IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 01 OF 2023

(Originating from the District Court of Kinondoni at Kinondoni in Matrimonial Cause No. 103 of 2014)

HELLEN CHANUA SAWERE ..... APPELLANT

VERSUS

DAVID JOHN ADAMS..... RESPONDENT

JUDGEMENT

2nd October, 2023 & 1st December, 2023

MWANGA, J.

The appellant, **HELEN CHANUA SAWERE**, is a Tanzanian citizen who lived in England for about 30 years. She worked at Heathrow Airport as a security officer who earned a salary of 1400 pounds per month. For some time, she also worked as an interpreter.

Likewise, the respondent, **DAVID JOHN ADAMS,** a UK citizen also worked at Heathrow Airport as a senior officer-European Customs Management based in Brussels. He was earning 40,000 pounds a year. He had also worked at TNT in Amsterdam where he earned 1000 pounds.

The facts can be stated. The parties started their intimate relationship in 2005 and it was when the respondent came to Tanzania for the first time. It was an incredible relationship that led to the celebration of their marriage at the Registrar's office in District West Berkshire in England on 29th June 2007.

After retirement, the appellant decided to come to Tanzania to start her new life. The respondent also got retired in 2009, and decided to join her beloved wife and started living together in the disputed matrimonial house in **Plot No. 108, House No. KUN/KIL/0/BLOCK "A".** The house is located in Kinondoni Municipal Council at Kunduchi Ward, Kilongawima Steet within Dar e Salaam Region.

The parties are not blessed with any issues. Their presence in court corridors is because of the above-mentioned house after the divorce had been issued. It occurs that, before the marriage, the couples had their way of life back in England.

The appellant had acquired properties in the UK (three houses), which she sold. At the trial court, she said that some of the monies as a result of the sale were sent to Tanzania to her brother, Dunkan Ndaushau who

supervised the construction of the disputed matrimonial house in question. Likewise, the respondent also had his pattern of life. He had divorced his former wife in England which led to the sale and distribution of the matrimonial property jointly acquired with his ex-wife. The house was located at Maiden Head in the United Kingdom. He told the trial court that, after the sale, he received 225,000 Pounds out of the 450,000 pounds of the sold price. He contends that he gave monies to the appellant (30,000.00 pounds) to buy a plot, and further that other monies were sent, through the appellant, to Tanzania to build a house with the assistance of her family members.

While living in the disputed house, difficulties crept into their marriage. Hence, the appellant petitioned for divorce in the District Court of Kinondoni at Kinondoni in Matrimonial Cause No. 103 of 2014 seeking a declaration that the marriage be dissolved. She also sought the right to her maintenance and costs of the suit.

The grounds raised for dissolution of marriage are due to allegations of the respondents being cruel, adulterers, and lack of love among themselves. Per contra, the respondent denied the allegations. However,

through his reply or answer to the petition, he did not dispute the divorce, acknowledging that, no more love between them.

It was the counsel for the petitioner by then Mr. Tairo who submitted to the trial court that, the issue of divorce is agreed upon by the parties, the fact that the learned counsel for the respondent, Mr. Makusha also admitted.

Subsequently, the trial court on page 4 entered the judgment on admission by invoking Order XII, Rule 4 of the Civil Procedure Code, Cap. 33 R.E 2002. Given such admission, the trial court declared that the marriage had been broken down irreparably and the parties were no longer husband and wife.

The trial court then had to proceed with the determination of the remained issues of matrimonial property and the appellant's maintenance. However, as it appears in the proceedings, it was seen as an oversight to fix the matter for hearing because the issues were not framed and the speed truck was not set. That was also proceeded by the filing of a list of additional documents by the respondent.

Before the same were filed, the counsel for the respondent Mr. Tesha prayed to amend the pleading i.e., an answer to the petition for the reasons

that there were a lot of things that needed clarification but were not incorporated in the answer to the petition.

It followed that the first and final PTC was conducted which was also proceeded by the framed two issues, to wit;

i. ***whether the property is situated at Plot No. 108, House No. KU/14/KIL/0/Block "A" was jointly acquired by the parties.***

ii. ***What reliefs are the parties entitled to?***

Over time, the appellant was granted an order to file a reply to an answer to the petition. Ultimately, the counsel for the respondent Mr. Tesha discovered that, the respondent's answer to the petition required to incorporate the cross-petition. Therefore, he was granted prayer for that matter. The appellant was then granted prayer for a reply to the cross-petition. In the end, the hearing started.

