IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

PC CIVIL APPEAL NO. 17 OF 2023

(Arising from Matrimonial Appeal No. 3/2023 of the District of Kilwa at Kilwa Masoko, Original Matrimonial Cause No. 11/2022 of the Primary Court Kilwa District at Kivinje)

HAMISI ABDALLAH MKWEKEA ..... APPELLANT

VERSUS

DARINI SELEMANI MROPE ..... RESPONDENT

JUDGEMENT

27th February & 20th March, 2024

MPAZE, J.:

This is the second appeal originating from the Primary Court of Kilwa District at Kivinje (hereinafter referred to as 'the trial court') in Matrimonial Cause No. 11/2022. In this case, the appellant petitioned for divorce and the division of matrimonial properties.

After hearing the petition on 17th January 2023, the trial court decided that the marriage between the parties had not irretrievably broken down, and therefore, divorce was not granted.

The respondent, dissatisfied with the trial court's decision, proceeded to file an appeal to the District Court of Kilwa at Kilwa Masoko (hereinafter referred to as the 'first appellate court') under Matrimonial Appeal No. 1 of 2023. Consequently, on 5th April 2023, the first appellate court reversed the decision of the trial court and declared that the marriage between the parties had irretrievably broken down, hence it proceeded to grant a decree of divorce.

Following the grant of divorce by the first appellate court, it ordered the case file to be returned to the trial court for the determination of issues related to matrimonial division and child maintenance. On 20th June 2023, the trial court complied with the order.

Regarding the division of matrimonial properties, the trial court awarded the appellant the Ngolo guest house located at Nangurukuru, a grain milling machine and its accessories, a house situated at Nangurukuru, an unfinished house in Kilwa Masoko, a house at Kibangule Mbagala Dar es Salaam, a tree farm at Nangurukuru, a farm at Nangurukuru Bondeni, a plot and building at Mpindimbi, and a plot at Njinjo Road Nangurukuru.

The respondent was awarded the Mrope guest house located at Nangurukuru Bondeni, a residential house situated at Likotwa Lindi, a grain milling machine and its accessories, a plot at Mpingoni, a plot at Dodomezi Starcom, a 20-acre farm with its building at Sengera, a cashew and mango farm at Njinjo, one wardrobe, and one TV.

In terms of maintenance and custody, the trial court ordered both maintenance and custody of one child named Twaha to the appellant. This decision was grounded in the fact that among the six surviving children, Twaha was the sole child under the age of 18 requiring maintenance.

As for the other children, the trial court's perspective was that since they had exceeded the age of 18, the Law of Child Act [CAP. 13 R.E. 2019] does not compel the appellant to provide maintenance for them.

The trial court went further directing both parents to contribute to their maintenance, emphasizing the fear of God, as the children were the product of their joint efforts in fulfilling the essential duties of marriage during its existence.

The respondent was dissatisfied with the trial court's decision, especially regarding the division of the house located at Kibangule, Dar es

Salaam to the appellant, and the court's failure to divide the livestock due to lack of proof of their existence.

Regarding maintenance, the respondent criticized the trial court for failing to order the appellant to provide maintenance for children over 18 years old who were still dependent and undergoing education.

In light of the respondent's dissatisfaction with the outcomes stemming from the trial court's rehearing of the matrimonial division and maintenance issues, the respondent opted to pursue further legal recourse through Matrimonial Appeal No. 03 of 2023 in the District Court of Kilwa.

In its decision on the said appeal, the District Court found that the division of matrimonial properties was generally proper, except for the house located at Kibangule Mbagala Dar es Salaam. This decision was reversed, and the house was awarded to the respondent. Conversely, the house at Likotwa, which had been awarded to the respondent at the trial court, was given to the appellant.

Regarding the maintenance of the children, the District Court required both parties to persist in providing support for the well-being of their children. The Senior Resident Magistrate based her findings on the principle

that parents are duty-bound to support their children, regardless of whether they have reached the age of 18, as long as the children remain dependent on them.

However, this decision did not amuse the appellant, he consequently, lodged this appeal presenting detailed grounds for appeal, which I will summarize as follows;

1. That the first appellate court erred in law and fact in awarding a house at Kibangule Mbagala Dar es salaam to the respondent who failed to prove her contribution to the acquisition of it.
2. That the first appellate court erred in law and fact for ordering maintenance of all children while it is only child who is below 18 years the rest are above 18 years.

At the hearing of this appeal, both the appellant and respondent appeared in person unrepresented. The Appeal was disposed of orally.

