IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

ONE STOP JUDICIAL CENTRE

PC CIVIL APPEAL NO. 66 2022

(Originating from Martimonial Cause No. 132 of 2021 of Ukonga Primary Court, Arsising from Civil Appeal No. 55 of 2022 of Temeke District Court, at the One Stop Judicial Centre).

ELIAS ABDALLAH BUNGA .....APPELANT

VERSUS

SALMA HASANI MJENGERA.....RESPONDENT

JUDGMENT

Date of last order:03 /04/2023
Date of judgment: 03/07/2023

OMARI,J.

This Appeal emanates from the judgment and decree of the District Court of Temeke One Stop Judicial Centre in Matrimonial Appeal No. 55 of 2022 exercising its appellate jurisdiction over the decision of Ukonga Primary Court in Matrimonial Cause No. 132 of 2021.

In brief, the Respondent instituted a matrimonial cause seeking a decree of divorce, distribution of matrimonial properties and maintenance for 4 children of the marriage. The trial magistrate was not convinced that the

marriage had irreparably broken down and ordered the two to separate for a period of 6 months according to section 110(2) of the LMA and that the children be maintained as usual through a judgment delivered on 24 August,2021.

In the 05 April,2022 Ruling the trial magistrate after elucidating the reasons for separating the parties under section 110(2) of the Law of Marriage Act, Cap 29 RE 2019 (the LMA) through the 24 August,2021 judgment went on to explain that on 10 March, 2022 both parties returned to court after failing to reconcile. Consequently, the Court guided by section 99 and 110(1) of the LMA granted a divorce decree. The trial court went on ahead to distribute what it considered as matrimonial assets.

As for the 4 children the trial court ordered that the youngest be placed with the mother, that is the Respondent, while the rest were placed with their father, that is the Appellant. Maintenance to the tune of TZS 50,000 per month as well as medical costs were to be borne by the Appellant. The trial court also ordered access for both parents.

The Respondent was aggrieved by the decision and appealed to the District Court armed with four grounds which centred on the custody of children

and distribution of matrimonial properties. On the basis of her grounds the Respondent prayed for the appeal to be allowed and the proceedings of the trial court to be quashed. She also prayed to be granted with the custody of all four children.

The first appellate court in its decision declared the Chanika Plot to be of the Appellant and removed it from the list of matrimonial properties. Likewise, it declared the property with the milling machine to be of the Respondent for she had inherited it. It also quashed the trial Court's order of distribution of the house at Kipunguni and Kivule by awarding the former to the Appellant and later to the Respondent. It also ordered the car to be valued and divided equally between the two. Now the Appellant being aggrieved by the District Court is armed with six grounds and has approached this Court for an appeal. The grounds are as follows:

1. That, the appellate court erred in law and facts to declare that house situated at Kipunguni B is matrimonial property between the Appellant and the Respondent while, the said property was acquired and developed by the Appellant before the marriage was contracted.
2. That, the appellate court erred in law and facts to grant the house situated at Kivule to the Respondent solely disregarding the fact that,

the said house is a matrimonial property which was acquired and developed by joint efforts of the Appellant and Respondent during subsistence of their marriage.

3. That, the appellate court erred in law and facts to grant to the Respondent the plot at Chanika (plot with milling machine) in disregard of the fact that the Appellant participated in developing the property including construction of the building where the milling machine is installed.
4. That, the appellate court erred in law and fact for failure to resolve the dispute by granting the Respondent the plot in Chanika (plot with milling machine) disregarding that, the said plot is bordered/adjoined to Appellant's plot and some of the Appellants buildings (two structures) extend into the Respondent's plot.
5. That, the appellate court erred in law and facts to nullify custody of the three issues which was granted to the Appellant and order for the trial court to summon them to record their wishes disregarding the fact that, the children appeared in the Primary Court for the same.
6. That, the appellate court erred in law and fact by ordering the car be valuated and proceeds be divided equally disregarding the fact that,

the same is Appellant's property and the Respondent has not contributed in acquiring the same

