IN THE HIGH COURT OF TANZANIA

(TEMEKE HIGH COURT SUB- REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 57 OF 2023

(Arising from the decision of Matrimonial Cause No. 30 of 2020 in the Resident Magistrate Court of Kisutu at Dar es Salaam)

DAUSON NEMWELI SINDATO.....APPELLANT

VERSUS

STELLA SOSSI NGOWI.....RESPONDENT

JUDGMENT

Date of last order:08/04/2024
Date of Ruling: 06/05/2024

OMARI,J.

The Appellant and the Respondent herein contracted a marriage in the Christian form on 06 May,2000. They are blessed with two children one being of age of majority and another who was at the time of the trial 10 years old. The peace and tranquility of matrimony waned and conflicts ensued. The two could not be reconciled thus the Respondent herein Petitioned for divorce at the Resident Magistrate's Court of Dar es Salaam at Kisutu vide Matrimonial Cause No. 30 of 2020. In the said Petition she sought for judgment that *inter alia* :

1. The court dissolves the marriage and grants a divorce decree.
2. The court orders equal division of matrimonial assets.
3. The court grants custody of the minor child to the Petitioner.
4. That the Respondent be ordered to provide maintenance for the children.
5. The Respondent be ordered to provide medical treatment and school fees for children.

When the hearing commenced, the trial court framed 4 issues for its determination as follows:

1. Whether the marriage between the parties has been broken down irreparably.
2. Whether the parties by joint effort acquired matrimonial properties.
3. To whom should custody of the child be granted.
4. What relief are the parties are entitled to.

Upon hearing both parties the trial court declared the marriage irreparably broken down and ordered that a decree of divorce be issued. It also ordered that the house at Boko be divided 60% of the value to the Appellant while the remaining 40% is to go to the Respondent. Custody of

the couple's child was granted to the Respondent while the Appellant was given access and the responsibility of maintaining him.

It is against this background that the Appellant is knocking on the doors of this court seeking reliefs that *inter alia* the decision of the trial court be quashed and set aside, the custody of the child be granted to him and that the assets which the lower court did not divide pursuant to the fourth ground of appeal are matrimonial assets.

These reliefs are sought through 13 grounds of appeal as are listed in the Memorandum of Appeal. The said 13 grounds of appeal resonate around four themes as follows:

1. The validity of the divorce decree *vis a vis* the provisions of section 107 of the Law of Marriage Act, Cap 29 RE 2019 (the LMA);
2. The distribution of matrimonial property and if the same was appropriately done;
3. The appropriateness or otherwise of placement of the child with the Respondent; and
4. The evaluation of the evidence by the trial court and the evidence having inconsistencies.

These are the four issues that the appeal pivots on, thus, I will explore each of them in the course of this judgment.

At the hearing of this appeal, the Appellant was represented by Goodchance Lyimo and Elifuraha Eliud represented the Respondent. Both are learned advocates.

As already pointed out, the grounds of appeal pivot on the four themes or issues, and the submissions by counsel for and against the appeal did the same. I shall discuss and consider both counsels' aptly done submissions in the course of this judgment as I proceed to determine whether the appeal is meritorious and if so what is the way forward.

However, before venturing into the four issues identified above, it is important for me to state as a first appellate court I have a role to re-evaluate the evidence on record in order to my own conclusion if need be. This is an established practice having roots in precedent see for example the case of **Kaimu Said v. Republic,** Criminal Appeal No. 391 of 2019 where the Court of Appeal had this to say:

> *We understand that it is settled law that a first appeal is in the form of re-hearing as such the first appeal court has the duty to re-evaluate the entire*

evidence in an objective manner and arrive at its own finding of fact, if necessary.

This has been the subject of many other decisions see for instance; **Hassan Mohammed Mfaume v. Republic,** (1981) T.L.R 167 **Faki Said Mtanda v. Republic,** Criminal Application No.249 of 2014 and **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another,** Civil Appeal No. 421 of 2021.