After a full trial, the trial magistrate noted that a divorce decree was issued upon judgment on admission. The court also ordered the matrimonial property in **Plot No. 108, House No. KU/14/KIL/0 /Block "A"** be divided equally, with no order as to the maintenance of the appellant.

The appellant was aggrieved by such a decision. Therefore, she filed ten (10) grounds of appeal as it appears in the amended memorandum of appeal as follows: -

1. *That, the proceedings in the trial court are defective as they were marred with irregularities.*
2. *That, the trial Magistrate erred in allowing amendments of pleadings after the commencement of the hearing.*
3. *That, the trial Magistrate erred in allowing amendment of the amended pleadings.*
4. *The trial Magistrate erred in entering two judgments in one case.*
5. *That, the trial Magistrate erred in law in proceeding with the case without parties adducing marriage certificate and certificate of Reconciliation Board as part of the exhibits.*
6. *That, learned trial Magistrate erred in finding that property on Plot No. 108, House No. KUN/KIL/O/BLOCK A is a Matrimonial property.*
7. *That the decree is defective for failure to comply with the provision of Order XX rule 9 of the Civil Procedure Code, Cap. 33 RE 2022 read together with rule 29 (2) of the Law of Marriage (Matrimonial Proceedings) Rules 1971.*

8. *That, the learned trial Magistrate erred in finding that the respondent contributed to the acquisition and development of the property on plot 108, House No. KUN/KIL/O/BLOCK A.*
9. *That the trial magistrate erred in ordering the equal division of Matrimonial property without ascertaining the extent of contribution by parties.*
10. *That, the trial court had no jurisdiction to try the case.*

During the hearing of the appeal, the appellant enjoyed the representation of Mr. Jamuhuri Johson and the respondent was represented by Mr. Florence Tesha, both learned counsels.

The Counsel, Mr. Jamuhuri Johson argued grounds of appeal Nos. 1, 2, 3, and No.4 jointly and together. He contended that the proceedings are marred with irregularities. According to him, on page 2 of the proceedings, there is an order recorded on 25th March 2015 that the judgment on admission shall be entered on 14th April 2015. Therefore, the counsel raised two things; **One** that it is impossible to have the Judgment entered and then followed by a reply to the documents of the Respondent. **Two,** under page 3 of the proceedings, there is no way there can be a judgment within the judgment. The counsel referred to the judgment on admission and the final judgment

delivered by the trial court stating that there are two judgments in one case. The counsel added that even if the said judgment on admission was a ruling of the trial court it was not entered at the first hearing of the suit and still it was entered when the pleadings were incomplete. He supported his stance with the decision of **Joseph Warioba Butiku vs Perucy Muganda Butiku** [1980] TZHC 4 (1 December 1980) 1987 TLR 1 (TZHC) where, Biron, J. held that;

> ***"By Rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules 1971, the court shall proceed to try a petition in the same manner as if it were a suit under the Civil Procedure Code 1966." And by Order XV Part 1 of the Civil Procedure Code 1966: where at the first hearing of the suit it is apparent that the parties are not at issue on sufficient questions of law or of fact, the court may at once pronounce judgment."***

On the other hand, Mr. Tesha took a different path. He contended that, since parties were not at issue that there was no more love between them the judgment on admission was legally entered. The counsel supported his contention in the cited case of **Joseph Warioba Butiku VS Perucy Muganda Butiku**(supra).

In response to the question that there are two judgments in one case, Mr. Tesha replied that it would be two judgments only if the court had made

a final judgment on the same issue. He pointed out that the judgment on admission was on the issue of divorce alone and the remaining two issues in the final judgment were on the distribution of matrimonial properties and the maintenance of the appellant. In his view, even in the final judgment, the trial court referred to the judgment on admission entered earlier.

Mr. Jamuhuri Johnson raised another aspect of irregularity stating that, the trial court entertained an amendment of the pleadings after the final PTC without first vacating from the scheduling order. The counsel supported his stance in the case of **Equity Bank (T) Ltd vs Abdulrahman Mohamed Kwadu t/a Kwadu Mikoma Enterprises & Another,** Misc. Civil Application No. 369 of 2021) [2022] TZHC 453 (11 March 2022) where my brother Kakolaki, J. held that the law under Order VIII Rule 23 of the CPC requires that, departure from, scheduling order shall be made where the court is satisfied that such departure or amendment is necessary in the interest of justice.

