IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

MATRIMONIAL APPEAL NO.01 OF 2020

(Arising from the decision of the District Court of Nyamagana in Matrimonial Appeal No. 18 of 2020. Originating from Mwanza Urban Primary Court, Matrimonial Cause No. 23 of 2020)

YULITA MATERA ..... APPELLANT

VERSUS

ONASISI IBRAHIM ..... RESPONDENT

JUDGMENT

Date of last Order: 10.02.2020

Date of Judgment: 12.02.2020

A Z. MGEYEKWA, J

YULITA MATERA, the appellant, and ONASISI IBRAHIM, the respondent respectively, were husband and wife. They were formally married in 2010 and were blessed with one child who was born in 2011. Out of that union, they owned some properties including the matrimonial house which is in dispute. It appears their marriage went on well all

along until the year 2020 when the relationship started to go sour after the alleged appellant's adulterous behaviour. Feeling that he could not stomach an unfaithful relationship any longer, the respondent was forced to flee their matrimonial home, file for a petition for divorce before the Urban Primary Court of Nyamagana, claiming for division of matrimonial house which he alleged was developed during the subsistence of their marriage. He also claimed for custody and maintenance of the child.

On 26th May, 2020 the respondent successfully petitioned for divorce in the Urban Primary Court of Nyamagana and the trial court in its findings found that both parties made an equal contribution in building and developing the matrimonial house, therefore, each party was given 50% shares. An order granting a decree for divorce.

The appellant was not happy with the distribution of the matrimonial assets she received and that the child was placed under the custody of his father. Hence she decided to file an appeal in the District Court of Nyamagana whereas the first appellate court decided the matter in favour of the respondent and dismissed the appeal. Undeterred, the

appellant decided to the instant appeal whereas the appeal is predicated on three grounds of grievance; namely:

1. *That, the trial Magistrate erred in law and facts on dividing equally the matrimonial properties without considering statutory factors when distributing the same.*
2. *That, the trial Magistrate did not taking into consideration the appellant's evidence on record.*
3. *That, the trial court erred in law and facts by determining custody of the child to the respondent without considering the welfare of the child.*

The appeal was argued before this court on 10th February, 2021 whereas, the appellant appeared in personal, unrepresented and Mr. Sekundi B. Sekundi, learned counsel, appeared for the respondent.

Prosecuting this appeal, the appellant urged this court to allow the appeal. She opted to argue the first and second grounds together and the third ground separately. The appellant argued that she was dissatisfied by the decisions of both lower courts hence she opted to file the instant appeal. She claimed that at the first appellate court the matter

was argued through written submissions and the first appellate court in its decision disregarded the exhibits tendered at the trial court. She claimed that she tendered her documents before the trial court to prove her case but the said documents were switched and placed to the respondent's testimony. The appellant lamented that she acquired the matrimonial house before marriage but surprisingly the respondent claimed that he is the one who constructed the said house.

The appellant did not end there she strongly argued that the division of matrimonial house was not fair since she is the one who builds the disputed matrimonial house. She stated that she is working at a bar and earns money which she used to construct the matrimonial house. The appellant went on to submit that she is the one who bought the plot but both lower courts did not consider her evidence. She claimed that the respondent wants to take the house from her while she is the one who constructed the said matrimonial house.

With respect to the third ground, the appellant faulted the lower courts for granting the custody of the child to the respondent while the child is residing with her aunt. She valiantly argued that the child needs to be

cared by her mother not her aunt who is residing in Dodoma. She urged this court to find she is good position to stay with her child.

On the strength of the above, the appellant beckoned upon this court to allow the appeal.

Resisting the appeal, the learned counsel for the respondent started his onslaught by attacking the first and second grounds of appeal which relates to division of matrimonial house. The learned counsel submitted that both lower courts were right to divide the matrimonial among the parties. He stated that the respondent constructed the matrimonial house and the appellant was the one who owned the plot. Mr. Sekundi argued that the matrimonial house was constructed by joint efforts. He added that the respondent testified to the effect that he is the one who bought the cement and other building materials and hired a builder.

It was Mr. Sekundi further submission that the property was acquired during marriage and the respondent made his contribution in constructing the matrimonial house. He added that hence the lower courts found it prudence to divide the matrimonial assets equally. To

support his submission Mr. Sekundi referred this court to section 114 (1) of the Law of Marriage Act, Cap. 29 [R.E 2019] and the celebrated case of **Bi. Hawa Mohamed v Ally Sefu**, Civil Appeal No. 9 of 1983 the trial court for failure to distribute the matrimonial assets equally.

As to the second ground of appeal, the learned counsel for the respondent argued that the lower courts placed the custody of the child under the respondent after finding that the appellant was working at a bar and nightclub. He added that the circumstances of the appellant's workplace and her adultery habit the lower courts to base its decision on the welfare of the child and thus the trial court placed the custody under the respondent.

