IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO.77 OF 2022

(Originating from Bukombe District Court Matrimonial Appeal No.07 of 2021; Original Civil Case No. 109/2021 of Masumbwe Primary Court)

NAOMI ANTHONY.....APPELLANT

Versus

ELIAS LUCAS.....RESPONDENT

JUDGMENT

Sept.22nd & Oct.5th, 2022

Morris, J

This second appeal crops from a typical case of a dispute over court's distribution of matrimonial property after dissolution of marriage. The parties herein had their marriage dissolved by Masumbwe Primary Court, the proceedings and details of which are not on record, save for the case number (65/2020) and Decree of Divorce (exhibit SMK1). Seemingly, the said court did not decide on division of matrimonial property. Records are also silent in terms of custody of children. However, on September,15th 2021 Naomi Anthony found her way back to the same court. This time for one and only one prayer, division of matrimonial property earned during subsistence of her former matrimony. Apart from

the household items which were randomly distributed among the parties, the court ordered sale of two landed property and proceeds therefrom be shared between applicant (Naomi) and respondent (Elias) on 40:60 ratio.

Aggrieved by such apportionment, the respondent herein (Elias) appealed to Bukombe District Court (first appellate court). District Court revised the trial court's order of distribution of the landed property. Accordingly, the appellant was given exclusive ownership of the house and five out of seven hectares of a farm (*shamba*). That is, the respondent (Naomi) was allocated only 2 acres. The decision of the first appellate court did not please the respondent. Hence, this appeal.

The appellant herein filed two grounds of appeal. The gist of such grounds points at disgruntlement of the distribution pattern of the matrimonial property. The first ground faults the District Court for having given her 2 out of 7 acres. The court's order to disentitle the appellant of the matrimonial house wholly is challenged under the second of this appeal.

Both parties appeared in this court unrepresented. Their respective submissions were, thus, brief and straight to the point. In support of the first ground of appeal, the appellant submitted that the first appellate court erred in law to give her 2 out of 7 acres of the matrimonial *shamba*. She faulted this pattern of distribution as being unjust. Further, she

challenged the matrimonial house to be given to the respondent solely, in sheer disregard of her contribution efforts. Henceforth, she prayed that the trial primary court's 40:60 distribution ratio should be confirmed by this court.

The respondent, unsurprisingly, resisted the appellant's submissions. To him, the District Court was justified to hold as it did. He argued that the first appellate court considered the fact that he was the custodian of six (6) children born during the dissolved marriage between parties. In his analysis, 2 acres given to her are adequate and fair for she will own them exclusively while the respondent's portion is being utilized in up-keeping the marriage issues. Similar submissions and reasoning were given in regard to the house. He prayed for dismissal of the appeal.

This court, having summarized the parties' submissions above, is of the firm view that it is being called upon to determine one basic issue. That is, whether or not the first appellate court was justified to distribute the matrimonial property among the parties the way it did. In determining the framed issue, this court is mindful of not re-evaluating evidence of the two subordinate courts unless justice warrants so. This is in accordance with the firmly settled legal principle that the second appellate court should not interfere with concurrent findings of the lower courts save for compelling reasons in the interest of justice.

The philosophy for the above bar is not too technical or hard to find: the two previous judicial fora, especially the trial one, have the privileged advantage of not only receiving the evidence but also examining the demeanor of the testifiers. The cases of **Benedict Buyobe@Bene v R**, Crim. Appeal No.354 of 2016, CAT at Tabora (unreported); **and Michael Joseph v R**, Crim. Appeal No. 506 of 2016, CAT at Tabora (unreported) are justifying the legal position elucidated hereof.

Trial court's proceedings do not indicate how each party proved their respective contribution to the acquisition of the foregoing property in total isolation of the other. While the trial court ordered sale and distribution of sale proceeds on the basis of 40:60 (appellant: respondent) pattern respectively, the first appellate varied this ratio significantly. In so varying, the latter court is paying adequate regard to the interests of children than the contribution of parties in acquisition of property. It argues:

> "*Indeed, it can be gathered from the trial records that, there was evidence brought by respondent herein to indicate the contribution of she made towards acquisition, although not to the extent of being entitled to 50% of all properties. The law is express that one is entitled to a share of the matrimonial properties to the extent of his/her contribution...in the circumstance, we have an argument not contested that the appellant is depended upon by their issues of marriage who are quite infants, their welfare is dependent the said only house and*

cultivation of the shamba for food...in this case, it is no brainer that if the house is sold the children will be rendered destitute. Thus, it is only just owing to the evidence presented, that the appellant be left with the whole house, as he is currently living in it with their children."

Section 114 of the **Law of Marriage Act**, Cap. 29 R.E. 2019 (**LMA**) provides the guide on what the court should consider in distribution of matrimonial assets. Relevant to the present appeal are two factors to consider as enumerated in the cited provision of the law. One is "the extent of the contributions made by each party" (s.114(2)(c) and "the needs of the children, if any, of the marriage" (S.114 (2) (d). Hence, in my view, the District Court was rightly so to consider the children's affairs in the distribution equation.