In reply, the respondent's counsel submitted that parties were accorded the full right and represented by their advocates. Additionally, that the pleadings could be amended at any time and no law stated to the contrary. In support of his contention, the counsel cited Order VI Rule 17 of

the CPC. He further submitted that the case cited by the appellant's counsel is distinguishable because it is a civil case and not a matrimonial one. He further averred that even if the court did not grant such leave, it was the court that allowed such departure. Hence there is no irregularity.

I have seriously applied my mind regarding the submissions of the learned counsels on the 1st,2nd,3rd, and 4th grounds of appeal. My analysis shall be based on two issues. **One,** whether the act of the trial Court to enter the final judgment within the judgment on admission amounts to two judgments. **Two,** if there is any departure from the scheduling order, what would be the consequences according to law?

It is my thought full consideration that, the judgment on admission may be entered where a party to the suit admits the claims or certain facts specifically pleaded in the plaint. According to law, the defendant or respondent may admit the claim or claims in full or in part. In Tanzania, judgment on admission is governed under the provision of Order XII, rule 4 of the CPC which provides, thus;

> ***"Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order as upon such admissions he may***

be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just".

Given the above, the provision is clear and straight. No cosmetic is required to be painted in the provision. Where there is an admission of fact by any party, he may apply to the court for a judgment or order as the case may be.

Because of the above, I have found nothing done by the court or parties. The counsel for the respondent is right to apply to the court for judgment on admission having observed that the parties admitted in their pleadings that no more love between them and **they did not dispute the issue of divorce.**

As I have previously noted, the counsel, Mr. Tairo who was holding a brief for Mr. Kugesha, and Mr. Makusha applied to the court for judgment on admission to be entered. Upon such application, the trial court entered judgment on admission as reflected on pages 4 and 5 of the typed proceedings.

Because of such analysis, I am inclined to hold that, there is only one judgment that is also reflected in the judgment on admission which is known by its name under Order XII, rule 4 of the CPC. Again, in the case of **Janeth Gonde Rubirya versus Pator Peter Masawe,** Civil Appeal No. 39 of 2022 the court held that parties can agree to the fact that they no longer want to live together as husband and wife. For ease of reference, below here is the holding;

> ***"While parties can agree to the fact that they no longer want to live together as husband and wife*** *the court has to ensure that the marriage has irreparably broken down before it can grant a decree of divorce as provided by section 99 read together with section 107 of the Law of Marriage Act". (***Emphasis is mine)**

The holding above, therefore, drives me to conclude that, this tiny ground of appeal lacks merit.

The other ground is regarding amendments to pleadings after the final pre-trial conference. The appellant's counsel argues that after the completion of the PTCs, pleadings cannot be amended without vacating the scheduling order. Opposing Counsel for the respondent stated that the pleadings can be amended at any time and no law states to the contrary.

I certainly agree with both counsels on the positions stated. Looking at the proceedings and as conceded by Mr. Tesha, after the judgment on admission was entered, both parties requested amendment of the pleading which was granted until on 14th January 2016 when the first PTC was conducted. Moreover, the Final PTC was conducted on 18th March 2016. Afterward, the counsel for the appellant realized that the appellant had filed the divorce petition a second time instead of replying to an answer to the petition. Given that, the court granted the prayer to file a reply to an answer to the petition. Eventually, as I have indicated earlier the counsel for the respondent Mr. Tesha requested to amend the answer to the petition to include the cross-petition, and the appellant was given leave by the court to make a reply.

It is true that, when all those were done, there was no prayer by either the appellant or the respondent to the court to depart from the scheduling order where both parties indicated that, **they did not intend to file further applications.**

The law is settled. Rule 24 of the Law of Marriage (Matrimonial Proceedings) Rules 1971 provides that pleading can be amended at any time if sufficient cause is shown. The provision reads;

"The court may, if sufficient cause is shown, allow any party at any time before the conclusion of the trial of a petition to amend his pleading, subject to such order as to costs as the court may think fit to make"

With the above position, it is entirely true that, much as the amendment of the pleading can be done at any before the conclusion of the trial of the petition, it is also the law under Order VIII, Rule 23 of the Civil Procedure Code, Cap 33 R. E 2022 that such amendment cannot be done without first vacating from the scheduling order. The said Order VIII, Rule 23 reads;

"Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary for the interests of justice and the party in favor of whom such departure or amendment is made shall bear the costs of such departure or amendment unless the court directs otherwise".

