IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 30 OF 2022

(Arising from the decision of Dar es salaam Resident Magistrate Court at Kisutu in Matrimonial Cause No.13 of 2021 delivered by Hon. H.A.Shaidi, PRM on 14th April, 2022)

MARYAM ABOUD OMAR ..... APPELLANT

VERSUS

KHALED HASSAN MOHAMED..... RESPONDENT

JUDGMENT

23rd September & 5th October, 2022

A.P. KILIMI, J.:

This is an appeal by one Maryam Aboud Omari (hereinafter appellant) who contracted an Islamic marriage by the respondent Khaled Hassan Mohamed (hereinafter respondent). This sanctified act was done at Malindi in The Republic of Kenya on 24th December 2012 and later the said marriage was duly registered in Tanzania on 11th February 2013. The dispute between

them started in 2019. Later it worsened, the appellant took the matter to the court, seeking for divorce and other consequential orders since they had children and properties. Accordingly, the trial court granted divorce to the appellant and custody of one issue was vested to custody of the respondent.

The appellant dissatisfied with the decision of the Resident Magistrate Court of Dar es salaam at Kisutu lodged this appeal with three grounds as shown below:

1. That, the trial Magistrate erred in Law and facts by failing to evaluate and analyze the evidence adduced by the Appellant and holding that there were no contributions of Appellant in matrimonial properties.
2. That, the trial magistrate erred in law and fact by failing to evaluate and analyze the evidence adduced by the Appellant by granting the custody of their children to the respondent.
3. That, the trial Magistrate erred in law and fact by failing to determine the other child's custody.

Wherefore the Appellant prays for this court to quashed and set aside part of trial court judgment, redistribute the Matrimonial properties between them, custody of children be granted to her, to get maintenance from respondent and any relief this court may deem fit and just to grant.

At the hearing of appeal, both parties were represented, Ms Hafsa Sasya learned counsel appeared for appellant while Mr. Kisusi Rashid advocated represented the respondent. Having perused the record of trial court and considered rival submission of learned counsels, who argued extensively on the principles of law in regard to division of matrimonial properties, custody of children and maintenance, I acknowledge their submissions and I will refer to them whenever the need arises.

I wish to deal with these grounds raised from the last backward to the first one, to start with ground number three, in my view the point for determination is whether the trial court erred in law not to consider the other child in regard to custody.

Ms. Hafsa submitted that during the hearing at the trial, the appellant testify that they had two children and the documents we tendered to that effect which is birth certificate, however, the trial magistrate discussed one child and neglected to mention the other child and granted no custody. In reply Mr. Kisusi submitted that, this was not part of prayer at the trial court, second the court did direct properly to child born in wedlock and at page 6 of the judgment the court directed properly, that the respondent did not adopt the said child and it is not justice for respondent to take care of him.

Now, let me glance what transpired, according to the record of the trial court at page 5 the appellant testified that and I quote;

> *"We were blessed with two issues, but one of the issues I came with, but he adopted him."*

At page 13 of the same proceeding Respondent testified;

> *"I am blessed with one issue with Maryam, a boy aged 8 years. Maryam had a baby girl she came with to me and I decided to accept her."*

I have asked myself whether that respondent's assertion amount adoption. To my opinion on above, it then undisputed that the respondent is not the father of the said girl, he merely accepted her to cherish the love in their marriage with her mother, I may say his acceptance was rebuttable when circumstances of their union change. Be as it may, this is not a legal adoption in the eye of the law. Therefore, the respondent did adopt the said girl, and therefore I am bold to hold that the trial court was right to decide that the respondent is not responsible in taking care and custody of her after the breakdown of their union. Thus, this ground is dismissed for lack of merit.

In respect to the second ground. Ms. Hafsa submitted that custody of a child should be placed to the appellant because she is the one takes them

to school every day and look after them. Further the learned counsel submitted that at the trial it was not testified that by children stay with the appellant will be exposed to any suffering or unfound condition for the welfare or best interest, to fortify her view, the learned counsel referred section 26 (b) of the law of Child act Cap 13 R.E.2019 and the case of **Halima Ally Enzimbal V. Ally Sefu Mwanzi** PC civil Appeal No. 34 of 2020, where the court observe best principles to be considered when granting custody an inquiry to the welfare of the child should be made.

