IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO 41 OF 2022

(Arising from decision of Kinondoni District Court in Matrimonial Appeai No. 48 of 2021 delivered by Hon. J.H. Mtega, PRM on 12th April, 2022 and originated from Matrimonial Cause No.8 of 2021 of Kinondoni Primary Court)

MBAROUK SUYA BINDO..... APPELLANT

VERSUS

MBONNY ABDALLAH MAUMBA ..... RESPONDENT

JUDGMENT

26th September & 11th October, 2022

A.P. KILIMI, J.

The appellant and respondent contracted Islamic marriage of 10th day of December, 2004. Their marriage was blessed with two children. It was the happy family but later misunderstandings started in 2016 when the respondent alleged the appellant to have relations out of their marriage vows and later married to another wife. The respondent alleges being

overwhelmed she was mentally disturbed by these habits which prompted her to petition for divorce and division of matrimonial properties at Kinondoni Primary court in early months of 2021.

The Primary Court issued the decree of divorce and ordered for division of matrimonial properties jointly acquired. It appears in record the appellant rejected in regard to the said division and sought an appeal before Kinondoni District court. The District court upheld the decision of the trial court in its entirety. Being dissatisfied with the decision of the first appellate court, the appellant has preferred this appeal to this court basing on three grounds as follows:

1. That, the 1st appellate Court (District Court of Kinondoni) erred in law for failing to nullify the wrongful division of properties in the proceedings of the Trial Court as required under the law as the judgment and decree of Trial Court is erroneous because it is not founded on the evidence tendered.
2. That, the 1st Appellate Court erred in law for failure to rectify the problematic judgement and decree of the trial court as it contradicts both the evidence tendered before the said court and the established legal principles.
3. That, the 1st appellate court erred in law as the judgement and decree of the trial court is erroneous because it is founded on wrong application of law.

When this appeal came for hearing the appellant was represented by two counsel Elias Mdeme and Salmini Mwili learned advocate, while the respondent enjoyed the service of Nakazael Lukio Tenga, Hamisi Mfinanga and Grace Laizer learned advocates.

Before I proceed, I am mindful this is a second appeal against a decision of the trial court. It has to be considered that the two court were having concurrently findings. There are two established principles of law with regard to what a second appellate court can do. One is that a second appellate court should only be enjoined to deal with issues of law and not facts. Two; a second appellate court can step into the shoes of the lower court on issues of facts pleaded and determined by the courts below, only where the said facts were not a subject of a concurrent findings unless there is a poof of misapprehension of evidence leading to miscarriage of justice.

This principle was cemented by the Court of Appeal of Tanzania in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs A.H Jariwalla t/a Zanzibar Hotel** (1980) TLR 31 that;

> *"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of*

practice should not disturb them unless it is clearly shown that there has been a misapprehension of evidence a miscarriage of justice or violation of some principle of law or procedure"

Having set the position of the law with regard to second appeals; I have considered the extensive rival submissions of the advocates from both sides, and having regarded grounds of appeal raised and what I glance from the record, I am of the view the claim of the appellant in this appeal is centered in division of matrimonial properties and custody of children.

This prompt me consider to have two issues, first whether the order of custody was issued as per requirement of the law, and second, is whether the two courts below was justified to identify matrimonial properties jointly acquired and later its division to the parties thereto.

I wish to start with the issue of custody of children, at the trial court children were placed to respondent. During the hearing of this appeal the counsel for respondent objected claiming that is a new issue. Having perused the record, I concede with the counsels for appellant that this was not a new issue, it was discussed in the written submissions scheduled by the first appellate court. It was unfortune the district court discussed nothing on those submissions

The remedy and for the sake of justice, this court has to back up on what transpired at the trial court and submission made by learned counsel at the district court. Having observed so, the point to be considered is whether to whom custody of children should be granted.

At all appellate levels the appellant counsels contended that children are aged more than seven years and profess in Muslim faith as their father, therefore is better to stay with their father instead of their mother with different religion, the appellant also requested for shared custody among parents due to their advanced age and they can have quality and private time with their father.