The learned counsel went to state that the respondent is the one who provides shelter, food and pays school fees therefore he is the one who provides for child maintenance. To fortify his position he referred this court to section 29 of the Law of Marriage Act, Cap.29 [R.E 2019] and section 4 (1) and (2) of the Law of the Child Act. He insisted that the law states that the welfare of a child is paramount and the courts are required to look at the interest of the child when placing the child under

the custody of either parent. He insisted that the appellant's adultery habits was not suitable for upbringing the child. The learned counsel admitted that the child is residing with her aunt in Dodoma and his father is living in Dodoma and Mwanza.

Mr. Sekundi the District Court considered the evidence on the record but the appellant could not tender the documents at the trial court. Mr. Sekundi cited section 110 of Evidence Act, Cap.6 [R.E 2019] and stated that the appellant is the one who alleged thus she was required to prove.

On the strength of the above argumentation, Mr. Sekundi, learned counsel for the appellant urged this court to dismiss the appeal.

In a short rejoinder, the appellant rebutted that the respondent is residing in Dodoma. She stated that the respondent is residing with his parents at Machinjioni.

Before embarking on the merits of the appeal, I wish to point out that, this is the second appeal. This being the case, this court is required to be cautious and very slow to disturb the concurrent findings of facts of the two tribunals. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance,

natural, or quality of the evidence. This has been the position of the law in this country; in the case of **Nurdin Mohamed @ Mkula v Republic**, Criminal Appeal No. 112 of 2013, Court of Appeal of Tanzania at Iringa (unreported), and in the case of **Materu Leison & Anor v Republic** [1988] TLR 102 that: where it was held that:-

> *"Appellate court may, in rare circumstances, interfere with trial court findings of facts. It may do so in the instance where the trial court had omitted to consider or had misconstrued some material evidence, or had acted on a wrong principle or had erred **in its approach to evaluating evidence**." [Emphasize added].*

I have dispassionately considered the grounds of appeal in the light of the submissions of the appellant and the learned counsel for the respondent. Having stated the above, I should now be in a position to confront the grounds of contention in this appeal.

In determining the first ground, I wish to consider the most crucial issue whether the division of matrimonial properties was fair or not. The appellant is complaining that the trial court erred in law and facts by

misdirecting itself on the division of matrimonial assets without properly evaluating his evidence on record and contribution to the acquisition of the matrimonial house. It is clear that in the instant appeal the disputed issue revolves around the division of matrimonial assets.

The Law of Marriage Act, Cap.29 [R.E 2019] guides the Court in the division of matrimonial properties, specifically, section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 114 (1) of the Act clearly states that 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 the sale of any such asset and division between the parties of the proceeds of the sale.

Expounding the requirement of section 114 of the Act, I find that there are some exceptions to section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 114 (3) provides that:-

> *"114 (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." [Emphasis added].

From the above provision of law, it is clear that a property acquired during the subsistence of the marriage is presumed to be owned by both spouses equally until proven otherwise. For property registered in the name of one spouse acquired during the subsistence of the marriage, the law presumes that it is held in trust for the other spouse. As for property held in their joint names, the presumption is that each of the spouses has an equal beneficial interest to the property.

In the division of such properties, each party has to prove his/her level of contribution, whether monetary or non-monetary. When these properties are substantially improved during the subsistence of marriage by the joint efforts of the spouse, they become liable for distribution as stated in the case of **Anna Kanungha v Andrea Kanungha** 1996 TLR 195 HC.

Based on the above provision of the law and the cited authority, the issue for determination is whether the appellant contributed towards the acquisition or developing the matrimonial house. The records reveal that

the appellant testified to the effect that she is the one who bought the plot and constructed the matrimonial house. On the respondent side he testified to the effect that the appellant owned the plot before they were married however, he made his contribution in constructing the matrimonial house.

I have revisited the written and typed trial court proceedings to find out what transpired, and found that the appellant testified that she bought the plot and tendered an exhibit however, the appellant did not prove if she constructed the said house in exclusion of her husband. In the record, I have found that the receipts bearing the names of the appellant Yulita Metela proofing that she bought building blocks in 2010, timbers in 2011, iron sheets, and other materials.

I have noted that the appellant's documents were filed but the trial court records are silent. In my considered view, the appellant has proved her ownership by tendering Exhibit D and even the receipts show that the appellant bought building materials such as building blocks and iron sheet. On the side of the respondent, he does not dispute that the appellant bought the plot. He also testified to the effect that he made a

contribution in constructing and developing the matrimonial house. However, I have perused the court records and found that the respondent documents specifically Exhibits G and F bears a different name of one Nases Lyimo and the same have no connection with the matrimonial house. Other documents relate to house maintenance, payments receipt of electricity and water bills.

