IN THE HIGH COURT OF TANZANIA

(TEMEKE HIGH COURT SUB- REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 59 OF 2023

(Originating from Matrimonial Cause No. 89 of 2022 of the District Court of Temeke at One Stop Judicial Centre)

INNOCENT JOHN KARAMAGI.....APPELLANT

VERSUS

PETRONILA BUBERWA KARAMAGI.....RESPONDENT

JUDGMENT

Date of last order: 13/05/2024
Date of Judgment: 27/05/2024

OMARI,J.

The Respondent herein petitioned for divorce vide Matrimonial Cause No. 89 of 2022 at the District Court of Temeke at One Stop Judicial Centre. In her Petition she sought for orders *inter alia* that the marriage had broken down irreparably, an order that a divorce decree be issued and the matrimonial properties be divided equally between the parties. The Appellant herein contested the Petition. The trial court framed three issues which are whether the parties' marriage is irreparably broken down, whether there are matrimonial properties and what the parties are entitled to.

After hearing the parties, the trial court found and ordered that the couple's marriage had irreparably broken down and issued a decree of divorce. The court also ordered that house No. 39 on Plot 36C at Kinondoni Dar es Salaam be equally divided between the parties.

Dissatisfied with the decision and order of the trial court, the Appellant came to this court armed with five grounds of appeal as follows:

1. That the trial court erred in law and facts to order a decree of divorce without sufficient grounds to prove that the marriage has broken down irreparably.
2. That the trial magistrate erred in law and facts to pass the decision based on improper reasoning and assumption of separation for ten years without proof thereof.
3. That the trial magistrate erred in law and fact to award a decree of divorce and equal share of the matrimonial asset to a wrong doer (Respondent).
4. The trial magistrate erred in law and facts to order an equal division of matrimonial asset without computing the contribution of each party towards the acquisition of the same.

5. The trial magistrate erred in law and facts to reach a decision without proper evaluation of the evidence.

It is based those five grounds that the Appellant prays the appeal be allowed, the impugned judgment be set aside with costs and any other reliefs which this court may deem fit and just to grant.

At the hearing of this appeal the Appellant was represented by Amon Rwiza while the Respondent had the services of Timothy Maeda both are learned advocates. The appeal was argued by way of written submission.

After what is seemingly an emotionally charged narration of the "historical context" surrounding the appeal, Mr. Rwiza argued the first and second grounds of appeal concurrently. He submitted that the Petition (for divorce) alleges adultery and cruel behaviour yet the proceedings do not indicate adultery or cruelty attributable to the Appellant. He went on to argue that the judgment of the trial court acknowledges that these allegations were never substantiated instead the trial court introduced a new issue that was not raised by the parties or adjudicated on by citing the case of **John David Mayengo v. Catherine Malembeka,** PC Civil Appeal No. 32 of 2003 wherein this court held once love disappears then the marriage is in trouble. Mr. Rwiza further argued that the assertion that there was a 10 year

separation was never substantiated by the parties during trial. In contrast, the learned advocate argued that the separation in question was harmonious and during the time the parties engaged in marital relations thus should not be construed as separation between husband and wife. He augmented his contention by adding that the parties misunderstanding began in 2021 thus it is not 10 years as presumed by the trial court. This, coupled with the presence of love and lack of evidence of chronic conflict between the two the trial court deviated from the legal merits of the case.

Submitting on the third ground of appeal counsel argued that there is no evidence to suggest that the marriage is irreparably broken down. The court concluded that the marriage was broken down based on the unsubstantiated assertion that the Respondent no longer sheltered affection for the Appellant. This, according to counsel is contrary to section 107(1) (a) of the Law of Marriage Act, Cap 29 R.E 2029 which requires a court not to grant a divorce when the Petitioner is the wrong doer. He went on to state there are several facts that underscore this which include the Respondent vacating the couple's bedroom without justification; she left the matrimonial home in the guise of visiting her daughter in Arusha. Counsel further elucidated that the Respondent had drafted a contract demanding 50% of the matrimonial

house and that she is the one who initiated proceedings at the Marriage Conciliation Board seeking both a divorce and matrimonial properties. Counsel then beseeched this court to or re evaluate the trial court's judgment and recognize the error in granting a divorce to the Respondent who is the wrong doer and 50% of the property while there is no evidence suggesting she made any contribution to the acquisition of the property or that there was joint ownership.

