IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO. 96 OF 2022

(Originating from the District Court of Ilemela in Matrimonial Appeal No.23/2021, Original in Matrimonial Cause No.95/2021 of Ilemela PC)

ANASTAZIA MICHAEL.....APPELLANT

VERSUS

JUSTINE RENATUS.....RESPONDENT

JUDGMENT

Oct.26th 2022 & Nov. 1st, 2022

Morris, J

Anastazia Michael, the Appellant, is before this Court in her second appellate attempt to protect what she considers her matrimonial rights. This is, thus, the second appeal. She first appealed to the District Court of Ilemela against the Ilemela Primary Court's decision in matrimonial cause no.95 of 2021. Initially, Anastazia petitioned for the decree of divorce, custody of children and distribution of matrimonial estate at the trial Primary Court. The respondent literally supported the respondent's prayer for divorce but had issues with her regarding division of matrimonial property, custody of children and maintenance of children.

The trial court granted the decree of divorce; distributed property on 40:60 basis (save for livestock and other items which were to be shared equally) for petitioner and respondent respectively; placed custody of all three children of the marriage under the appellant; and ordered the respondent to pay the appellant a monthly maintenance fees of TZS 50,000/- The appellant was aggrieved by such decision. Her main grievances were based on the distribution pattern; being denied any share in the house allegedly situated at Msumbiji -Nyasaka area; and the amount set as maintenance fee.

The appellant appealed to the District Court marshalled with three grounds of appeal. The respondent filed a cross-appeal too. She was unsuccessful. However, the respondent's cross-appeal was partly allowed. Consequently, she was granted 20% of one matrimonial house; custody of 2 children out of three was given to the respondent leaving her with the lastborn child; and the maintenance order against the respondent was quashed. Still aggrieved, she has preferred the present appeal with six grounds of appeal. However, during hearing of this appeal, her Advocate prayed to consolidate them into three major grounds. That is, grounds 1,2 and 3 were argued jointly. Ground number 4 was pursued exclusively while

grounds 5 and 6 were also consolidated. Accordingly, the appellant faulted the District Court's decision on triad aspects; distribution of matrimonial property, custody of children and maintenance of children. The appellant pursued the appeal under Advocate Mussa Muhingo's representation. The respondent appeared in person; unrepresented.

Submitting for the consolidated grounds 1-3, Mr. Muhingo stated that parties to the appeal had been married for about seven (7) years. Properties jointly acquired by the couple were mentioned to include, one house at Shibula-Mwanza; one house at Msumbiji-Nyasaka - Mwanza and other domestic property. He submitted further that the appellant disagrees with the District Court's decision which held that the house at Msumbiji belongs to the Respondent alone because it was acquired in total exclusion of the appellant. To him, both houses were acquired when parties were living together as husband and wife. But the respondent bought the latter in his name on pretext that he bought it for his sister. So, he submitted that it should be included in the matrimonial property too.

He referred the Court to section 114 of **Law of Marriage Act**, Cap 29, R.E. 2019; **Gabriel Nimrod Kurwija v Theresia Hassan Malongo** Civil App. No. 102/2018(CA-Tanga; unreported); and **Bi. Hawa Mohamed**

v Ali Seif (1983) TLR 32 to buttress his argument that even housewife duties constitute contribution of the subject spouse in acquiring matrimonial property. To counter this argument, the respondent submitted that the District Court was justified to hold as it did because the house at Shibula was constructed exclusively by him before cohabiting with the appellant. Further, the house at Msumbiji area was bought for and on behalf of his sister as testified by her (page 18 of the Primary Court's proceedings).

Regarding 4th ground, the appellant's counsel submitted that, the two children whose custody had been placed under the respondent are still young at 9 years and about 7 years respectively. Hence, they would be better under the custody of their mother subject to the respondent's maintenance. The basis for such argument, according to the Counsel is in line with children welfare principle. The respondent objected this argument. He stated that the appellant is serving an employment which requires her to go to work from 6 am to 7 pm. Thus, she lacks time for proper care of the children. So, the first appellate court considered that the age of the two elder children was somehow advanced, they could stay with their father thereby reducing the burden to the appellant. He stated further that the appellant intended to use custody as the ground upon which to claim high amount of maintenance

charges (TZS. 8,000/=per day) in total disregard of respondent's earning capacity (p.9 of PC proceedings).

