IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY

AT MOROGORO

PC CIVIL APPEAL NO. 3826 OF 2024
(Arising from Civil Appeal No 55 of 2022 of the District Court of Kilosa, Originating from Matrimonial Cause No 13 of 2022 of Mikumi Primary Court)

JOHN LIBAWA ..... APPELLANT

VERSUS

ELIZABETH PROSPER MWAKIMATA ..... RESPONDENT

JUDGMENT

07/05/2024 & 29/05/2024

KINYAKA, J.:

Sometimes in the year 1967, the appellant herein tied the knot with the respondent in a Christian marriage ceremony held at Mngeta within Ifakara Township. Their happy marriage turned sour in 1997 following the appellant's marriage to another woman resulting into allegations of wilful neglect, cruelty, adultery and sexual perversion on the part of the appellant.

Expressing her discontentment with the marriage, the respondent instituted a matrimonial case against the appellant at the Mikumi Primary Court, herein after "the trial court" wherein she petitioned for divorce and division of matrimonial properties. After hearing the evidence from the parties, the trial

court dissolved the marriage and ordered division of matrimonial assets. The appellant was awarded two houses located at Magoma area, the farms and a house both located at Mngeta. On the other hand, the trial court ordered that the two houses located at Green Mikumi area and a farm located at a place known as Morem to be placed in the ownership of the respondent.

The decision of the trial court disgruntled the appellant who appealed to the District Court of Kilosa herein after "the first appellate court" vide Civil Appeal No. 55 of 2022. To his dismay, the first appellate court upheld the decision of the trial court after having finding the same to be just and fair.

Disappointed, the appellant has approached this Court seeking to challenge the concurrent findings of both the trial court and the first appellate court based on the grounds of appeal reproduced below:-

1. That the appellate District Court erred in law and in fact for failure to hold that the Respondent failed to prove her contribution in acquisition of the properties that the trial court divided as matrimonial asset;
2. That, the appellate District Court erred in law and in fact for failure to re-evaluate the evidence tendered by the appellant at the trial court to make its own findings and draw its conclusion that the evidence of the

appellant was heavier than that of the respondent in respect of assets which belongs to the appellant's brother;

3. That, the appellate District Court erred in law and in fact for failure to find and hold that the case was premature as there was no certificate of marriage reconciliation board as required by law; and
4. That, the appellate District Court erred in law and in fact for failure to state and explain the reasons for the decision.

Hearing of the appeal was by way of oral submissions. The parties appeared in person without legal representation.

The appellant was the first to address the Court in support of his appeal. He dropped the third ground and opted to argue the first and second ground jointly and the fourth ground separately.

On the first and second grounds, the appellant submitted that the trial court divided a farm in Molem and two houses built on Plot No 33C and 34C located at Posta Road, Mikumi belonging to his brother who handed the same to him on 21st March 1972. He told the Court that the said properties were not matrimonial assets as he submitted the documents proving his brother's ownership of the properties and therefore according to him it was wrong for the lower courts to divide the assets. In respect of the fourth ground, the

appellant attacked the first appellate Court for its failure to evaluate the decisions of the primary court in respect of the division of the assets. He contended that the two houses located at Magoma which were given to him were not matrimonial properties but the same belonged to the late Mary Martin with whom she had three children with. He thereafter prayed for the Court to determine the appeal and allow the same in his favour. In reply, the respondent firmly opposed the first and second grounds of appeal. As regards to the plots allegedly belonging to the appellant's brother, the respondent told the Court that the plots had no structures but later on, they jointly built the tree house and afterward changed it and built a block house with three rooms.

In relation to the farms, the respondent told the Court that they were given the same during the cotton project, however the appellant gave it to his alleged concubine. In that regard, she sued both of them at Mikumi Primary Court where she won and the farm was returned to the family as a matrimonial asset.

As for the houses located at Magoma, the respondent refuted the claim that the same belonged to the late Mary Martin, whom the appellant alleged to

have been his former wife. She said, it is the appellant who built the houses while she was the one who was cooking for the masons. The respondent added that the appellant built two houses one for Doxia Komba and the other for Mary Martin, his concubines.

Rejoining, the appellant insisted that when he was given the plots by his brother, the houses were already built on the plots. As regards to the farm located at Molem, he highlighted that after the decision of Mikumi Primary Court, he took half of the farm and sold to one Kweka, and left half of the farm to the respondent. He insisted that the houses at Magoma were owned by the late Mary Martin who left the houses to her children.

