

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

PC CIVIL APPEAL NO. 99 OF 2020

(Originated from Matrimonial Cause No. 172 of 2020 at Kimara Primary Court)

GUNDELINA JOHN MMASI.....APPELLANT

VERSUS

BAHATI SANDULI MASSAWE.....RESPONDENT

JUDGMENT

2/11/2021 & 4/01/2022

N.R. MWASEBA, J.

The respondent herein initiated the matrimonial proceedings at Kimara primary court seeking for divorce. The trial court granted a divorce order and went further to distribute matrimonial assets and custody of the sole child was granted to the appellant whereby the respondent was ordered to provide Tshs 100,000/= per month for maintenance of their child. The respondent was aggrieved by the trial court's decision with

regard to the distribution of matrimonial assets and maintenance order and appealed to the district court whereby his appeal was allowed. This time the decision did not please the appellant then she appealed before this court raising the following grounds of appeal:

- 1. That, the honourable magistrate erred in law and fact for not ordering equal division of jointly acquired matrimonial properties.*
- 2. That, the honourable magistrate erred in law and fact for disregarding the evidence and fact and instead of ordering the respondent to be compensated with only 1,000,000/= TSH as part of her contribution on the matrimonial assets thereto.*
- 3. That, the honourable magistrate erred in law and fact by excluding some of the properties that were jointly acquired during the existence of marriage leaving the same under the custody of the respondent.*
- 4. That, the honourable magistrate erred in law and fact by ordering division of the matrimonial ~~assets~~ without considering that the custody of the issue in on ~~the~~ appellant hereto.*
- 5. That, the honourable ~~magistrate~~ erred in law and fact by ordering the respondent to provide Tsh 80,000/= only per month without*

considering that he has not provided for the issue since 2018 and it is now 4 years and the court did not also consider other needs of the child such as medical services, school fees etc.

6. That, the trial court erred in law and fact for not considering the evidence adduced by the appellant herein above during the hearing of the matter at Kinondoni district court.

Before this court both parties appeared in person, unrepresented. It was agreed by both parties that the appeal be disposed of by way of written submission.

In her submission, the appellant prayed to abandon the first and third grounds of appeal and proceeded to submit on the remaining grounds. She submitted on the second and sixth ground of appeal jointly that during the hearing at the primary court and district court she testified that she was contributing to finishing of their house and the respondent did not dispute at the primary court. She claims that this evidence was not considered by the district court. She referred this court to **Section 114 (2) (b) of the Law of Marriage Act, CAP 29 R.E 2019** and its interpretation in the case of **BI Hawa Mohamed Vs Ally Sefu, (1983)**

TLR No 32 (CA) which articulates that, in exercising its power of division of matrimonial assets the court should have regard to the extent of contributions made by the spouses in terms of money, property or work towards acquisition of the property. She further clarifies that it is undoubted that she contributed towards the acquisition of matrimonial assets by doing domestic works including taking care of the issue. Therefore, she emphasizes that she is entitled to equal distribution of the matrimonial assets.

She further submitted on the fourth and fifth ground of appeal in which she shows her grievances on the amount to be paid for the maintenance of the child. She says Tshs 80,000/= per month, equals to Tshs 2,666/= per day. According to her, the amount is not fair as it is not adequate to cover the child's basic needs. She says the court was to consider the proposed amount of Tsh 100,000/= as considered by the primary court. She cited **Section 129 (1) of the Law of Marriage Act**, CAP 29 R.E 2019 which says it shall be the duty of a man to maintain his children and **Section 44 of the Law of the Child Act**, CAP 13 R.E 2019 which specifies matters to be considered when making maintenance order.

The respondent in his reply argued on the second and sixth grounds of appeal jointly that it is undisputed that the house in question was built before marriage but it is not true that the appellant contributed to the finishing of the said house. He says the house is still unfinished due to lack of money. That he was ordered by the trial court to pay the appellant Tshs 2,000,000/= as her contribution of which he challenged at the first appellate court which reduced the amount to 1,000,000/=. He further says there is no justification for the said amount and prays for this court to order payment of Tshs. 200,000/= as compensation.

