IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA.

PC. CIVIL APPEAL NO. 37 OF 2021
(c/f District Court of Arusha in Civil Appeal No.52 of 2020 Originating from Arusha Urban Primary Matrimonial Cause No.64 of 2010)

EPHATA JOHN.....APPELLANT

Versus

HAPPY EPHATA.....RESPONDENT

JUDGMENT

01/03/2022 & 12/04/2022

KAMUZORA. J,

Before the Primary at Arusha Urban, the Appellant Ephata John petition for divorce against the respondent Happy Ephata. The trial primary court in its decision dated 24/09/2010 issued a decree for divorce and granted the custody of two children, Jackson and Donald to the appellant while the custody of one child, Clara was granted to the respondent. The appellant was further ordered to pay for maintenance of the child in custody of the respondent. No appeal was preferred therefrom but on 21/08/2018, the

respondent wrote to the primary court claiming for division of matrimonial properties. This followed with application made in writing to the primary court for determination of the issue on division of matrimonial properties. Before the hearing of the application, the appellant informed the trial court that he intended to be represented by an advocate. The trial primary court made an order that since the advocate is not allowed to appear in primary court, then the respondent should institute the application for distribution of matrimonial properties at the district court. This order resulted into a revisional order by the district court in Civil Revision No. 12 of 2018 and the district court in its decision dated 09/08/2018 directed the trial court which heard and determined the petition for divorce to determine the issue on division of matrimonial properties pursuant to the provision of section 114 (1) of the Law of Marriage Act. However, the appellant filed Application No. 48 of 2019 before the district court praying for the transfer of the proceedings to the district court but the application was dismissed and the court ordered the case file to be remitted to the trial court to comply with revisional order in Civil Revision No. 12 of 2018.

When the matter was remitted to the trial primary court, the court, upon summoning and hearing both parties, allowed the application on the

division of matrimonial house and ordered the appellant to pay to the respondent 40% of the value of the matrimonial house for the appellant to retain and reside in the matrimonial house. The appellant was aggrieved by the trial court ruling but successfully appealed to the district court in Civil Appeal No. 52 of 2020. Four issues were raised before the district court to as follows: -

1. *Whether the trial court was functus officio.*
2. *Whether the trial magistrate was wrong to hear the appellant while the respondent was the one who filed the application.*
3. *Whether the appellant was denied right to defend.*
4. *Whether the trial magistrate failed to evaluate the evidence.*

The district court found the appeal to have no merit and dismiss it. From the decision of the district court the present appeal was preferred on the following grounds: -

1. *That, the trial court erred in law in entertaining an application while it was functus officio.*
2. *That the trial court erred in law in receiving the evidence of the appellant prior to hearing the respondent's case while the respondent is the one that had filed the application.*
3. *That the trial court erred in failing to afford the appellant the right to defend himself on the respondent's allegations.*

4. *That the trial court erred in ordering the division of the Appellant's house contrary to its former order regarding the same property*
5. *That the trial court failed to properly analyze the evidence before it thereby arriving at the wrong conclusion.*

As a matter of legal representation, the appellant was dully represented by Mr. Emmanuel Kinabo while the respondent was well represented by Mr. Ephraim Koisenge. The counsel for the parties opted to argue the appeal by way of written submissions and they both complied to the submissions schedule save for the rejoinder submission.

In the submission in support of the first ground of appeal, the appellant submitted that, the trial court erred in fact and in law in entertaining an application while the court was *functus officio*. That, the judgement in Matrimonial Cause No. 64 of 2010 before the Arusha Urban Primary Court was delivered on the 24th September 2010 and the court made an order that two issues of the marriage, namely Jackson and Donald, should remain in custody of the Appellant at the matrimonial home of the parties. The appellant also submitted that, it is trite law that once a court has pronounced judgement it becomes *functus officio* over the matter and any party who is aggrieved by its judgement is enjoined, as a matter of law, to prefer an appeal and not to go back to the same court to seek further orders.

The appellant explained that in the instant case, the Respondent having received judgment on the 24th September 2010 decided to sit on it without preferring any appeal until sometime on the 29th August 2018 when she knocked on the doors of this Honourable court vide Revision No.12 of 2018 seeking revision of the Primary Court's judgement so that the issue of division of matrimonial assets be re-opened. That, in the revision application the district court ordered the matter be remitted back to the trial court so that the same can be decide on the issue of division of matrimonial property. The appellant was of the view that, as the same court, Arusha Urban Primary Court had already pronounced judgement in Matrimonial Cause No.64 of 2010 which addressed the issue of the matrimonial home of the parties herein, it makes the same court *functus officio* to decide over the same issue on the division of the matrimonial home of the parties.