The above held is also echoed in the decision of the Court of Appeal in the case of **Bunda Town Council and 4 others versus Elias Mwita Samo and 9 Others,** Civil Appeal No. 309 of 2021 which provides;

"*The trial court cannot grant an order for amendment of pleadings or addition of parties after a scheduling conference order has been made,*

unless it is satisfied, which was not in this case, that such a grant, in so far as it has the effect departing from or amending the scheduling conference order, is necessary in the interest of justice."(emphasis is mine).

Taking the view above, and after having perused the entire proceedings, the amendment effected in this case had the effect of departing from or amending the scheduling order. However, the proceedings fall short of indicating that there was a departure and if the trial court was satisfied that the amendment was necessary in the interest of justice.

The position of the law above was a result of the amendment of the Civil Procedure Code, by GN No. 381 of 2019. Before the amendment, there was a similar governing Order VIIIA, Rule 4 of the Civil Procedure Code Act 1966, which was couched in similar wordings as follows;

"Where a scheduling conference order is made no departure from or amendment of such 'order shall be allowed unless the court is satisfied that such departure or amendment is' necessary in the interests of justice and the party in favor of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise".

Based on the above, Honorable Masati, J. as he then was, when applying the above provision in the case of **Tanzania Fertilizer CO. LTD**

vs National Insurance Corporation of Tanzania Limited & another (Commercial Case No. 71 of 2004) [2006] TZHC 209 had this long observation;

> *"As can be seen the rule is couched by using the term "shall". The first question is whether the rule is mandatory or merely a directory. If an act done in breach thereof must be invalid, but if it is directory the act will be valid although the noncompliance may give rise to some other penalty if provided by statute. The question as to whether a provision is mandatory or directory is upon the intent of the legislature, as can be discerned from the phraseology, its nature, its design, and the consequences that would follow from construing it one way or the other; but above all whether the object of the legislation will be defeated or furthered. If the object of the legislation will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general the inconvenience will be created for innocent persons without very much furthering the object of enactment, the same will be construed as a directory.* ***In my view, the object of enacting O. VIIIA of the Civil Procedure Code is to speed up and minimize delays in the disposal of civil cases by setting different speed tracks for different types of cases. In real terms and in my experience, those speed tracks are more observed in their breach than in their compliance.*** *Some of the reasons for noncompliance are genuine, but some are not.* ***So,***

> ***construing the rule as mandatory would lead to the nullification of all the proceedings conducted beyond the scheduling order.*** *And this will have dire consequences for those with genuine causes. Taking into account the phraseology of the rule, the consequences that would follow if it is construed as mandatory, and the penalty provided for noncompliance and the intention of the legislature,* ***I have to conclude that r. 4 of O. VIII A of the Civil is merely a directory, although the word shall', is prima facie mandatory. However, although directory, and without losing sight of the intention of enacting O. VIII A, I agree that the rule must be construed strictly, if the parties are to be put on alert".(emphasis is mine).***

Admittedly, in the present case, both parties resorted to amendment of the pleadings without first obtaining leave and departing from the scheduling order. However, of most significance is that when the counsel for the respondent sought leave to amend an answer to the petition and include the cross-petition, the counsel for the appellant by then conceded to the prayer. I tend to agree with the counsel for the appellant Mr. Jamuhuri that, there was no departure from the scheduling order, But I do not agree with him that the remedy available is to nullify the proceedings.

As Hon. Massati, J. held, construing the rule as mandatory would lead to the nullification of all the proceedings conducted beyond the scheduling

order. I agree with him that, the nullification was not what the legislature intended. In the circumstances of this case, it is my view, that such oversight can be cured by the overriding objectives which are famously known as the oxygen principle. I find no need to impose technicalities in the dispensation of justice.

