IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

PC CIVIL APPEAL NO. 60 OF 2022

(Arising Out of Civil Appeal No. 53 of 2021 from the District Court of Arusha, Originating from Matrimonial Cause No. 124 of 2020 from Arusha Urban Primary Court.)

SAMWEL NJANE NYAMBURA_____**APPELLANT**

VERSUS

JACKLINE GIROY_____ **RESPONDENT**

JUDGMENT

09/11/2023 & 01/03/2024

BADE, J.

This is a second appeal. The brief material fact leading to this appeal can be discerned from the records revealing that the respondent petitioned before Arusha Urban Primary Court (Henceforth "the trial court") for a decree of divorce, child support, and division of matrimonial property against the appellant. The trial court heard the evidence of both sides and ruled out that the marriage had broken down irreparably, issued the decree of divorce, ordered the one issue of marriage, Rebeca

Samwel Njane to remain under the custody of the respondent, the appellant was accorded the right of visitation and ordered to pay TZS 50,000 per month as maintenance for the Rebeca. The trial court further ordered that a suit house be divided 50-50 to the parties. The appellant was not amused by the said division and thus preferred his first appeal to the District Court of Arusha (Henceforth "the first appellate court"). The first appellate court made its findings and eventually upheld the decision of the trial court and dismissed the appeal for want of merit. The appellant still aggrieved lodged this appeal to challenge that decision.

The appellant raised three grounds of appeal which this court found imperative to reconstruct as herein for easy understanding:

i. That, the first appellate court erred in law and fact for upholding the decision of the trial court which declared that a house located at Terat as a matrimonial property and that the respondent contributed to the acquisition of the same hence resulting in an erroneous decision.

ii. That, the first appellate court erred in law and fact by not faulting the decision of the trial court which distributed the house at Terat to 50% to parties herein without considering the appellant's

testimony that the said property does not form part of matrimonial property.

iii. That, the first appellate court erred in law and fact for failure to evaluate the evidence adduced by parties as the result reached into erroneous decision.

This appeal is disposed of by way of written submissions. The Appellant was represented by advocate Caroline Mollel, from Legal and Human Rights Centre, while the Respondent appeared in person unrepresented.

On the 1st ground of appeal, Ms. Mollel submitted that the term matrimonial property has been defined by the Court of Appeal in the case of **Bank of Commerce Ltd vs Nurbano Abdallah Mulla,** Civil Appeal No. 283 of 2017 to mean matrimonial assets which include matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage. Ms. Mollel further submitted that to distinguish what amounts to matrimonial or private property the intention of the parties is of primary consideration. That, if the parties intended for the property acquired to be a joint property. To support her position, she cited section 58 of the

Law of Marriage Act Cap 29 R.E 2019 and the case of **Mariam Tumbo vs Harold Tumbo [1983] TLR 393.** In her

view, for a party to claim that a property is a matrimonial property there must be proof that the property was acquired during the existence of their marriage or that the property was acquired by one party and developed by the other party during subsistence of their marriage. Ms. Mollel contends that in the present case, the acquisition of the land in which the house was built was by the Appellant whose evidence was to the effect that he bought the plot of land solely without any contribution from the Respondent and that the Respondent found him with both the land and the house which was unfinished, which the Respondent was not even aware of its existence yet. Ms. Mollel further added that the Appellant provided proof that the house was built in March 2015 before he got married to the Respondent and he attached a copy of the sale agreement and agreement for the development of the plot as exhibit D1.

Concerning the 2nd ground of appeal, Ms. Mollel submitted that, section 114 (2) (b) of the Law of Marriage Act, provides that the distribution of matrimonial property will be awarded based on evidence by both sides shown to what extent each side contributed to acquisition of such

property. To buttress her position, he cited the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo,** Civil Appeal No. 2018 of 2018.

Moreover, Ms. Mollel submitted that in the distribution of such properties, each party must prove the level of contribution in the acquisition of such property something which the Respondent did not do. To support her stance Ms. Caroline cited the case of **Yesse Mrisho vs Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported).

On the 3rd ground of appeal, Ms. Mollel submitted that the court has to satisfy itself on each party's contribution toward the acquisition of matrimonial property, and thereafter distribute the same based on evidence adduced by each party. That, the first appellate court failed to properly evaluate the evidence of the Appellant whose testimony proves the extent of his contribution towards the acquisition of matrimonial property and the court misdirected itself by distributing the house located in Terat equally between the parties while the evidence clearly shows there was no contribution by the Respondent in acquiring the said property.