Supporting his appeal regarding the distribution of the house at Kibangule Mbagala Dar es Salaam, the appellant argued that the first appellate court made an error in dividing the said house as it was not a matrimonial house.

He contended that he acquired the plot in the year 1990 before marrying the respondent.

He stated further that when he married the respondent in 1992, the construction was already completed, with only the finishing touches remaining. He asserted that based on this evidence, it was incorrect for the first appellate court to award this house to the respondent. He urged this court to reconsider the decision of the first appellate court on this issue and uphold the decision of the primary court on this basis.

Regarding maintenance, he argued that it was wrong for the court to order maintenance for all children when some are above the age of 18, except for the one who is just 13 years old, whom he has been ordered to stay with and support.

Explaining why it was not correct for him to be ordered to provide maintenance for children over 18 years old, he stated that Mwajuma was born in 1999 has already completed school, and is not currently studying. Rahma, born in 2004, has completed Form Four and is currently at home not pursuing further education. He mentioned that Salha is the only child who is above 18 years old and is studying in Form Six in Kilimanjaro, and Twaha,

the youngest, is in grade six and he is the one taking care of and providing for maintenance.

The appellant contended that for the child who is continuing with her studies, he has no issue with continuing to support her, but not for the others who are not studying. Regarding this maintenance order, he requested that this court to examine its correctness.

In response to the appellant's submission, the respondent vehemently opposed the appellant's claim that the house at Kibangule Mbagala Dar es Salaam was not a matrimonial property. She argued that the house was constructed in 1993, shortly after their marriage in 1992. At the time, they did not possess any house or land; they only had a small shop (kiosk). They resided at the appellant's brother's residence. The land where the house was built was purchased in 1993, and construction completed in 1995 when their second child was born.

The respondent emphasized that during the hearing at the primary court and even at the first appellate court, the appellant never contested the status of the house as matrimonial property. She asserted that they both agreed to construct the house together. Additionally, she stated that during the primary

court proceedings, they were instructed to list their matrimonial properties, and this house was included among the listed properties as part of the matrimonial asset.

Regarding the issue of maintenance, the respondent argued that the children still require support as Mwajuma is currently studying Medical Doctor at Kigamboni in her second year, Rahma is pursuing automotive engineering in Dar es Salaam, and Salha is in Form Five at Tarekea Rombo. Since all these children are still pursuing their education, the respondent argued that it is appropriate for the appellant to be ordered to provide maintenance and care for them.

Furthermore, the respondent contended that even the child under the custody of the appellant continues to be supported and cared for by her and has not been left solely to the appellant's care.

Based on these arguments, the respondent urged the court to dismiss the appeal, asserting that it lacks merit.

In a brief rejoinder, the appellant reiterated that the house was not constructed in 1993; rather, by the time he married the respondent, he found it in the finishing stage. Regarding the children, he argued that all of them

have already obtained their basic rights. He emphasized his plea for this court to allow his appeal.

Having thoroughly examined the submissions in light of the grounds of appeal, the central issue at hand for the determination of this appeal is whether this appeal has merit. In addressing this issue, the court will be guided by the two grounds of appeal raised by the appellant.

It is crystal clear that this is the second appeal. According to the decided cases, the second appellate court usually refrains from intervening in the concurrent findings of fact made by the lower courts unless compelling reasons exist to justify such intervention. This principle has been affirmed in numerous decisions as follows;

In the case of **Bomu Mohamed v. Hamisi Amiri** Civil Appeal No. 99 of 2018 (Unreported) the Court of Appeal held that;

> *'We are very alive to a well-established rule of practice that on a second appeal, the Court will not normally interfere with a concurrent finding of fact of courts below unless there are sufficient grounds to do so. These grounds will be things like misdirection, non-directions, or misapprehension of the evidence.*

Again, in the case of **Helmina Nyoni v. Yeremia Magoti** Civil Appeal No. 61 of 2020 (Unreported), the Court of Appeal held that;

> *'It is trite law that second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice'.*

Relying on these decisions, the court now delves into the examination of the grounds of appeal, keeping in mind the standards expected as the second appellate court.

Beginning with the first ground of appeal, the appellant contests the decision of the first appellate court to award the house at Kibangule Mbagala Dar es Salaam to the respondent, which he asserts was not a matrimonial property but his asset. He maintains that he purchased the plot before marrying the respondent, and when he married her in 1992, he found the house already in the finishing stage.