In reply respondent counsel contended that appellant had married another wife and has lost interest in the children of the marriage, this is due to the fact is not contribute anything towards their up keep, shelter, medical and school fees and also all children are girls therefore she argued that will be taken care if the custody is placed to the appellant.

According to the section 125 (2) of the law of Marriage Act Cap. 29 R.E.2019 (hereinafter LMA) provides for the factors to be considered in assessing where the custody be places, for this purpose I reproduce this provision;

125. (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to—

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong.

(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.

This provision developed principle of best interest of a child where the court has to investigate the circumstances around the case so as to stablish 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, religions background of the child, parent-child relationship bound, parenting ability, each parent mental, physical and emotional child's health

etc. (see the case of **Neema Kulwa Mrang v Samson Rubehe Maira** in Civil Appeal No. 1 of 2018 unreported).

The trial court having heard both parties with their evidence, had these observations at page 22 para two of the typed judgment;

> *"Hivyo kwa mazingira haya naona watoto wabaki na mama yao kwakuwa amemudu kukaa nao kwa muda wote na amemudu kuwaangalia vizuri, Katika shauri hili tumeona kuwa watoto wa wadaawa wametimiza umri ambao wangestahili kukaa na mdaiwa ambae ni baba yao, lakini, kama tulivyoona kwenye ushahidi ni kwamba tokea mdaiwa alipooa mke mwingine na kuhamia Arusha hakuwahi kutoa matunzo yoyote kwa watoto wake na hata baada ya mdai kuhama kwenye nyumba yake ya ndoa, mdaiwa hakuwahi kuchukuwa hatua zozote za kuchukuwa watoto wake kutoka mikononi mwa mdai ili aishi nao mwenyewe bali aliendelea kukaa kimya, hadi mdai alipofungua shauri hili hapa mahakamani ndipo alipoiomba mahakama kuwa imkabidhi watoto wake akae nao mwenyewe kwa madai kwamba mdai hataweza kuwalea kwasababu ni mnywaji wa pombe, na yeye anataka aendelee kuwalea watoto wake kwenye misingi ya dini ya kiislamu.*

Hata hivyo mahakama kwa pamoja tumeona kuwa ushahidi wa mdaiwa hauna ukweli wowote kwasababu kama mdai angekuwa mlevi ni Dhahiri kabisa kuwa asingeweza kuwasomesha watoto wake kwenye shule ambazo ada zake ziko juu kama tulivyoona kwenye ushahidi. Hivyo basi, mahakama kwa pamoja inatoa amri kwamba watoto wote wawili wa wadaawa wataendelea kukaa chini ya uangalizi wa mdai ambae ni mama yao."

In view thereof, the trial court made an inquiry on the best interest of the children, also to my view the trial court further considered Section 39 (2) (f) of the Law of a Child Act, 2009 which provides:

"Subject to subsection (i) the court shall also consider; The need for continuity in the care and control of the child."

In the circumstances of the above, I am of considered opinion the trial court encountered the requirement of the law in granting custody to the respondent, I therefore affirm the order of the trial court granting custody of the two children to the respondent.

In regard to the order of maintenance issued by the trial court, I have considered that the trial court was having ample time to assess the means

of the parties, and since was a matter of credibility, I believe the trial court undoubtedly was justified on reaching the said amount to be paid to the respondent as maintenance. Therefore, it is my opinion the amount is reasonable and justified, the order of the trial court is hereby sustained accordingly.

The next issue stated above is in respect to division of matrimonial assets. Before I commence analyzing what were the evidence at the trial court, I wish to highlight principles which will guide me in disposing this matter. In the case of **Shomari Matambo vs Shamilla Ally** Civil Appel No.149 of 2019 (unreported), the court had this to say:

> *"For an asset to be regarded as a matrimonial asset, the party making the assertion has to prove that the respect asset was acquired or substantially improved in subsistence of marriage and through joint efforts."*

Furthermore, a property subject to division must pass three tests, which are enshrined by section 114 of the Law of Marriage Act Cap 29 R.E. 2019. 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.