It is on the basis of those grounds that the Appellant is praying for an order that the house situated in Kipunguni is his property acquired before marriage and the house situated in Kivule is a matrimonial property hence to be divided at the ratio of 75% to the Appellant and remaining 25% to the Respondent. The Appellant also prays that the plot with the milling machine in Chanika be divided at the ratio of 75% to the Appellant and remaining 25% to the Respondent. As an alternative the Appellant prayed for the Chanika Plot with the milling machine to be granted to the Respondent to the extent the boundary of the Plot shall be marked or and where the Appellant's structures begin or the said Plot to be valued and the Appellant be ordered to compensate the Respondent for her plot. Further it is the Appellant's prayer that the car be declared his and not subject to division. He also prayed to be granted with custody of the children.

When the Appeal was called for hearing the Appellant was represented by Lugiko John Hindishi learned advocate while the Respondent informed this court that she was a beneficiary of legal assistance from the Legal and

Human Rights Centre. The Appeal was disposed by way of written submissions.

The Appellant's submission commenced by stating that there are only two issues in dispute; the first is the division of properties amongst the parties which involves a house at Kivule, a house at Kipunguni B, a plot at Chanika (with a milling machine), a plot at Chanika (with chicken coops) and a motor vehicle. The second issue in dispute is the custody of children. Thereafter the Appellant submitted on the grounds of appeal seriatim.

On the first ground, it was the Appellant's submission that the house at Kipunguni B is his sole property thus, does not form part of their matrimonial properties. In the trial court the Appellant adduced evidence that the plot which the house is on was purchased by him in March 2008 and he built the house in November,2008 while the marriage with the Respondent was contracted in December,2008. He therefore argued that the said property was acquired before marriage. It is the Appellant's view that the first appellate court failed to weigh the evidence adduced in the trial court and as a result reached an erroneous decision.

On the second ground, the Appellant submitted that the Kivule house is a matrimonial property and it should be subject to division. He submitted that the Respondent admitted during trial that the purchase of the plot and funds for building the said house was done by the Appellant and her only contribution was the idea to buy it and overseeing the building of the house. This is what led the trial court to decide the way it did, that is 75% of the house to the Appellant and 25% to the Respondent. Therefore, the Appellant submitted that the order of the trial court should be upheld pursuant to section 114(2)(b) of the LMA.

The Appellant submitted the third and fourth grounds of appeal jointly. It is his submission that from the proceedings of the trial court it is undisputed that there are two adjacent plots both at Chanika. The parties conduct business on the said plots. He contended that the first plot is the one that the Respondent inherited form her father in 2011. However, the said plot was developed by the Appellant's finances, whereby he installed the machinery and other services for the business and this testimony was not challenged by the Respondent during trial something that led to the trial court ordering the distribution the way it did. The Appellant further submitted that the second plot is the one that the Appellant bought from the

Respondent's relatives. On this second plot the Appellant built chicken coops. The development(s) on the two plots overlap and the two share the electricity connection, this being the case the order of the first appellate court creates another conflict as the same declared the plot and developments to be the property of the Respondent while the said developments overlap. In that respect the Appellant beseeched this court to either grant the first plot to the Respondent to the extent where the structures of the chicken coop begin or order for the plot to be valued and the Appellant to compensate the Respondent per the valuation.

Submitting on the fifth ground of Appeal the Appellant argued that the trial court's decision was right in so far as placement of the children. The trial court had taken the opinion of the said children and made the said decision considering the children's welfare. The Appellant further argued that the trial court is better placed to assess the evidence when compared to the appellate court that only relies on the record. He further submitted that it is unreasonable for the first appellate court to send back the children to the trial court at this stage for them to give opinion as to who they wish to stay with. This act, according to the Appellant, is not good for the children's wellbeing and is akin to putting the children in conflict with their parents.

The Appellant then prayed for the order of the first appellate court regarding the children to be nullified and the order of the trial court to be upheld.