Having stated the above I commence with the first t question, the legality of the divorce decree. This being a matrimonial matter, all the other reliefs are ancillary to the decree of divorce. In tackling this issue, I shall answer the question as to whether the marriage between the two has irreparably broken down to warrant a divorce as the trial court has done or as averred by the Appellant's counsel something is a mis.

From the trial court's judgment, one can discern that it considered the parties' evidence consisting of cross accusations of infidelity and neglect among many others on record. The Appellant's counsel is saying none of those things was proved with evidence. The Respondent's counsel is of the view that the trial court considered the evidence put forward and made a correct decision to declare the marriage irreparably broken down.

In its decision, the trial court cited the **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293 wherein the court categorically stated that proof of matrimonial offences is not in itself something that would entitle a party to a decree of divorce and *vice versa.* The court further stated that the relevance lies in whether the said marriage has irreparably broken down. Furthermore, the court in the **Mariam Tumbo v. Harold Tumbo** *(supra)* case was of the view that courts in deciding whether the marriage is broken down irreparably should have due regard not only to the specific offences but all relevant evidence regarding the circumstances. In that regard the trial had the trail court had this to say:

> *"From the testimony of the Petitioner and the Respondent it appears that each is raising serious accusations against each other. It clearly shows that the parties are no longer in love and no possibility they can continue with their marriage. The evidence available clearly proves that the marriage between the two has broken down irreparably"*

In this appeal the Appellant's advocate is saying there is no evidence to prove that the marriage between them is irreparably broken down. One of the things he argued against is the allegation of dissertation, stating the same has not been proved. While I agree with Mr. Lyimo that the desertion has not persisted for three years I am also aware that the fact that the two

are not living under one roof, when put in context of the parties' testimonies and the overall circumstances of the parties it adds into tilting the scale of irreparability as was observed in the **Mariam Tumbo v. Harold Tumbo** *(supra)* case. Looking at the evidence available on record I am of the view that the provisions section 107 (1) of the LMA by having regard to the relevant evidence and circumstances of the parties which in this case also includes physical abuse as well as accusation of adultery. Moreover, going through the evidence one can see that there is no love between the parties as such that situation is what led one of them to knock on the doors of the trial court seeking a divorce decree. This court has held the view that whenever spouses can no longer co-exist as such then they should not be forced to live together under the pretext of the provisions of section 107 and section 110 of the LMA. In **Boniphace Abel Mwachipindi v. Winney Martiney Obwobwe** (Matrimonial Appeal No. 7 of 2021) [2022] TZHC 14941 this court had this to say:

> *Reading the enactment of section 107 of the Law of Marriage, it is obvious that the powers of courts in section 107 (3) and 110 (1) of the Law of Marriage Act were intended to resolve matrimonial disputes in accordance to the reality on ground.* ***In that case, this court in its mandate has not been reluctant to dissolve a marriage when it is***

> ***satisfied that the said marriage has broken down irreparably and if restored may cause more peril than cure.*** (emphasis supplied)

In an earlier decision of **John David Mayengo v. Catherine Malembeka,** PC Civil Appeal No. 32 of 2003, this court observed that:

> *"Marriage is a voluntary union of a man and a woman intended to last for their joint lives. It is the parties themselves who are the best judges on what is going on in their joint lives.* ***A crucial ingredient in marriage is love. Once love disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him."*** (emphasis supplied)

The **John David Mayengo v. Catherine Malembeka** *(supra)* decision was cited with approval by the Court of Appeal in **Tumaini M. Simoga v. Leonia Tumaini Balenga** (Civil Appeal 117 of 2022) [2023] TZCA 249 where in addition to citing the **John David Mayengo v. Catherine Malembeka** *(supra)* the Court had this to say:

> *"Be it as it may, we subscribe to the persuasive decision and satisfied that the trial court had properly analysed the evidence* ***and considered that the petitioner and the respondent had lost love with each other and denied each other conjugal rights for more than two years."*** (Emphasis supplied)

The evidence and the analysis of the same by the trial court depicts that the two are not in a situation where they can continue to live together as a

husband and wife. Therefore, the trial magistrate was right to hold that the marriage had broken down irreparably beyond repair and as a consequence granted a decree of divorce.