Now coming to the facts, according to the judgment of the first appellate court at page 8 approved the decision of the trial court that was fairly made, and I reproduce hereunder;

> *"A trial court gave the respondent several matrimonial assets as her share including as follows;*
>
> *1. A house at Ununio Boko,*
> *ii. One company.*
> *m. One plot of Bagamoyo bought form Papen.*
> *iv. One plot located at Kibugumu Kigamboni*
>
> *On the other hand, the appellant was given the following matrimonial assets:*
>
> *Four apartments located at Kigamboni.*
> *Three plots in Block L located at Mwavi Bagamoyo.*
> *One farm located at Zinga Bagamoyo.*
> *One plot located at Kigamboni Kibada Block 2, and*
> *One plot located at Vijibweni Kigamboni."*

Now, the next point to be considered in the light of the arguments of parties in this appeal is whether the above-mentioned assets exist and were acquired by joint effort. It is a trite law under section 110 of the

Evidence Act Cap 6 R.E. 2022. that, whoever alleges the existence of any facts must prove. See the case of **Faraja Msemwa vs Alex Mbilinyi**, PC Matrimonial Appeal No.4 of 2020. (unreported).

It was appellant's counsel submission that the trial court did not consider assets bought by money from the company which is Mubabi Investment Ltd. Further they submitted that, the court did not consider exhibit D4, which is plot in Kibada, Plot number 139 Block 2 that belonged to the appellant plot number 133 Block 2 belong to the respondent, it is clearly in evidence each part used to have personal property e.g. exhibit D4. but court continued to distribute without this regard.

Also, they contended that, the trial court failed to analyses the evidence, because it is clear as per exhibit D5, a farm in Zinga Bagamoyo, the same was purchased in the name of the appellant, it was a private property of the respondent and was given as Wakfu to Kalam Education foundation, but the court continued to divide it. In respect to motor vehicle make Toyota with reg. no.T 177 DUD was bought in contribution to the appellant but the same was not divided as matrimonial assets.

Mr Salmin for the appellant concluded that, properties which were distributed to both parties were improper and without evidence no

evidence shows the existence of the most of the properties except to the house of Ununio which was given to respondent and one farm which in Zinga which was disposed to wakfu.

Nakazael Lukio Tenga counsel for respondent replied that, the record appear the evidence tendered at the trial court was legally oral, there were no serious evidence that appellant acquired all himself without inputs from the responden,t no evidence to show that respondent contributed nothing, marriage is not like institution or a company where expenditure and incomes are recorded and at the end of year balance sheet statement is drawn, in family most activities are done jointly and done in love and trust, source of income is rarely recorded so is done in good faith, under that circumstance is not easy to prove a party contribution to a certain extent therefore the standard of prove must be is on balance of probabilities, she refeedr the case of **Elimina Nyoni V. Yeremia Magoti** CAT civil appeal 61 of 2021 to support her argument.

The counsel for respondent further submitted that, at the trial court respondent showed clearly, she was working and well paid, she managed to buy family assets, also testified she took loan and gave appellant to finance development of family, this was not challenged by the appellant.

In respect to plots in Bagamoyo and two other plot in Kigugumo Kigamboni, the testimony SM2 (Magreth Abdallah Mambi) testified these plots of Kigamboni has four apartment and this was never refuted by appellant.

Having grasp brief submission of the counsel for both parties, I now turn to the evidence adduced at the trial court in the light of them, first I must put clear the asset which are not in dispute and was not contested is the matrimonial house situated at Ununio. The remaining were disputed in other way or another and I will pass through them, to see whether were proved to be matrimonial properties.

Starting with the issue of company. I am in agreement with counsels for appellant that company shares are also matrimonial properties so qualify to be divided. However, I am of the view, the company in itself is not a family property, but shares of the spouse like any other assets is a family matter. Therefore, is taken that shares are like any other property are subject of division as the family asset.