On the last ground of appeal the Appellant submitted that the motor vehicle is his property and in any case the Respondent did not address the trial Court the extent of her contribution to the acquisition of the same. To conclude his submission the Appellant prayed that the decision of the first appellate court be quashed and set aside and this court to decree as per his submission.

When it was her turn the Respondent began her submission by poetically giving a historical background of the matter then veered into the grounds of appeal whereby she began her submission with the first ground. On the said ground she argued that the house in Kipunguni was jointly acquired during the marriage and her contribution is partly stated on page 2 of the trial court's decision, she supervised the construction when the Appellant was in Mbeya. In addition, she was present during the purchase as a witness. To further cement her argument, she stated that the two lived together before their marriage in December 2008. This according to her is evidenced by the fact that their first born was born in the year 2008.

On the second ground of appeal that concerns the Kivule property the Respondent submits that she is the one who gave the idea to acquire the plot. She argues that the evidence of her contribution was not disputed. In her view, the Appellant in his suggestion on how the property to be divided does not provide any evidence of why he is making such a suggestion as is required by section 110 of the Law of Evidence Act Cap 6 RE 2022. Moreover, she referred to section 114 of the LMA and argued that she had evidence in both the trial court and the first appellate court how she contributed to the acquisition of both houses. She also argued that since it was the Appellant who made her quit her job of a teacher to become a home maker then she deserves a better distribution for she was in her words "the chief cornerstone of the development of the properties".

On the Chanika plots she submitted that the plot with the milling machine was undisputedly hers as she inherited the same therefore cannot be part of the distribution according to section 28 of the LMA. As for the second plot which the Appellant purchased from the Respondent's relatives, he paid for the same without including her share as it was sold by the heirs. This in her opinion is why the first appellate court treated it as property that was acquired jointly and distributed it accordingly.

The last part of the Appellant' submission involves the issue of custody of the children. She grieved that the Appellant is claiming for custody of the children without due regard to their welfare and growth. She went on to submit that the children that the Appellant is now claiming custody of are the same children she quit her employment at his insistence to care for. She asked the question when will he be available to care for them while he has to work to provide for them. It was her submission that instead of a third party caring for them then it should be her. She also submitted that the said children are willing to stay with her.

In her opinion the trial courts findings on the issue was hanging and did not exhaust the considerations as per section 125(2) of the LMA. Relying on section 125(2)(c) she opined that the customs are clear a child is to be cared by the mother. She also argued that the children's independent opinion on who they wish to stay with is important as the trial court did not follow this consideration then that is why the first appellate court made the order it did.

The Respondent then concluded her submission by stating that the Respondent gave evidence in the trial court as to her contribution to the jointly acquired matrimonial properties but it was disregarded for reasons

unknown. She therefore prayed for this Court to uphold the decision of the first appellate court.

In his rejoinder the Appellant reiterated what was written in the submission in chief and sought to add and clarify on several issues raised by the Respondent. On the argument that the two lived together prior to contracting the marriage he contended that this was never pleaded and evidenced during trial. He maintained he is the sole purchaser and owner of the said Kipunguni B house. As for the Kivule property the Appellant reiterated that the trial courts order for the division was fair as per each parties contribution and argued that Respondent has brought in new facts; however, he contends that he never precluded her from going on with her career. He went on to add that she, the Respondent was never employed during their marriage. He also added that the Respondent was a manager in the milling business he begun in 2015 but the same collapsed due to her misuse of TZS 7,500,000 she therefore, deserved less than the 25% awarded.

Regarding the Chanika plots that are adjacent to each other; he argued that the second plot is his personal property for he bought it and she also signed the sale agreement. In his view the Respondent cannot benefit twice, by

getting a share of the money received from the sale and claim a share in the plot.

On the issue of custody, the Appellant beseeched this Court to grant custody in his favour as it will be in the children's best interests. He stated further that there is foreseeable danger of the welfare of the children since the Respondent is now living with the said children in a single bedroom (home) irrespective of their ages and gender. The Appellant then concluded his rejoinder by remarking that since the Respondent has remained silent in respect of the motor vehicle then she has admitted the facts and this makes the same the sole property of the Appellant. He therefore prayed for this Court to decree as submitted in the submission in chief.

