

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 26925 OF 2023

*(Arising from the decision of District Court of Temeke at One Stop Judicial Centre in
Matrimonial Cause No. 248 of 2023 before Hon. M. X. Sanga – SRM)*

EMMANUEL MOSES BISEKO.....APPELLANT

VERSUS

NEEMA LAISON NKWAMA.....RESPONDENT

JUDGMENT

20/03/2024 & 15/04/2024

M.MNYUKWA, J.

An order of Temeke District Court (the trial court) on division of matrimonial properties and maintenance of the issues of marriage are among the orders which triggered the appellant to prefer this appeal. Records shows that appellant (the then petitioner) and respondent contracted a Christian marriage at St. Gasper, Del Bufalo, Dar es Salaam parish church on 28/12/ 2013. They were blessed with two issues of marriage where by at the time when the appellant petitioned for divorce they were eight (8) years old. Their marriage was not a happy one since each of the spouse accused another for adultery behaviour.



It is the complaint of the appellant that respondent associated with adultery life and the situation was intolerable which compelled him to move out of the matrimonial home in 2019. He therefore, petitioned for a decree of divorce, equal division of the matrimonial assets acquired by the parties during the subsistence of marriage, custody of children and costs of the suit.

At the trial, appellant paraded two witnesses, he testified as PW1 and his witness was PW2. In his evidence, appellant adduced evidence on respondent's adultery association with another man and alleged that he found her in a *flagrento delicto*. He adduced that marriage life was intolerable which forced him to desert respondent from 2019 in order to live peaceful life. Appellant also testified on how they acquired matrimonial house and other houses built on the same plot. He testified that they jointly bought a plot at Mivumoni in two phases and the plots were registered in their names. He tendered some exhibit to prove his assertion.

In proving his contribution in construction of the houses, appellant testified that he contributed more than respondent because he is employed and he took loan from PPF SACCOS to finance construction of the houses. He tendered exhibit P4 to prove the same. He further testified that the first house was built in 2014 to 2016, the second house was built



from 2016 to 2017 and the third house was built on 2021. Appellant also adduced evidence on custody of children and prayed the trial court to grant him custody of his children since he was not given an access to see them as he used to access them through the house boy or when he visited them at school. He said that he paid the school fees for them and tendered Exhibit P6 to prove his assertion. Appellant also called PW2 who mainly testified on finding respondent in *flagrante delicto*.

On her part, respondent also accused appellant for adultery association and being cruel to her as he used to beat her. She disputed being found in *flagrante delicto* as she said that the man was just a friend and she called him to escort her to church and appellant used that chance to allege that she met her in *flagrante delicto* with that man after he forced the man to undress in their bedroom. And, they were severely beaten by the persons accompanied appellant but that the matter was reported to the police where appellant was told to have committed the offence of causing grievous bodily harm.

Disputing appellant's contribution in the construction of the houses, respondent testified by admitting that they have jointly bought plots in two phases but in the first plot which was bought for Tsh 4,500,000, she contributed Tsh 3,000,000 and respondent contributed Tsh 1,500,000.



She added that for the other plot which was bought in the second phase for Tsh 4,000,000 they both contributed equally that is Tsh 2,000,000.

As it is reflected on the evidence of both parties, the plots were developed by constructing three houses. In her testimony, respondent adduced that appellant did not contribute in the construction of the house since when he was asked to contribute in the construction of the first house in 2014 but he responded that he did not have money. She further testified that the construction of the two houses was done when respondent deserted the matrimonial home. To prove that she was the one who built those houses she tendered Exhibit D5 collectively. She also brought three other witnesses who testified in her favour on the construction of the house.

After hearing both parties the trial court was satisfied that marriage between the parties was irreparably broken down and proceeded to grant decree of divorce. It also made an order for custody of children to respondent while appellant was ordered to maintain them by paying monthly maintenance of Tsh 100,000 for each child. Appellant was also ordered to pay school fees and cover medical expenses for children. The trial court also made an order on division of matrimonial assets acquired by the parties during the subsistence of their marriage where awarded appellant 20% of the value of the houses respondent was



awarded 80%. The trial court's reasoning was that, appellant failed to exhibit his contribution in the construction of the houses compared to respondent.