After all, such an oversight did not cause undue delay and no party suffered undue prejudice; For example, in a divorce, it is not uncommon for one party to want to drag out the proceedings. Sometimes one party is waiting for the other to commit some act that will prejudice the other in the eyes of the court. I take the wisdom of the late Mwalimu Julius Kambarage Nyerere, first President of the United Republic of Tanzania in his book "Freedom and Socialism" Oxford University Press Dar es Salaam (1968) on pages 110 – 112 stated as follows; regarding the Judiciary in the one-party state. He said;

> ***" ... the fact that Judges interpret the law makes it vital that they should be part of the society which is governed by law. Their interpretation must be made in light of the assumptions and aspirations of the society in which they live. Otherwise, their interpretation may appear ridiculous to that society and may lead to the whole concept of law being held in contempt by people."***

As it can be seen from the records, after the respondent's counsel asked for the prayer to amend an answer to the petition, the appellant was allowed to file a reply to an answer to the petition. More importantly, even before the counsel for the respondent put forward his prayer before the magistrate, the counsel for the appellant filed the petition for divorce for the second time instead of a reply to an answer to the petition. Therefore, I find the grounds of appeal relating to the irregularities untenable in the eyes of the law.

On the 5th ground of appeal, counsel for the Appellant submitted that from exhibits PE1 to PE9 no marriage certificate and reconciliation board certificate were tendered as an exhibit in court, the act he considers fatal. The counsel cited section 105 of the Law of Marriage Act, Cap. 29 R.E 2019 which provides that a reconciliation board certificate is mandatory. He also cited the case of **Mhubiri Rogega Mong'ateko vs Mak Medics Ltd,** Civil Appeal 106 of 2019 CAT-Unreported) which stated that relying on evidence that was not tendered and admitted in evidence as per the requirement of the law is fatal. Mr, Tesha, on the other hand, considers such submission as irrelevance in the circumstances of this case. He argued that the appellant in her petition in paragraph 3 stated that the petitioner and the respondent

were married to the Registrar and issued with the certificate which is also attached to the petition. Therefore, both shall be read as one. The counsel also considered that, under paragraph 12 of the appellant's petition it is stated that the marriage difficulties were referred to the Marriage Reconciliation Board, and the certificate was attached and it is certified. According to the counsel, these two documents form part and parcel of the case and it is part of the pleadings. He further submitted that, at the trial court there was no dispute of the existence of marriage, neither issue whether the matter was referred to the board or not. Thus, the Court admitted the petition because it was not at issue on the matters. He cited the case of **Sinol Hydro Corporation versus Abdul Mohar Tumah and another,** Revision Application No. 313 of 2022(CAT-Unreported), in which the Court held that parties are bound by their pleadings. He also cited Section 101 of the Law of Marriage Act, which talks of a reconciliation board. He contends that the law does not say the certificate be tendered but rather the dispute be referred to the board which shall hear the parties. It is his submission that Section 106 of LMA requires the petition to be accompanied by the certificate of the board. His contention is supported by the case of

Tumaini Swoga Vs. Lemiya Tumaini Balenga, Civil Appeal No. 117 of 2022(CAT) (Unreported).

In, Rejoinder, Mr. Jamuhuri submitted that the certificates (marriage certificate and Reconciliation Board certificate) were to be tendered before the court acted on them.

I have considered the submission of both parties on this ground. My view is that the Marriage Certificate and Reconciliation Board Certificate are the documents to be considered at the admission stage of the case and what is important must be part of the pleadings which might not require proof later. In the circumstances, where there is an issue calling for proof using the documents then it should be tendered as evidence, otherwise, failure to tender the document should not affect the case as it was held in the High Court case of **Hassan Mohamed Timbulo vs Rehema Clemens Kilawe** (Civil Appeal 163 of 2020) [2021] TZHC quoted in the case of **Jannet Gonde Rubiria Vs, Pastory Peter Massawe**, Civil Appeal No. 39 of 2022 my sister Omary j, held that;

> ***"At this juncture, I would like to agree with the court reasoning in Hassan Mohamed Timbulo vs Rehema Clemens Kilawe(supra) that a certificate of the board is something that is required at the admission stage. It must exit before the case is registered and***

given a number. It is a registration condition that might not necessarily be needed later. What is important is it must exist as part of the pleadings…The court was of the view that, in circumstances where there is an issue calling proof using the document, then it should be tendered as evidence, otherwise failure to tender the document shall not affect the case…In my considered opinion for this particular case, the none tendering of the certificate of the board did not affect the petition as it was pleaded and annexed and there was no contention about it during the hearing".