In response, the respondent argues that the house in question is a matrimonial property. She claims that the plot was acquired in 1993, and construction of the house commenced, culminating in its completion in 1995.

Upon assessing the submissions by the parties, the court is inclined to consider whether the house at Kibangule Mbagala Dar es Salaam qualifies as a matrimonial property.

Upon closer examination of the appellant's submission, where he requests the court to set aside the decision of the first appellate court and uphold the decision of the primary court, it appears the appellant impliedly accepts the Kibangule house as matrimonial property.

The court expresses this view because the appellant acknowledges the correctness of the primary court's decision regarding the division of this house, implying that the house at Kibangule Dar es Salaam is a matrimonial property.

This inference arises from the fact that the primary court, after careful evaluation and analysis of the evidence, concluded that the said house is part of the matrimonial assets and proceeded to divide it to the appellant. If the court had determined during its assessment of the evidence that the house was not a matrimonial property, it would not have proceeded with its division.

Therefore, by agreeing with the primary court's finding in respect of the division of this house, the appellant is implicitly admitting that the Kibangule house in Dar es Salaam is a matrimonial property. There are number of cases have elucidated the meaning of matrimonial assets as follows;

In the case of the **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** Civil Appeal No. 102 of 2018 (Unreported), The Court of Appeal held that;

> *'They refer to those property acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives'.*

Therefore, if the house was built with the intention that it should be continuing provision for them and their children during their joint life is a matrimonial asset.

Additionally, according to Section 114 (3) of the Law of Marriage Act [CAP. 29 R.E. 2019] (hereinafter 'the LMA'), if the asset is acquired by one spouse before marriage but substantially improved by both spouses after marriage is a matrimonial asset.

In the case of **Yesse Mrisho v. Sania Abdul** Civil Appeal No. 147 of 2016 (Unreported), the Court of Appeal emphasized that;

> *'The assets to be determined are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts.'*

See also: the case of **Nacky Ester Nyange v. Mihayo Marijani Wilmore** Civil Appeal No. 147 of 2016 and **Tumaini M Simoga v. Leonia Tumaini Balenga** Civil Appeal No. 117 of 2022 (Both Unreported).

Therefore, in determining the present issue, I will go along with the meaning given concerning what constitutes a matrimonial asset as stated in the cases cited herein above.

Guided by the authorities and considering what the LMA says regarding matrimonial properties, and based on the appellant's testimony at the trial court and his submission in this court that the respondent found the house in the finishing stage upon marrying her, and they continued to reside in that house throughout their marriage, and by agreeing with the decision of the primary court, it is sufficient to conclude that the house located at Kibangule Dar es Salaam is matrimonial property.

Having found that the house located at Kibangule is a matrimonial property, the court will now proceed to address the complaint that the first appellate court erroneously awarded the said house to the respondent, who allegedly failed to prove her contribution.

It is important to note that the division of matrimonial assets is regulated by section 114 of the LMA. This provision offers guidance to the court regarding the various factors to be taken into consideration when dividing matrimonial assets. For quick reference, section 114 (1) and (2) stipulate that;

> (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 the 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) to any debts owing by party which were contracted for their joint benefit; and

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

The Court of Appeal in the case of **Tumaini M Simoga v. Leonia Tumaini Balenga** Civil Appeal No. 117 of 2022 emphasized that;

'There is no dispute that section 114(1) vests powers to the court to order division of assets between the parties which were jointly acquired during subsistence of their marriage. Nonetheless, before exercising such powers, it must be established that, first, there are matrimonial assets, secondly, the assets must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts'.

As previously stated, the house located at Kibangule Dar es Salaam is a matrimonial property. Now, the question at hand is whether the first appellate court erred in awarding the said house to the respondent.

In its determination regarding the award of this house to the respondent instead of the appellant, the first appellate court provided the following reasons;

> *'I have gone through the trial court division and found that the division was done properly save to the house located at Dar es Salaam which was allocated to the respondent. The reason is, that this house is the one the appellant has resided with the family since the dispute arose and the family members are still residing thereat.*
>
> *It is the same house which was given a directive by the High Court Judge that, she should continue to be occupied by the appellant pending the petition of the decree of divorce. That wisdom accord that the same should be left to her and the children, as hereby order, and the house located at Lindi which was given to appellant now returned to respondent.'*

It should be noted that the decision referred by the first appellate court of this court was made to allow the respondent to continue occupying the house at Mbagala pending the proper procedure for the petition of divorce.

