IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO 45 OF 2022

(Arising from Kinondoni District Court in Consolidated Matrimonial Appeal No.04 and 08 both of 2021 delivered by Hon. Silayo. L., RM on 4th November, 2021 and originated from Matrimonial Cause No.135 of 2019 of Kimara Primary Court)

CONSOLATA MARIKI KIMARO..... APPELLANT

VERSUS

DAMIANO DOMINICO SIKAPILI..... RESPONDENT

JUDGMENT

23rd September & 5th October, 2022

A.P. KILIMI, J.:

This is a second appeal originating from the decision of the Kinondoni District Court in Consolidated Civil Appeal No 4 and 8 of 2020. Initially, appellant petitioned for divorce, division of matrimonial properties and maintenance of the issues of their marriage with the respondent at Kimara Primary Court in Matrimonial Cause no. 135 of 2019. After trial Court

decision, both parties were aggrieved as a result two appeals were filed at Kinondoni District Court bearing different appeal case numbers stated above. After the decision thereat, the appellant herein again dissatisfied with the decision of the District Court, she appealed at the High Court Dar es salaam District Registry vide P.C. Civil Appeal No. 148 of 2020. On 11th day of May, 2021. The said High Court found the principle of right to be heard was misconceived by the District court and ordered re hear of the appeal to the requirement of the law at the District Court appellate level. On 4th November 2021 the said High Court order was complied with and Judgment was delivered by the District Court.

Briefly the background story that gave rise to this appeal goes as hereunder. Way back in 2014 parties contracted a Christian marriage. Happier life went on until 2019 when the marriage was annulled by Kimara Primary Court on the ground for being illegal for the reasons that for the time it was contracted there was in existence of another Christian marriage between the respondent and another woman. Thereafter the trial court proceeded to determine and ordered distribution of matrimonial properties and the custody and maintenance of the two issues whom they were blessed during the annulled union. At the first appellate court in re hearing, the court

found that, the house at Malamba mawili is their matrimonial house and ordered it be divided 50% each, in respect to other order of the trial court remained intact.

Again, the appellant still aggrieved sought this appeal after aggrieved by re hearing of her appeal, she is moving this court basing on the following grounds;

1. That the district court of Kinondoni erred on both law and facts by its failure to consider that it was seating as appellate and not as trial Court thus failed to dispense justice upon the parties.
2. The district court of Kinondoni erred on law and facts by its failure to analyses evidence, as a result failed to distinguish between void marriage "ab-initio" and presumption of marriage.
3. That district magistrate erred on both law and fact, by framing new issue as if a trial court while was the appellant court.
4. That District Magistrate erred on both law and fact, by proceeding on dividing the house at Malamba mawili without the proof of joint contribution between the parties towards acquiring of the house in dispute.

Wherefore, the appellant herein prays before this court to nullify the judgment of district court of Kinondoni and order that the House in dispute

belongs to one Violet Gibson Manyama and other matrimonial properties be provided equally among the parties.

The appellant and respondent argued this appeal orally and unrepresented. The appellant started by submitting that, house alleged to be joint acquired does not belong to her or respondent, but it is owned by one Vailet Gipson Manyama. She also submitted that there are other properties she mentioned at the trial court, which are a farm and plot situated at Kibaha and others situated at Mpiji Majohe Kibaha, further she submitted that evidence were falsely adduced about the plot at Mpigi Majohe, in reality they bought it in 2009 but witness said was 2003.

In reply, the respondent submitted that he testified at the trial court with witness on how the said house was built by himself, and because the appellant has come to this court rejecting that he and her own nothing on that house, the respondent prays this court to quash that fifty percent given to her and be given all 100% of the house. The respondent further submitted that in respect of farm and plot of Mpigi Majohe and Kibaha farm respectively he acquired them before the annulled marriage existed.

In rejoinder the appellant vehemently insisted that the house belongs to Vailet Gibson, whom they had one child with him before she joined the annulled marriage. Also, she said that it was not proved at the trial court, that they jointly obtain loan from any bank.

I have considered the entire record and the oral submission before this court; I wish to start with the issue whether this Court could hear and determine a matter not raised and decided by the first appellate court. On this issue I wish to reiterate what the court of Appeal said in the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (unreported) that:

> *"It is now settled law that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

This being the second appellate court in my view should consider this principle to see new grounds raised, despite the appellant say nothing on the first, second and third grounds, both are new thus were not raised at the first appellate court. It is therefore my view as regard to the

circumstances of this case from the trial court, the appellant was misconceived to raise them at this stage. Thus, all of them are dismissed.

In respect to the fourth ground, the question to answer this ground is whether the house was proved to be the matrimonial home and if this is answer in affirmative whether the division of it by 50% ordered to each by the first appellate court was justifiable.

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.

The appellant in this appeal asserts that the said house belongs to Violet Gibson Manyama, I have perused the record, she never proved by evidence at the trial court. The mere assertion that the said house belong to him cannot make this court to reverse what was proved at the trial court and affirmed by the first appellate court.

Being guided by principle, whoever alleges the existence of any facts must prove. (See section 110 of the Evidence Act R.E. 2019).

According to the testimony at the trial of Iddy Ramadhan Tamla (SU5) and Pantaleo John Mkude whom were eye witnesses to the building activities of the said house, they said on how respondent participated to raise the said house. Moreover, I am of the view that, the trial court directed properly in respect to the credibility of the appellant when she said at first that the plot belong to Gipson Manyama and later changed this version and said the said plot belong to his son one Vailet Gipson Manyama and none of them were brought to testify truth of it at the trial court, I concede with the view of the trial court and first appellate court when observed that the appellant was having bad motive to deprive respondent right on the said property. I therefore in agreement with the lower court that the house in Malamba Mawili is the matrimonial house, thus the issue raised is answered in affirmative.

To the next point I wish to highlight the duty of the first appellate court, the 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 to decide.(See the case of **Peters v. Sunday Post Ltd** (1958) E.A. 424.)

The first appellate court changed the order of the trial court of division of the said house between Appellant and respondent which were divided 70% and 30% respectively to 50% each. The issue now at this point is whether the first appellate was justified to do change the percentage as per principle of the law.

In my view the first appellate court could not reach the said conclusion without address itself on the issue of extent of contribution, 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. The said position is cemented by the case of **Gabriel Nimrod Kurwijila Vs.Hassan Malongo**, Civil Appeal No. 102 of 2018 (CAT-Unreported) which stressed that the extent of contribution by the party in matrimonial proceedings is a question of evidence. Therefore, it is a rule that equality of division as envisaged under section 114(2) of Law of Marriage act (supra) cannot arise where there is no evidence to prove such extent of contribution.

I have passed through the submissions to see where the first appellate court was prompted in that respect and the entire analyses of evidence, as it appears at page 4 and page 5 respectively, the learned appellate court Magistrate did analyze the evidence adduced at the trial court and came up with the said conclusion. To my view the approach was proper and reasoned I thus indorse it, it is therefore my considered opinion the first appellate court was justified and proper to order the division of the said house for fifty percent each.

Therefore, I find the appellate court was considerate and justified in awarding division to that extent, in conclusion thereof I see no need to fault with the decision of the first appellate court and is hereby affirmed.

This appeal is hereby dismissed. This being a family matter I order no 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 appellant, respondent absent. Right of Appeal dully explained to them.

Sgd: A.P. KILIMI

JUDGE

5/10/2022