IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO.26631 OF 2023

(Arising from decision of Temeke District Court at One Stop Judicial Centre in Matrimonial Appeal No.27 of 20213before Hon. A.Swai originated from Matrimonial Cause No 343 of 2022)

MWANISHA OMARY NASSORO.....APPELLANT

VERSUS

ATHUMANI OMARY MAPUYA.....RESPONDENT

JUDGMENT

09/02/2024 & 16/04/2024

M.MNYUKWA, J.

This is the second appeal which traces its origin from Matrimonial Cause No 343 of 2022 before the Primary Court of Temeke One Stop Judicial Centre (the trial court) where its decision was subject to appeal in the District Court of Temeke One Stop Judicial Centre (the 1st appellate court). For better understanding of this appeal, it is vital to narrate background facts which leading to the same.

What has been gathered from the records are that; parties to this appeal were husband and wife after they celebrated marriage according to Islamic rites. The couples were blessed to have eight children where four of them are minors. It is on record that respondent issued *talaka* to appellant where according to Islamic rites, it is one among the way of

dissolving marriage. Since parties were married according to Islamic rites, the trial court dissolved the marriage by issuing a decree of divorce in accordance to section 107 (3) of the Law of Marriage Act, Cap 29 R.E 2019 (the Act).

A decree of divorce was not disputed by either party, what was in dispute was an order for division of matrimonial assets, custody of children and maintenance. At the trial court it was held that the parties acquired several properties to wit; a matrimonial house at Kiimbwa, Segerea which was awarded to appellant, a plot at Gongo la Mboto, a plot at Chanika and a plot at Morogoro which were awarded to respondent. The trial court also granted custody of children to appellant and ordered respondent to pay monthly maintenance and educations costs for children. The monthly maintenance which was ordered was at the tune of Tsh 200,000 for all children being Tsh 50,000 for each child.

The above decision disgruntled respondent who successfully appealed to the 1st appellate court. The 1st appellate court revised the order of matrimonial assets after holding that the only assets acquired by the parties during the subsistence of their marriage is the house at Kiimbwa, Segerea where each party was given a share of 50%. It proceeded set aside an order for maintenance and ordered the parties to go back to the trial court for it to take the independent view of children

as to which parent they wished to stay with. And, it also ordered the trial court to assess the capability of the respondent to maintain his children.

Unhappy with the above decision, the appellant knocked the doors of this court with three grounds of appeal. The first ground disputed an order of dividing matrimonial house between the parties while appellant is residing with her children in that house. The second and third grounds of appeal challenged an order of setting aside monthly maintenance and payment of education costs for the children imposed to respondent.

Appellant prayed appeal to be allowed, the decision of the trial court be upheld and the decision of the 1st appellate court be quashed and set aside.

At the hearing of this appeal parties appeared in person, unrepresented. The appeal was argued orally. Both parties were very brief when arguing for and against appeal.

Arguing in favour of the appeal, it was appellant's submissions that the 1st appellate court erred by holding that the only property which was acquired by the parties during the subsistence of their marriage is the matrimonial house of Kiimbwe, Segerea while the evidence at the trial court shows that parties acquired several properties.

On the second ground she said that the 1st appellate court erred to hold that the issue of custody was not determined and on the third ground

of appeal she submitted that the 1st appellate court erred when it failed to upheld the decision of the trial court ordering respondent to pay monthly maintenance and school fees for their children. She thus prayed appeal to be allowed.

Contesting, respondent submitted that, the 1st appellate court was right on division of the only matrimonial assets acquired by the parties during the subsistence of the marriage. He said that the only property proved by the 1st appellate court to be a matrimonial property is the house of Kiimbwe, Segerea.

Regarding the amount on monthly maintenance which is the second ground of appeal he stated that, respondent is incapable to pay the amount ordered by the trial court for he does not have formal employment. He claimed that, since the issue of custody was not determined, it was incorrect for a trial court to order maintenance of children.