As I have said earlier on, appellant was dissatisfied with the orders of the trial court. He advanced four grounds of appeal which are;

- 1. That the honourable Magistrate erred in law and facts by holding that respondent had sole contribution in the construction of the three houses located at Mivumoni area Dar es Salaam without considering extent of contribution made to petitioner.*
- 2. That the hounourable magistrate has erred in law and facts for failure to order equal division of matrimonial properties acquired through jointly efforts of the parties.*
- 3. That the honourable magistrate has erred in law and facts by imposing excessive amount and liability to petitioner in maintenance of the matrimonial issues without considering financial status of both parties*
- 4. That the hounourable magistrate erred in law and facts by reaching into conclusion which is misconceived, unsupported by evidence and based on unprocedurally admission of evidence on record.*

He thus prayed the decision of the trial court be nullified and set aside.

At the hearing both parties were represented. Mr. Isack Temu, learned counsel represented appellant while Ms. Loveness Ngowi,



represented respondent. By the leave of the court the appeal was argued by way of filling written submission.

Supporting the appeal, learned counsel for appellant argued jointly the 1st, 2nd and 4th grounds of appeal and argued separately the 3rd ground of appeal. .

On the joint grounds of appeal, he submitted that the trial court erred to hold that respondent had sole contribution in the construction of the house by relying on the evidence of the respondent only which is tainted with irregularity and left behind appellant's evidence. The counsel referred to section 114 (2)(b) of the Law of Marriage Act, Cap 29 R.E 2019 (the Act) and claimed that, the trial magistrate failed to consider the extent of contribution made by appellant and ignored the evidence of his witness and took cognizance to respondent and her witnesses while their evidence failed also to clearly show her involvement in the construction of the three houses.

The counsel went on to attack Exhibit D5 collectively which he believed the trial court used as a basis for the construction of three houses and claimed that the same does not show how much (money) was injected in the construction of the three houses. He said that, having loan facility, purchasing building material and proof of payments are not



enough since the same are not an automatic proof that the same have been used in the construction of the houses. He referred to the case of **Sixbert Bayi Sanka v Rose Nehemia Samzughi**, Civil Appeal No 68 of 2022. He added that, Exhibit D5 which was used to gives respondent bigger share than him was wrongly admitted. He referred the case of **Antony M Masanga v Penina (mama Mgesi) and Lucia (mama Anna)**, Civil Appeal No 118 of 2014 where he said that the trial court erred to admit the documents collectively or omnibusly.

He concluded in these grounds by stated that the documents, Exhibit D5 falls under the instruments defined under section 2 of the Stamp Duty Act, Cap 189 R.E 2019 read together with section 5 item 51 of the schedule and section 47 which prohibited the same to be admitted as part of evidence.

On the third ground he submitted that the trial court failed to consider the income of both parents in ordering maintenance of children. He was of the view that even though section 129 (1) of the Act places duty of a man to maintain his children but the said section has to be read together with section 44 of the Law of the Child Act, Cap 13 R.E 2019 which places duty to both parents to maintain children. He referred to the case of **Aloyce Masalu Mapembe v Pualina Romanus Masanga**, PC Matrimonial Appeal No 03 of 2021. He retires by faulting the trial court's



decision for its failure to order equal division of the houses and excessive amount for maintenance.

Contesting, respondent's counsel referred to section 114 (2)(b) of the Act and the case of **Edward Mbele v Magdalena Jackline Mbele**, PC Matrimonial Appeal No 11 of 2021 and the case of **Gabriel Nimrod Kurwijila v Theresia Hassan Mwalongo**, Civil Appeal No 102/2018 and the case of **Sixbert Bayi Sanka v Rose Nehemia Samzugui** (supra) where this court and the Court of Appeal emphasized on the aspect of contribution made by each party in the acquisition of the assets as a criteria for consideration when ordering division of matrimonial assets. The counsel added that, based on the evidence on record, appellant failed to prove the extent of his contribution in the construction of the house as he failed to exhibit the same with a documentary evidence compared to respondent.

