IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC MATRIMONIAL APPEAL NO. 25 OF 2021

(Arising from DC Matrimonial Appeal No 08 of 2021 originated from Matrimonial Cause No 117 of 2020 of Mwanza Urban Primary Court at Nyamagana)

ELIZABETH WATSON NYINGI----------APPELANT

VERSUS

WILBERD BANDOLA---------- RESPONDENT

JUDGEMENT

Last Order: 24.02.2022
Judgement Date: 29.03.2022

M. MNYUKWA, J.

This is the second appeal originating from Matrimonial cause No. 117 of 2020 at Mwanza Urban Primary Court and Matrimonial Appeal No. 8 of 2021 at Nyamagana District Court. The appellant herein petitioned for decree of divorce, division of matrimonial property and maintenance of a child at Mwanza Urban Primary Court in which for the purpose of this judgement I will refer it as the trial court. After hearing the evidence from both parties, the trial court granted divorce, made an order for the division of the matrimonial assets which was a matrimonial house at the ratio of

30% to the appellant and 70% to the respondent, the trial court also ordered the respondent to maintain their child by paying the school fees amounting to Tsh. 1,360,000/= yearly.

Dissatisfied, the appellant appealed to the District Court against the decision of the trial court raising three grounds of appeal as follows:

1. *That, the trial primary court grossly erred in law and fact by failing to find and hold that during the subsistence of their marriage, both the parties herein were employed in the civil service and thus each had direct or indirect adequate and substantial financial contribution into the acquisition of matrimonial properties and hence trial court erred in failing to order for an equal and a fair share of matrimonial property between the parties herein, owing the fact that the same was equally and jointly acquired by the parties herein during the substance of their marriage.*
2. *That, the trial primary court made a grave error in law and in fact by holding that the house in Ndofe, which was ruled to be the property of the child between the parties herein, be registered in the Respondent without considering the fact that it is the appellant herein who has the custody of the child of their marriage hence putting the subject property in danger of alienation given the fact*

that the Respondent has established different families with other women.

3. *That, the trial primary court made a grave error in law and in fact by shifting the burden of proof of financial contribution to the Appellant, contrary to the records of the court which show that even the Respondent himself miserably failed to adequately prove his financial contribution thereof, apart from the scanty and farfetched allegations. Being a mother and employed wife is an adequate proof of the Appellant's adequate contribution therein.*

At the end of 1st appellate court's proceedings and judgement, the court upheld the trial court's decision. The 1st appellate court held that the appellant provided no evidence /exhibit to verify on how she contributed on the acquisition of the house in question and so it concurred its findings with the trial court on division of matrimonial properties. The 1st appellate court also held that it was not wrong for the respondent to register the house on his name as a guardian of the child who is still a minor. The 1st appellate court held that it is the duty of the father to maintain his child and so the trial court was right on its order of maintenance.

The 1st appellate court decision to uphold the trial court's decision did not amuse the appellant and she now appeal to this court with 4 grounds of appeal as I reproduce them here under;

1. *That the two lower courts grossly erred in law and in fact by failing to find and hold that the Appellant herein is entitled to an equal share of the matrimonial properties, acquired through their joint and equal contributions, contrary to the weight of the evidence which proved that the Appellant immensely and equally contributed to the acquisition of the said matrimonial properties.*
2. *That, the lower courts grossly erred in law and fact by holding that the Appellant's only contribution was her performance of domestic duties and thus was only entitled to a meagre share of 30% equated to her domestic duties' performance.*
3. *That, given that the parties herein unanimously agree that the house at Ndofe had been given and handed over to the only child born of the parties herein during their marriage, the two lower courts made a gross error in law and in fact by holding that the same house could again be registered in the name of the Respondent, contrary to the fact that the trial court erred in law by involving and dealing with a none matrimonial property in a matrimonial issues, while the first Appellate court erred in law by holding that the said property should be registered in the name of the respondent because he has the custody of the said child contrary to the records*

which shows that the Respondent was never granted custody of the said child, but maintenance only.

4. *That, the first appellate court again grossly erred in law and in fact by failing to thoroughly, extensively scrutinize and analyse the evidence and proceedings both at the trial court and before the first Appellate court hence reaching a wrong and biased finding and conclusion.*

The appellant prayed for this court to allow this appeal with costs, quash and set aside the judgement and decision of the two lower courts, and any other relief the court deems fit and just to grant.

During hearing of this appeal, the appellant was represented by Mr. Yonna Shekifu learned advocate, while the respondent enjoyed the services of Ms. Marina Mashimba, learned advocate. The appeal was heard orally.

