the fundamental principle guiding division of matrimonial property is contribution of each spouse towards the acquisition of the property. That is, if the parties acquired together any asset or property it will be subject to division based on proof of each one's contribution. The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. However, in resolving the issue of extent of contribution the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution. **Hawa Mohamed v. Ally Seif** (sura) and the case of **Bibie Maulid v. Mohamed Ibrahim** (supra). Thus, this presses the burden for a party alleging contribution to prove the extent of contribution in line with section 110(1) of the Evidence Act Cap 6 R.E 2019 which provides that:

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The facts which can be glanced from the records of the lower courts reveals that the evidence showing how the properties were acquired was tendered, according to the record page two of the trial court proceeding the respondent (SM1) had this to say and I quote;

"Kwenye Maisha yetu ya ndoa tumebahatika kuchuma nyumba moja iliyopo temboni na mchango wangu katika nyumba hiyo ni ujenzi bali kiwanja nilimkuta nacho mdaiwa alisema amechangiana na mama yake, ila ujenzi wa nyumba tangu mwanzo na mimi nimeshiriki kujenga...."

At page 7 another witness Sophia d/o Averine Mrungi (SM2) had this to say;

"Namfahamu SM1 kuwa jirani yangu tangu wanaanza kujenga. Huo ndio mwisho wa Ushahidi wangu"

The respondent's counsel contended that the appellant's failure to cross examine on the testimony adduced above was an admission of the truthfulness of the said testimony. I am mindful, it is the generally accepted

position, that failure to cross-examine a witness on a certain fact ordinarily implies the acceptance of the truth of the witness (see: **George Maili Kemboge v. Republic**, Criminal Appeal No. 337 of 2013, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, **Athumani Rashidi v. Republic**, Criminal Appeal No. 264 of 2016 **and Nyerere Nyegue v. Republic**, CAT Criminal Appeal No. 67 of 2010 (unreported).

While this is the general rule, the followed decision of the Court of Appeal in **Zakaria Jackson Magayo v. Republic**, CAT-Criminal Appeal No. 411 of 2018 (DSM-unreported), qualified the said position and introduced a dimension that removes the absoluteness of the rule cited by the respondent counsel. The court observed that:

> *"Appears to us to be dear that the rule is not absolute. Our understanding of it is that it focuses on the material evidence adverse to the other party excluding incredible evidence."*

Therefore, in view of the rule established, where there is unchallenged testimony, the court has to look keenly on whether is not improbable, vague or contradictory, and it is not incredible.

In matters of credibility the trial court is undoubtedly the best judge. An appellate court will only assess the credibility of witnesses if there are

circumstances of an unusual nature which appearing on the record. In my view, the circumstances shown, there is every justification that the trial court did perform its duty, therefore, the trial court's finding as to credibility of witnesses binds the first appellate court.

It is therefore my considered view the two court below assessed the respondent's testimony and found the impression that the respondent's testimony at the trial carried all the hallmarks of the positive credentials stated above, making the general rule advocated by the respondent's counsel applicable.

Moreover, the evidence on record shows that both the Appellant and the Respondent during the subsistence of their marriage acquired other properties but their contest is on the matrimonial house, this cause me to infer that they had some arrangement, therefore the fact that the appellant did not contest to others, continue to raise the cognizance of this court to believe that the house in question need to be distributed judiciously.

Section 108 of the Law of Marriage Act (supra), stipulates duties of a court hearing a petition for separation or divorce. One of such duties is provided for under Section 108 (b) as follows;

> *"To inquire into the arrangement made or proposed as regards... division of any matrimonial property and*

to satisfy itself that such arrangements are reasonable."

It is also my considered opinion that, the trial court which had an ample time to hear and test the demeanor of the parties and their witnesses, has greater chance of assessing the truthfulness among the parties in battle of winning their case before it. It is thus my view that, the trial court inquired in reaching the decision, and is proved at the last paragraph of the Judgment which contend as hereunder;

"Mgao wa viwanja na magari uwe kama wadaawa walivyokubaliana na endapo makubaliano hayo yateleta sintofahamu, mgawanyo ufanyike kwa kila mdaawa kupata asilimia hamsini"

I therefore concede with the counsel for the Respondent according to the evidence adduced at the trial court and the first appellate court did their duties to inquire as which properties were jointly acquired during their marriage life and make division thereof basing joint efforts and work.

In conclusion thereof, I am of the considered opinion that the trial court properly addressed in line with the provisions of section 114 of the Act while giving orders of division of matrimonial properties. Having said so I find all

grounds of appeal with no merit, hence the entire appeal is hereby dismissed. As the matter involves family issues, I make no order as to costs. It is so ordered accordingly.

DATED at DAR ES SALAAM this 3rd day of October, 2022.

A.P.KILIMI

JUDGE

3/10/2022

Court: Judgment delivered in chambers in the presence of Mr. Mwombeki Kabyemera Advocate for appellant who is absent while Mr. Benard Mashauri advocate holding brief of Mr Othman Omari advocate for respondent. Respondent also present. Right of Appeal dully explained to them.

Sgd:A.P.KILIMI

JUDGE

3/10/2022