Responding to the third ground of appeal, he contended that appellant is the one who collects rent in their matrimonial house therefore she is supposed to pay maintenance for children. He added that, the trial court failed to take independent views of children for it to decide as to which parent they wished to stay with. He thus prayed the appeal to be dismissed.

In a short rejoinder, appellant reiterated what she submitted in her submissions in chief and insisted that the house at Kiimbwe, Segerea is not the only matrimonial assets acquired by the parties during the subsistence of the matrimonial assets.

I have dispassionately reviewed the rival submissions of both parties and the records of proceedings and the decisions of the lower courts, the main issue for consideration and determination is whether the appeal has merit. In the course of determining the above issue, I will address all the grounds of appeal.

Before I determine the grounds of appeal on merit, I think what is intended to be challenged by appellant in her first ground has been featured in her submissions in chief which disputed the holding of the 1st appellate court that the only matrimonial property acquired by the parties during the subsistence of their marriage is a house at Kiimbwe, Segerea. However, in her Memorandum of Appeal there is a word which negates that. The appellant's first ground of appeal reads as hereunder:

1. *"Kwamba, Mheshimiwa Hakimu Mkazi wa Mahakama ya Wilaya ya Temeke Kituo Jumuishi cha Mahakama amekosea kisheria na kimantiki kushindwa kutengua Hukumu ya Mahakama ya Mwanzo hapa Kituo Jumuishi iliyotoa amri ya kwamba nyumba iliyopo mtaa wa Kiimbwe eneo la Segerea wilaya ya Ilala mkoa wa Dra es Salaam*

apewe mleta rufaa kwa kuzingatia kuwa Mletea rufaa atakaa na watoto wanne."

In English the above passage can be translated to mean

1. *"That, the Honourable Resident Magistrate of Temelke District Court integrated justice centre erred in law and fact for his failure to set aside the decision of the primary court of integrated justice centre which ordered the house situated at Kiimbwe street Segerea within Ilala District at Dar es Salaam region be given to appellant considering that she will stay with four children."*

For what I observed in the first ground of appeal is a bad drafting of the ground of appeal. I say so because appellant is challenging the decision of the 1st appellate court which ordered the division of the matrimonial assets as she believed that the said house is not the only matrimonial property acquired by the parties during the subsistence of their marriage.

For that reason, and for the interest of justice to both parties, since respondent understand what is disputed by appellant, I will determine this ground considering what has been submitted by appellant in supporting the ground of appeal which is also responded by respondent when replying to the same. Thus, the main controversy in this ground is the findings of the 1st appellate court which held that the only matrimonial property of the parties which is proved before the trial court is the house

at Kiimbwe which is ordered to be divided equally among the parties. That is to say, the 1st appellate court faulted the trial court's findings that parties had other properties apart from the house of Kiimbwe, Segerea acquired by their joint efforts during the subsistence if their marriage.

In answering the above ground, I have to start with the settled position of law that annexure are not evidence. The law is settled that, the purpose of annexure is to inform the other party on the document wished to be relied upon so as to inform him on the case he is going to face and not to be taken by surprise. If annexures are not tendered, the other party has no burden to disprove them because they are not part of the evidence.

In **Sabry Hafidh Khalifa v Zanzibar Telecom Ltd (Zantel) Zanzibar,** Civil Appeal No. 47 of 2009, the Court of Appeal stated that: -

> *"We wish to point out that annexture attached along with either the plaint or written statement of defence are not evidence. Probably, it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or the written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprise. But annextures are not evidence".*

Guided by the above decision it is my firm view that in determination of the first ground of appeal I will not consider any annexure which was not tendered during trial for they are not part of the evidence.