The appellant insisted that, it was wrong for District court to direct the trial court to re-open Matrimonial Cause No.64 of 2010. He was of the view that, the implication is that there are two sets of judgement with two conflicting orders in Matrimonial Cause No.64 of 2010, the one dated 24th September 2010 stating that the matrimonial home remains with the Appellant and two of his children and the second one dated the 23rd July

2020 which states that the Respondent should be paid up a sum equivalent to forty percent (40%) of the value of the said house. The appellant supported his argument with the case of **Leopold Mutembei Vs Principal Assistant Registrar of titles and Another,** Civil appeal No.57 of 2017 in the Court of Appeal of Tanzania at Mwanza (Unreported) at page 14, where the court of appeal held that the trial court was *functus officio* when it decided on the issue of cause of action in proceedings by one judge after his predecessor had already decided upon it. The appellant was of the view that in the present case, the trial court was *functus officio* to decide on the issue of the matrimonial home which had been dealt with earlier in its own judgement.

In reply the respondent submitted that for the court to become fanctus officio there must be a determination of the point in issue/dispute conclusively. Reference was made to the case of **Scolastica Benedict Vs Martin Benedict (1993) TLR 1.** The respondent insisted that, the trial court granted an order for custody of marriage issues and was ordered by the district court in Revision No. 12 of 2012 to determine the issue on division of matrimonial assets. For the appellant, the trial court did not reopen the proceedings itself but was complying to the revisional order of the district

court and what was to be determined by the trial court was not determined in the first place. The respondent added that the trial court was competent to revisit the proceedings and hear the parties very specific on the question of distribution of the matrimonial properties as per the requirement of the provision of section 114 (1) of the Law of Marriage Act, Cap 29 RE 2019. That, as the issue on division of matrimonial properties was not determined before, the trial court was not *fanctus officio*.

I have considered the arguments by the parties and evidence in records. I have also directed my mind to the provision of section 114 of the Law of Marriage Act which govern the issue of division of matrimonial properties. The said provision reads: -

> *114.-(1) The court shall have power,* ***when granting or subsequent to the grant of a decree of separation or divorce****, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*

From the wording of the above provision, it becomes obvious that, the court is obligated when granting or subsequent to granting a decree for divorce division to make an order for division of matrimonial properties. The

wording used imposes a mandatory requirement to the court and where such requirement is not adhered to at the time of granting divorce, subsequent to the grant, meaning on the later dates, the court that issued a decree for divorce can still hear and determined the issue on division of matrimonial properties. It is also a well-known practice that when the court grants divorce without an order for division of matrimonial assets, the parties may at any time apply for division before the court which granted a decree for divorce.

It must be noted that, for the court to be *functus officio* the same court must have determined the same matter in its conclusion. In the present matter what is claimed to be re-determined is the issue of division of matrimonial properties. While the appellant claim that the same court heard and determined the issue on division of matrimonial property, the respondent claimed that such an issue was never determined.

Upon revisiting the records, I discovered that the trial court never determined the issue on the division of matrimonial properties. It is in record and specifically the judgment of the trial court in Matrimonial Cause No.64 of 2010 dated 24th September 2010 that the court made a determination on the decree for divorce and custody of children. The issue on the division of matrimonial properties was never determined by the court thus the

contention by the appellant that the trial court stated that the matrimonial home remains with the Appellant and two of his children is unfounded.

It was also contended by the appellant that the application for division of matrimonial properties was brought many years later and the trial court erred in re-opening the file for purpose of determining the application that was already determined. I reiterate that the issue of division of matrimonial property was not determined. The appellant did not state the provision law which enforce the opening of the new file for determination of application for division of matrimonial property. As I have pointed out earlier, the issue of division as per the provision of section 114 of the Law of Marriage Act was to be determined by the court when granting divorce or subsequent to granting divorce. Nowhere is directed that a new file has to be opened. It has only been a matter of practice to open a new file. As the application in this matter was based on the same matrimonial proceedings, I do not see how the parties were prejudiced by the hearing of the application in compliance of section 114 of the Act. The issue of time to when the application was made was not raised on appeal before the district court and it is not among the grounds of appeal before the district court and even before this court. It was only raised in the appellant submission thus I will

not bother much to deliberate on the same. In addition, the appellant did not state the provision of law that was infringed. Much as the issue on division of matrimonial properties was never determined before, it is my settled mind that trial court was not *functus officio* to determine the application for division of matrimonial properties.