As regards the fourth ground of appeal counsel contended that the trial court was wrong to award equal distribution of the property without considering the contribution made by either party to its acquisition. He argued that the only basis for the equal distribution was the 36 years of marriage between the two. Mr. Rwiza argued that matrimonial property is only to be awarded upon evidence of contribution by a party as was held in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo,** Civil Appeal No. 102 of 2018. And, section 114(2) (b) of the LMA which obligates a court to consider evidence of contribution made by each party towards the acquisition of the assets. Counsel then went on to state that 36 years of marriage do not in themselves entitle the respondent to equal division because she made no financial contribution. Counsel cited the case of **Yesse Mrisho v. Sania**

Abdul,Civil Appeal No. 147 of 2016 wherein the Court of Appeal held that domestic duties do not necessarily amount to 50% contribution. He concluded on this ground by stating that the available evidence suggests the contribution (of the Respondent) should not exceed 20% which he terms as generous considering she is a wrong doer.

On the last ground of appeal which is based on failure to evaluate evidence, counsel submitted that the trial court rendered its decision without a thorough evaluation of the evidence. Counsel referred to the case of **Sophia Hugo Kunguru v. Dickson Gabriel Hone,** PC Civil Appeal No. 05 of 2022 where the court emphasised evaluation of evidence. It is Mr. Rwiza's contention that there is no evidence to justify the grant of divorce and 50% award of the matrimonial house. Counsel concluded his submission by praying *inter alia* that the divorce be set aside and the order for division and sale of the matrimonial house be set aside as it is a family house and the parties are both above 60 years old.

When it was his turn Mr. Maeda gave a brief synopsis of the appeal then went on to point out that the alleged contract that the Appellant spoke of was never tendered in court as evidence, thus, called upon this court to disregard the same. Counsel then proceeded to submit on the first and fifth

grounds of appeal by stating that there is a lot of precedent that explain what it means for a marriage to be said to have irreparably broken down. He cited the case of **Tumaini M. Simoga v. Leonia Tumaini Balenga,** Civil Appeal No. 117 of 2022 in which the Court of Appeal referred to the persuasive decision of **John David Mayengo v. Catherine Malembeka** (*supra*). And, addressed Mr. Rwiza's contention that the issue of there no longer being love between the parties was never addressed in the trial as misconceived since the same was dealt with as part of the trial court's first issue and it is after hearing the parties that the trial court held the marriage was broken down irreparably and granted the decree of divorce.

As regards the second ground of appeal counsel emphatically argued that there was separation between the parties, stating that the proceedings depict that both parties testified to there being separation including the Appellant's own testimony that they separated since 2011. Counsel referred to section 60 of the Evidence Act, Cap 6 R.E 2022 which provides that facts not in issue need not be proved as well as section 107(2) (f) of the LMA which states that voluntary separation of three years is evidence of breakdown of a marriage. According to counsel, all of this makes the ground

of appeal unmeritorious since the parties have separated for more than 12 years.

Submitting on the third ground of appeal which hinges on the Respondent's wrongdoing counsel argued that this was not argued during the trial and to the contrary, it is she, who testified the Appellant's wrong doing, testimony that was augmented by the testimony of SM2. He further stated that the Respondent should not be blamed for her actions which are a result of the Appellant's behaviour as was stated in the case of **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293 wherein the Court of Appeal held that where a spouse behaves in a manner that virtually compels the other to leave then the former may in law be the deserter.

As for the fourth ground of appeal counsel stated that the Respondent testified that she contributed to the acquisition and modification/rebuilding the matrimonial house both monetarily and through care work in the form of domestic chores as can be seen in the trial court's proceedings. He further stated that the Appellant did not adduce any evidence substantiating his contribution to the acquisition of the matrimonial home. Counsel argued further that the couple was married for more than 30 years and being none of them was contemplating divorce at the onset of the marriage it would be

implausible that they kept receipts of expenses incurred in connection to the matrimonial home. Mr. Maeda referred this court to the case of **Sixbert Bayi Sanka v. Rose Nehemia Samzugi,** Civil Appeal No. 68 of 2022 wherein the court was faced with a similar situation. He also referred to the case of **Tumaini M. Simoga v. Leonia Tumaini Balenga** (*supra*) where it was observed that contribution is not restricted to monetary terms only. Mr. Maeda further argued that the assertion that the trial court did not provide reasons for equal division is misconceived as it did and cited the case of **Sixbert Bayi Sanka v. Rose Nehemia Samzugi** *(supra).*

Counsel then prayed for the appeal to be dismissed for lacking merit and the decision of the trial court be upheld with costs to the Respondent.

Mr. Rwiza submitted a rejoinder stating that the Respondent did not argue the appeal but rather argued as if this were a trial court. He went on to generally distinguish the cited cases stating none are relevant to the present matter since the trial court dismissed the allegations of cruelty and adultery. He also distinguished the present case from the case of **John David Mayengo v. Catherine Malembeka** (*supra)* since there is no lack of love for the Respondent.