In view of the above, in this matter, at the trial nothing was tendered or adduced as evidence for shares in respect to the company known as Mubabi Investment Ltd or the other company alleged to belong to the

respondent. Therefore, it is my considered opinion ought not to have regarded in division of the matrimonial assets. Thus, are hereby removed from the division made by the trial court.

Next, in regard to these companies, there were claims from the appellant's counsel that the evidence reveal they are assets accrued by using company's money, and it was not settled by the court which kind of money from company used, whether is individual shares or dividends to shareholders. I agree, also to my view this is ambiguous, I may say, courts in her duty of exercising justice decide only disputes brought before it and proved by evidence, the issue of assumption cannot be dealt with in court, in fact ought to be ignored, the facts that properties were bought by money from the company without any further explanation remained ambiguous and cannot be taken as proof that are matrimonial properties unless there are evidence to the contrary. In this matter at hand evidence to the contrary were shown by the respondent in respect to only two plots situated at Kigamboni area, to be discussed hereunder.

In regard to the issue of private ownership of properties, this happen on ownership of cars and also unbuilt plots which were having different names of one spouse. Under section 60 of the Law of Marriage Act [Cap. 29 R.E.

2019], it provides the situation that the said properties may exclusively belonged to the one spouse alone. The law provides that;

> *"Where during the subsistence of a marriage, any property is acquired: -(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; or(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal."*

According to the typed record of the trial court at page 23 and 25 respectively the appellant during the hearing conceded that they had arrangement each to have his/ her properties, but here aimed to the plot sold by respondent and the motor vehicle make Toyota with reg. no. T177 DUD.

Section 108 (b) of the Law of Marriage Act, 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."

In the premises of this provision, I find the trial court did perform its duties after regarding the above arrangement, that is why those assets were not among the properties divided between the parties.

In respect to the property given to Wakfu to Kalam Education Foundation, the appellant contended that, the same was purchased in the name of the appellant, and it was argued at trial that is private property therefore it was right to be given to wakfu, but the court continue to distribute it, in other part the respondent alleges she was not informed on the said act because it was a matrimonial property. I have considered that the evidence is not disputed that it was given to Wakfu, I am of the view it was not proper to be considered and listed to assets to be divided among the parties, however I am in agreement with the trial court reasoning that this property can't be among the properties owned separately by family arrangement like those I have said above. But be as it may, instead of listing it as matrimonial assets to be divided, the trial court could have considered using restoration principle whereby if one spouse disposes

matrimonial properties alone, in division of the remaining properties, the court should count the disposed property in his share.

Now in regard to two plots of Kigamboni as reserved for discussion above. At page 15 and 16 of the typed proceeding of the trial court, Magreth Abdallah Maumba (SM2) only witness testified at the trial court had this to say;

> *"Mimi nafahamu katika kuishi kwao wamechuma mali Pamoja lakini sizifahamu zote ila nafahamu kuwa wananyumba ambayo* ***ipo Ununio*** *ambayo ndio alikuwa anaishi mdai na mdaiwa ....., ila viwanja nafahamu kuwa viko* ***kigamboni kwa sababu baada ya kumuoa mdai kuna siku mdaiwa mwenyewe aiinipeieka huko kigamboni na kunionyesha hivyo viwanja na kuniambia amevinunua na mdai.*** *Pia mdai amewahi kuniambia kuwa wana viwanja Bagamoyo na Kigamboni wana kiwanja ambacho wamejenga na vingine bado hawajajenga."*
>
> (Emphasize added).

Therefore, it is not true as the counsel for respondent asserted SM2 said these plots have four apartments, however SM2 testimony above remained

vague and unclear in respect to identification of those plots, because her statements show plots are more than two, second it is inevitable to know which one has been developed and which has none, and third which plots are at Kigamboni or Bagamoyo. Nonetheless, in my view SM2 testimony shows existence of these plots because the appellant after testimony did not object or cross examined her.