Having heard the rival submissions of the parties this Court's duty is to determine whether the grounds of Appeal are meritorious and the way forward. As rightly put by the parties through their submissions there are only two issues in dispute; the division of the matrimonial properties and the custody of children of the parties. However, before going into the specific ground of appeal on which the two issues are pivoted on I find it imperative to point out that both of the parties have either brought up new matters that were not decided in the trail and or the first appellate court or new evidence

that was not admitted in the trail court. Both cannot be entertained at this stage, for the new matters the Court of Appeal in **Amos Masasi v. The Republic**, Criminal Appeal No. 280 of 2019 has provide clarity on the same. Furthermore, Order XXXIX Rule 27 of the Civil Procedure Code Cap 33 provides that parties to an appeal are not entitled to produce additional evidence.

That said, I will begin with the issue of custody of the four children of the marriage. The record depicts that when the parties were at trial the oldest child was 13 years, the second was 9 years, the third 7 years and the last was 2 years and 8 months. In its 24 August, 2021 judgment the trial court did not make any orders as regards the custody of the children. However, in the 05 April, 2022 Ruling it stated that the three older children to live with the Appellant while the younger child with the Respondent. The first appellate court in determining what was the first ground of appeal before it ordered for the trial court to take the children's views and wishes and ordered the same to be done in the absence of the parents, that is not what was done by the trial court. The first appellate court in its decision made it clear there are three considerations by a court when making or granting an order as to custody under section 125(2) of the LMA. The learned magistrate

went on to explain that the basis of the considerations is the best interests of the child(ren), then mentioned the considerations as the wishes of the parents, the wishes of the child; where he or she is of an age to express an independent opinion and the customs of the parties. He referred to the case of **Sajjad Ibrahim Dharamsi and Ally Gulambas v. Shabira Gulambas Nathan**, Civil Appeal No. 42 of 2020 and went on to quash the trial court's order granting custody to the three older children to the Appellant then made directives on the way the trial court was to take the said views and wishes of the children. The Appellant called this unreasonable, while the Respondent is of the view that opinions of the children was important as they were and are of an age where they can express their wishes by an independent opinion. The trial court deprived them this. To make matters even more complicated the children as per the Appellant's rejoinder are currently living with the Respondent and he is concerned with the living arrangements.

The question is whether the trial court's order as to grant of custody was done as per the provisions of the law? In the learned magistrate's words:

> *'Kwa mujibu wa fungu 125(1) Mahakama imeangalia mtoto akae kwa bibi (sic) au mama yake watoto wameamriwa zaidi ya miaka saba (7) kwa umri huo watoto hao wanajitambua na wanao uwezo wa kuishi*

na baba yao na mtoto (...)3yrs ataendelea kuishi na mama yake (SM1) na SU1 atatoa pesa matunzo shilingi 50,000 kwa mwezi, pia pesa ya matibabu atatoa SU1'

The first appellate court made the orders it did having considered the parties submissions before it and the evidence adduced in the trial court. Further section 125 is very clear on the powers of the court to grant custody of children. Other than stating that the three older children are old enough to be able to live with their father, nothing in the trial court's decision depicts how the same was reached.

It would seem that the learned trial magistrate only considered the age of the said children and placed them with the parties as per section 125 (3) of the LMA. The considerations under section 125(2) must have skipped the learned magistrate's attention. This is noted by the first appellate court which then ordered for the trial court to hear the wishes of the children as they express an independent opinion in the manner directed by the district court. This, in my considered view, is the best way to deal with the matter since other than the youngest child the rest are capable of expressing their wishes. And, the district court like this court did not have any evidence on record that would have assisted it to make any other determination. I am of the

opinion that the court needed to have reliable information and evidence to decide of such kind, which clearly affects the welfare of the child(ren) whether at trial or during appeal.