Having examined the appellant's memorandum of appeal and submission from both parties, notably, the appellant has silently dropped the contents of the 4th ground of appeal as instead of expounding on the ground, his submissions on the ground were pegged on the lamentation that the two houses at Magoma area that were divided by the trial court didn't belong to him and hence, should not have been the subject of division. Even if I was to determine the fourth ground, the same would have been dismissed for want of merit as the decision of the first appellant court contain reasons as

reflected on the third page from the first paragraph to the last paragraph of the decision.

That being said, my determination of the present appeal will be on the sole issue as to whether the first appellate court properly evaluated the trial court's judgment as regards to the division of the matrimonial properties alleged to have been acquired during the subsistence of the parties' marriage.

Before divulging into the determination of the aforestated issue, I wish to restate a well-established principle guiding courts sitting at the second appellate stage when dealing with concurrent findings of the lower courts that, such courts are enjoined to refrain from disturbing the respective findings unless there has been a misapprehension of evidence or where there has been a misdirection that occasioned miscarriage of justice to the appellant.

In **Neli Manase Foya v. Damian Mlinga [2005] TLR 167** as cited with approval by the Court of Appeal on page 7 of its decision in the case of **Martin Kikombe v. Emmanuel Kunyumba, Civil Appeal No. 201 of 2017** (unreported), it was held:-

"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact..."

Having regard to the above stance of law, I now revert to the determination of the appellant's grievances as presented in his memorandum of appeal which faults the District Court of Kilosa as the first appellate court for its failure to re-evaluate the evidence on record.

Mindful of the principle that the first appellate court is duty bound to re-evaluate the entire evidence on record, subjecting it to a critical scrutiny and reach into its own finding, I had to scrutinize the record of both the trial court and first appellate court's judgments so as to satisfy myself whether the District Court properly exercised the duty.

My close scrutiny of the judgment reveal that the District Court found that the trial court fairly distributed the matrimonial properties. It also confirmed the trial court's holding that the allegations that the houses never belonged to the appellant unfounded, as neither documents nor witnesses were presented to prove the truth of the same.

In concurring with the trial court's decision, the District Court held as follows:-

"According to the evidence adduced at trial court the respondent evidence and her witnesses was very strong than that of the appellant as the parties passed at the reconciliation board without success hence to court at where divorce was granted and parties got right in all properties acquired during the existence of their marriage. The allegations that those houses never belonged to the appellant had no leg to stand as he never brought any document or supporting witnesses to verify if those houses and plots belong to another person rather than the respondent evidence was strong that those properties are matrimonial."

In view of the foregoing holding, it is clear that the District Court, sustained the trial court's finding that the appellant failed to adduce cogent evidence to prove that the properties that were subject of distribution were not matrimonial properties.

On the other hand, in his submissions in support of the instant appeal, the appellant insisted that the houses that were distributed by the trial court were neither his nor jointly acquired by the two former couples. In that regard, I had to revisit the trial court's records. In his testimony at the trial court, the appellant who testified as SU1, informed the trial court that the two houses located at Magoma belongs to his former wife, and that the farm at Molem belongs to one Andreas Titus Libawa, his brother who gave him

two plots. He testified further that the house in which he resides at Mngeta belongs to his father, but he has built a house therein as he is the head of the clan.

During cross examination, the appellant testified as hereunder in relation to the farms and the plots:-

> *"hivyo viwanja nimepewa na huyo marehemu kaka yangu, alinipa nivimiliki hivyo ni mali yangu sio ya mdai au chumo la pamoja mimi na yeye. Shamba la Molem alinipa kaka yangu mwaka 1972..."*

On her part, the respondent in his testimony in chief told the trial court that she and the appellant had acquired five houses, and that she has equally contributed in the acquisition of the same being the house wife who was also engaged in agricultural activities with the appellant. She testified further that she was cooking for the constructors and overseeing the general supervision of their household.