Before I toss myself in determining the present appeal, I find it necessary to look at the brief background of the facts that led to this appeal. The brief facts are; the appellant and respondent contracted customary marriage in between 2009 and 2010, when they were living at Musoma. Soon after, the respondent moved to Kigoma for work where started to cohabit with another woman and he sired a child, the fact that was also known by the appellant. The parties also were blessed with one son. The spouses started accusing one another on adultery allegations while living apart. Later on, the respondent moved to Magu where the

appellant also moved to Magu and that they did not cohabit together for a long time at Magu. However, the respondent alleged that the appellant had an extramarital affair with her office mate, an accountant whom she cohabited with him while living at Sengerema. That, at sometimes the appellant and respondent lived apart and the respondent alleged to have caught the appellant red-handed committing adultery with the said accountant at Sengerema. The parties had constantly misunderstanding led the respondent to refer the matter to the reconciliation board which its effort to reconcile the parties proved futile and so matrimonial cause was instituted before the trial court. That, during their marriage they had acquired properties which are houses that are being disputed as to whether they are matrimonial properties or not.

After the trial court heard the parties and their respective witnesses, it was established that the marriage between them has broken down irreparably and it went on to grant divorce, make an order for division of the matrimonial house on the ratio of 30% to the appellant and 70% to the respondent and ordered the respondent to maintain their child to the extent of paying school fees amounting to Tsh. 1,360,000/= yearly.

During the submission, the appellant's advocate was the first to kick the ball rolling, he adopted the petition of appeal and stated that he will

argue the 1st and 2nd grounds of appeal jointly and he will argue the 3rd and 4th ground separately.

On the combined 1st and 2nd grounds of appeal he submitted that, both the appellant and respondent were public servants and so they were generating income as reflected on page 3 of the judgement. That, the appellant was wrongly awarded 30% of the matrimonial property as she took loan liability as seen on page 2 of the typed judgement as the trial court acknowledged that the appellant took a loan of Tsh. 5 million for the purpose of doing fish business. That the appellant also did domestic chores which is part of the contribution in acquisition of the matrimonial property. That the trial court erred to treat the appellant as the house wife.

He went on that the trial court used the case of **Bi Hawa Mohamed V Ally Seif** [1983] TLR 32 to justify that the appellant was a mere house wife and therefore deserved that share on the division of the matrimonial property.

The appellant's counsel submitted further that, the trial court used bank slip to show the contribution of the respondent in building the house but the said slip had some irregularities as the slip were dated 7/8/2014 with total value of Tsh. 800,000/= while the disputed house was built on 2009 and parties were living on the disputed house since 2011 and so it

was wrong for the court to consider it as part of contribution. That, the respondent at the trial court did not object the evidence that the appellant took loan that was used in construction. The learned counsel cited the case of **Yesse Mrisho V Sania Abdul,** Civil Appeal No. 147 of 2016 were the Court of Appeal held that the court should take into consideration the contribution of each party in the marriage. He prayed for the grounds to be allowed.

In arguing the 3rd ground, the appellant's counsel submitted that, the court prejudiced the rights of the child and her mother. That the house that was bought in the name of the child was later on transferred to respondent's name while the appellant is the one who is granted custody of that child. Furthermore, there is a possibility the said house to be wasted as the respondent is living with another family at the moment.

He went on that, it is the best interest of the child under section 26(1) of the Law of the Child Act Cap 13 R.E 2019, that the house bought in the name of the child to be in possession of the appellant who is the mother of the child and living with him. That the house is the separate property and not part of matrimonial house and the court was not supposed to make an order for division. He retired on this ground praying for the appeal to be allowed.

On the 4th ground of appeal, the appellant's counsel submitted that, the respondent's evidence was not strong enough to prove his contribution in the acquisition of the said house. That, the evidence of DW2 and DW3 were just a mere word as there was no proof that they were given money by the respondent for the construction of the house. He further submitted that, the trial court did not analyse the evidence properly. He therefore, prayed for this appeal to be allowed with costs and the two lower courts' decision to be quashed and set aside and the court to grant any other relief it deems fit.

Responding to the appellant's submission, Ms Marina started by opposing appeal as presented by the appellant in her petition of appeal. She went on to submit on the combined 1st and 2nd grounds that, both lower courts were correct on deciding the appellant to be awarded 30% and respondent 70% of the matrimonial home which is situated at Shamaliwa. That the trial court reached the decision after analysed properly the evidence adduced on the contribution of each party on acquisition of that matrimonial property.

