IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE-STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO. 20 OF 2022

(Arising from the decision of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Appeal No. 22 of 2021)

JOSEPH MTUKA MWAFISI.....APPELLANT

VERSUS

HAPPINESS TILYA.....RESPONDENT

JUDGMENT

Date of last order: - 9/02/2023
Date of judgment: - 22/03/2023

OPIYO, J.

Joseph Mtuka Mwafisi aggrieved by the decision of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Appeal No. 22 of 2021 appealed against the said decision based on four grounds as stipulated hereunder;

1. That, the learned Resident Magistrate grossly erred in law and fact by not establishing the extent of contribution of the respondent in deciding on the division of the house at Chanika.

2. That, the learned Resident Magistrate grossly erred in law and fact by not establishing the best interest of the child who was put into the respondent's custody.

3. That, the learned Resident Magistrate grossly erred in law and fact by disregarding and ignoring to objectively evaluate, analyse the gist and value of evidence adduced during the hearing at the trial court.

4. That, the learned Resident Magistrate grossly erred in law and fact by establishing that all the properties owned by the appellant were acquired by joint efforts with the respondent.

Wherefore, the appellant prays for the appeal to be allowed, and the judgment and decree delivered on 16th February 2022 to be set aside, the cost for this appeal and any other relief deems fit and just to be awarded by this court.

This matter was disposed of by way of a written submission, the appellant through the assistance of counsel Bernard Mashauri submitted on the first ground that, the respondent's extent of contribution was not ascertained in deciding on the division of the house at Chanika. The plot

at Chanika was bought on 07th June 2014 by appellant as per sale agreement tendered. Also that there was admission by the respondent that the house was built during separation and when she returned back she found the house and she does not know where the funds came from.

On the second ground that the best interest of the child was not established as the custody of the child was put to the respondents. This principle was overlooked as the child was at boarding school with her sister, despite her choice to stay with her mom her basic right would have been in jeopardy as the appellant is the one paying all the fees.

He argued that, in civil litigations, the burden of proof lies on the one who alleges as per section 110(1) and 112of the Evidence Act, Cap 6, R.R 2019, and referred the case of **Gabriel Nimrod Kurijwa v Theresia Hassan Malongo, Civil Appeal No. 102 of 2018(2020) TZCA 31, (20th February 2020)** thus the trial court did not evaluate the evidence in the record on the appellant contribution towards the acquisition of the properties.

Lastly, the appellant stated that the trial court erred in law in holding that, all the properties were acquired by joint efforts. The respondent's claim that she contributed through her chicken business, salon, and VICOBA is unrealistic since it was after the completion of the house except for the fence and more so it was the appellant who gave that capital and the chicken hut and shop rooms were built alongside the fence, there is no evidence on the joint contribution. The attention of the court was drawn to the holding in the case of **Zawadi Abdallah v Ibrahim Iddi (1980) TLR 311**. Based on the above submission the appellants pray for the appeal to be allowed, and for judgment and decree to be set aside.

In reply, the respondent combined grounds 1, 3, and 4 and stated that the issue of the extent of contribution was disposed of and elaborated by the appellate court on page 7 of the impugned judgment after the court was satisfied by her contribution came up with the decision that it was fair to award the respondent 40% and there is no evidence that, the respondent's business was financed by the appellant.

On the second issue regarding custody, the respondent stated that the trial court did right to place the younger issue named Julieth Joseph, 6

years as the child chose to stay with the respondent after being asked by the trial court and referred to the case of **Abdulharam Salim Msangi v Munira Margarate (1984) Appeal No. 37** of 1983 and prayed for the appeal to be dismissed with cost.

From the grounds raised by the appellant only two grounds may be formulated enough to dispose of the appeal. These are whether the first appellate court regarded the parties' extent of contribution in dividing matrimonial properties, and whether the order of the custody of the children was for the best interest their best interest.

Starting disposing of the first ground it is without saying that section 114(1) of the Law of Marriage Act, Cap 29, R.E 2019 (*LMA*) vests the power to the court to order the division of matrimonial assets jointly acquired. And section **114(2) (b)** and **(C)** places some tests which the court may regard in ordering the division;

> *"(a) N/A*
> *(b) the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets;*
> *(c) any debts owing by either party which were contracted for their joint benefit."*

Thus, the law requires each party to produce evidence of the extent of contribution or debt incurred towards the acquisition of such property. the first appellate court awarded the respondent 40% of the share of the matrimonial home and 60% to the appellant. Also the respondent was awarded 30% share of the plot located at Ikwiriri and the same at percentage for the plot at Dodoma. The remaining 70% goes to the respondent. (see pages 7 and 8 of the District Court judgment).

