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

MATRIMONIAL APPEAL NO.12 OF 2021

(Arising from Nyamagana District Court in Matrimonial Appeal No.02 of 2021, Originating from Mwanza Urban Primary Court in Matrimonial Cause No.69 of 2020)

VERONICA NTALIMA MAGOFU ..... APPELLANT

VERSUS

PETER JAPHET ..... RESPONDENT

JUDGMENT

Date of last order: 18.06.2021

Date of Judgment: 22.06.2021

A Z. MGEYEKWA, J

Peter Japhet, the respondent, and Veronica Ntalima Magofu, the appellant respectively, were husband and wife. Before getting down to the nitty-gritty of the determination of the matter, I find it appropriate to narrate the factual background to the present appeal before me. The

factual background is, ostensibly, short. It goes thus: the two started to live together in 2006. The couple was blessed with four issues.

It appears their marriage went on well all along after four years, in 2018, the relationship started to go sour whereas, the respondent left the matrimonial house and went to stay in another place. The appellant claimed that the respondent was disrespecting her and abandoned her with the four children. The appellant claimed that she was the only one who was caring for their children. Regarding matrimonial properties, the appellant contended that they have acquired together a house and one plot. On his side, the respondent stated that he bought a plot in 2004 and developed it in the exclusion of the appellant.

In 2020, the appellant filed a Matrimonial Cause No. 69 of 2020 at the Mwanza Urban Primary Court, petitioned for divorce, division of properties jointly acquired during the existence of marriage, and custody and maintenance of children. The trial court dissolved the marriage and ordered the division of properties acquired during the subsistence of their marriage and custody of children.

Dissatisfied, the appellant filed an appeal before Nyamagana District Court whereas the first appellant court uphold the decision of the trial court and dismissed the appeal.

Undeterred, the appellant preferred this appeal in this Court. The appeal is predicated on three grounds of appeal as hereunder:-

1. *That, the trial Magistrate erred in law and fact on dividing matrimonial properties without considering statutory factors when distributing the same.*
2. *That, the trial Magistrate erred in law and fact for failure to consider the evidence on record.*
3. *That, the trial Magistrate erred in law and fact for not considering some important facts stated by the appellant during the trial by omitting some important facts which were generous evidence to be considered to show the appellant's contribution towards acquiring matrimonial; properties.*

When the matter was called for hearing on 18th June, 2021, the appellant appeared in person, unrepresented whereas the respondent enjoyed the legal service of Mr. Mhingo, learned counsel.

On the first ground of appeal, the appellant disputed the improper division of matrimonial properties. The appellant contended that the respondent stole the certificate occupancy and letter of offer that bears her name. She claimed that the respondent has abandoned her with their children.

Regarding evidence on record, that the trial court did not consider the appellant's testimony. The appellant argued that the respondent was not telling lies that he cannot feed his family with three meals for a day. She claimed that the respondent delayed making his case, he delayed to call his witnesses to testify, as a result, the trial court had to rehear the case once again. The appellant went on to claim that the letter of offer was issued in 2008 but the respondent forged the date to read 2004 since he wanted to prove that he acquired the said plot before he got married.

Submitting on the third, the appellant claimed that she is the one who bought the plot and she constructed a matrimonial house. The respondent's contribution was minimal compared to her contribution. She went on to argue that she is a traditional healer, acquired two plots

and a house. She valiantly argued that the lower courts gave the respondent the matrimonial house while she is living there with their children. She urged this court to intervene and reverse the lower court decisions and place the matrimonial house in her hands and the respondent to be given the plot located at Maina.

In conclusion, the appellant beckoned upon this court to allow the appeal.

Opposing the appeal, he stated that the applicant's claims are based on the division of matrimonial properties. He valiantly argued that the appellant's claims are not featured in the trial court record. Shooting from the hip, Mr. Mhingo contended that the appellant did not tender any document to prove her allegations. He argued that in the division of properties each party contribution is valued. To fortify his position he referred this court to section 114 (1) of the Law of Marriage Act, Cap. 29 [R.E 2019]. He went on to submit that the respondent acquired the said plot before he was married in 2004.

It was Mr. Mhingo's further submission that the respondent tendered documents to prove the extent of contribution which he made in constructing the house located in Mahina. He claimed that the respondent sold cattle and used the money earned to construct the house. Mr. Mhingo fortified his submission by referring this court to page 15 of the trial court proceedings. He went on to state that the respondent contributed more than the respondent. Mr. Mhingo state that the trial court placed the house to the respondent and the appellant was given two plots located at Mahina and Misungwi.

On the strength of the above submission, Mr. Mhingo beckoned upon this court to find that the lower courts made the right decision. He urged this court to sustain the lower court's decisions and dismiss the appeal.

In his brief rejoinder, the appellant' reiterated his submission in chief. Insisting, she argued that she is the one who bought the plot and made a huge contribution to the construction of the matrimonial house compared to the respondent. She urged this court to allow the appeal.

I have subjected the rival arguments by the appellant and the learned counsel for the respondent to serious scrutiny they deserve. Having so done, I think, the bone of contention between them hinges on the question *whether the appellant had good reasons to warrant this court to allow his appeal.*

I have keenly followed the appellant and learned counsel for the respondents' arguments for and against the appeal. Now I turn to determine the grounds of appeal whereas I have opted to address the grounds of appeal separately. The issue for determination is ***whether the appeal is meritorious or not***.