As pointed out earlier, 5th & 6th grounds were merged. The learned counsel that the District Court erred in exonerating the respondent from providing for maintenance of the lastborn (3rd child) aged three (3) years. He argued further that naturally, the younger the age of child the more the maintenance (upkeep) costs. He stressed on the statutory requirement that parents have the responsibility to provide for the children. Reference was made to section 129 of the **Law of Marriage Act**, Cap 29 R.E. 2019. Hence, he reiterated that the trial court's order of maintenance fee at TZS. 50,000/- per month was wrongly quashed and disallowed by the by the District Court. According to him, such exclusion amounted to subjecting the mother to exclusive responsibility to maintain the youngest child. The appellant thus prayed that this ground be allowed by not only ordering the respondent to be responsible for maintenance but also the amount awarded by the trial court should be enhance to at least TZS 150,000/- per month.

The foregoing submissions met rivalry arguments from the respondent. He stated that the District Court did not err at all. To the respondent, the said Court considered various factors. One, the fact that the

custody of the other 2 children was given to him. Two, the appellant had testified before Primary Court that she was employed thus the court construed it to mean that she has ability to maintain the only child under her custody. Three, the earning capacity of the respondent. He thus prayed that the District Court's decision should be confirmed by this Court.

From the background and submissions set above, this Court is to determine three major issues; whether or not the District Court justly distributed the matrimonial property amongst the parties; whether the order pertaining to custody of children appropriately considered welfare of the children; and the justification for disallowance of the maintenance fee in this matter.

The Court is further 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 is not expected to interfere with concurrent findings of the lower courts save for compelling reasons in the interest of justice. The philosophy for such warning is that 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. This position is well stated in **Benedict**

Buyobe@Bene v R, Crim. Appeal No.354 of 2016, CA at Tabora (unreported); and **Michael Joseph v R**, Crim. Appeal No. 506 of 2016, CA at Tabora (unreported).

In determining the first issue above, it is important to comment on what the term 'matrimonial property' implies in our legal regime. The **Law of Marriage Act**, Cap 29 R.E. 2019 does not define it. However, in **Bi Hawa Mohamed case** (*supra*) the term was defined as:

> *'..things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of capital nature, such as matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife.'*

Accordingly, for a property to qualify as a matrimonial one, it passes a number of tests. These are; acquisition by party/parties to a marriage, individually or jointly; with intention that the property is a continuous joint-life asset; and the aim is to benefit both spouses and their children (if any). Further, according to **Habiba Ahmadi Nangulukuta and 2 Others v.**

Hassaniausi Mchopa and Another, CAT (Mtwara) Civil Appeal No. 10 of 2022(unreported) matrimonial properties are either jointly acquired by the spouses prior or during the subsistence of their marriage and/or those acquired by individual spouses in their own names. All that matters most is the proof by the alleging party in matrimonial proceedings that a given item is a matrimonial property.

On the basis of the above highlights, it is imperative that the appellant was obliged to prove that each of property she claims to be part of the matrimonial assets, was either jointly acquired by the spouses; or if it was acquired separately by either party, the intention was to have it transformed into a joint property; or that she put efforts to improve the property for mutual benefits together with their children. From the records, the Court is unable to see how the appellant discharged the said duty, particularly for the plot allegedly situate Msumbiji area.

The submissions given in this connection do not indicate how the first appellate court failed to consider evidence that established that the said property was acquired jointly. The appellant is merely insistent that such property was bought by her ex-husband during subsistence of the marriage. But no corresponding evidence from the appellant's side to such effect. I had

the opportunity of going through the records of the trial Primary Court in this regard. The appellant and her paraded witnesses mainly engaged in proving marriage and disputes between parties. As for the acquisition of property, little is gathered therefrom. The appellant, in passing by, simply and rather vaguely states about one property in phrases such as "*mdaiwa alitaka niondoke kwake*" (the respondent chased me from his home); "*akafunga chumba chetu*" (respondent locked our room); "*baadae alinipa nyumba ya Shibula*" (he later gave me the house at Shibula); "*anataka kujenga pale tunapoishi na watoto kwa ajili ya mke wake mwingine*" (he was planning to build a house at our residence for his other wife). It is only on being asked by the court assessor (Getrude, at p.9 of the proceedings) the appellant is stating that:

> "*Nilichangia upatikanaji wa nyuma(sic) kwani tulifanya kazi ya kuuza dagaa na mshahara. Mali tulizochuma ni; nyumba mbili (2) moja ipo Nyasaka Msumbiji na nyingine Shibula mtaa wa Kishiri na viwanja viwili vipo pamoja huku Nyashishi mtaa wa Nyamagana.*"

From the excerpt above, the appellant was testifying to the effect that she contributed to the acquisition of matrimonial property through selling sardine and salary. Further, she mentioned the property to include, two

houses at Nyasaka Msumbiji and Shibula streets respectively; and two plots at Nyashishi street in Nyamagana. With respect, the above clarifications would have been of significant use if they were meant to cement on the previously given testimony/proof by the appellant. In its current form, the inherent vagueness in the given testimony is not cleared.