In this appeal, the appellant's claim is that, the division is not just since he built the house alone during the separation and the respondent contributed only 800,000/- in building the wall (fence), 3 Iron Sheets for the frames as per page 5 of the trial court proceedings. The facts are silent as to when the parties separated. It is not disputed that the marriage was contracted in 2014, this was after they stayed together for some time, but it is not very clear as to when the parties separated and when did they reunite. These facts would have been very useful to back up the claim that the house was built during separation and during the reunion, and the respondent contributed in constructing the fence. From the evidence of SM2 and SU1 at the trial court they all stated that the construction of the house started back in 2019 and SM3 stated that the construction started in 2015.

As the facts are silent it is hard to calculate with precision each party's contribution as there was no clear quantification of everything. At page 5 of the trial court proceedings it is stated that the appellant herein borrowed Tsh. 1,500,000/= to buy a farm at Bunju and a plot at Dodoma and the respondent was one of the witnesses. The facts were again silent on how the debt was repaid, if the respondent had any contribution in repaying the debt or not. That would anyhow constitute financial contribution only. The law does not however recognise only that single source of contribution. In the famous case of **Bi Hawa Mohamed v Ally Sefu (1983) TLR 32** introduced the issue of consideration of spouse's contribution to the welfare of the family as sufficient contribution in acquisition of the matrimonial properties as well. It came out with two major factors in that regard by stating that:-

> *"(i) Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider a contribution by a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets;*
> *(ii) the "joint efforts" and 'work towards the acquiring of the assets have to be construed as embracing the domestic "efforts' or "work" of husband and wife"*

Therefore, in consideration of the respondent's contribution in the acquisition of the house at chanika, not only the Tsh 800,000/= admittedly issued by her for the fence, the 3 iron sheets for the frame, Poultry business are to be considered, but also her general contribution towards the welfare of the family through domestic work. The respondent testified not being aware of source of funds that was used in the construction of the house apart from contribution from the appellant's mother. That means the house was not form their joint efforts only. There is contribution from appellant's mother to be considered in distributing the same.

Reading the records critically, the appellant said the house was constructed at the time of separation. However, at the time of the alleged separation the respondent seemed to have been at appellant's mothers' home (see page 10 of the proceedings where SU1 stated that the appellant left them with his mother). That is not a separation known in law that counts in excluding ones contribution in acquisition of matrimonial properties. Her staying at his mother's home was in furtherance in taking care of the family while he was working on their own accommodation. Therefore, repondent's contribution through work

and later contributing 800,000 still counts. However for the house that was buit solely from monetary contribution of the appellant and her mother award of 40% in the value of the house by the first appellate court for respondent's contribution through work is on the higher side. I reduce it to 30% and the appellant 70%. The award of of 30% for respondent and 70% for appellant of the value of farms located at Ikwiriri and Dodoma respectively are retained as concurrently held by the both lower courts.

On the second issue regarding the custody of the issues, it is observed on page 8 of the trial court Judgment that Joyce Joseph, 9 years chose to live with the appellant and Julieth Joseph (age not mentioned) chose to live with the respondent and the court later decided the appellant to have custody of both issues as he is able to maintain them (see page 8 of the trial court Judgment), at the appellate court the District Magistrate order the child to reunite with her sister and be in the custody of the mother (respondent herein) until she reaches the age of maturity as per own wishes (page 10 of the District Court judgment).

Perusing the typed trial court proceedings, I find no place where the court considered the wishes of the children. I have failed to know at

what point were the said children wishes ascertained, as the proceedings are silent. In obtaining the wishes of the child certain requirements must be met like the proceedings to be in camera, to be done in presence of a Social Welfare Officer in order to have an independent opinion of the child as per Section 39 (2) of the Law of the Child, Cap 13, R.E 2019 and section 11 of the Law of the Child, (supra) provides for the right of the opinion of the matters affecting his /her wellbeing which custody is one of them. it states that;

> *"A child shall have a right of opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being"*

I find there is procedural irregularity as all these were not reflected in the proceedings hence, I hereby remit back the matter to the trial court to determine issue of custody only and it must be reflected in the proceedings and be done accordance with the laws, in due time the issues are to remain with the respondent (mother) and the appellant to provide maintenance as ordered by the first appellate court until the matter is resolved by the trial court. Having said so, this appeal is partly

allowed to the extent explained. Regarding the relationship of the parties, I order no costs.

It is so ordered.

M. P. OPIYO,

JUDGE

22/03/2023