I am not losing sight of the fact that this is a second appeal and as a general rule, this court may not interfere with the concurrent findings of facts by the two courts below. Therefore per the general rule referred to above this court may not fault that finding. However, there is an exception to that rule, and that is when the finding has been reached in a misapprehension of facts or wrong interpretation of a principle of law. Therefore this court must be cautious when deciding to interfere with the lower court's decision as was propounded in the cases of **Jafari**

Mohamed v Republic, Criminal Appeal No. 112 of 2006 (unreported) and **Edwin Mhando v Republic** [1993] TLR 174. The Court of Appeal of Tanzania in the case of **Jafari Mohamed v Republic**, Criminal Appeal No. 112 of 2006 (unreported) held that:-

> *"An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance,* ***Peters v Sunday Post Ltd*** *[1958] E.A. 424:* ***Daniel Nguru and Four Others v Republic****, Criminal Appeal No. 178 of 2004, (unreported).*

Equally, in the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

> *" An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."*

In my determination, I will consolidate the first and second grounds because they are intertwined. Except for the third ground, will be argued separately in the order they appear.

On the first and second grounds, the appellant complained that the trial court did not consider the factors for division of properties and the evidence on record. In the instant appeal, the disputed issue revolves around the division of matrimonial assets. The trial court proceeded to divide the matrimonial assets after finding that there was a presumption of marriage as per section 160 of the Law of Marriage Act, Cap.29 [R.E 2019]. Therefore the trial Magistrate was in the right direction to proceed with determining the division of matrimonial properties.

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] which provides 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.

Likewise, section 114 (2), (b) of the Law of Marriage Act, Cap. 29 [R.E 2019] states the extent of contribution. In exercising the power conferred by the law on the division of matrimonial properties, the court shall regard the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets. The same was held in the case of **Bi. Hawa Mohamed v Ally Seif** [1993] LR 32, and **Yesse Mrisho v Snia Abdul,** Civil Appeal No. 147 of 2016, Court of Appeal of Tanzania.

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 provisions of the law and the cited authorities, the issue for determination is whether the appellant contributed towards

the acquisition or developing the house located at Mahina. In the instant appeal, the records reveal that the properties which were subjected for division were one house located at Mahina and two plots. The appellant claimed to have bought the plot and made an enormous contribution compared to the respondent. The respondent on his part claimed that he bought the plot in 2004 before he was married and tendered a letter of offer. Therefore, as per the record, the respondent acquired the plot before marriage, however, the house was developed during the marriage by both parties.

Expounding the requirement of section 114 of the Law of Marriage Act, Cap.29 [R.E 2019], there are some exceptions to section 114 (1) of the Act. 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. The record reveals that both parties testified to the effect that they have constructed the house jointly, however, what is disputed is the extent of contribution. On page 14 of the typed trial court proceedings, the respondent said that I quote:-

" Mali tulizovuna naye ni nyumba na viwanja viwili na kiwanja cha pili ni kiwanja tulichochukulia watoto wake niliowakuta nae."

The appellant on her side also on page 10 of the typed trial court proceedings testified the:

" Tukajenga nyumba ya kuanzia maisha..."

Guided by the evidence adduced at the trial court, the respondent tendered a letter of offer to prove that he is the one who bought the plot. However, both parties and their witnesses did not prove the extent of the contribution of each spouse. Their arguments were mere words. The source of income was not proved the claims that the respondent sold family cattle was also not proved and the appellant's claimsr were not proved.

Consequently, it was not correct for both parties to insist that the house located at Mahina belongs to one party in exclusion of the other party. In that regard, I find that the said house was substantially improved during the marriage by joint efforts, thus, I find it prudent to include the appellant in the division of the said house.

On the last ground, that the trial court did not consider some important facts stated by the appellant during the trial. I have perused the court records and found that the trial court analysed the evidence of both parties. Reading the appellant's testimony, it is vivid that the appellant's testimony was mere words. She did not testify anything regarding the extent of her contribution when acquiring or contracting the said house.

There is no evidence to show that the appellant constructed the said house in exclusion of the respondent. The parties, in this case, had no any existence marriage therefore the properties which they acquired together are subject to division and it worth noting that the contribution factor is evident by documentary evidence such as a receipt. Therefore I do not find any reason to fault the trial court decision save for the

respondent who did not prove his contribution in constructing as explained above. Therefore this ground is demerit.

In the circumstances and for the foregoing reasons, the trial court and first appellate court decisions are partly quashed and set aside. The order in regard to the division of land parcel is not disturbed. I proceed to issue the following orders:-

1. *The house located at Mahina, the appellant is given 40% shares and the respondent is given 60% shares.*
2. *Since this is a matrimonial matter, I make no order as to costs, each party to shoulder his/her own costs.*

Order accordingly.

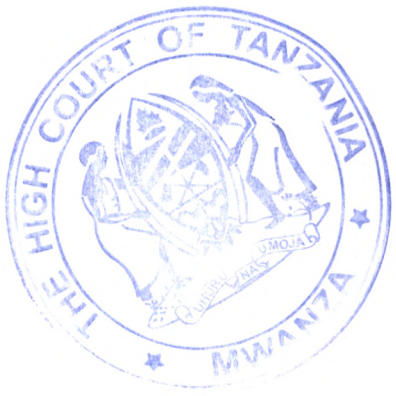
DATED at Mwanza this 22nd June, 2021.

A.Z.MGEYEKWA

JUDGE

22.06.2021

Judgment delivered on this 22nd June, 2021 via audio teleconference in the presence of the appellant and Ms. Lilian, learned counsel for the respondent.



A.Z.MGEYEKWA

JUDGE

22.06.2021

Right to appeal fully explained.