On the second and third grounds it was contended by the appellant that the trial court erred in law in receiving the evidence of the appellant prior to hearing the respondent's case while the respondent is the one that had filed the application. That, conduct denied the appellant the right to defend himself on the respondent's allegations. The appellant submitted that the trial court erred in calling the Appellant to adduce evidence before hearing the Respondent's case and that denied the appellant the right to defend himself on the respondent's allegation. The appellant added that, the Respondent after receiving the ruling in Misc. Civil application No.48 of 2019 which confirmed the order in Revision No.12 of 2018 lodged an application before the primary court for division of matrimonial properties. That, the trial court in hearing the said application compelled the Appellant to state his case and call witnesses before hearing the Respondent on the Application. That, the effect of this anomaly is to deny the Appellant his right to be heard on

the claim of the respondent in respect of division of matrimonial properties. To him the role of the parties was switched and could not reflect as to who had the duty to argue the Application before the other. That, the omission by the trial court to call upon the Respondent to argue her application for division of matrimonial property before the Appellant is heard did prejudice the appellant from making a sound defence against the same. The Appellant submits that the disorderly reception of evidence by the trial court confused the Appellant's case and his right to a sound defence.

The respondent submitted that, when the file was remitted back to the trial court following revisional order, all parties were aware that what was to be dealt by the court was the issue on the division of matrimonial properties and nothing else. That it cannot be said that the appellant was denied right to be heard by the trial court.

I agree with the appellant that the respondent in this application is the one who moved the trial court to determine the issue on division of matrimonial properties. In practice, the evidence of the applicant in the respective application (the respondent herein) was to be taken before that of the respondent to the application (the appellant herein). There is no dispute that in the present matter the trial court while hearing the parties

started by receiving the appellant's evidence followed by the respondent who was the applicant for that matter. I asked myself as to the mischief caused by the switching of the parties' role in presenting their evidence. In that I directed my mind to the provision of section 114 of the Law of Marriage Act which govern the issue of division of matrimonial properties. I have two line of argument on that matter.

The first line of argument is that, the requirement under that provision is for the court to determine the issue of division of matrimonial properties when granting or subsequent to granting a decree for divorce. In doing so the court receives evidence from the parties and make a determination there on. As per typed proceeding of the trial court dated 22/05/2020, both parties were informed by the trial court that there was an application for division of matrimonial properties. The records read: -

> *"MAHAKAMA: Mahakama imewaeleza wadaawa kuwa mdaiwa amewasilisha ombi la mgawanyo wa mali baada ya makahama kutoa amri ya talaka pasipo kuziongelea mali"*

The appellant responded and informed the court that he intended to present four witnesses while the respondent promised to present two witnesses. Both parties testified in court and were allowed to cross examine the other part. From the records, I do not see how the switching of the role

affected the appellant. The appellant presented his evidence and closed his case, and when the respondent was called to testify, he was allowed to cross examine her. I do not see how the switching of the parties' role confused the Appellant's case and denied him right to a sound defence. While appearing before the trial primary court the appellant was aware that they were to present evidence on the division of matrimonial properties.

The second line of argument is that, in this matter the appellant instituted matrimonial proceedings before the trial court with only one relief of decree for divorce. While issuing the divorce, the court was bound by the law to also deliberate on the issue of custody and welfare of the children as well as division of matrimonial assets. It is unfortunate that while determining a petition the trial court skipped the determination of the division of matrimonial properties which enforced the respondent to apply before the trial court for its determination. Thus, to me this could not be regarded as a matter which would force the respondent to be the one to start presenting the case on division. As the appellant was the one who instituted the matrimonial matter, there was a need for him to also justify before the court that during the subsistence of the marriage between them what was acquired jointly as matrimonial properties. I therefore do not see

how the appellant was prejudiced by being the first one to state the case on division of matrimonial properties. I reiterate that the records are clear that, the appellant was given a chance to present evidence on the existence or non- existence of the matrimonial properties, and when the respondent was accorded a chance to present evidence to that effect, her evidence was open to cross examination by the appellant. It is my conclusion therefore that while it is true that the evidence of the appellant was recorded prior to recording the evidence of the respondent, I do not see how the appellant was prejudiced. To me, the appellant was accorded full right to defend himself on the respondent's allegations. The 2nd and 3rd grounds are therefore meritless.