The foregoing concurrence notwithstanding, this Court finds that such consideration should not have been at the extreme detriment of the appellant herein. I endeavour to give reasons for the departure. One, the law under the said provision expressly provides that the court, having considered all factors before districting the matrimonial property, "shall (be) incline towards equality of division" [s.114 (2) (d)]. In my firm consideration, this provision is giving supremacy to the principle of equality. Two, the District Court in this case is stating that the age of

children is paramount. However, going through records of both trial and first appellate court, the age of the children is not discussed and deliberated upon. More so, as pointed out earlier, the records are silent as to the order of custody of children. Therefore, this time around the appellant came for division of property, what if (assuming custody of children had not conclusively determined by any court) she comes back to the court to demand for custody of children. What will be the safeguard elements to give or deny her custody of children? Further, if presently the matrimonial house is exclusively given to the respondent, but in future custody is given to her, will the court revise its decision over the property. Well, no! The court will then be *functus officio*.

Three, if I have to be guided by the decree of divorce (F/PCF/34) tendered by the appellant at the trial court (exhibit SMK1) the ages of the issues of dissolved marriage call for no extreme attention. The youngest was five (5) years of age, thus not infants as portrayed in some of the subordinate court's proceedings. The children's respective ages: youngest to adult, by 2020 were 5; 9; 12; 14; 16 and 20 years.

Four, in this matter the trial court typed proceedings indicate that the appellant also contributed to the acquisition of the property. Indeed, both the appellant and respondent herein were at congruence in this connection. I will quote a couple of testimony excerpts therefrom:

*"P.4: Baada ya kuvunja ndoa yetu, nimefika hapa Mahakamani, naiomba Mahakama igawanye mali **zetu** tulizozipata kwa **nguvu ya pamoja**."*

*"P.6: Kiwanja **chetu** cha Shinyanga 'A' tulikipata baada ya kuuza Kiwanja **chetu chenye nyumba** huko ng'anzo. Pesa za kiwanja hicho ndio ilitumika kununua kiwanja na kujenga nyumba hapa Shinyanga 'A'. Mimi ndiye niliyekuwa nikiwa(sic) **nikiwapikia chakula** mafundi na kuwasimamia. Pia nilikuwa nikifagia na **kutunza** nyumba **yetu** hiyo. Tuliuza mazo(sic) **tukanunua** shamba."*

*"P.10: Tulijenga nyumba **zetu** na kununua kiwanja baada ya kuuza ng'ombe **zetu** 05. Hizo ng'ombe **zetu** zilikuwa Bariadi kwa mama yangu."*

From the quoted conspicuous evidence (attention drawn to the supplied bolding), it is evident that the appellant contributed significantly to the acquisition of the matrimonial property. It is not just, in this court's view, to front only children's affairs/welfare in total ignorance of and/or to merely bypass such efforts by one of the then spouses.

The principle to guide the court in arriving at the proportion of the distribution is the extent of a spouse's contribution instead of the actual value or use of the property at the time of the division or thereafter. So, having determined that the appellant had her share of labour in acquiring

the matrimonial property, the first appellate court should have translated such efforts into some form of share in the property in question. It is a settled principle of law that even if she had not contributed money, domestic chores would have entitled her to a share of the matrimonial property [**Bi Hawa Mohamed v Ally Sefu** [1983] T.L.R. 32].

Thus, in my considered opinion, the appellate District Court used an erroneous gauge to arrive at the awarded 0% share in the matrimonial house. On the basis of the stated reasons, this court is inclined towards elevating it to 20% share in the appellant's favour. Valuation for the house should be done by a competent government valuer in order to determine each party's share. A willing party may buy the other off in the said proportion.

I am mindful of the fact that the records so far do not indicate how the issue of custody and maintenance of children (those who are still minor) was delt with, if at all. Custody and maintenance of children, particularly after the marriage is dissolved, are essential aspects which cannot be taken lightly. It requires adequate attention. So, parties may need to consider such aspects, if at all they have not litigated on them to-date, by engaging the appropriate court. To buttress this point, I am guided by the principles laid down in various cases including, **Basiliza B. Nyimbo v Henry Simon Nyimbo** [1986] T.L.R. 93; **Festina Kibutu v Mbaya Ngajimba** [1985]

T.L.R.42; **Juma Kisuda v. Hema Mjie** (1967) HCD n.188; and **Abdalah Salum v. Ramadhani Shemdoe** [1968] HCD n.129; Or, [1967] HCD n. 55.

On the basis of what is elucidated above, I partly allow the appeal. The District Court's judgment and decree are accordingly revised. The appellant is entitled to 20% share of the value of the matrimonial house after valuation. The rest of the District Court's holding is left intact. Each party will bear own costs.

It is accordingly ordered.

C.K.K. Morris
Judge
October, 5th 2022

Judgement is delivered in the presence of Naomi Anthony, the appellant and Elias Lucas, the respondent.

C.K.K. Morris
Judge
October, 5th 2022