The respondent's counsel went on that Exhibit D5 states the purpose of loan contrary to appellant's loan which was not used for construction purpose and he failed to prove how the loan taken was used for constructions of the houses. On the issue of omnibus admission of documents the counsel contended that each document was identified before tendering and appellant got an opportunity to cross examined it. In regards to admission of Exhibit D5 without being stamped she was of



the view that the same is neither a ground of appeal nor a ground of objection in the trial court. She was of the opinion that, this is a new fact which was never raised in the trial court. She added that appellant failed to identify the documents which are required to be affixed with the stamp duty. She claimed that the stamp duty can be paid even in appeal stage. She retires by arguing the court to apply the overriding principle and not to be tied up with technicalities on the issue of stamp duty as it was stated under Article 107(2) of the Constitution, Cap 2 R.E 2019.

On ground three which is all about the excessive amount for maintenance ordered by the trial court, Ms. Ngowi submitted that it is the duty of a man to maintain his child as it is provided under section 129 of the Act. She said that a mother can discharge that duty if the husband is dead, his whereabouts is unknown or he is incapable to do so. She referred the case of **George Ganvench Ganvench v Hope Elizabeth Yusuf Abbebe**, Civil Appeal No 109 of 2019. She concluded that the amount of maintenance awarded to appellant is relatively low compared to the costs of living.

That marked the end of the submissions from both parties since appellant did not file rejoinder. Now, upon going through the available records supplied to me and the submissions of both parties, the main issue for consideration and determination is whether the appeal is



merited. In answering the above issues, I will determine the appeal as argued by the parties.

Before I embark to determine the appeal on merit, I must say that this is the first appeal. Being the first appellate court, I am enjoined to re-evaluate the evidence on record and come with my own analysis and conclusion based on the available facts. (See the case of **Tom Morio vs. Athumani Hassan (suing as the administrator of the Estate of the late Hassan Mohamed Siara & 2 others)**, Civil Appeal No. 179 of 2013 CAT.

For simplicity and convenient, I will start with the 3rd ground of appeal which is all about maintenance. As it is reflected in the trial court's judgment, the trial magistrate ordered monthly maintenance, education costs and medical treatment to be borne by appellant. While appellant claimed that the amount of maintenance is high and the trial court ought to have considered the income of both parents in ordering the same, respondent claimed that it is the duty of the father to maintain his children and that duty shifts when the man is dead, or his whereabouts is unknown or he is incapable of doing so.

In answering the above ground, first and foremost I wish to state that respondent's counsel ought to have considered the Law of the Child



Act, Cap 13 R.E 2019 which is the specific law in dealing with children issues which cut across all children regardless of whether they are born within the wedlock or outside the wedlock. Admittedly, it's true that section 129 of the Act places duty to a man to maintain his child. However, section 44 (a) of the Law of the Child Act, Cap 13 R.E 2019 pointed out factors to be considered when ordering maintenance of a child. The law is clear under section 44 which provides that:

"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".

From the above provision of law it is clear that court shall consider the income and wealth of both parents when ordering maintenance of a child. The law of the Child Act gives a liberal approach on maintenance issues. That, it is not the sole duty of the father as it is used to be. Since the child belonged to both parents, all parents are in equal footing in maintaining a child unless there are special circumstances for diverting that duty as it is provided in the above cited provision of law.

