IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO 29 OF 2022

(Original Matrimonial Cause No. 19 of 2020 of the Kinondoni District Court before Hon. L. Silayo - RM)

DAVID ROBERT MAKANGE.....APPELLANT

VERSUS

LINDA DAVID ROBERT MAKANGE.....RESPONDENT

JUDGMENT

12/10/2022 & 14/11/2022

I.C. MUGETA, J.

Parties to this appeal celebrated their Christian marriage in 2001. It was blessed with two issues. Their marriage became sour on allegations of infidelity against each other. The appellant accuses the respondent of over drinking alcohol which is disputed by the respondent who accuse him of violence. The appellant petitioned for divorce and division of matrimonial properties. Consequently, divorce decree was granted and the property at Mbweni Malindi declared as the only matrimonial asset was divided equally between the parties. Despite evidence tentered that the appellant owns land at Dusinyara, Mlandizi Pwani Region, the trial court did not pronounce itself on whether that property is a matrimonial asset. Without evidence or prayer from the respondent the trail court awarded her

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maintenance at the tune of 500,000 per month from the date they separated to the date of the judgment. The appellant has appealed on three grounds that:

1. *The trial court erred both in law and fact by finding and deciding that the respondent contributed to the acquisition of the property on Plot No. 9 Block C, Mbweni Malindi, Kinondoni - Dar es Salaam without taking regard to the evidence adduced in record.*
2. *The trial court erred both in law and fact by finding and deciding that the respondent is entitled to the share of 50% of the property on Plot No. 9 Block C Mbweni Malindi Kinondoni Dar es Salaam without considering evidence adduced in record.*
3. *The trial court erred both in law and fact by ordering the appellant to pay maintenance of Tshs. 500,000/= from the date of separation to the date of judgment without the respondent having prayed for such relief, without evidence in support and without affording the appellant the right to be heard thereof.*

In terms of rule 22(1) and (2) of Order XXXIX of the CPC, the respondent filed a memorandum of cross objection on the ground that:

i. *The trial court having established that the present respondent actively contributed to the development of Farm No. 736 located at Dusinyara Village in Mlandizi Coast Region; erred in law and in fact by failing to recognise the said farm as part of*

the matrimonial assets and consequently failed to recognise the right and entitlement of the respondent to receive 50% of the farm and or 50% of the proceeds of the plots allocated to the plaintiff.

ii. *That the court erred in law and in fact by failing to recognise the import of the law relating to distribution of matrimonial assets as settled in the following cases.*

The appellant is represented by Nereus Mutogore, advocate while the respondent enjoys the services of John Seka, advocate. The appeal was heard by way of filing written submissions.

From the grounds of appeal, the cross objection and the parties' submissions, the issue for my determination are firstly, whether the unfinished house at Mbweni Malindi and the sold plots at Dusinyara, Mlandizi – Coast Region are matrimonial assets. Secondly, whether the respondent is entitled to the maintenance awarded.

I shall start with the plots at Dusinyara constituting farm No.736. There is no dispute from evidence presented that the appellant inherited this farm from his parents. It is also undisputed that the farm was divided into about 700 plots which was sold leaving only two plots registered in the name of the appellant. Further, it is also undisputed that the proceeds of the sale of the plots was used to buy the property at Mbweni Malindi Plot No. 9, block C.

It follows therefore, that a discussion on the property at Dusinyara ought to be limited to the remaining two plots and not the whole farm which is no longer in existence. Unfortunately, both counsel have argued having the whole farm in mind. Mr. Seka for the respondent argues that it is a matrimonial asset because the appellant acquired it during subsistence of the marriage and later improved by joint efforts of the parties. That in improving it the respondent supported the appellant in transforming it into plots and conducted extensive marketing of the plots. Counsel for the appellant has argued that the trial court was right not to include the farm as matrimonial asset because the respondent did not tender evidence on how she participated in improving the farm. For the plots she marketed and sold, he argued, she was paid fully the due commission.

It is my view that for the farm inherited by the respondent to form part of the matrimonial assets, the respondent ought to prove participation in improving it. The improvement that was conducted before disposition was dividing it into plots which were sold. The respondent being not a surveyor cannot claim to have participated to improve the farm. Therefore, her contribution ought to have been financial in terms of financing the survey but there is no evidence to that effect. Being a person who was employed in various financial institutions, she never tendered evidence on how she

facilitated or supervising the survey process. Understandably she was busy in her office. Under the circumstances, her evidence which I accept is that she participated in marketing the plots and managed to secure some clients. Therefore, since the proceeds of the sale was used to secure the landed property at Mbweni, her claim on contribution shall be considered in relation to that property.

The trial court never discussed the status of the property at Dusinyara by considering whether it is a matrimonial asset. This is the reasons for the complaint in the second ground of objection. Upon my re-evaluation of the evidence as done above, I rule that the respondent contributed nothing towards the acquisition of the farm at Dusinyara including the unsold two plots. They are declared personal properties of the appellant.

The property at Mbweni Malindi was acquired in 2016. By this time, even if the parties were living under one roof, they were constructively separated as they slept in separate rooms. It is for this reason counsel for the appellant has suggested that since the property is in the name of the appellant it exclusively belong to him because it was bought from the sold plots being personal property of the appellant. According to the appellant, actual separation occurred in 2018 while the respondent testified that it was in 2019. The learned counsel for the appellant has further argued

that the trial court awarded equal shares in the property contrary to evidence where the respondent testified that she believed her share in the property is 40%. In the counsel's views in dividing the property on Plot No. 9 Block C , Mbweni, the trial court ignored the principle on the extent of contribution of the parties established in **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32, **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** [2020] TZCA 31- Tanzlii, **Mohamed Abdalah vs Halima Lisangwe** [1998] TLR 197.

