IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB – REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 03 OF 2023

(Originating from the Judgement of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 73 of 2021 before Hon. Mpessa A.E – SRM)

HELLENA MACHAALI ..... APPELLANT

VERSUS

GABRIEL MACHAALI ..... RESPONDENT

JUDGEMENT

14/6/2023 & 11/7/2023

M.MNYUKWA, J.

Parties to this appeal were husband and wife who started their marital relationship in 1979 and celebrated their Christian marriage in 1988. They are blessed with four children who are adults now. The available record shows that the appellant was living in Arusha before she joined her husband who was living and working for gain in Dar es Salaam. And, that she moved to Dar es Salaam in 1994. They lived happily marriage until 2010 when the marriage turn sour due to misunderstanding that arose when the respondent moved out of his matrimonial home for 7 years from 2010 to 2017.

It is the appellant's allegation that the respondent had a character of being abusive and irresponsible man while respondent claimed that he moved out of the house to stay away from the appellant who was too noisy and wanted him to die. Sometimes in 2019, the appellant filed a petition for divorce at the Primary Court of Kimara where an order for separation of two years was granted. It is unfortunate that those two years didn't serve the purpose of separation for parties to get chance to reconcile their difference and continue to live together as husband and wife.

Since their problems persisted, the appellant decided for the second time to petition for divorce at the District Court of Temeke at one stop judicial centre and her wishes succeeded since a decree of divorce was granted and matrimonial properties were divided, and the appellant was given 20% share of the value of a house at Mbezi and 30% share of the value of a house at Arusha. However, she was dissatisfied by how the properties were divided to them leading to the present appeal.

On her appeal, she presented five grounds as hereunder;

1. *The trial court erred in law and in fact by failure to order division of the matrimonial asset equally houses located at Mbezi Kimara Dar es Salaam and Oldadai village Arusha hence cause unfair distribution to the appellant.*

2. *The trial court erred in law and fact by refrain from distributing property located at Goba, 10 acres of plot of land located at Misugususgu, quarter acre of plot of land located at Misugususgu, frame and shop at Goba, Dar es Salaam, which were testified and were not cross examined hence reached into erroneous decision.*
3. *The trial court erred by failure to evaluate evidence hence quarter acre of plot of land also at Misugususgu reached erroneous decision (sic)*
4. *The trial magistrate erred in law and fact acted bias against the appellant by apply double standard on deciding on matrimonial assets hence denied the appellant rights to fully contribution of matrimonially assets (sic).*
5. *The trial magistrate erred in law and fact by failure to consider the right of the children*

The appellant prayed for equal division of matrimonial properties located at Dar es Salaam and Arusha, an order for appellant to bring fresh evidence on this appeal concerning properties located at Goba and plots of land at Misugususgu, and other relief(s) this court deem just and proper to grant.

The hearing of appeal was done by way of written submissions. The submissions of the appellants were drafted by Adolf Temba and Flavian A. John advocates from Jued Business Centre while the respondent submissions was drafted by Mtaki Robart and Terry Tomson from L.S AND TERRY CHAMBERS. It is also on record that, ground two of appeal was

expunged from the court records following the prayer made by the appellant's counsel before the hearing that prayer was granted by the Court.

Before the learned counsel for appellant submitted in support of the appeal, he raised a concern about what he called procedural irregularities. He claimed that at page 14 to 24 of the typed proceedings, the trial court failed to properly record the proceedings as it is not known whether what is reflected on those pages are answers from questions or submissions of the parties. Hence, according to him the same vitiate the proceeding.

In supporting the appeal, the learned advocate argued on the 1st ground of appeal by submitting that, the trial court ought to have divided the houses equally between the parties. He contended that, for more than 30 years of the parties living together, it is undisputed that the houses were acquired during the subsistence of their marriage and were developed by the parties. It was his submission that the appellant contributed by work and money in acquisition of the houses. To buttress his argument, the learned advocate cited page 8 and 11 of the typed proceeding, the cases of **Bi hawa Mohamed vs Ally Seif** [1983] TLR 32 and **Tumain M Simoga vs Leonia Tumain Balenga**, Civil Appeal

No.117 of 2022 (unreported). He thus believes that, this ground is merited.

On the 2nd ground, the learned advocate argued that the trial court erred in law by refraining to distribute the plots of land at Misugusugu. He contended that the said properties were acquired during the subsistence of marriage and their existence are proved by Exhibit P2. He argued that failure of the trial court to distribute the said properties benefited the respondent. It was his argument that these plots of land were supposed to be divided equally. To support his argument, he cited the case of **Tumain M Simoga (supra), GabrielNimrod Kurwijila v Theresia Hassani Malongo,** Civil Appeal No 102 of 2018 and the case of **National Bank of Commerce Limited v Nurbano Abdallah Mulla,** Civil Appeal No 283 of 2017.

On the 3rd ground of appeal the appellant said that those properties exists, that is the plots at Misugusugu. He therefore prayed the court to decide on it.