This court in the case of **Rose Ngonyani v.Chile Ngonyani,** Civil Appeal No. 60 of 2020 had this to say:

> *'I have therefore to say, it is the duty of the trial court, when hearing a matrimonial proceeding where custody and maintenance is an issue, to take a more active role for the best interest of the children. This is important because, these powers are exclusively vested in the court.'*

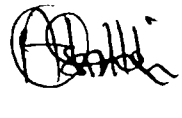
In consideration of the above, I am inclined to agree with the district court that the opinions of the children were essential considering their ages, since their opinions were not taken, the matter should be sent back to the trial court before another competent magistrate so that the children can give their opinions before a decision regarding their custody is made. The fifth ground of appeal is therefore dismissed for being unmeritorious.

On the Kipunguni house, which is what the first ground of appeal is pivoted on; the record from the trial court reveals that, the Appellant testified he bought the plot in 2008, his father was a witness and the Respondent found him with it. On the other hand, the Respondent testified that they have two

houses and she was involved in the supervision during building of the said houses. Basing on parties testimony, the trial court ordered that the Respondent should get 25% and the Appellant should get 75% of the house.

Section 114(3) of the LMA is to the effect that for a property to qualify as matrimonial, it must have been acquired during the subsistence of the marriage through the joint efforts of the spouses. Likewise, matrimonial properties may be acquired by one spouse and improved during the marriage through the joint efforts of the spouses.

In the first appellate court, it was established that the house is matrimonial property, so it should be granted to the Appellant. There is no evidence by the Appellant to prove that the house is his separate property and was obtained before their marriage. The Respondent mentioned the house in Kipunguni B as one of the matrimonial assets at the trial court the testimony which was not contested by the Appellant. He also confirmed that the Respondent participated in 5% in the acquisition of the house. It is apparent that the Appellant's testimony at the trial court is in inconsistent with his submissions. On the whole, I also find this ground as unmeritorious and dismiss it for the reasons stated.



As his second ground of appeal the Appellant contended that the house at Kivule is a matrimonial property thus qualified for division. The Appellant asserted that Respondent admitted during the trial that it was the Appellant who have purchased the plot and funded the money for building the house and the Respondent's contribution was through her opinion to purchase the plot and overseeing the erection of the building. It was therefore proper for the trial court to order division of 75% and 25% to the Appellant and the Respondent respectively.

The Appellant is thus, praying for this court to nullify the decision of the district court and upheld the trial court's decision pursuant to section 114(2)(b). The first appellate court's finding was that the house is matrimonial asset therefore it was distributed as such and in turn granted to the Respondent. The Appellant is claiming that the first appellate court was incorrect since the house is matrimonial asset to be divided between them. At page 5 of the district court's judgment it is stated:

> *'nimezingatia kikamilifu ushahidi wa mrufaniwa mbele ya mahakama ya mwanzo na hoja zake kwenye rufaa hii. Kimsingi ushahidi wake haupingi mali tajwa hapo kuwa ni mali zilizopatikana wakati wa muunganiko wao pamoja kama mume na mke...'*

Being satisfied that the house is matrimonial asset and the Respondent has a contribution, the question is on the extent of her contribution. In the exercise of the power conferred to it with regard to the division of matrimonial property a court is required to determine the extent of contribution of each party towards its acquisition. The same position was stated in the case of **Bi Hawa Mohamed v. Ally Seif**, Civil Appeal No. 9 of 1983. The district court in consideration of the evidence adduced by the parties at the trial court declared the house a matrimonial property and in effect granted it to the Respondent giving reason that:

> *'Lengo la msingi la mamlaka haya siyo kuzalisha watu wasio na makazi (homeless persons), kwa kutoa amri ya kuuza au kuwagawanya makazi yao kwa namna ambayo upande mmoja hasa mwanamke utapoteza makazi. Athari hii itafika hadi kwa Watoto ambao pengine Mahakama imeagiza waishi na mama yao. Hivyo,naridhika kuwa ni muhimu sana kuzingatia mgawanyo kwa wigo mpana hasa pale wadaawa wanapokuwa na nyumba Zaidi ya moja. Kwa sababu hizi natengua amri ya mgao kwa nyumba ya Kipunguni na Kivule. Naagiza kuwa nyumba ya Kipunguni inakuwa mali ya mrufaniwa na Kivule inakuwa mali ya mrufani.*

Basing on the above explanation, the evidence in the trial court and the submissions of the parties I hold the same view as the first appellate court; thus, this ground of appeal is dismissed for being baseless.