She further stated that the fact that the respondent said custody should be granted because he is financially capable, that was not gist of section 26(b) of law of child Act, which outweigh those reasons stated, instead what is paramount is to safeguard the best interest and capacity to raise them mentally, therefore the court did not rely on this provision. And further argued that respondent is a businessman so he has a lot of schedules hence it is her submission he is not there in comparison with appellant who is the house wife.

In reply Mr. Kisusi submitted that in granting custody, the trial court considered the child is aged 7 years and further observed the requirement of section 125 of Law of Marriage Act Cap 29 R.E.2019 (LMA) which states

the factors for consideration in granting custody by the court, So, the trial magistrate considered the warfare and best interest of the child, and decided properly, he argued that this is envisaged at page 5 and 6 the judgement.

I have considered these arguments, in my view the issue that need to be determined in this ground is Whether the Trial Court did consider the best interest of the child in the course of determining custody.

I am mindful it is a trite law when court determines the best interest of the child has to investigate the circumstances around the case so as to establish whether the child has suffered or is likely to suffer any harm if custody is given to mother or father. Court may also consider the age, gender, religious background of the child, parent-child relationship bond, parenting ability, each parent mental, physical and emotional child's health etc. (see the case of **Neema Kulwa Mvanga Versus Samson Rubele Maira**, Civil Appeal No. 1 of 2018),

I wish also to reiterate section 125 of Law of Marriage Act for the purpose of clarity;

> *(1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional*

circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the ***objects of which include child welfare.***

(2).....

(3) There shall be a rebuttable presumption that it is for the good of a ***child below the age of seven years to be with his or her mother*** *but in deciding whether that presumption applies to the facts of any particular case, the court shall have* ***regard to the undesirability of disturbing the life of the child by changes of custody.***

(Emphasizes supplied*)*

Moreover, later parliament enacted another act which also insisted in determining custody of the child the best interest of the child should be paramount, the Law of the Child Act provides for such mandatory requirement in determining all issues involving children under **section 4(2) of the Law of the Child Act, [Cap 13 R.E 2019]**. The section reads as follows; -

4. (2) The best interests of a child shall be a primary consideration in all actions concerning children

whether undertaken by public or private social welfare institutions, ***courts*** *or administrative bodies.*

(Emphasizes supplied)

The said law also provides that where parents of a child are separated or divorced, a child shall have a right to first, maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced; and second live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child; (see section 26 of Law of Child Act)

Reading these provisions as a whole, it is undisputed that the trial court is legally empowered to make inquiry as to the best welfare of the child and to come up with determination to whom to grant custody, and these can only be grasped from the evidence tendered before the trial court in such respect.

This being the first appellate court, I am mindful that it is a trite law the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. This was observed in the case of **Future Century Ltd v. TANESCO** Civil Appeal No. 5 of 2009, wherein the Court of Appeal held that;

"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

(See also **Makubi Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (unreported).

According to the evidence on record, at page 8 of the proceeding. The appellant in cross examination had this to say;

"-The second issue I gave birth with him is aged 7 years and his father pay school fees and everything
-Children heals at home of my sister.
-I said I live at Tanzania
-This is my third marriage to break down."

Also, Idd Nassoro DW3 a driver employed by the Respondent' s family since 2013 has this to say at page 18 of the proceeding of the trial court;

"I know the family very well, at Temeke the child was very happy, was getting time to rest so he was not getting tired. However, after shifting to Tuangoma the child wakes up very early, so, he does sleep in the car. Sometime we report to school late due to the distance and car queue. I pick the child at 1:30 pm,

but I don't go home straight because his mother is having other activities."

In my view, this evidence tendered by affirmed witnesses hereinabove contain evidently information, which when are construed within the line of principles of custody stated above, obviously have assisted the Trial Court to make consideration to the best interest of the child before determination to grant the custody to the respondent. Having reasoned so, it is now my considered opinion, the issue raised is answered in affirmative that, the trial court did consider the best interest of the child in the course of determining custody. I therefore find the second ground devoid merit and hereby dismissed.

Back to the first ground, the appellant learned counsel submitted that at the hearing the appellant testified and identified the following properties. House No. 29 situated at Uzuri Street in Temeke were she used to live with her husband for 10 years. Also, the landed property situated at Tuangoma and Gezaulole Kigamboni respectively, the landed property which they built a house which is unfinished, of which she lived there for 3 months during the separation period, the appellant also mentioned 5 motor vehicles, to

which she sold two of the cars to pay rent and other expenses when the respondent stopped to provide to her maintenance when she filed this case.