In the present case which contains similar facts, I am also inclined to hold that it is not contested that parties were married and a certificate was attached to the pleading. And, the marriage difficulties that occurred were referred to the reconciliation board. That being the case and taking into account that it was the appellant who referred the matter to the board and she is the one who filed a petition at the trial court, it is not expected for her to raise such issues that she never disputed right from the start. Again, it should be noted that the issue of divorce was not contested by the parties, and the same was resolved after the court entered the judgment on admission.

Given the above, the non-tender of the marriage and reconciliation board certificates under the above circumstances did not affect the petition as it was pleaded and annexed to the pleading. Therefore, this ground of appeal also lacks merit.

Coming to the 6th ground of appeal, the counsel for the appellant submitted that the court erred in stating that property, Plot Number 108 is a matrimonial property. According to him, the proceedings in exhibit P1 and P2 show that the property in question belongs to the third party. He referred to page 28 of the proceedings. He stated that the property belonged to one E. Shileto, hence it was wrong for the trial court to hold that it was part of the matrimonial property without further proof.

On the other hand, it was the respondent's counsel's submission that, the sale agreement contained the name of another person. However, it should be considered that the respondent is a foreigner and, in our country, the foreigner cannot own and. Therefore, the sale document not bearing the respondent's name is not an issue.

The issue now is whether the House in question was a matrimonial property. The definition of matrimonial property was well-elaborated in the

case of **Bi Hawa Mohamed vs. Ally Seif** [1983] TLR 32, where the Court of Appeal made the following observations:

> ***"In our considered view, the term 'matrimonial assets 'means the same thing as what is otherwise described as 'family assets'.... it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole."***

Likewise, in the case of **Bank Of Commerce Ltd Vs. Nurbano Abdallah Mulla,** Civil Appeal No. 283 Of 2017, the Court of Appeal defined the term matrimonial property in the following terms:

> ***"On the other hand matrimonial property has similar meaning to what is referred to as matrimonial asset and it includes matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage".***

From the above-cited cases, the term matrimonial asset and matrimonial property have the same meaning. Therefore, a matrimonial home is also one of the matrimonial properties.

Now, in the present case, the sale agreement shows that the plot was purchased in May 2005. As I have earlier noted, this was the first time the

respondent visited Tanzania, though the appellant showed that the respondent visited in 2007. The appellant stated that, when they both visited Tanzania in 2007 the house was still under construction. They stayed at the appellant's brother-in-law's premises because the house was still under construction. Notably, they got married on 29 June 2007. The construction of the house was completed in 2009. From 2009 to 2016 when the divorce was issued, parties were living together with the respondent in the disputed house.

Be that as it may, even if the appellant acquired or constructed the house alone, as she wanted the court to believe, still the house in question is a matrimonial property. The appellant herself admits that the respondent made some improvement by constructing the servant quoter in the said plot. Because of that, I am confident that the disputed house is matrimonial property.

The 7th ground is that the decree is defective for failure to comply with the provision of Order XX Rule 9 of the CPC. Mr. Jamuhuri submitted that Rule 28 of the matrimonial proceedings rules and Order XX Rule 9 provides that where the subject matter of the suit is immovable property the decree shall provide a description sufficient to identify the same. According to him,

the description given does not show the title, number, and location. The counsel referred to page 16 of the proceedings. He added that the decree of the court does not even describe the identity of the property. He cited the case of **Nassoro Abubakari Hamisi and Another Vs. Wakfu of Trust Commission of Zanzibar and another**, Civil Appeal 245 of 2020 (Unreported- CAT).

Per contra, counsel for the respondent argued that paragraph 24 of the amended answer to the petition shows that the landed property is **Plot No. 108, House No. KUN/KIL/O/BLOCK "A"** located at Kilongawima. The counsel argued that the property is well known to the parties. According to the counsel, the rectification of the decree can be done by the executing court where the parties may apply for clarification of the decree under section 96 of the CPC.