That, the evidence of the trial court shows that the money which was Tsh. 1,200,000/ used to purchase the plot at Shamaliwa was sent by the respondent. That the sale agreement bears the respondent's name and there is a presumption that if the property is acquired in the name of

one spouse, then it belongs to him unless there is evidence to rebut such presumption.

She further succumbed that, DW2 evidence as reflected on page 4 of trial courts judgement shows that the respondent was sending money for the construction of the said house at Shamaliwa. That, the appellant did not know where the house was built until 2011 when DW2 showed that house to the appellant. And that DW2 was the one supervising the construction of the house.

That, both lower courts took into consideration the appellant's domestic work as a contribution as it was held in the case of **Bi Hawa Mohamed** and decided to award her 30% as her contribution in acquisition the disputed matrimonial home.

The counsel for respondent further submitted that, being a public servant is not enough to show the appellant's contribution towards the acquisition of the disputed matrimonial house. That, the appellant did not tender any exhibit to show monetary contribution in acquiring the same.

She went on opposing the appellant's allegation of taking loan as she did not remember how much she took as a loan and so this evidence does not prove appellant's contribution of the said house. She further contended on the allegation of 5 million loan for fish business as the appellant's failed to prove the same and also there was no proof that the

money earned from fish businesses was used for construction of the house. That she contends so as page 2 of the trial court's judgement shows that the money was stolen.

She went further to elaborate on the cited case of **Yesse Mrisho** (supra)where the Court of Appeal on page 9 and 10 stressed on the provision of section 114 of the Law of Marriage Act, Cap 29 R.E 2019 and argued the court to take into consideration the extent of contribution of each party. That, the trial court and 1st appellate court took into consideration that the appellant was a public servant but did not contribute financially on acquisition of the matrimonial property as it is not true that she was treated as a mere house wife.

Regarding the presented slip dated 7/8/2014, Ms. Marina submitted that, it was misapprehension of fact as the slip did not show it was for the construction of which house between the Shamaliwa house that was occupied by the parties which its construction ended on 2011, and Ndofe's house that was built by the respondent as evidenced by DW3. She further submitted that, the trial court did not show if the slip was tendered to prove the construction of Shamaliwa's house, and since its construction ended on 2011 then it is clear that the slip involved the second house which is situated at Ndofe. She thereafter, prayed for the court to dismiss the 1st and 2nd ground of appeal.

On the 3rd ground, Ms. Marina submitted that, both lower courts decided that the house situated at Ndofe remains to be the child's property Yohana Wilberd Bandola and the said house can be registered in the name of either parent as a guardian of the chid who is below 18 years. She further submitted that, the trial court saw it to be wise for the house to be registered in the name of the respondent as a guardian and not the owner. That the granted right of occupancy was granted over the area while the matter was in trial court and it was registered in the respondent's name. However, after the trial there had no time to add the child's name to the title as the owner and respondent as a guardian due to consecutive trials.

That the other plot was bought for the benefit of the other child and the court ordered that plot to be separated from Yohana's and the appellant did not object. She further contested the appellant's reasons for opposing respondent's name to be entered as a guardian and submitted that custody cannot be a determining factor to deny the respondent to be the child's guardian. She went on that there was no court order regarding child's custody as it was not an issue. And therefore, custody can change at any time by considering the best interest of the child taking into consideration that the child is above 10 years. She supported the trial court's decision that the house to be registered in respondent's name as

a guardian as he is also the child's parent, and the one who bought the plot and built the same. She added that the respondent is also responsible for paying child's school fees. And that the fact that the respondent has another family does not deny him the right to be a guardian and be registered in Ndofe house.

Regarding the appellant's prayer to be given possession of the said house at Ndofe, Ms. Marina submitted that, this is new prayer and the court should disregard it as it was not raised in the 1st appellate court. She finalised the 3rd ground by praying the same to be dismissed.

On the fourth ground of appeal, Ms. Marina submitted that, this ground is baseless as the two lower courts analyzed the evidence tendered and correctly reached its decision. That, the respondent evidence was strong compared to the appellant's evidence. That DW2 and DW3 gave evidence on oath and they were entitled to credence as the position of law requires unless there was other proof to the contrary. That they witnessed to have supervised the construction of house while the appellant did not have any other witness apart from herself to prove that that she had constructed the house. She submitted that this ground lacks merit and should be dismissed.

She finalised her submission by praying the entire appeal to be dismissed with cost and the court to upheld the two lower courts' decision.