With regard to the fourth and fifth grounds of appeal he expresses that he would wish to provide more than what the two lower courts had ordered for maintenance, but unfortunately he does not have a stable income to pay the proposed amount per month. He says his day starts with a prayer and he enters the street to look for whichever work he finds to perform and gets paid according to the work done. So, he prays for the mercy of this court to reduce the amount to Tshs. 30,000/= per month of which he can struggle to to pay monthly. He further declares that in case his income increases he promises to pay even more than what is ordered by the lower courts. He denied the allegation that he is

earning Tshs 450,000/= per month and insisted that he has no permanent work.

The appellant did not intend to file a rejoinder. After having the submissions from both sides and going through the argued grounds of appeal, I find only two issues for determination, viz:

1. Whether the house in dispute is a matrimonial asset which is subject to division among the parties.
2. Whether the maintenance order was well considered by the two lower courts.

Starting with the first issue, the record shows that the property in dispute is the house which was undisputed that it was acquired before marriage but some improvements were made during the subsistence of marriage. Looking at the claim filed at the primary court, the respondent said they had not acquired any of the matrimonial assets. I have gone through the proceedings and realised that it is evident that the respondent acquired the said house before marriage but there were improvements which were effected during the subsistence of their marriage. The record shows that the finishing of the house was done

during subsistence of the marriage and, they built a 'frame' beside the said house. Obviously, this 'frame' is expected to generate income as it is known 'frames' are meant for business. **Section 114 (3) of the Law of Marriage Act**, CAP 29 R.E 2019 gives the position of the assets which was acquired before marriage but was improved during the subsistence of marriage. For easy reference I quote:

*"For the purposes of this section, references to assets acquired during the marriage **include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.**" (Emphasis added)*

This being the legal position, the house in question is declared as a matrimonial asset to the extent that the 'frame' thereto was built by joint efforts. However, the appellant says she contributed to the finishing of the house, but the record is silent as to which stage the house reached before marriage for the court to ascertain her contribution. So, the fact that they jointly built the 'frame' for business thereto which is not disputed by both parties amounts to contribution from both parties. Being a property for business it is fair for the

appellant to be given Tshs. 2,000,000/= as it was ordered by the trial court. Thus, the first issue is answered in affirmative.

Coming to the second issue regarding the maintenance order, the trial court ordered that the respondent should be providing Tshs 100,000/= per month. This order was reconsidered at the first appellate court that due to the level of income of the respondent he will be paying Tshs 80,000/= monthly for maintenance of their sole child. I wish to make reference to the Law of the Child Act which was promulgated in order to stipulate the rights of the child, promote, protect and maintain the welfare of the child. **Section 26 (1) of the Law of the Child Act, CAP 13, R.E 2019** which indicates the rights to the child when the parents are separated or divorced that a child shall have the right, among other things, to maintenance and education. **Section 44 of the Law of the Child Act, (Supra)** articulates:

44. A court shall consider the following matters when making a maintenance order-

(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;

(b) any impairment of the earning capacity of the person with a duty to maintain the child;

(c) the financial responsibility of the person with respect to the maintenance of other children;

(d) the cost of living in the area where the child is resident; and
(e) the rights of the child under this Act.

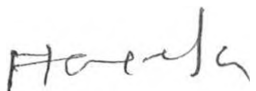
Looking at the above provision, the record shows that the respondent is a driver and the appellant is a business woman. They both do not have any impairment of earning capacity, and they have only one child who is subject to be maintained and the record is silent if they have any other responsibilities which they are legally bound. Considering the economic situation, the amount of Tshs 80,000/= is not satisfactory. However, in dealing with these kinds of cases one must consider the proportionality of all the listed points for considerations. A child must live according to the economic status of his or her parents. Keeping in mind the economic status of the respondent, an order of payment of Tshs 80,000/= per month is quite satisfactory. The appellant will have to contribute to maintain her son.

In short, this appeal is partly allowed. An order of the district court for distribution of matrimonial assets is quashed and the court upholds the order of the trial court. The order for maintenance of the child will remain undisturbed. No order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 4th day of January, 2022.




N.R. MWASEBA

JUDGE

4/01/2022