Further to that, I must say that I am alive with the provision of section 114 (1) of the Act 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.*

Now, considering the evidence on record, my mind is settled that the only property which is proved by the parties to have been acquired during the subsistence of marriage is the matrimonial house of Kiimbwe at Segerea. As it was rightly held by the 1st appellate court, the said house is the only property which its existence was proved by the parties. It is on record that appellant mentioned a number of properties alleged to be matrimonial properties but its existence were not proved at the trial court. I hold so based on what is gathered from the record.

In addition, when responded to the claim brought by appellant at the trial court, respondent said that, appellant has to give her evidence on those properties as a wife. As it is reflected on page 16 of the trial court's proceedings, respondent's evidence was very clear when he said that he don't know the intention of appellant who wished the property to be sold while knowing that it is the house in which they are living with their children.

Reading between lines the above excerpts of respondent's evidence reflected in the trial court's proceedings which collaborated with the testimony of PW2, the only property which is proved by the parties to be the matrimonial property is the house of Kiimbwe, Segerea. Though in her evidence appellant testified that she knew that respondent had other plots which bears his name, however, she did not tender any proof to prove respondent's ownership. Unfortunately, this evidence was not collaborated by her witness, PW2, since when he was cross examined, he testified that he was told that parties had other plots. This evidence lacks proof because it is hearsay evidence.

Therefore, guided by the provision of section 114(1) of the Act, I uphold the decision of the 1st appellate court that the only property which is proved to be the matrimonial property acquired by the joint efforts of the parties during the subsistence of their marriage is the house of

Kiimbwe, Segerea. I am also in agreement with the decision of the 1st appellate court for the house in question to be divided equally between the parties and the manner of disposing it. Therefore, this ground of appeal lacks merit and it is hereby dismissed.

The second and third grounds of appeal challenging the decision of the 1st appellate court which set aside the maintenance order of monthly payment and education costs for children. Appellant was not satisfied at all for a court file to be remitted back to the trial court for it to assess the capability of the respondent to pay. However, in their submissions, parties submitted on both, custody of children and maintenance order.

To begin with, I must say that I will not address the issue of custody of children since it is not among the grounds of appeal in this court. All the two grounds submitted by appellant are challenging the decision of the 1st appellate court on maintenance order. For that reason, I will jointly determine the second and third grounds of appeal altogether for they are related.

As it is shown in the Memorandum of Appeal, the second ground of appeal is faulting setting aside the monthly maintenance order while the third ground is challenging the setting aside of the order imposed to respondent to cover education costs for children. Undoubtedly, the court record shows that, the 1st appellate court did neither state the amount of

monthly maintenance nor ordered what should be covered in the maintenance. But rather, it set aside the order for maintenance.

Upon revisiting the record, I don't think if this issue need to detain me much. The provision of section 129 (1) of the Act places duty to a man to maintain his children. Further to that, section 44 of the Law of the Child Act, **Cap 13 R.E 2019** provides for the factors to be considered before making maintenance order. The section 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.*
>
> *(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.*

Considering the above, it come clear in mind that the court cannot order maintenance of a child in a vacuum. It goes without say that the court has to consider the factors stated in the above section and any other factor which is appropriate for it to reach just and fair decision. In our case at hand, the evidence on record does not establish the capabilities

of the respondent to pay as he claimed in his submissions that he does not have formal employment.

Therefore, it is my considered view that it is wise for the file to be remitted back to the trial court for it to assess the capability of the respondent to pay when the issue of custody is settled. Therefore, I upheld the decision of the 1st appellate court for the file to be remitted back to the trial court for it to assess the capability of the respondent on monthly maintenance. This ground therefore lacks merit and it is dismissed too.

Having said so I upheld the decision of the 1st appellate court. Consequently, the appeal is dismissed for lack of merit. It is so ordered. No orders as to costs since parties were married couples.

Right of appeal explained to parties.

HIGH COURT OF TANZANIA

M.MNYUKWA

JUDGE

16/04/2024.

Court: Judgment delivered in the presence of the parties.

M.MNYUKWA

JUDGE

16/04/2024