Re-joining, the appellant's counsel submitted that if being a public servant is not a reason to show that the appellant earned income and contributed to the acquisition of matrimonial property, the same goes to the respondent as he also did not tender any relevant document to show that he solely contributed to the acquisition of the matrimonial property.

That it was not easy for the appellant to write everything down since they started living together in 2009 and she took loan for the betterment of the family as during the marriage the couple were living in good faith.

He submitted further that; the respondent was also required to prove that he solely owned the fish business by issuing the business licence or any other document. That, since the respondent did not tender any exhibit, it means that he also failed to prove that he solely owned that business.

The appellant's counsel opposed the respondent's submission regarding misapprehension of fact as he submited that Ndofe house is not among the disputed house in this appeal, as the controversy was in Shamaliwa house which both parties proved their contribution. He finalised by pointing out that, if the respondent is to be registered as a guardian, then it should be clearly indicated so since up to now it is not shown if he is the guardian and this depict bad faith on part of the

respondent. He therefore, prayed for the appeal to be allowed. That mark the end of the submission from both parties.

Before I determine this appeal, I find it prudent to thank both counsel for their well-argued submissions. The court will determine this appeal with one issue in question as to whether there is merit in this appeal. In answering this issue, I will determine the four grounds as chosen to be argued by the parties.

In the 1st and 2nd grounds of appeal, the appellant's counsel main contention was on the share of 30% awarded in the matrimonial house by the trial court as it treated the appellant as a mere housewife without considering that she was a public servant and she took loan that used to establish fish business which was part of the income of the parties.

The position of the law guiding on the issue of division of matrimonial assets that is the Law of Marriage Act, Cap 29 R.E 2019, which is very clear on the criteria that need to be considered by the court when ordering division of the matrimonial assets between the parties. The provision of section 114 gives power to the court to order division of matrimonial properties that were acquired during the subsistence of the marriage. However, the provision goes deep to warrant the court to take into consideration the extent of contribution of each party in acquisition

of such properties or assets. See the case of **Gabriel Nimrod Kurwijila V. Theresia Hassan Kalongo,** Civil Appeal No. 102 of 2018.

In our case at hand, the appellant's counsel disputes the division of 30% to the appellant as her share in acquisition of matrimonial property and faults the trial court's decision as she asserts that the trial court did not take into consideration that the appellant was a public servant.

The law is settled that what matters in the division of the matrimonial assets is the proof of the contribution by the party in acquisition of the disputed matrimonial assets. I entirely agree with the respondent's counsel that, being a public servant does not necessarily mean that the appellant contributed towards the acquisition of the property in dispute which is the house situated at Shamaliwa. From the trial court's records, it is clear that both parties were public servants as stated by the parties. But there was nothing more to indicate that the appellant used her earnings as a public servant to the acquiring of disputed matrimonial home of Shamaliwa.

The appellant's counsel asserted further that the court did not take into account that the appellant took loan liability. From the trial court's record, the appellant testified that she did not remember how much loan was taken. I take appellant's assertion to be mere the words as there was no exhibit to back up her assertion and worse enough the appellant

testified that she don't even remember how much she took. As a matter of law, the appellant was supposed to prove what she alleged but even her own words betray what she testified as she can't even remember the amount she took as loan, and more importantly, she did not state as to how much was apportioned in the construction of the disputed house of Shamaliwa.

The same goes for the alleged loan taken for the fish business, I agree with the respondent counsel that, for the appellant to base her contribution in the said business she was supposed to show at least how much was being generated from the business and how much was injected to the construction of the house. But there is no evidence as to that effect. Further, the appellant's counsel asserted that the respondent did not object on the loan taken for the fish business, however going through trial court's judgement, the appellant talked about that loan when she was answering courts questions, that's after respondent cross examination, meaning he had no opportunity for asking about it. Also, the respondent denied to be indebted when he was cross examined by the appellant. And he further testified that the fish business was his business as reflected on page 7 of trial court's proceedings. When I am comparing these evidences, I am of the settled view that, the appellant did not prove her extent of contribution into the fish business.

Appellant's counsel also asserted that the trial court was wrong to rely on the bank slip, I also agree with the respondent counsel that the slip was tendered basing on the house situated at Ndofe, although at the trial court's proceeding it was not clarified by the respondent that the tendered exhibit was for which property. However, the evidence given by the respondent on page 7 of the trial court's proceeding shows the money was sent to Issa Yombo who was the masonry who built the house at Ndofe as well as SU3 testimony when answering the respondent's question said that, the house was built at Ndofe. Thus, considering the fact that the disputed house is that which is situated at Shamaliwa, it is my view that this assertion is baseless.