Now that, the proper procedure has been followed, in my opinion, it was not correct to reason that the house should remain with the respondent

based on a previous finding by this court which just issued the order pending the proper procedure to be complied with.

The law regarding the division of matrimonial properties is so clear in articulating that the court must take into account the contribution of each party while dealing with the issues of the division of matrimonial property. Furthermore, if the criterion for consideration is children, the law explicitly refers to infant children see section 114(2) (b) of the LMA.

The Court of Appeal in the case **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** (supra), held that;

> *'The extent of contribution is of utmost importance to be determined when a court is faced with a predicament of the division of matrimonial property, and in so doing the court should always rely on the evidence adduced by the parties to prove the extent of contribution'.*

While this court in the case of **Assah A. Mgonja v. Elieskia I. Mgonja**, Civil Appeal No. 50 of 1993,(unreported) it was stated;

> *'It is wrong for a court to refrain to determine the issue of a matrimonial home simply because there are children of the marriage who stood to benefit'.*

Applying the principles established in the cited authorities, I will now proceed to assess the extent of contribution of each party regarding the acquisition of the said property to determine whether the division made by the first appellate court was justified.

Upon examining the evidence presented in the trial court, the appellant asserted that he was the one who purchased the plot and tendered a sale agreement which was admitted as Exhibit PKA 12. He explained that he began construction before marrying the respondent in 1992, who found the house in its finishing stage.

On the other hand, the respondent stated that when married by the appellant, they purchased the plot together and commenced construction in 1993, completing it in 1995.

Considering the evidence from both parties, it is evident that aside from the appellant's sale agreement for purchasing the plot, the remaining evidence concerning the construction of the house is too general and does not demonstrate the contribution of each party.

The appellant claims that the respondent found the house in its finishing stage without providing detailed clarification, while the respondent simply states that they built it together without further elaboration.

Based on this evidence, it is apparent that each party claims to have contributed to the construction of the house. However, besides their general assertions, neither party provided detailed explanations on how they were involved in the construction process.

Therefore, considering how the evidence was presented, the criterion of one party retaining the house in Dar es Salaam while the other receives the one in Likotwa Lindi does not appear justified.

As stated earlier the first appellate court reasoning in revising the trial court order of division of this house was that the respondent had been residing in the house with her family throughout, hence she deserved to retain it.

However, Section 114 (2) (d) of the LMA states that the needs of infant children, if any, will be taken into account in the division of matrimonial assets, and the court shall lean towards equality of division, subject to these considerations. The provision reads;

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

From this provision, the court will only be inclined towards equal division after considering the needs of the infant children, if they exist. But who are the infant children?

While the LMA CAP 29 R.E 2019 does not provide a definition for "infant" or "infant child," it is worth noting that the previous version of the law, LMA CAP 29 R.E 2002, defined "infant or infant child" as a child who has not attained the age of eighteen years.

Similarly, in the case of **Mariam Tumbo v. Harold Tumbo** [1983] TLR 4, when discussing the custody of infant children, the court stated;

'The petitioner also prayed for custody of the youngest five children; the respondent prayed for custody of the last three. Custody may only be ordered in respect of ***a child who has not attained the age of 18 years.... The fifth, sixth and seventh were born in 1967, 1968 and 1970 respectively. They are therefore still "infants" within the meaning of the law.*** *However, they are not the sort of infants whose views one can safely ignore..... In matters of custody, the*

welfare of the infant is of paramount consideration, but where the infant is of an age to express an independent opinion, the court is obliged to have regard to his or her wishes.' [Emphasis added]

When examining the children stated in this decision as infants, at the time the case was filed in 1983, they were aged 16 (born in 1967), 15 (born in 1968), and 13 (born in 1970). Therefore, according to the decisions of this case an infant child is that child who has not yet attained 18 years old.

Reverting to the case at hand and considering the evidence in the records, among the six surviving children of the parties, the youngest is 13 years old and was placed in the custody of the appellant, while the rest are over 18 years old.

It is clear that even if the first appellate court magistrate intended to consider the provision of section114 (b) of the LMA in the division of this house, still it was not entirely correct because, based on the evidence, there are no infant children; all children, except for the one in the custody of the appellant, do not meet the definition of infant children.

Furthermore, I have encountered hesitation in discerning the exact criterion used by the two lower courts to ascertain which party should retain

the house in Dar es Salaam and which should receive the one in Likotwa Lindi.