In my considered view, the trial court misdirected itself to rely its decision on the receipts which had a different name and which were not connected with the matrimonial house. However, as long as the parties build the matrimonial house when they were married the husband might have made a slight contribution in developing the said house but the appellant deserves a huge share.

Next for consideration is the issue of custody of the child. I have to say that what matters in the custody of a child is the best interest and welfare of the child. Children of tender years are kept under the custody of their mothers unless there is sufficient evidence to discredit the mother. Under section 125 of the Law of Marriage and

section 26 (2) of the Law of the Child Act, No.21 of 2009 enables a woman to seek custody for a child who is below 7 years old.

In the instant case, the child is nine years old and in accordance with the law the child can stay with either of the parents depending on the circumstances of the case. The respondent claims that the appellant has engaged herself with extramarital sexual behaviours, I have to say that the respondent testified without adducing any cogent evidence thus the same was not per se evidence of parental unfitness. In my understanding, extra marital sexual behavior will only be a factor in a custody award if it rises to the level where it harms the children. Reading the trial court records the issue of adultery is a mere allegation, it was not proved and adultery was not the cause of their divorce.

In case adultery could have been proved by the court then the court could have decided the way it has decided. The same was observed by Mississippi in the United States, the States' highest court in the case of **Hanby v Hanby**, 158 SO. 727, 728 (Ala. 1935) whereas the highest court stated that wife adultery was conclusive of her unfitness

to have custody of the child. In the instant case adultery was established there was no showing of actual harm to the child and the records do not show whether the appellant abandoned her son.

The court could have been in a better position to sustain the order of both lower courts only if the child could have been in the hands of his father to the contrary the child is residing with her aunt in another Region. His parents are alive and there is no evidence that the appellant is an unfit parent for purpose of custody. There is no evidence that the appellant was unable to give the child a reasonable upbringing by virtue of living in a deplorable condition. There is no evidence that the child expressed his wishes that he would prefer to live with her aunt or the respondent. I understand the child is no longer a child of tender age, he is, however, still relatively young at ten years.

Additionally, there is no evidence that the appellant has failed to take care of her son no custodial arrangement that has proved that placing the son under the appellant's custody was a bad idea. It should be noted that it is clear and natural bifurcation between 'care giving' and 'bread winning' and that men do the latter while women do

the former thus my take if a mother is in a better position to care for her child than a mother should be given custody instead of placing the child to the father who has abandoned her child to his aunt.

In the upshot, the custody order cannot stand. The best interest of a child dictates a change. In my view, the custody of the child needs joined efforts of both parents have a right to participate in upbringing the child. Therefore, the appellant will provide shelter to the child. The respondent is required by the law to maintain his child and pay for his school fees as stated under section 129 (1) of the Law of Marriage Act, Cap.29 [R.E 2019], and section 26 of the Law of the Child Act, No.21 of 2009. Section 129 (1) of the Law of Marriage Act, Cap.29 the father is responsible to provide maintenance to his children. Section 129 (1) of the Act state that:-

> *"129 (1) Save where an agreement or order of court otherwise Duty to maintain provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, children either by providing them with such*

accommodation, clothing, food, and education as may be reasonable having regard to his means and station in life or by paying the cost thereof."

Pursuant to the above provisions of law, the respondent is ordered to provide for their children's maintenance which includes education, health, food, and clothing. The respondent is entitled and is accorded with the right to see, visit, and stay with his children during weekends and holidays. However, in case of changes of circumstances that render the appellant unfit to have the custody of the child, the respondent may move the court to rescind its order. Until such time the trial court order on the custody.

In the circumstances and for the foregoing reasons I allow the appeal and I quash and set aside the District Court decision in Matrimonial Appeal No. 18 of 2020 and issue the following orders:-

1. The matrimonial house divided 90% is placed to the appellant and 10 % to the respondent.

2. The custody of the child is placed to the appellant, the respondent is accorded right to visit his child unless such arrangement interferes with their school calendar.
3. The respondent to pay Tshs. 80,000/= per month for maintenance of his child.
4. The respondent to provide necessities such as shelter, food, clothing, and medical care.
5. The respondent to continue to pay for school fees of his children as per section 129 of the Law of Marriage Act, Cap.29 [R.E 2019].

I make no order as to costs, each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 12th February, 2021.

A.Z.MGEYEKWA

JUDGE

12.02.2021

Judgment delivered on 12th February, 2021 in the presence of the appellant and Mr. Sekundi B. Sekundi, learned counsel for the respondent.

A.Z.MGEYEKWA

JUDGE

12.02.2021

Right to appeal fully explained.