Having found as above, I am now at liberty to canvas the other three questions starting with the division of matrimonial properties.

The Appellant's dissatisfaction with the way the trial court divided the assets is fourfold. The first is that it did not include properties that he had wanted to be included in the list of matrimonial assets or properties these include plots of land in Kibaha, Mabwepande and Madale, apartments in Madale, a motor vehicle as well as a shop. Secondly, he is also unhappy with the division of the Boko/Bunju house for the Respondent did not bring any evidence of her contribution and the court disregarded that DW4 has an interest in the said house. Likewise, he is aggrieved that the court divided the Boko/Bunju house while it was a house in Bunju that was pleaded by the Respondent. And, lastly, the court did not take into consideration that the Respondent squandered matrimonial property and used proceeds to get properties in her name and that because of that she should not be entitled to any share of matrimonial assets as per the case of **Martin v. Martin,** 1967 3 ALLER 629 as was cited in **Rodney Baraka v.**

Laurean Ngaiza, PC Civil Appeal No. 109 OF 2019 which the Appellant's advocate cited in his submission.

As for the first question, as can be seen on page 15 of the judgment the trial magistrate after considering the evidence stated as follows:

> *"The respondent mentioned other properties including [...]as properties acquired during the existence of their marriage. The respondent did not present any tangible evidence to prove his allegations. From the evidence tendered it appears the properties [including ...] are in the name of the Petitioner, the respondent did not present any tangible evidence to prove that he had his contribution toward acquisition of the same."*

Despite the Appellant's grievance that the trial court did not consider the evidence and more so the fact that the Respondent acquired the properties through squandering his business. There was none to consider. The Appellant, when testifying alleged that she bought the Madale land after she stole money from his business but provided no evidence of the same or even how then the listed properties are matrimonial properties so as to rebut the presumption under section 60 of the LMA.

As regards to the house in Boko/Bunju there is undisputed testimony that the said house is on the boarder of Boko and Bunju. And, since during

hearing it was evident that the property in question is the one that is the matrimonial home that both averred to have lived together in then it is rather sketchy to use the Boko/Bunju name as a reason to quash the order of the trial court. The house that was divided by the trial court is not just any house it is also their matrimonial home so it cannot be said to be easily confused with some other house in either Boko or Bunju for that matter.

In so far as the property also belonging to DW4 who is the Appellant's brother due to their agreement as evidenced by Exhibit D6. It is clear both in evidence and the judgment of the trial court that the house is on land that the Appellant was given as a shared parcel with DW4 by their brother. Through Exhibit D6 the Appellant compensated his brother for a part. On page 46 of the proceedings he, the Appellant is quoted to have said:

> *"I had to pay the debt of Tsh. 43,000,000/= to my brother"*

In any case, the record depicts that even some of his witnesses recognize the house as his and a matrimonial home with the Respondent. Furthermore, he testified he compensated the brother who also testified to that effect it would be rather strange for one to conclude that Exhibit D6 was to the effect that the plot still also belonged to DW4. I say this since

even the title on Exhibit D6 would defeat the Appellant's argument as it reads *"Mkataba wa Maridhiano ya Kugawa Kiwanja [Boko] na Kulipa Deni"* which means it's a contract for dividing for the said plot and payment of debt and even one goes further to read the terms of the said document they reflect that state of affairs. The Respondent claims that the land/property belongs to the Appellant and she is entitled to a share of the same by virtue of her taking part in the improvement of the said property.