This uncertainty stems from the fact that the evidence concerning the contribution to the acquisition of the said property is too general; neither party specifically delineated how they contributed to the construction, although each asserts their involvement in their testimonies.

Based on this observation, I have noted a misapprehension of the evidence by the two lower courts, necessitating intervention by this court in their findings. Upon reviewing the evidence on record, this court deems it fair and equitable for each party to receive a share in these two houses.

Since the evidence indicates that the appellant was the one who purchased the plot on which the house in Kibangule, Dar es Salaam was built, in dividing this property, the court is awarding him 60% share and allocating 40% share to the respondent. As for the house in Likotwa, Lindi, the appellant is awarded 50% share and the respondent is awarded 50% share. However, either party has the option to compensate the other party for their share and retain the matrimonial property.

Moving to the issue of maintenance, based on the records and the submission presented by both parties, it is an undisputed fact that the only child under the age of 18 is Twaha, who is allegedly 13 years old and under the custody of the appellant. The remaining children are all above 18 years old.

On her part, the respondent argued that despite the children being above the age of 18, they are still in school, and therefore, they still require care and support. In issuing the maintenance order, the first appellate court stated;

> *' Having regard the maintenance of the children, it is evident that the younger child who is aged 13 years old and named Twaha Hamisi Abdallah Mkwekea is in the custody of the respondent. The trial magistrate ordered as well the appellant to maintain the child as well. All parents have to maintain their children even if they are above 18 years of age and still depend on them. Hence it is the duty of both parents and respondent to maintain their children and sustain them for their own betterment!*

According to section 129 (1) of the LMA, the obligation to maintain children is imposed on the male parent. The section provides;

> 129.-(1) '*Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such* ***accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.***' [Emphasis added]

This section should be read together with section 44 of the Law of Child Act [CAP. 13 R.E. 2019], (hereinafter the LCA) which outlines the circumstances to be considered when issuing a maintenance order, it states;

> 44 '*A court shall consider the following matters when making a maintenance order-*
>
> *(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*
>
> *(b) any impairment of the earning capacity of the person with a duty to maintain the child;*

(c) the financial responsibility of the person with respect to the maintenance of other children;

d) the cost of living in the area where the child is resident; and

(e) the rights of the child under this Act.

The appellant has contested the first appellate court's decision to order him to provide maintenance for children who have exceeded the age of 18 and are not in school. On the respondent's part, she mentioned three other children, besides Twaha, who is under the appellant's custody that they are still pursuing their education, with one studying for a medical doctorate, another in automotive engineering, and the third currently in Form Five. This illustrates that all of them still depend on care and support.

Section 26 (1) (a) of the LCA provides for the right of a child to receive maintenance and education of the same quality as they enjoyed immediately before the separation or divorce of their parents. The section reads;

26.-(1) *'Subject to the provisions of the Law of Marriage Act, where parents of a child are separated or divorced, a child shall have a right to –*
(a) maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced'

The main complaint of the appellant in this ground is being ordered to maintain children over 18 years who are not currently pursuing education, a contention challenged by the respondent who indicated that the three children over 18 are still enrolled in schooling.

Section 48(1) of the LCA addresses the conditions under which maintenance orders may continue in certain situations, stating;

> 48.-(1) '*Notwithstanding the provisions of section 47, the court may continue to enforce a maintenance order after a child has attained eighteen years if the child is engaged in a course of continuing education or training.*'

Considering this provision, it is evident that maintenance orders can be issued even for children who are above 18 years old, only if there is evidence that such children are still pursuing education.

The maintenance order by the first appellate court decrees both parents to provide for their children's maintenance, yet neither the trial court nor the first appellate court delineated the precise amount of maintenance costs each parent should bear. Without a clear indication of the amount, such an order becomes unenforceable.

On the foregoing premises, the absence of specified maintenance costs renders this obligation practically unattainable. Therefore, the court record

shall be remitted to the trial court before the same magistrate for the assessment and determination of appropriate maintenance costs after hearing the parties. In the event that the trial magistrate is unavailable, another competent magistrate will take over.

In the upshot, the appeal is partly allowed to the extent explained above. Considering this is a matrimonial matter, I make no orders as to costs.

It is so ordered

Dated at Mtwara this 20th March 2024.

M.B. MPAZE

JUDGE

Court: Judgment delivered in Mtwara on this 20th day of March, 2024 in the presence of the appellant Hamisi Abdallah Mkwekea and Darini Selemani Mrope respondent.

M.B. MPAZE

JUDGE

20/3/2024