On the fourth and fifth grounds the appellant submitted that the trial court failed to properly analyze the evidence before it and erred in ordering division of the matrimonial home contrary to the former order regarding the same property. He added that the trial in its judgement dated 24th September 2010 conferred the ownership and occupation of the matrimonial home to the Appellant and two of his children yet on the 23rd July 2020 the same court ordered that part of the value of the matrimonial house be paid to the Respondent by the Appellant. It is the appellant's view that, the trial court

had no powers for depart from its own previous order and does not have jurisdiction to make orders on a closed case. Moreover, that the order for 40% of the value of the matrimonial home was made without assigning any reason for arriving at such a figure hence failed to properly evaluate the evidence before it.

The respondent on the other hand referred the judgement of the trial court and submitted that nothing was addressed indicating that the matrimonial house was given to the appellant and his two children as alleged by the appellant. he referred the case of **Robert Aranjo Vs Zena Mwinjuma (1984) TLR 7** to support the argument that the court has to consider the parties contribution to the breakdown of marriage for purpose of grating division of matrimonial assets. That as the first two courts found that the house was jointly acquired it was sufficient reason to justify division.

I do not agree with the appellant contention that there are two conflicting decisions of the trial court in relation to division of matrimonial properties. It is not true that in its judgement dated 24th September 2010 the trial court conferred ownership and occupation of the matrimonial home to the Appellant and two of his children as alleged by the appellant. It is in record that upon concluding that the marriage has broken down beyond

repair, at page 5 to 6 of the typed judgment dated 24th September 2010, the trial court enquired on the welfare of the children and made an order custody and maintenance. However, the trial court never made a determination on the division of matrimonial properties.

On the contention that the trial court failed to analyse the evidence hence arriving to a wring conclusion, I have revisited the judgment of the trial court in relation to division of division of matrimonial properties. The trial court made analysis of the evidence and came up with the conclusion that only the house was proved to be a jointly acquired property and order its division at the rate of 40 percent to the respondent. The reasoning by the trial court was that, the respondent contributed to the acquisition of the house as she was doing business and animal keeping. On appeal the district court concluded that there was a proper evaluation of evidence and did not bother to further and state the evidence that was well evaluated by the trial court.

I do agree with the trial court findings that was also blessed by the district court that only the house was proved by the parties to be a matrimonial property. However, the trial court did not state how it arrived at 40 percent division of the same. From the evidence, neither of the parties

presented material evidence showing the extent of contribution towards acquisition of the house. The trial court considered business status of the respondent in granting the 40 percent without analyzing the earning status of the appellant.

I am alive of the fact that when deciding the cases of this kind, the wisdom of the court is paramount as failure to deploy the principle of this Court in **Bi Hawa Mohamed Vs Ally Seif** [1983] TLR 32 mostly women will go empty handed. I am also aware of the principle that in making orders for division of matrimonial properties, the court must also consider the extent of contribution and for women even house errands like cooking and taking care of children will also count as contribution towards acquisition of matrimonial properties.

In the present matter there was no thorough analysis of evidence before the court could come to conclusion that the respondent was entitled to 40 percent of the house. The court did not state how it regarded the appellant works toward acquisition and how it disregarded the evidence on the misappropriation of matrimonial properties raised by the appellant. Only the evidence of the respondent was considered in arriving to a conclusion that the respondent was entitled to 40 percent division. It is unfortunate that

the district court skipped that part and did not re- evaluate evidence to see if the trial court was correct to arrive at a 40 percent division. This court therefore is forced to step into the shoes of the first appellate court and re-evaluate evidence to see if the trial court was correct to allow 40 percent division to the respondent.

Going to the records, there is undisputed facts that the appellant was working as tour guide, thus, his earning is well known. It is also undisputed fact that the plot to which the house was built was not bought by the parties jointly rather it was given to the appellant by his parents and it is within the family compound (Boma). The respondent's contribution is based on the fact that she was doing business and keeping cattle but does not indicate how much she was earning. I understand that where there is proof that a property was acquired during the subsistence of marriage, it becomes mandatory that each party is entitled to the share of that property. But I am alive of the principle that each party has to prove the extent of contribution. In my view, if the trial court could have taken into consideration that the appellant contribution is more open than that of the respondent, and that the appellant resides in the same house with the children and is responsible for paying children school fees, it could have arrived to a different conclusion.

This court therefore in considering what is stated above and in considering that the appellant was unable to prove misappropriation by the respondent, find that it will be fair and just for the respondent to be paid 20 percent of the value of matrimonial house in exclusion of the value of the plot to which the house is built. The decision of the trial court is varied to that extent. The appeal is therefore partly allowed and partly dismissed to the extent explained above. Since the appeal arises out matrimonial cause, I make no order as to costs.

DATED at **ARUSHA** this 12th Day of April 2022

D.C. KAMUZORA

JUDGE