Having considered the submission in support and against the grounds of appeal made by counsel what is remaining is to determine whether the appeal is meritorious or not. This appeal is based two issues, the first is whether the marriage between the Appellant and Respondent is irreparably broken down and whether the evidence is geared towards that. The second issue is whether the order for the division of the matrimonial property was done as per the law.

However, before venturing into the two 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, **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.

On the first issue, the trail court although held that there was no evidence that there was adultery and cruelty occasioned by the Appellant, it went on ahead to consider that the two had been separated for a long time, the Respondent testified that the two have been separated for more than 10

years and they no longer lived together since 2020. This is testimony that was not refuted by the Appellant. My reading of the trial courts' proceedings depict that the Appellant admitted that they had separated since 2011. It is against this back ground that the trial court took to the wisdom of this court in the case of **John David Mayengo v. Catherine Malembeka** (*supra)* and went ahead to observe that there was no love lost between the two. The trial magistrate went further and explained why he did not agree to the Appellant's request for separation since the two had been separated for more than 10 years and could not settle their differences during that time. The trial court granted the divorce citing section 107(2) (f) of the LMA. In this regard I see no reason to fault the decision of the trial court since it analysed the evidence before it and applied the law as it should have. Thus, I find the first and second ground of appeal with no merit. And in so far as the evidence as to the marriage having broken down irreparably then the fifth ground is also found to be unmeritorious for this first issue.

Moving to the second issue, the Appellant is complaining that the trial magistrate divided the house at 50% to each party without there being evidence of the Respondent's contribution but also the Respondent being the wrongdoer should not be benefiting from her wrongs. Furthermore, the

Appellant is contesting the order for sale is repugnant to the parties well being for they are both above 60 years of age. And, given that she drafted a contract seeking 50% of the house before she began the proceedings she must have harboured ill intentions.

To begin, I wish to comment on the notion that the Respondent is a wrongdoer, and she should not be getting 50% of the couple's house. This I should not belabour on since with the enactment of the LMA our laws were rid of the concept of fault divorce, in other words, the law in this jurisdiction is based on a "no-fault" divorce system thus, so long as the evidence is leaning towards the marriage being irreparably broken down one does not need to prove fault to obtain a divorce. Even if the Appellant was by whatever standard trying to refer to section 107 (1) (a) of the LMA which provides that unless the court for any special reason otherwise directs, refuse to grant a decree where a petition is founded exclusively on the Petitioner's own wrongdoing; then he would be bringing in new issues that were not dealt with in the trial court. On the alleged contract that the Respondent drafted and presented to the Appellant, I am inclined to agree with the Respondent's counsel that the same was never tendered in evidence nor determined by the trial court and, cannot be dealt with at this stage.

When determining the issue of the matrimonial asset which is house No. 39 located on Plot. No. 36C in Kinondoni, the trial magistrate analysed the evidence of the parties before concluding. It was not contested that the two have only that one house and the same was acquired and later on improved by the joint efforts of both of the parties. It is on record that the Appellant stated in court that in addition to the domestic chores which he is saying should not add up to the 50% that the trial court awarded, the Respondent worked doing various odd jobs which were low paying but helped with the upkeep this can be seen on page 27 of the proceedings. He also stated that she did some supervisory work when they were renovating/rebuilding the house as can be seen on page 28 of the proceedings. It is for this reason that I am of the opinion that the trial court considered more than just the fact that the two had been married for 36 years as the Appellant is asserting. The trial court was correctly guided by section 114 (2)(b) of the LMA and the case of **Sixbert Bayi Sanka v. Rose Nehemia Samzugi** *(supra)* to divide the said house the way it did.

On the issue of the order of sale, the trial court ordered for the house to be valued, after deduction of the valuation expenses then the remaining amount be distributed equally between the two. The learned magistrate made it very

clear if there is a side that is able to compensate the other then they should do so otherwise if the same is not done within 6 months then the house be sold and the proceeds be divided equally. While I empathize with the Appellant's concern that this is a family home and the two are above 60 years, being the said house is matrimonial property jointly acquired by the parties it is them who are best suited to discuss and reach an agreement that is better suitable in their circumstances as this court cannot impose that the two be forced to live together or co own the property.

From the foregoing analysis I find no fault with the findings of the trial court. I hereby dismiss the appeal and uphold the decision of the trial court. This being the matrimonial matter, each party is to bear own costs. It is so ordered.

A.A. OMARI

JUDGE

27/05/2024

Judgment delivered and dated 27th day of May, 2024.

A.A. OMARI

JUDGE

27/05/2024