In opposition, Respondent started her submission by reminding this court of the long-established principle that, this court being a second

appellate court is restrained from interfering with the concurrent findings of facts of the two lower courts unless it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure or have occasioned a miscarriage of justice. She supported her position by citing the case of **Helmina Nyoni vs Yeremia Magot,** Civil Appeal No. 61 of 2020**.** The Respondent insisted that this appeal being the second appeal, the court should be reluctant to interfere with the concurrent findings of facts of the two lower courts unless it falls squarely under the exception above stated of which she believes there is none.

With regard to the 1st ground of appeal, the Respondent submitted that she strongly disputed that the Appellant acquired the house at Terat separately from the Respondent and before the marriage, relying on the principle that standard of proof in civil cases is on balance of probabilities. To cement her position, she cited the case of **Petrolube T. Ltd vs Tanzania International Containers Terminal Services Ltd,** Commercial Case No. 24 of 2020.

Her further contention is that the Appellant in his testimony before the trial court failed to prove that he acquired the said house before his marriage to the Respondent, that her evidence before the trial court

was heavier than that of the Appellant, and that she managed to prove how the house came into existence. It was her evidence that on various dates during the existence of their marriage, they bought different pieces of land in the same area until it reached the size of 14 meters in width and 60 meters in length, and later, they started building the house therein. She established her contribution towards the acquisition of the house since she worked a job at Quick Printers before and after getting married, and her salary per month was TZS 300,000. Her further testimony at the lower court was that she used that money to contribute to the acquisition of the property in dispute, and sometimes in the course of her employment she took a loan of TZS 500,000 purposely for the acquisition of the said house. She also testified that after her termination she contributed her pension to the existence of the house. That the evidence above was not disputed by the Appellant. Hence, the trial court correctly divided the said house equally as she proved her contributions to the required standard compared to the Appellant's evidence. To support her position, she cited the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017.

She insists that her evidence on the contribution toward the acquisition of the said house was heavier than that of the Appellant, and in her view, the trial court and first appellate court correctly arrived at the conclusion that the house is a matrimonial property acquired by joint efforts between the Appellant and the Respondent, cementing her position through the **Bank of Commerce Ltd** case (supra).

Regarding the 2nd ground of appeal, the Respondent submitted that the lower courts correctly divided the house in question at the ratio of 50% to each after considering the evidence of both parties. To support her stance, she cited the case of **Gabriel Nimrod Kurwijila** (supra). The Respondent further submitted that there is nowhere in the trial court records that shows that the Appellant did prove that he alone contributed to the acquisition of the said house, what he did is just to bring exhibit D1 showing that he bought the piece of land. He had not brought any evidence showing he solely constructed the house in dispute. The Respondent contended that at the trial court, the Appellant admitted and testified that there were pieces of land in which they bought jointly with the Respondent but they sold the same during the existence of marriage. That, the Appellant's averments are neither backed up by evidence nor is there any description of the land which

was sold. In her view, the Appellant fabricated exhibit D1 for his interest.

On the 3rd ground of appeal, the Respondent submitted that it has been always noted that matrimonial property found during happy and loving days of marriage no spouse may expect and foresee that one day the marriage can change and become bitter. However, when things change and the marriage breaks down, one of the spouses begins to conceal the fact that the property was acquired by joint efforts of both of them as the Appellant did in this appeal. To cement her position, she cited the case of **Anna Aloyce vs Zacharia Zebedayo Mgeta,** PC Matrimonial Appeal No.1 of 2020. In her opinion, the trial court and the first appellate court rightly and properly analyzed and evaluated the evidence adduced during the trial and arrived at a just decision. She referred to this court on page 10 of the trial court's typed judgment.

In rejoinder, Ms. Mollel reiterated her submission in chief and insisted that marriage shall not operate to change ownership of properties privately acquired before marriage unless there is an express agreement between parties, insisting the Appellant had not consented to the properties acquired before marriage to form part of

matrimonial property, and hence the Respondent cannot claim over the Appellant's personal property as he had no intention of that property to become joint property, and the appellant had provided the evidence to the effect that he bought the said land solely without any contribution from the Respondent and he solely developed the
said plot.