The trial court, on pages 12 through to 13 of its judgment after it referred to this court's decision in the case of **Mary John Mmasy v. John Augustino Mmasy,** PC Matrimonial Appeal No. 7 of 2019 observed as follows:

> *"In the case at hand, on the basis of available evidence, it appears the plot of land at Boko/Bunju given to the respondent by his late brother, however, the same improved by joint efforts of the petitioner and respondent."*

The trial court then went on to cite another one of this court's decision in **Bakiju Mwanjala v. Floriana Pius Mwanjala,** Civil Appeal No. 87 No. 2009 where it was held that the presumption of ownership of property by a spouse under section 60(a) of the LMA can be rebutted where for an example the asset has been substantially been improved either by one

spouse or joint efforts in the course of their marriage. If there is improvement then a property in the name of the parties becomes matrimonial property capable of being divided in case of divorce.

And, it is upon finding that, although the house at Boko/Bunju was in the Respondent's name, the same was improved by joint efforts of both parties thus, the trial court ordered a division of 60% to the Appellant and 40% to the Respondent to be obtained after valuation and sale or if they are willing either party can compensate the other. I labored to go through the trial court's record, there is nothing that seems to suggest that the Respondent had a zero contribution. At the same time, her contribution cannot be equated to that of the Appellant.

The Appellant is complaining that the trial court did not show the formula for how it reached the 60% per 40% ratio. This is something that is based on evidence and shall vary from case to case. There are no mathematical formulae or an SI unit for the same. The court has to decide on the ratio based on the balance of probability of depending on the evidence adduced by the parties. For instance, in the case at hand, even if one were to assume it was true as the Appellant's counsel put it the Respondent is a mere housewife, then by taking part in the construction by hiring the

masons paying them even if it was presumably the Appellants money then that amounts to work capable of being deemed contribution in the purview of section 114(2)(b). It is therefore my view that the trial court having considered the available evidence and properly analysed the same, considered the said property a matrimonial property that is subject to division. However, considering the fact that the plot that the said house is built on belongs to the Appellant and the evidence on record suggests that it is he who contributed substantially then I find it prudent to adjust the percentage of the parties' share to 70% to the Appellant and 30% to the Respondent.

The next thing that the Appellant is aggrieved about is custody of the couple's minor child. This grievance is twofold, that the Respondent is not a fit person to care for the child, more so being a male child, and that the decision is based on a questionable social inquiry report. In the event of a divorce, courts are empowered to make orders for custody and access of a child or children, this is provided for under section 125 of the LMA which has to be read together with *inter alia* section 26 of the Law of the Child Act, Cap 13 RE 2019 (the LCA). Clearly, what a court should aim at is a placement that is in the best interests of the child. Such mandatory

requirement in determining all issues involving children as provided for under section 4(2) of the LCA, the section reads:

> *'The **best interests of a child shall be a primary consideration in all actions concerning children** whether undertaken by public or private social welfare institutions, courts or administrative bodies.'* (Emphasis supplied)

A court, before it can pronounce which of the two parents (or even a third party) is to be granted custody of a particular child has to make an assessment to determine the best interests of each child in the specific situation. This assessment, therefore, can be made by ordering the Social Welfare Officer (SWO) to conduct a social inquiry, come up with a Social Inquiry Report (SIR) and submit the same to the court to assist with the assessment and ensuing determination. This is clearly stipulated under section 136 (1) of the LMA. Section 26 (1) of the LCA imposes rights to the child (a child's rights) where parents separate or divorce one of those rights is placement or custody. For the avoidance of doubt, I reproduce the section here under:

> *'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; (b)* ***live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child;*** *and (c) visit and stay with other parents whenever he desires unless such arrangement interferes with his schools and training program.'* (Emphasis supplied)

The above section is clear, in line with the best interests of the child principle a child needs to be placed with a parent who in the opinion of the court is capable of raising and maintaining them. This means one cannot over emphasize the role of the SWO and the SIR in aiding the court to reach its decision in a manner that fosters the best interests of a particular child.