The third and fourth grounds of appeal is related to the appellant's claim that the district court was wrong in law and facts in the way it divided the Chanika plots. The Appellant asserted that the plot which the Respondent inherited from her father was developed by the him through the installation of the milling machine and its building, electrical facilities and digging of a well for permanent supply of water. He has also claimed that this evidence was not contested by the respondent, so the trial court considered the contribution of the appellant and awarded him 75%, but the district court ignored the improvement made by him in that plot.

In response, the Respondent explained that the plot is her personal property being an inheritance from his father, so it should not be included as matrimonial property in accordance with section 28 of the LMA.

The parties do not dispute that one plot at Chanika is the Respondent's inheritance from her father. The Appellant's assertion is that he was the one who made the developments on the said plot so with that improvement the

plot becomes a matrimonial property subject for division. The trial court in its decision was of the opinion that the appellant should get 75 % and the respondent get 25%. The first appellate court considered the plot as the personal property of the Respondent since it was her inheritance.

According to section 114(3) of the LMA matrimonial property includes property belonging to one spouse and developed during the marriage with the joint efforts of the spouses. For these reasons it is apparent that the plot, being the personal property of the Respondent, it was improved during the union of the parties by their joint efforts hence both parties are entitled to the share of the property.

In view of what is stated above I do not agree with the first appellate court in its findings that the plot was a not matrimonial property. Therefore, the property should be valued and be distributed between the parties to the tune of 60% to the Respondent and 40% to the Appellant.

Regarding the second Chanika plot (with the chicken coops) the testimony at the trial court is clear that the plot was bought by the Appellant from the Respondent's family. The decision of the trial court granted 25% to the Respondent and 75% to the Appellant. As regards the district court the plot

was considered the Appellant's personal property and not marital property so it was granted to the Appellant. There record is clear that the plot was acquired during the union of the parties. It is also undisputed that it is matrimonial property.

What is to be considered is the contribution of each party in acquiring the property. The Appellant states he bought it from the Respondent's relatives therefore the Respondent cannot benefit from the purchase money from her relatives and then claims part of the plot from the Appellant.

Going through the records of the trial court the Appellant did not testify to show that the Respondent received part of the allocation from her family or what exactly disqualifies her from getting a share from the plot just because she was allocated a share from her father's inheritance. The property being matrimonial property, Respondent has a contribution in the property, so she is entitled to get a share, of 30% and the Appellant should get 70%. In effect, the third and fourth grounds of appeal are allowed to the stated extent.

The last ground of appeal is with regard to the car whereby the first appellate ordered it to be valued and proceeds be divided equally. The

Appellant claims that the court disregarded the fact that it is the Appellant's property, the Respondent has not contributed in its acquisition. As explained from the beginning, a matrimonial property is that property which is acquired by the joint efforts of the spouses during their marriage. The disputed vehicle was ordered by the trial court to be divided by the ratio of 25% to the respondent and 75% to the appellant and the district court ordered that it should be evaluated and the proceeds be shared equally. Since the records are clear that the car is matrimonial property, what needs to be considered is the contribution of each party.

I have examined the court records, there is no evidence from both parties regarding the extent of their contribution. I am of the same opinion with the district court that the car is a matrimonial property acquired through the joint efforts of the parties while they were married hence the same should be valued and the proceeds be distributed equally between the parties. I therefore dismiss this ground of appeal for lacking in merit.

Consequently, this appeal is dismissed to the extent explained, due to the nature of this matter I make no orders as to the costs.

It is so ordered.

A.A. OMARI

JUDGE

03/07/2023

Judgment delivered and dated 03rd day of July, 2023.

A.A. OMARI

JUDGE

03/07/2023