Furthermore, going through the trial court's judgement, the trial magistrate clearly evaluated the evidence before her on the extent of contribution of each party towards the acquisition of the matrimonial house at Shamaliwa and she was satisfied that, the evidence given by the respondent was very stronger than that of the appellant. Therefore, the division of the share of 30% of the house situated at Shamaliwa awarded to the appellant was justified considering the evidence on record. In the foregoing reasons, the 1st and 2nd grounds of appeal are hereby dismissed.

On the 3rd ground of appeal, the appellant's counsel submitted that the house located at Ndofe which is their child's house has to be registered

in the name of the child and the appellant as her guardian as the house is in danger to be wasted for the reason that the respondent has established another family with another woman. First of all, I would like ti put it clear that the trial court did not award the house to the respondent as it is reflected on page 5 and 6 of the trial court's judgement which clearly stated that the house remains to be the child's property. Also, there was nowhere where the trial court said the respondent be registered as the guardian because he has custody of the child. The trial court, only said that, it was not bad for the respondent's name to appear as a child guardian although it did not disclose its reasoning. The same goes to the 1st appellate court when determining the second ground of appeal, at page 8 of its judgement, the court said despite the fact that the child was placed under the custody of the appellant, still the respondent was ordered to maintain the child. And so still there is no particular time when the lower courts said the respondent had custody of the child.

In that view, I agree with the trial court's decision that, respondent as the father of the child also qualify to be the guardian of the child. However, it is my considered view that taking into consideration that the appellant is also the parent of the child and now that the parents are not in good terms after divorce, then for blocking any suspicious intention against each parent toward the property, it is for the interest of justice

and the best interest of the child for both parents to appear as the child guardian in the property title. The reason behind, being that it will be impossible for a single parent as a guardian of the child to do anything on the property without the other being notified by the proper authority. And so, this will waive any speculated danger towards the child interest over the house.

Further, the appellant's counsel advanced the prayer that, the appellant to be given possession of the house as she now has the child custody. I would not confine myself in entertaining this prayer as it was not raised as a ground in the 1st appellate court. For that reason, the 3rd ground is hereby allowed to the extent as shown above.

Moving to the 4th ground of appeal, the appellant counsel asserted that the trial court failed to analyse the evidence given as evidence of DW2 and DW3 were just the mere words. At this juncture, I should point out that in civil cases the standard of proof is on the balance of probability, that the one with strong evidence will be the winner. (see section 19 (2) of the Magistrate's court Act, Cap 11 RE 2019 and Regulation 6 of the Magistrates court (Rules of Evidence in Primary Court) Regulations, 1964 GN No.22 of 1964). Looking at the trial court's judgement, it is my considered view that, the trial magistrate properly evaluated and analysed the evidence on record and reached its decision. From the records, the

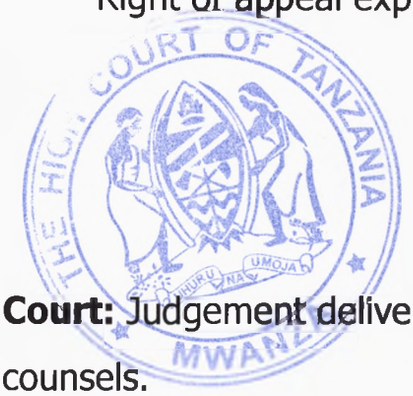
appellant adduced her evidence aiming to prove that their marriage was broken down. She outlined her contribution through trial court's questions without any other evidence to prove the same, comparing to the respondent who had other witnesses to prove his assertions on acquisition of property together with exhibits.

I still hold the view that the trial court's magistrate incorporated the evidence adduced in her judgement while putting both appellant's and respondent's evidence into critical scrutiny to see which one had stronger evidence than the other as seen on page 5, 6 and 7 of the trial court's judgement. And so, the trial court magistrate properly analysed the evidence before reaching her decision. The same goes to the 1st appellate court which also concurred with the trial court's decision that the appellant failed to prove her contribution compared to the respondent evidence as well as to why the respondent be registered as the child guardian. For that reason, I dismiss the 4th ground of appeal.

In the upshot this appeal is partly allowed as far as ground No. 3 is concerned, while the remaining grounds are hereby dismissed. Taking into consideration of the relationship of parties, I make no order as to costs.

It is so ordered.

Right of appeal explained to the parties.



M. MNYUKWA
JUDGE
29/03/2022

Court: Judgement delivered in the presence of both parties learned counsels.

M. MNYUKWA
JUDGE
29/03/2022