Some questions still lingering on the foregoing aspect are such as; with whom was the appellant doing sardine business; whose salary was it and how much; when were the property acquired and the means thereof, inheritance, disposition, allocation, etc.; what was/is the state of plots at Nyashishi (and/or why she is not interested in having them distributed as matrimonial property); why she is not introducing the allegations that the house at Msumbiji-Nyasaka was purchased by the respondent in the pretext that it was his sister's. Answers to these and similar questions would have assisted the two subordinate courts to arrive at a well-informed decision. Lest, the appellant cannot benefit from speculative analysis of non-existing evidence.

Further, the appellant seems bank her arguments on the contradictions apparent in the respondent's witness (especially Josephina Renatus -pp. 18 & 19 of trial court's proceedings) to prove her case. That is,

instead of procuring witnesses or mobilizing evidence which would prove that she actually contributed to the acquisition of each property, the appellant in its place relied on the opposite party's set of evidence. Towards this strategy, the appellant's counsel submitted that the subject witness testified as the owner of the house at Msumbiji while purchase credentials bore the respondent's name; hence the inference that the house was part of the matrimonial estate. This is, in law, not correct. Firstly, the standard of proof in civil cases is balance/preponderance of probability not beyond reasonable doubt, See, for example, **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama**, CAT (Bukoba) Civ. Appeal No. 305 of 2020 (unreported). It would have made a great difference is the appellant's side of the proof/evidence corroborated the respondent's evidence in her favour.

Secondly, the cardinal principle in this regard is that the alleging party should not shift the burden to the opposite side. See for instance, **Barelia Karangirangi v Ateria Nyakwambwa**, Civ. Appeal No. 237 0f 2007, CAT-Mwanza (unreported); **AG & Others v Eligi Edward Massawe & Others**, Civ. Appeal No. 86 of 2002, CAT (unreported); and **Ikizu Secondary School v Sarawe Village Council**, Civ. Appeal No. 163 of 2016 CAT

(unreported). In **Habiba Ahmadi Nangulukuta** (*supra*), the Court of Appeal is categorical thus:

> *'It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, [Cap. 6 R.E. 2019]. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/hers and the said burden is not diluted on account of the weakness of the opposite party's case.'*

So, the appellant's submissions which tend to drag the respondent to the negative side of the scale of justice by using part of evidence of the latter fail from the shortfalls inherent in the scheme. Consequently, I find that the first appellate court was justified in holding that the appellant's evidence did not sufficiently establish her contribution towards acquisition of the house at Msumbiji-Nyasaka.

Notwithstanding the analysis above, the conclusion is not similar in respect of the house at Shibula. The appellant strongly submitted against the awarded 20% share of in the said house's value. She based her argument

on the ground that the District Court did not consider her financial contributions and the fact that, per law, even a mere house wife is entitled to share in the matrimonial estate. [**Bi Hawa Mohamed's case** (*supra*) followed].

I agree with her. The finding of the first appellate court to support the respondent's 20% share of the house at Shibula is incorrect or unjustified. The said court rightly concluded that the house in question was part of the marriage despite the evidence to prove how it was jointly or exclusively acquired being blurry. The District Court held that the appellant did not prove her contribution towards acquisition of the house. Yet, it awarded 20% of the same. With respect, this Court finds that the first appellate court used an erroneous or unclear gauge to revise the award from the trial court's 40% share by half.

Going through the trial court's record, I find that the respondent had no issue with distributing the said house together with other matrimonial assets to the parties. See, for example, page 16 of the Primary Court's proceedings (answering questions put to him by the lady assessor – Getrude) where he partly stated that, "*Nipo tayari kugawanyishwa (sic) mali zetu zote pamoja na alizopeleka kwao.*") He, indeed, was express in his concession

that he appreciated the appellant's involvement in acquisition of various matrimonial property.