The Appellant's counsel is complaining that the report is doubtful and that it violates his right to be heard. He is suggesting that no social inquiry was done at all. The Respondent's counsel was of the view that the decision was made based on the available evidence and not just the SIR. On page 66 of the proceedings, it is shown that the matter was set for mention for necessary orders on 24/08/2022 at 1300HRS. On the said date the parties were present and the record reads:

> ***Court:*** *Since this matter involves custody of the child, this court finds that a report if a Social Welfare Officer is very crucial for the court to make*

proper findings. I hereby order a Social Welfare Officer Asha Mbarouk, to bring Social Inquiry Report for assisting the court in its findings.

Sgd: Hon. E.N. Kyaruzi, PRM

24/08/2022

ORDERS: *1. Mention on 14/09/2022*

2. Parties to attend.

Sgd: Hon. E.N. Kyaruzi, PRM.

The trial court's proceedings also depict on the day fixed for mention that is 14/09/2022 the parties were present in person and were informed that the SIR was ready after which they were given time to file their final submission before the matter was fixed for judgment. Furthermore, the SIR in the file discloses that the source of information (methodology) is interviews of the parties and the child. The said report shows that the Appellant participated in the inquiry and a home visit was also done. Being ordered in the presence of the parties and, no objection being made and having taken part in the same cannot stand the test of infringement of the constitutional right to be heard or even be called doubtful. Likewise, the Appellant has not explained how the said right is infringed whilst having taken part in the process. On the basis of the evidence adduced by the parties and the SIR that was submitted the court decided to place the child

with the Respondent. I should perhaps state that the Respondent was already living with the child thus, the claim that she is unfit to care for the child would need tangible evidence of which none was produced either in court or discoverable through the SIR. The Appellant is also concerned that the child is a male child and when submitting counsel referred to the case of **Judith Augustino Simon v. William Isaya Mpinga** (Civil Appeal 79 of 2019) [2020] TZHC 1335 in which this court was of a view sex of the child is a factor that the court has to consider during placement.

While I agree with counsel that the sex of the child should be one of the many considerations for a court to have regard for, I also hold the view the most paramount consideration when determining the placement of a child is the best interests of the child. This, tramples even an important consideration like the views of a child, if they are capable of making the same.

Having gone through the record I am convinced that the trial court followed procedure to order the SIR and coupled with the evidence to consider the same in its decision. Furthermore, since the Appellant has access to the child, any concerns about socialization can be addressed

during access. Therefore, I do not see any compelling reason to vary the custody order at this juncture.

The last theme is the issue of evidence and whether the trial court analyzed and applied the same appropriately. The Appellant also complained that there were inconsistencies in the Respondent's testimony.

Having read the proceedings and the parties' testimonies, I can say that, I agree with counsel for the Appellant that in some instances the Respondent's testimony was imprecise. However, where evidence of a party is either inconsistent or has contradictions, it is for the court to address them in a manner that either resolves them where possible or if the same are minor and do not go to the root of the matter to leave as is. This was held by the Court of Appeal in the case of **Mohamed Said Matula v. R.** [1995] TLR 3.

The discrepancies of the Respondent's testimony do not go to the root of the case, the said cannot be said to be of such gravity as to render the proceedings a nullity. In another case, **EMMANUEL JOSEPHAT v. R,** Criminal Appeal No. 323 of 2016 the Court of Appeal had this to say:

> *"We would like to begin by expressing the general view that contradictions by any particular witness or*

among witnesses cannot be escaped or avoided in any particular case".

The above said and done, the appeal is only allowed to the extent of the house at Boko/Bunju being divided at 70% to the Appellant and 30% to the Respondent. The remaining grounds are dismissed for being wanting in merits. The rest of the judgment and orders of the trial court remain the same. And, this being a matrimonial matter I shall order that each party beards their own costs.

It is so ordered.

HIGH COURT OF TANZANIA

A.A. OMARI

JUDGE

06/05/2024

Judgment delivered and dated 06th day of May, 2024.

A.A. OMARI

JUDGE

06/05/2024