On his part, Mr. Seka submitted that the respondent contribution is by both performance of domestic works and financially. Domestically, he submitted, she gave birth to and raised to adulthood her two children and cared for the three children sired by the appellant out of the wedlock. Financially, he argued, she provided them with medical cover, food, clothing and sometimes paid for their school fees.

I have reviewed the evidence on record, indeed, while on cross examination the respondent said that "my ownership in that plot to building a house is 40%". This is what the appellant's counsel has termed as admission of her extent of contribution. I do not agree because the context in which this answer was provided is not clear due the manner by which the trial magistrate recorded the evidence. It is recorded in the

bullets not narrative form. My conclusion is based on the fact that in the answer to the petition the respondent prayed for equal division of the matrimonial assets. Since evidence ought to be interpreted taking into account what was pleaded, I am not convinced that in her evidence the respondent was assigning to herself shares in the asset.

My further review of the evidence has shown that appellant quitted employment in 2004 and entered the business world. There is no evidence on what he earned from 2004 to 2011 when he inherited the land at Dusinyai which he divided into plots and sold the same to generate income. During this period, the respondent was employed and she testified that she supported the family financially and performed domestic works as a wife which evidence is disputed by the appellant who, without disclosing from which income source, says he shouldered the burden of providing and maintaining the family affairs alone.

The nature of the evidence on recoding being not documentary, the determination of most disputed issues in this case including who did what to support the family depends of the assessment of the credibility of witnesses. My assessment of the evidence is that in term of credibility, the respondent is more reliable than the appellant. My conclusion is based on the fact that in some instances the appellant testified falsely. One of

them is his denial that he is the father of Simon, Daniel and Lisa while on cross examination as reflected at page 14 of the proceedings. The pleadings and the evidence on record if looked at as a whole proves that they are his children whom he sired through extra marital affairs.

It is settled that lying on one material fact in evidence does not turn the whole evidence of that witness into falsehood. However, it lowers his credibility. The appellant, therefore, can hardly be believed by his story that the respondent being a salaried servant contributed nothing to family provisions like health care, clothing, education and food for the family where there is no evidence about his earnings from 2004 to 2011. As a result, I hold that, besides her role as a wife, the responded provided financially for the family too. This contribution is enough to give her interests in the house at Mbweni Malindi besides being bought by proceeds from sale of properties solely owned by the appellant. The trial court was right to divide that house at equal share.

For the foregoing I find no merits in the first, second ground of appeal and both grounds in the cross objection.

Finally, to the issue whether respondent is entitled to maintenance. As I have said the trial court awarded the respondent maintenance without

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being pleaded nor having received evidence as to the respondent's income. The counsel for the appellant has submitted that the trial court could not have rightly awarded a relief which was not pleaded. According to the decision of the district court, the learned magistrate, awarded the same in accordance with section 63(a) of the Law of Marriage Act [Cap. 29 R.E. 2019 which reads:

> *'63. Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court -*
>
> *(a) it shall be the duty of every husband to maintain his wife or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life'.*

Counsel for the respondent has argued that the trial court correctly applied this provision of the law considering the fact that the appellate influenced the respondent to leave the matrimonial home despite being unemployed.

With respect I do not agree. I have several reasons. Firstly, section 63 was intended to provide for wives who are full time domestic wives. The respondent is not one of them as she is employed. The submission by Mr. Seka that when she left the matrimonial home she was unemployed is not

supported by evidence. Her testimony on oath is that she left the matrimonial home in 2019 after being chased away by the appellant. When she gave evidence on 4/10/2021 at page 20 she said:

"For now I work at City Trust Financial Service..."

Therefore, during trial she was on employment.

Secondly, maintenance as a relief cannot be awarded unsolicited and ought to be pleaded. In **Aziz Ally Omary vs Eshe Majid Ganzel**, Civil Appeal No.18 of 2022, High court, Temeke Registry (unreported) I held that where maintenance is not pleaded but ought to be granted as a consequent relief subsequent to orders of divorce or separation, evidence ought to be led as to the means of the one who would pay the same, who needs such a relief and reasons thereof. This was not done by the learned trial magistrate. There is completely nothing on record to show what prompted him to award maintenance to the respondent and not the appellant.

Thirdly, even if the respondent was unemployed and, indeed, was forced to leave the matrimonial home by the appellant as submitted by Mr. Seka, maintenance is not awardable as a punishment to the other party. It is an order of necessity to meet the basic needs of the receiving party. Therefore, the trial court erred to award maintenance under the

circumstances of this case. The third ground of appeal has merits, I allow it.

In the fine, the appeal is partly allowed to the extent that the order of maintenance is quashed and set aside. The decision of the trial court on division of Plot No.9 Block C Mbweni is upheld. The cross objection is dismissed. No orders as to costs.

I.C. MUGETA

JUDGE

14/11/2022

Court: Judgement delivered in chambers in the presence of Sikujua Clement for the respondent also holding brief for Nereus Mtongole, advocate for the appellant.

Sgd: I.C. MUGETA

JUDGE

14/11/2022