She further argued that, the marriage cerebrated in 2012, since then it is rebuttable presumption, property acquired belong to husband and wife in exclusive to other, thus the appellant contributed through various means including domestic work which is joint effort to the accumulation of it, therefore she deserves half of the said acquired properties. To fortify this argument the counsel, refer the case of **Yesse Mrisho v. Samia Abdul** – Civil Appeal No. 147 of 2016.

In reply Mr. Kisusi submitted that the trial court analyzed evidence and reached a conclusion that the appellant has no contribution on the properties, or substantially improved during the subsistence of their marriage. He referred the case of **Apolonia Kanome V. Nestory Mponda** TLR (2020) Vol. 1 at page 44 to support this argument.

The counsel further submitted that, the respondent managed to tell how he constructed the house, therefore the said house can't be the matrimonial house and the appellant did not tender evidence to show that the said properties belongs to matrimonial properties. He referred the case of Gabriel

Nimrod Kurwijila V. Theresia Hassan Marongo Civil Appeal No. 102 of 2018(CAT) to support this view.

In dealing with this ground, I am persuaded to ask myself whether there were any matrimonial properties subject for division after this marriage divorced. It is a trite law before any court decide on any property purported to be matrimonial property, three requisites must be met, that is first, it must be a matrimonial property, Second, it must have been acquired by the joint efforts of the parties and third is the extent of contribution. (See section 114 of the Law of Marriage Act Cap 29 R.E. 2019). These need to be proved by evidence.

It is undisputed that the appellant was a housewife, the principle underlying division of matrimonial property under section 114 (1) of the Law of Marriage Act does not make any different whether the compensation is based on direct monetary contribution or domestic services. matrimonial assets to be divided must have been acquired by the parties during the subsistence of their marriage and they must exist before the Court's power to divide the matrimonial or family assets (see **Ismail Rashid v Mariam Msati**, Civil Appeal No. 75 of 2015 (unreported).

The fact that there was evidence tendered on what she alleged to the matrimonial house was built in 2008 before their marriage existed, I concede with the trial court that the same cannot be among matrimonial property by virtual of the law stated above. Also, it is undisputed fact that the appellant sold two cars make Toyota Runx and Toyota Crown which were among matrimonial properties which were purchased by the respondent. The trial court held that she already took her part in matrimonial assets which were subject to division.

It is also my view the trial court was right to hold so because not necessarily monetary contribution is regarded but by virtue of appellant being the wife of the respondent, obvious helped him to acquire properties during the subsistence of their marriage. In the case of **Gabriel Nimrod Kurwijiia v. Theresia Hassan Malongo** (supra), the Court of Appeal held inter-alia that:

> *"the issue of extent contribution made by each part does not necessarily mean monetary contribution, it can either be property or work or even advise towards the acquiring of the matrimonial properties.*

The Court went further stating that:

It is dear therefore that the extent of contribution by a party in the matrimonial proceedings is a question of evidence. ***Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision.*** *In our view, the issue of equality of division is envisaged under section 114 (2) of the LMA cannot arise also where there is no evidence to prove extent of contribution".*

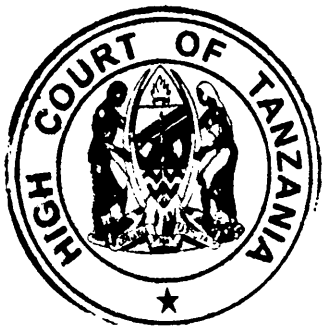
(Emphasize added)

I therefore of considered opinion in respect to other alleged properties mentioned by the appellant as observed hereinabove she did not tender any evidence in that regard; thus, her prayer was misconceived at the trial court.

In the final analysis, and to the extent of my observations, I am satisfied that the trial Magistrate properly analyzed the evidence availed before him and reached to an appropriate conclusion, hence there is no justification to interfere with that decision. In view of the aforesaid, I find the entire appeal to be devoid of merit. It thus, hereby dismissed forthwith. As the matter involves a matrimonial cause, I order that each party shall bear his own costs

It is so ordered.

DATED at DAR ES SALAAM this 5th day of October, 2022.



A.P. KILIMI

JUDGE

5/10/2022

Court: Judgment delivered in chambers in the presence of Mr. Kisusi Rashid advocate for the respondent, appellant and her advocate absent, respondent present. Right of Appeal dully explained to them.

Sgd: A.P. KILIMI

JUDGE

5/10/2022