About this ground and after the hearing of both submissions, it is true that the decree has to describe the immovable property to be identified. The provision of Order XX Rule 9 of the Civil Procedure Code provides;

> ***"Decree for recovery of immovable property where the subject matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and***

where such property can be identified by a title number under the Land Registration Act, the decree shall specify such title number."

In this case at hand, indeed, the decree is not identified by its details as per Order XX Rule 9 but I wish to go further to scrutinize what was the purpose of this provision. In the case of **The Board of Trustees of F.P.T.C Church vs. The Board of Trustees of Pentecostal Church,** Misc. Land Appeal No. 3 of 2016, 12 HCT Shinyanga (unreported), Makani, J was of the view that;

> ***"The rationale for proper description is to make execution easy and to avoid any chaos by proper identification of suit property.*** *The judgment of the Ward Tribunal is therefore not executable for failure to have proper details/description of the suit land"* ***(emphasis is mine).***

In view of the above-quoted case, the purpose of the law was to ease execution to avoid chaos. In the case at hand, the only property known to the parties was specified in the Judgment, and even on the issues raised. Having said that, I join hands with Counsel for the respondent that, the failure of the decree to identify the description of the immovable property in our case, does not change anything because there was only one property and the parties were aware of the same.

Furthermore, even if there were some errors in the decree or even if the decree did not detail the immovable property it was the duty of the party to go to the court-issued decree and file an application for clarification of the decree under Section 96 of the CPC.

The counsel for the appellant argued grounds 8 and 9 as one ground on the division of matrimonial property equally. He submitted that it is the principle in matrimonial proceedings that parties must show their contribution towards the acquisition and development of the property. According to him, there was no extent of the contribution shown by the Respondent in the acquisition of the matrimonial property. He cited the case of **Regina Lutundwa versus Pendo Joseph** [2017] TLR 2.

Mr. Tesha does not agree with the counsel for the appellant. He submitted that the respondent contributed greatly to the acquisition of the property. He referred to the testimonies of the respondent that after selling his properties in England(house) he gave the petitioner 30,000.00 pounds for acquiring the plot in 2005. Unfortunately, the sale agreement shows that the plot was bought for nine million (9,000,000/=) shillings. According to him, they constructed the house in 2009. They both retired in England and came to live in Tanzania. Also, that, the brother of the appellant who

supervised the construction stated that the money was coming from England but could not tell whether it was the appellant's or the respondent's money. The counsel referred to pages 4,5,6,7,8,9,10 and 12 of the typed proceedings. He also referred to the case of **Seif Salehe Mananguku and another Vs. Seif Mwananguku**, Land Appeal No. 132 of 2020 HCT Land, 6914 on Page. 8 where it was held that the evidence that is consistence must be considered as reasonable.

Similarly in the case of **Selemani Kichawa Brighton Vs. Republic**, Criminal Appeal No. 109 of 2019 HCT on Page 12 where the Court held that every witness is entitled to credible and he must be believed and his testimony accepted unless there is a concrete reason not believing the witness.

Mr. Tesha submitted that the whole case is based on the credibility and reliability of the witness. The trial court had the opportunity to see the credibility of the witness, evaluate the evidence, and come to the conclusion that the respondent had contributed to the matrimonial property. Hence, this court shall uphold the decision of the trial Court. He further averred that the contribution of each party shall be looked into the extent to of each party contributed greatly financially.

In his rejoinder, Mr. Jamuhuri submitted that the petitioner tendered all the exhibits showing that she contributed to the acquisition of the matrimonial property. According to him, the respondent only tendered part of his story and his mere words.

After hearing submissions on the 8th and 9th ground of appeal as enjoined by the counsels and upon perusal of the records; it is important to restate that the law which governs the division of matrimonial assets is to be found in section 114 of the Law of Marriage Act, Cap. 29 R.E 2022. Subsection (2) of section 114 provides for matters on which the courts; while inclining towards equality of division, must have regard when dividing any assets acquired by divorcing couples during the marriage by their joint efforts.

My understanding of this provision is that after identifying a matrimonial asset that was acquired under joint efforts, courts shall first incline towards the extent of contribution by each party in the acquisition of the property in the division of those assets.

Now, the learned trial magistrate took the important initial step to first decide whether the house was matrimonial assets for purposes of equal division under the aforementioned section 114 (1) and (2) of the Act.