In our case at hand, respondent is ordered to pay monthly maintenance, school fees and medical treatment. It is on record that both parents are employed and works for gain. It is not in record if respondent



is incapable of any how to maintain her children. To my view, taking the spirit of section 44 (a) of the Law of the Child Act, Cap 13 R.E 2019, the respondent is also obliged to contribute toward maintenance of her children. For purpose of sharing responsibilities to maintain children, I find it wise to revise maintenance order made by the trial court which also includes payment of school fees and medical cover. Since both parents are employed, and these are their only children for now, both of them should contribute equally to pay school fees for their children and medical cover. On the amount of monthly maintenance, the same is not disturbed, and that is to say appellant will pay Tsh 200,000 as a monthly maintenance for his two children. Therefore, this ground of appeal is partly allowed to the extent explained therein.

In relation to the issue of division of matrimonial assets alleged to be jointly acquired by the parties during the subsistence of their marriage, it is my humble view that the law is settled in making an order for division of the matrimonial assets, one among the criteria to be considered is the extent of contribution made by each party in acquisition of the matrimonial assets in issue.

In our case at hand, parties are in agreement that the only property which is the matrimonial properties acquired during the subsistence of their marriage is the plot of Mivumoni. However, they locked horns on the



development of plots where appellant claimed that he contributed in the development of the said plots where three houses were built therein and therefore he is entitled a division of equal share with respondent. Whereas, respondent contended that appellant contributed nothing in the construction of the house.

Before I analyse the evidence on record in relation to contribution made by each party in the construction of the houses, I have to answer two legal issues raised by appellant in his submissions. These issues emanates on the 4th ground of appeal which specifically attacked Exhibit D5. In one of its objection appellant claimed that the trial court was wrong to admit Exhibit D5 collectively. I don't think if this issue need to detain me much, I have examined the trial court's proceedings and Exhibit D5, I am satisfied that, all documents are related as they meant to prove respondent's contribution in the construction of the houses. Further to that, appellant got an opportunity to see them in the pleadings and he got an opportunity to cross examine them when tendered. Therefore, I don't see if appellant was prejudiced in anyhow when they were tendered collectively. And thus, the objection is baseless.

On the issue of stamp duty to be affixed in Exhibit D5, it is my view that this is an afterthought since the same was not objected during the tendering of exhibit and it was not specifically stated as a ground of appeal



since the ground of appeal queried on un-procedural admissions of exhibit and not the validity of the exhibit itself. As it was rightly submitted by the respondent's counsel, appellant failed to identify which documents among Exhibit D5 is required to be stamped with the stamp duty. Respondent's counsel had the view that, even if the exhibit is not stamped with the stamp duty, still this court can order for payment to be done and the document be stamped. Again, on my side, I don't think this issue need to detain me much as I believe that justice demands the duty which are chargeable to some of the documents in Exhibit D5 be paid. Thus, respondent is hereby ordered to pay the stamp duty with which some of the documents in Exhibit D5 are chargeable. Therefore, considering there are oral evidence of DW1, DW3 supporting exhibit D5, I proceed to determine this ground on merit.

Turning now to the question of the extent of contribution of the parties in the constructions of the three houses. I am alive with section 114 of the Act which empowers the court to order division of matrimonial properties upon dissolution of a marriage. This section also provides for factors to be considered by the court when exercising this power that is it should consider the extent of contribution made by each party in money, works or property towards the acquiring of the assets, section 114(2)(b) of the Act is to that effect.



And, the law is clear on standard of proof in civil cases that, proof is on balance of probability that which party to the case has cogent evidence than the other. Then, whoever alleges must prove as it is provided for under section 110(1) of Cap 6 R.E 2019 which reads that;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

Now, considering appellant's evidence as reflected on page 12 of the typed proceedings, the first house was built from 2014 to 2016, the second house was built in 2016 to 2017 and the third house was completed in 2021. It is clear that appellant did not state as to when the construction of the third house begun. Impliedly, the same started after the construction of the second house as he didn't state in his evidence if the same was built parallel with the second house. From the respondent's evidence (DW1) as reflected on page 37 of the trial court's proceedings, the third house was rented in 2022. Her evidence was collaborated with that of DW4 who testified that she was one among the first tenant of the respondent and that she rented a house to respondent in 2022 and all other houses were rented when she was there. And, that there was no house that was rented before 2022.