Although, it is true that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. (See the case of **George Maili Kemboqe vs. R,** Criminal Appeal No. 327 of 2013, CAT Mwanza registry (unreported). But the assertion quoted above from SM2 to my view cannot prove specifically which properties she was saying, thus in my opinion is unclear and vague.

I wish to support my observation by referring this Court's decision in **Kwiga Masa v. Samweli Mtubatwa** [1989] TLR 103, in which Samatta, J. (as he then was) held as hereunder:

> *"Failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The*

witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness, was not making a concession that the evidence of the witness was true".

Be as it may, the appellant in his testimony proved existence of two plots at Kigamboni, which in my observation to his testimony, have no relations with company' s money. At page 22 of the typed trial court proceeding the appellant testified that he bought two plots at Kibada Kigamboni, block 2 registered by his name and other plot no. 133 block 9 was registered in the name of the respondent. It further evidenced that on 7/05/2010, the respondent sold the plot registered on her name, the appellant tendered sale agreement deed which was admitted as exhibit D4.

In this particular, the respondent did not object the exhibit tendered in regard to the said sale agreement, which proves her acknowledgment of the said sale to be true as observed above. Therefore, it was not right for

the primary court to list it as asset subject for division, so ought to have been expunged.

Therefore, this means there is a prove of existence of one plot mentioned by block 2 situated at Kigamboni which appellant said is in his own name, but in my scrutiny, as per exhibit D4 tendered by appellant himself at the trial, which was also not objected by respondent as afore observed. This is Plot no. 137 Block 2 Kibada in Temeke Municipality.

Having settled on which are matrimonial properties proved to exist, it is important to remember that when considering the contribution of the parties to the acquisition of property within the matrimony, in civil cases, the burden of proof lies on the one who alleges, (see the case of **Anthony M. Masanga Vs Penina (Mama Mgesi) and Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 and **The Registered Trustees of Joy in the Harvest Vs Hamza K. Sungura,** Civil Appeal No. 149 of 2017 (both unreported).

In this matter the respondent was supposed to prove at the trial, that those properties are matrimonial properties by leading evidence to prove the same and was supposed to prove her contribution toward acquisition of

those matrimonial assets, because in determining the division of matrimonial assets, the contribution of each party in acquiring them must be considered. (See the case of **Yesse Mrisho vs Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported).

Having observed hereinabove, this being the second appellate court has been prompted to interfere because at the trial court there were misconception of evidence in regard to prove of matrimonial properties on board and thus causing to reach the decision misconceived as per principle of law stated above.

In conclusion, it is therefore my finding that those properties listed and divided by the trial court were not proved to be matrimonial assets except only two properties, matrimonial house situated at Ununio within Dar es salaam city, titled **Plot No. 2005 Block 'C' Ununio in Kinondoni Municipality** and second **Plot No. 137 Block 2 Kibada in Temeke Municipality.** the others as listed at the division made by a trial court, are hereby expunged from being matrimonial assets for want of prove of their existence into matrimonial domain as shown above.

Taking into account the surrounding circumstances, having also paid consideration to the parties' contributions and the needs of the children in this matter as provided under section 114(2)(b) and (d) of the Law of Marriage Act Cap.29 R.E.2019. I hereby award each party 50% share of the said two properties. Each party is free to buy out the other by paying 50% value of the two properties as to be determined by a government valuer. In the event of inability to buy either of them, those mentioned properties be sold and the proceeds of sale to be divided equally among them. Appeal is allowed to that extent.

As held hereinabove in regard to custody and maintenance of children, the order of the trial court in such respect, is hereby undisturbed.

Considering that, the matter is matrimonial there are no orders as to costs.

DATED at DAR ES SALAAM this 11th day of October, 2022.

HIGH COURT OF TANZANIA

A.P. KILIMI

JUDGE

11/10/2022

Court: Judgment delivered in chambers in the presence of Mr. Salimin Mwili advocate of appellant and Mr. Hamisi Mfinanga for respondent. Appellant and Respondent in person absent. Right of Appeal dully explained to them.

Sgd; A.P. KILIMI

JUDGE

11/10/2022