Secondly, this court on the first appeal will re-evaluate whether the trial magistrate determined the extent of the contributions which were respectively made by the appellant and respondent towards the house.

With due respect, the learned trial magistrate on page 12 of his judgment made a lucid finding about the house on the issue of contribution which made the development of the plot. With that regard, I find that the house does form part of matrimonial assets as stated in the 6th ground, and is subject to be divided amongst the parties.

My re-evaluation of evidence leads me to a similar conclusion to one reached by the learned trial magistrate. There was sufficient evidence before the trial magistrate to establish on a balance of probability that the house was part of matrimonial assets subject to division. It is settled law that, the extent of contribution by a party in matrimonial proceedings is a question of evidence. This was stated in the case of **Gabriel Nimrod Kurwijila vs. Theresia Hassani Malongo** [2020] TZCA 31 (Unreported) where it was stated that:

> ***"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the***

evidence adduced by the parties to prove the extent of contribution".

Reverting to the matter at hand, before the trial court, the appellant stated how the properties were acquired and how she contributed to its acquisition. She told the trial court, that she was an employee in the UK. She also narrated how she sold her properties abroad. According to her, through her efforts, she built the house. However, the appellant did not show how such amount of money that she sold her properties abroad were injected into the construction of the matrimonial house in dispute. There is evidence that the respondent stated that he contributed greatly to the acquisition of the property. The respondent testified that after selling his properties in England he gave the petitioner USD 30,000/= for acquiring the plot in 2005. Unfortunately, the sale agreement shows that the plot was bought for nine million (9,000,000/=). They constructed the house in 2009. They both retired in England and came to live in Tanzania. The brother of the appellant who supervised the construction stated that the money was coming from England but could not tell whether it was the appellant's or the respondent's money, there is also a clear testimony of the appellant that admittedly the

respondent assisted her to construct the servant quoter. The Respondent is entitled to be believed in telling nothing but the truth.

As can be seen in the proceedings, the trial court in its observation discredited the testimony of the appellant in the following manner. **One,** He visited the locus in quo (house in question), and he did not agree with the appellant that the plot was purchased in Tshs. 9,000,000/= due to its size and the location in the beach area. In his view, the plot was valued at USD 30,000 or above. Based on that, he was short of saying the respondent is entitled to be believed and that he was a credible witness. He gave the appellant money to purchase the plot. **Two**, he took into account that the respondent is not a Tanzanian citizen, therefore no purchase document would bear his name.

It is a fact that it is the trial court that heard the witnesses. The trial magistrate was in a better position to determine the demeanor and credibility of the witnesses. That being the case, with the effort shown by the trial court, this court does not see any reason why it should not believe the reasoning based on the testimonies of the respondent.

The law is settled, every witness is entitled to credence and must be believed and his testimony accepted unless there, are good and cogent

reasons for not believing the witness. See the case of **Goodluck Kyando versus Republic,** (2006) TLR 363. In my view, there are no circumstances in this court that call for a reassessment of witness credibility.With those tenuous molds of the parties in their testimonies regarding the plot, it cannot be said that the appellant had established on the balance of probability that the plot belonged to her for purposes of excluding it being a matrimonial asset. Likewise, the appellant did not on the balance of probabilities prove that the respondent had no any contribution to the plot which renders it to equal distribution.

More or so, I hasten to state that, the aspect of contribution of the acquisition of the matrimonial property is not limited to the contribution of each party in terms of money only. It also includes contribution in terms of property or work towards the acquiring assets. There is evidence on record and even in the judgment in the trial court that the respondent paid for KK security, electricity bill, housekeepers, and other emergency bills. Further, it is observed that the appellant receives rent from a servant quoter every month. This servant quoter which the appellant is collecting rent is the one in which she contemplates and admits that the respondent has his

contribution. Given that, all these are important factors to consider in the distribution of the matrimonial property.

For the foregoing, the 8th and 9th grounds of appeal also lack merit and are hereby dismissed. Since the counsel for the appellant dropped the tenth ground of appeal, I am confident that, the appeal lacks merit.

As a result, I hereby dismiss in its entirety and uphold the judgment and decree the trial court. Owing to the nature of the matter being a matrimonial cause, I make no order as to costs.

Order accordingly.

H. R. MWANGA

JUDGE

1/12/2023