It was the learned advocate's submission on the 4th ground that the trial court acted biased against the appellant for not distributing the matrimonial properties equally. He said since it is in record that both

parties failed to prove the level of contribution it was prudent for the same to be divided equally.

Lastly on 5th ground, it was submitted that the trial court ought to have considered the rights of the children when dividing the matrimonial properties since, according to the learned advocate children have interest in the properties too. He cited section 129 of the Law of Marriage Act, **[Cap 29 R.E 2019]** and the case of **Nyakasanga Mafuru vs Babuu Shirima**, Pc Civil Appeal No.96 of 2021 to buttress his argument.

He therefore prayed for an equal distribution of matrimonial houses, plots of land at Misugusugu to be declared matrimonial properties and divided equally and an order vitiating the proceedings of the trial court.

Opposing the appeal, the respondent submitted that, the appellant deserved what she got from the distribution since she failed to prove her extent of contribution. He further submitted that all the houses were constructed by the respondent who was employed during that time while appellant was a house wife. He argued that, the house situated at Oldudai was built on the customary land which he had inherited it from his parents. The respondent further submitted that, the appellant failed to prove her contribution on the house at Kimara if at all resulted from the gain of the milk of the cow. He added that, the trial court considered the extent of

contribution for each party that's why awarded the appellant to get the shares which she deserved.

In regards to the properties alleged to be at Misugusugu and Goba, he contended that the same were not proved as the appellant failed to prove its location and existence since whoever alleges must prove as per section 110 of the Evidence Act **[Cap 6 R.E 2019]**. He went on that, the appellant failed to prove whether those properties are the matrimonial properties as it is provided for under section 114(1) of the Law of Marriage Act, **[Cap 29 R.E 2019]**.

As for the rights of the children, he argued that, the children aren't infants as required by law as submitted by the appellant. He contended that the case at hand is not a probate case for the children to have right of inheritance. He prayed for the appeal to be dismissed with costs.

When re-joining the learned advocate for the appellant reiterates what he submitted in his submission in chief.

After considering the submissions of the parties and records of the lower court and before going to the analysis of the grounds of appeal, I have to address the issue of procedural irregularity raised by the appellant's counsel in his submission in chief. If I understood the learned advocate correctly, he faulted the trial court for not recording questions

and answers during cross examination. In his rejoinder he cited O. XVIII r.7 of the Civil Procedure Code **[Cap 33 R.E 2019]**. For easy of reference, let me reproduce what does the above cited provision says;

> *"Where any question put to a witness is objected to by a party or his advocate, and the court allows the same to be put, the judge or magistrate shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the court thereon".*

To my understanding, the above provision provides for a procedure to be followed when an objection is raised or when a question put to a witness is objected during cross examination and a magistrate or a judge allows the same that is when a magistrate has to write down the question, the objection and the answer. Thus, it is my humble view that this procedure does apply only when the question asked is objected. As for this case at hand I regret to say that, the learned advocate is misconceived. Otherwise, he ought to have shown this court the specific pages which the said procedure was not followed instead of generalizing the whole proceedings on cross examination. That being said, it is my conviction that there was no any procedural irregularity as alleged by the learned advocate. And to that end, I find this objection to be not merited as I am satisfied that the proceedings were properly recorded.

Coming now to the merit of appeal, it has to be noted that the 2nd ground of appeal was expunged from the court record, it is unfortunate that the parties submitted on the same. Since ground two was expunged, it is my view that it lacks legs to stand, consequently I shall determine ground 1, 3, 4 and 5. Thus, the 1st and 4th grounds will be determined jointly while the 3rd and 5th grounds will be determined separately.

I find it pertinent to start by saying that, this is the first appeal as the matter originated from the District Court whose appeal lies to this Court by virtue of section 80 of the Law of Marriage Act, **[Cap 29 R.E 2019]**. Being the first appeal, I am enjoined to reconsider and re-evaluate the evidence on record and if the need arises, draw my own conclusion. This is a settled position of the law in a plethora of authorities including the case of **Tanzania Sewing Machine Co. Ltd vs Njake Enterprises Ltd,** Civil Appeal No. 15 of 2016.

Now, coming to the appeal at hand, it is with no doubt that the 1st and 4th grounds of appeal raises the issue of whether the appellant deserves an equal distribution of matrimonial properties. I must be clear here that the properties which I am referring to, are the two houses as far as the decision of the lower court is concerned.

The learned advocate for the appellant when submitting on the above grounds argued that the houses were built during the subsistence of marriage and the appellant contributed in work and in money. He contended that the appellant's shares which were given by the trial court from the houses are trivial hence could render her homeless. He remarked that considering years which parties lived together, equal distribution is inevitable.

The above argument was strongly disputed by the respondent who argued that both houses despite being constructed during the existence of marriage still, the appellant did not contribute anything. He said that, the appellant was a house wife while the respondent was working. So, it was his submission that money for construction of houses came from the respondent hence what appellant got is what she deserved.