The above evidence suggests that the third house was built when respondent deserted matrimonial home. I say so since in his evidence as reflected on page 14 of the trial court's proceedings he testified that;

"... I decided to leave the matrimonial home from 2018 when we separated the family was involved to reconcile so as to rescue the marriage, unfortunately nothing was achieved."

The above piece of evidence collaborates his petition for divorce which shows that he left matrimonial home in 2019 which is a difference of one year from his testimony. All in all, the pleadings and evidence on record shows that appellant was not in communication with respondent during desertion period for them to plan the construction of the house. Therefore, it is difficult for this court to believe that he was sending money to respondent for construction of the house. Thus, it is my conclusion that appellant did not contribute in the construction of the third house.

On the two remaining houses, appellant's evidence is to the effect that he contributed in the construction of the house as he took loan and also contributed as he gave money to respondent from his allowances and salary for construction purpose. In her evidence, respondent strongly refuted that testimony as she testified that when appellant was asked to contribute in the construction of the houses he responded that he does



not have money. It is clearly shown in the record that appellant failed to exhibit if his salaries, allowances and loan taken from PPF SACCOS was injected in the construction of the house. As it was stated by the Court of Appeal in **Sixbert Bayi Sanka v Rose Nehemia Samzugĩ** (supra) that:

"... as it is also one thing for one to establish that he was financially liquid and quite another guaranteeing that the money was spent in the construction of the house."

Unfortunately enough, apart from his failure to exhibit how his income was injected in the construction of the houses, appellant also failed to cross examined respondent's evidence on the material fact when she testified that he asked appellant for money and he responded that he does not have money and on her evidence that she contracted the houses without appellant's contribution. It is trite law that failure to cross examined on the material facts is equal to admission of that facts. (See the case of **Shadrack Balingo vs. Fikiri Mohamed @ Hamza and 2 others**, Civil Appeal No. 223/2017 CAT (Unreported)). Again, appellant evidence was not collaborated with any other evidence at the trial court since his witness, PW2 testified on how they found respondent in *franganto delicto*.



It was expected for appellant to call even the house boy to whom he claimed that he accompanied with respondent in the construction of the houses, but still he didn't. In the case of **Hemed Said Vs Mohamed Mbilu** [1984] TLR 133 the Court of Appeal held that;

"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interests".

Further, in **Boniphace Kundakira Tarimo v Republic**, Criminal Appeal No 350 of 2008, the Court of Appeal reiterated the principle of failure to call a material witness in which it had this to say;

"..... It is now settled that, where a witness who is in a better position to explain some missing links in the party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against the party, even if such inference is only permissible one."

Contrary to that, in her evidence respondent exhibited her contribution in the construction of the house through exhibit D5 and the evidence of DW2 and DW3. Their evidence (DW2 and DW3) on respondent's construction of the houses was unchallenged and in fact collaborates DW1 evidence adduced in the trial court. I am therefore,



satisfied that respondent contributed in terms of money and works as he supervised the construction of the houses. As it was rightly stated by the trial magistrate, appellant who alleged to build the houses refused to shift to their home when construction was completed. This is unbelievable though it was a reality.

That being said I see no fault on the part of the trial court for holding that appellant did not contribute in the construction of the house as the evidence on record shows only he contributed in acquiring the plot. Thus, I am not going to interfere with the trial court's findings on the division of the matrimonial assets acquired by the parties during the subsistence of marriage. Therefore, this ground must fail and it is hereby dismissed.

In the event, appeal is partly allowed to the extent explained therein. No order as to costs since parties were couples.

Right of appeal explained to the parties.




M.MNYUKWA
JUDGE
15/04/2024.

Court: Judgment delivered in the presence of Adv. Kassim Mussa for appellant who also hold brief for Adv. Loveness Ngowi for respondent.


M.MNYUKWA
JUDGE
15/04/2024