Further, the respondent evidently acknowledged (at page 14 paragraph 1 of Primary Court's proceedings) that the appellant participated in improving the house. He is recorded testifying that "*Nyumba anayoishi nilijenga mwaka 2013 na kuiendeleza na yeye...*" (that is, I built the house in which she resides in 2013 and we jointly improved it...) Moreover, in the Primary Court's proceedings at page 14, the respondent agrees to had conceded the appellant to reside in the house in question before the Kawekamo Ward Tribunal. Documents from the subject Tribunal as contained in the trial Primary Court's record indicate that the respondent stated that the house was built by the two parties herein. In part, the relevant document reads: "*Nimekubali kuwakabidhi watoto wetu nyumba ambayo tuliijenga mimi na mama yao.*" That is, he agreed the house jointly built with the appellant to be occupied by their children.

On the basis of the stated reasons, I revise the proportion given by the District Court upwards to 40% share in the appellant's favour. That is, the Primary Court's awarded proportion is restored. Hence, the same should be evaluated consequent of which each party will get his/her share in the

awarded proportion. Either of the parties may buy off the other party's share in the house (after evaluation) and retain it wholly.

The Court now embarks on ground 4 about custody of children. The appellant is challenging custody of two children being placed under custody of the respondent. According to her, the said children are still too young to be separated from their mother. I am inclined to disagree with the appellant's submissions in this regard. I will elaborate.

Heedful of the provisions of the **Law of the Child Act**, Cap 13 R.E. 2019 especially sections 4, 26, 37 and 39; this court finds justification to interfere with the District Court's holding in this respect. The basis of court's consideration hereof is threefold: firstly, evidence of the appellant's ability to care for all three children is unclear. It has not been firmly established by the appellant that her source of income will enable her to sustain the upkeep needs of the three children. More so, in the light of the matrimonial house in which she currently resides with the children, being sold as held above.

Secondly, the respondent has actively been involved in the welfare of all children throughout times of conflict with the appellant an indicator that he is responsible enough to sustain the children's welfare. Thirdly, the appellant's employment, as testified by respondent and uncontroverted by

the appellant leaves her with little/limited time of the day which time is critical in the children sustainable welfare. It is on record that she leaves home at 6:00 hours only to return at around 19:00 hours. Consequently, the children literally take care of themselves with little help, if any, from neighbours and well-wishers. This is an unhealthy state of affairs for the growing children. On this basis, the 4th ground of appeal is deficient of merit. It accordingly fails. However, this Court is inclined to order, as it now does, custody of all children to be placed under the respondent. This pattern of custody will enhance the children's brotherhood/sisterhood for they will continue living under one roof. Further, the respondent is having a relatively settled life than the appellant. It is held further that the latter will have the right of visitation to her children now under the respondent's custody.

As for the disallowance of maintenance, the Court is of the view that this issue is corollary to the second issue which has been determined above. Maintenance of issues of marriage particularly after the marriage is dissolved is fundamental and cannot be taken lightly. It requires adequate attention. See, for instance decision of courts in **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.

In this appeal, the Primary Court had ordered the respondent to pay the appellant TZS 50,000/- per month as maintenance fee. This amount was in respect of three children custody of whom was granted to the appellant. However, the District Court held that each party should be exclusively responsible to maintain the child or children under own custody. That is, none of the parties herein was ordered to pay to the other any sum of money in this connection. Having taken keen cognizance of this aspect; and in view of the Court's findings for the 4th issue above (custody of children), I am out-and-out that neither the appellant nor respondent should be awarded maintenance fee. The justification of this order is straightforward. The children will now be maintained by the respondent. Further, though one of the children is still very young which age attracts a lot of upkeep concerns: medical, cleanliness, hygiene, nutritional awareness, clinical routines, etc.; the appellant's current employment seemingly does not enable her to pay any fees for maintenance. Furthermore, the respondent had voluntarily committed himself to pay for maintenance of the three (see p.16 of Primary Court's proceedings).

Sequel to the above, the present appeal stands partly allowed. In brief, the appellant is entitled to 40% share of the established value of the house at Shibula; custody of all children is granted to the respondent; and no party will pay the other any maintenance fee. The rest of the District Court's holding is confirmed. Each party will bear own costs.

It is accordingly ordered.

C.K.K. Morris
Judge
November 1st, 2022

Judgement is delivered today in the presence of Anastazia Michael (appellant) and Justine Renatus (respondent).

C.K.K. Morris
Judge
November 1st, 2022