On my part I must say that, I am alive with the provision of section 114 of the Law of Marriage Act, [Cap 29 R.E 2019] which gives power to the court to order division of matrimonial assets. However, such power is subject to certain conditions to be considered first as stipulated under sub section 2. The law states;

> *114.-(1) The court shall have power, when granting or subsequent to the grant of a decree of*

separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order sale of any such asset and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1), the court shall have regard to –

(a) the customs of the community to which the parties belong;

(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; and

(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) 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.

Apparently in the foregoing provision, it is settled that the assets which are subject to division are those which were acquired during the

subsistence of marriage by joint efforts of the parties. For the case at hand, it is on record that the matrimonial houses were acquired during the subsistence of marriage. The question now is, how much parties should get from the assets.

It is a rule that distribution of matrimonial assets is subject to several conditions which amongst them is the extent of contribution made by each party in money, property or work towards acquiring of the same as provided under section 114(2)(b) of **Cap 29 RE 2019**. It is the evidence of the parties which proves the contribution of each party and ultimately determines the percentage of share for each party. Whether it is equal distribution or not, it all depends on the evidence on record.

It is therefore the duty of the party who wishes for an equal distribution to prove extent of his/ her contribution towards the acquisition of the properties. In our case at hand the appellant testified to have contributed by supervising construction of a house at Arusha when respondent was staying and working in Dar es Salaam. She also said to have been cooking for the masons, carrying bricks and other activities of alike.

As per the record, it is undisputed that a house at Arusha was built when the appellant was living in Arusha. In fact, the appellant lived in that house before moving to Dar es Salaam. However, these facts were

disputed by respondent who testified to have his brother supervised the construction at Arusha but the same was not proved. I therefore agree with the appellant that she was the one who supervised the said construction.

For a house at Kimara Dar es Salaam she said, when she moved to Dar es Salaam from Arusha, she came with her cows and earned some income from selling milk hence was able to develop their house which was unfinished. But she failed to prove how much she earned from selling milk and how much she contributed in finishing or improving the said house. I am certain that proving facts testified in court is a requirement of law and whoever alleges must prove as it is provided for under section 110 of the Law of Evidence Act, **[Cap 6 R.E 2019]**.

The Court of Appeal in the case of **Gabriel Nimrod Kurwijira vs Theresia Hassani Malongo,** Civil appeal No. 102/2018 had this to say;

> *"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*

That being said I accept what was submitted by advocates for the respondent that appellant failed to prove her extent of contribution to warrant her an equal distribution of their matrimonial houses. However, I respectful disagree with what the trial court has given her as it was vividly seen in the record that the appellant contributed in terms of domestic work as he was a house wife who did domestic chores. She also contributed in terms of doing works related to construction as she supervised the building of the house and also she contributed in monetary form as the proceeds of selling milk were used in the construction.

Guided by the provision of section 114(3) of the Law of Marriage Act, **[Cap 29 R.E 2019]** which recognize the contribution of a spouse who substantially improved the property of the other spouse during the subsistence of the marriage, I find merit on these grounds. Again, being persuaded by the decision of this Court in the case of **Eliester Pilemon Lipangahela v Daud Makuhana,** Civil Appeal No 139 which recognize domestic work and other works done by the other spouse in acquisition of the matrimonial properties, I am convinced to allow these grounds of appeal.

Consequently, I allow these grounds of appeal and varying the percentage from 30% and 20% of the value of the house in Arusha and

Kimara at Dar es Salaam respectively given to the appellant to 40% of the value of each house while respondent will get 60% of the value of each house.

As for the third ground of appeal, I think this issue should not detain me much as the same relates with ground no 2 of appeal which is expunged from the court record. However, the appellant submitted on it. Since there is no evidence that was adduced before the court to substintiate the existence of the property which is the plot at Misugusugu which as alleged, I find this ground is not merited and it is hereby dismissed.

As for the 5th ground of appeal, it is with no doubt that the law enjoined the court to consider children of marriage during division of matrimonial assets. However, the children who were referred under the provision of section 114(2)(d) of the Law of Marriage Act, **[Cap 29 R.E 2019]** are those children who did not attain the age of 18 years. In the case of **Bibie Maulid Vs Mohamed Ibrahim** [1989] TLR 162, the court referred them as infant children. The law provides for this requirement as a precaution to court when granting an order of sale of matrimonial assets for the purpose of avoiding to render children homeless. But children in

this case are adults who are not under the parties' care. To that end, this ground of appeal is meritless, it is hereby dismissed

In the event, the appeal is partly allowed to the extent explained therein. I refrain to make an order for costs since this is the matrimonial course and the parties were spouses.

It is so ordered.

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

11/07/2023

Court: Judgement delivered in the presence of the parties.

M.MNYUKWA

JUDGE

11/07/2023