Deducing from the above testimonies from both parties, I entirely agree with the findings of the lower courts that the evidence by the appellant was insufficient to prove his assertions. It is a common knowledge that in civil suits, he who alleges the existence of a certain fact must prove that the respective fact exists. In the case of **Ernest Sebastian Mbele v.**

Sebastian Sebastian Mbele & Two Others, Civil Appeal No. 66 of 2019 on page 8 through to 9, the Court of Appeal underscored:-

> *"The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who asserts...the existence of facts to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6). It is in that respect, in Godfrey Sayi v. Anna Siame as Legal Representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2012 (unreported) we said: -*
>
> > *"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."....."*

In the instant matter, it was the duty of the appellant who asserted that the matrimonial assets listed were not jointly owned by the parties herein to prove the truth of his assertions. However, from the above evidence, it is apparent that there was no proof to such effect. It was for instance expected of the appellant to bring such witnesses to fortify his claims that the houses belonged to the late Mary Martin who under the circumstance could have been either the heirs of the late Mary Martin or the administrator of her

estate. Further, it was required of the appellant to prove that the plots that were given to him by his brother did not undergo any further development since then, and that if there was any development, the same had not been contributed by the respondent to prove that it remained to be his sole property. To the contrary, the appellant and the respondent both testified that the plots underwent some constructions during the subsistence of their marriage whereby the respondent managed to inform the Court the extent of her contribution, including cooking for the masons who built the houses and engaging in agriculture together with the appellant.

I am entirely in agreement with the trial magistrate's reasoning as depicted in the third and fourth paragraphs of page 6 of the trial judgment as below:-

> *"mahakama baada ya kuuchambua ushahidi wa pande zote mbili na tumejiridhisha kuwa mali hizo ni za ndoa na chumo la pamoja kwa kuwa mdaiwa hajaleta mahakamani hapa uthibitisho kuwa kiwanja ilipo nyumba ya Mngeta ni cha ukoo na aliijenga akiwa anaishi na mdai....Mdaiwa hajaleta mahakamani hapa uthibitisho kuwa nyumba za Magoma mbili ni mali ya marehemu mke wake aliyekuwa hakimu hivyo mahakama tunaukataa utetezi wake kwa kukosekana ushahidi."*

As regards to the plots that the appellant claim that he was given by his brother, it is on records that at first, in his testimony in chief, the appellant

told the trial court that the plots were empty with no houses. However, during cross examination, the appellant told the court that it was in those plots that there was a house in which the respondent was residing. The appellant averred:-

> *"ni kweli nilikukabidhi uishi unapoishi lakini nilikukabidhi mbele ya watoto uishi tu ila sio mali yangu ni ya kaka yangu"*

From the above piece of evidence, it is notable that after the appellant was given the plot by his late brother, a house was later on built. As such, I equally agree with the trial magistrate that the fact that the appellant was given empty plots by his late brother could not at any rate mean that the houses that were built later therein by the parties were not matrimonial properties. Section 114(3) of the Law of Marriage Act, Cap. 29 R.E. 2002 hereinafter the "LMA" reads:-

> *"For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts"*

The Court of Appeal in applying the above provision in an akin situation in the case of **Hidaya Ally v. Amiri Mlugu, Civil Appeal No. 105 of 2008** on page 9 observed as follows:-

"We hasten to say that we agree with the High Court that there was no dispute that the plot on which the house is built was acquired in the name of the appellant in terms of exhibit No. 3 of 15.9.1996. Also, we are satisfied; as did the High Court that the parties lived together for at least 2 years from 1998 up to 2001. As such, the High Court was justified to uphold the lower court's finding that the respondent was entitled to a share from that house. We are saying so because there was sufficient evidence that the respondent was seen supervising the construction thereof- (see the evidence of SM3 at page 93 of the Court Record) .....In terms of section 114 (3) of the LMA, supervision of construction of a house such as in the present circumstances is amongst the inputs which constitute contribution. Section 114 (3) of the LMA provides that: -

> *"(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts...."*

When applying the import of both the provision and the authority stated above in the present matter, it is clear that so long as the respondent established that the houses were constructed during the subsistence of their marriage and that she contributed in the said construction, it is safe to hold that the said houses fall within the purview of section 114 (3) of the LMA

stated above, and that the respondent was entitled to the share upon adducing sufficient evidence at the trial court on the extent of her contribution over the acquisition of the same [See the case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo, Civil Appeal No. 102 of 2018** (unreported)]. Having that said and done, the appellant's grounds of appeal fall.

In view of the analysis above, I have found nothing in the concurrent decisions of the lower courts worthy of the interference by this Court. In the upshot, the appeal is devoid of merit and I hereby dismiss it in its entirety. Having regard to both the age of the parties herein as well as the nature of their dispute, I make no orders as to costs.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 29th day of May 2024.

Kinyaka

H. A. KINYAKA

JUDGE

29/05/2024

THE HIGH COURT OF TANZANIA