The counsel for the Appellant further contended that the fact that the Appellant admitted that they bought a plot of 10x20 square meters separate from the disputed house is enough to prove that the property in dispute does not form part of the matrimonial property hence not subject to distribution. The evidence about the purchase of the plot was tendered in court by the Appellant but the court failed to analyze the same and hence reached into an erroneous decision. Ms. Mollel further submitted that the said property that was jointly acquired by the parties was sold by the Respondent to one Sabrina
Juma Raphael on 05/12/2016 as seen on the record. That, the Respondent sold a matrimonial property individually without the consent of the Appellant and then she used the proceeds of the sale alone. Ms. Mollel forcefully contends that the Respondent acted deceitfully and curtailed the rights of the Appellant towards their

matrimonial property, arguing that a person of that nature cannot enjoy a 50% distribution of a property that does not even form matrimonial property.

I have dispassionately considered the rival submissions made by the parties and well examined into the record. I find two issues calling for determining according to the grounds of appeal, that is whether the disputed property forms part of matrimonial property. If the said issue is answered in the affirmative, then the next one would be whether the extent of contribution was established to enable the trial court and first appellate court to order the division of an equal share of the suit house. As correctly argued by the Respondent, ordinarily this Court being a second appellate court will not interfere with concurrent findings of fact of the two courts below unless there is a misapprehension of evidence or violation of some principles of law or procedure.

In the case of **Ramadhan Hamisi vs Republic,** Criminal Appeal No. 121 of 2017 the Court of Appeal is steadfast in this position:

> "..... this court as a second appellate court, will not interfere with the findings of fact of the courts below unless there is a misapprehension of evidence by

misdirection or non-directions or when it is clearly shown that there has been a miscarriage of justice or violation of some principles of law or procedure".

This principle is further expounded in the case of Yosiala Nicholaus Marwa and two others vs R, Criminal Appeal No. 192 of 2016 (unreported) that:

"Where there are misdirection and non-directions on the evidence, a court of a second appeal is entitled to look at the relevant evidence and make its own findings of fact".

Armed with the above guidance, I now proceed to demonstrate why I am convinced that the trial court and the first appellate court misapprehended the evidence. In the case of **Asile Ally Said vs Irene Redentha Emmanuel Soka and Another,** Civil Appeal No.80 of 2020, the Court of Appeal sitting at Dar es Salaam had defined matrimonial property. The Court held:

"It is now a settled law that, a property acquired by a husband or wife during the subsistence of their marriage, is a matrimonial property. Irrespective of the fact that where purchased, the

purchase money is provided by one spouse, that property is taken to have been acquired through their joint efforts".

Meanwhile, Section 114 (1) of the Marriage Act, Cap 29 R.E 2019 provides:

"The court shall have power, when granting or subsequently to the grant of a decree of separation or divorce, to order the division between the parties or any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale".

Sub-section (3) is further clarifying as it provides:

"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.

It is clear from the record that the Appellant purchased the disputed property before marrying the Respondent. Exhibit E1 shows that he bought the land on 05/01/ 2015 while the parties married in September 2015. There is no evidence to prove that after the Appellant bought the land the Respondent contributed to the improvement of the said land to

make it become matrimonial property under section 114 (2) of the Law of Marriage Act. The Respondent testified that she contributed towards the construction of the suit house by taking a loan and pension after retiring from her job. Still, she provided no evidence whatsoever to show that she was working or she in fact took the loan to back up her testimony that she contributed towards the improvement of the already existing property to become a matrimonial property. These missing links would have accounted for the contribution towards acquisition theory and in my view, satisfied the condition provided under subsection 3 of the Law of Marriage Act.

The issue of contribution toward acquiring matrimonial property requires to be proved by evidence. A spouse does not automatically have a share in matrimonial property simply by being married but must prove their contribution towards acquiring the property. In the case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo,** Civil Appeal No. 102 of 2018 as cited by the counsel for the Appellant, the Court of Appeal held that the extent of contribution is of utmost importance in determining the division of matrimonial assets, and that in resolving the issue on the extent of contribution, the court will mostly rely on the evidence adduced by the parties.

Having said so this Appeal is allowed. The order of division of the suit house is set aside as it does not fall in matrimonial property.

It is so ordered.

DATED at **ARUSHA** this **01st** day of **March 2024**

A. Z. Bade
Judge
01/03/2024

Judgment delivered in the presence of the Parties and or their representatives in chambers on the **01st** day of **March 2024**

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
01/03/2024