IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB-REGISTRY

AT BUKOBA

PC MATRIMONIAL APPEAL NO. 11 OF 2023

(Arising from Matrimonial Appeal No. 9 of 2022 District Court of Bukoba; Originating from Matrimonial Cause No. 1 of 2022 Katoma Primary Court)

GODWIN RWEYEMAMU SILAS..... APPELLANT

VERSUS

AGNESS MACHIMU MWASHI..... RESPONDENT

JUDGMENT

7th and 16th February, 2024

BANZI, J.:

On 9th August, 2022, the respondent filed matrimonial cause before Katoma Primary court (the trial court) against the appellant seeking decree of divorce, division of matrimonial properties and maintenance of their two children.

At the trial, the respondent apart from explaining how their marriage became sour after the appellant married another woman, she claimed that, during their marriage, they acquired various properties together including a house at Kyakailabwa, another house at Kagondo, trees farm at Rukurungo, avocado trees farm at Rukurungo, banana tree farm at Rukurungo, business

container at Rwamishenye and another house where the appellant is living with another woman together with furniture.

On the other hand, the appellant admitted to have married another woman. On the issue of matrimonial properties, he claimed to acquire the house in Kyakailabwa prior to their marriage and he had already sold it. The house where he is currently living, belongs to his new wife. Also, the banana trees farm does not belong to him. He also claimed that, he had already sold the trees fam and the farm located at kwa Ma Teonestina.

After receiving the evidence of both sides, the trial court dissolved their marriage. It further granted custody of both issues to the respondent with visitation right to the appellant. However, the appellant was also ordered to provide the children with food, cloth, shelter and education as well as to pay Tshs.70,000/= monthly for their maintenance. As far as matrimonial properties are concerned, the house at Kyakailabwa was given to the appellant and children. The appellant was also granted the houses he is living in with his new wife, avocado trees farm, banana trees farm and part of furniture. On the other hand, the respondent was given the house at Kagondo, trees farm, business container and part of furniture.

Aggrieved with that decision, the appellant appealed to Bukoba District Court (the first appellate court) complaining among other things, distribution of matrimonial properties. The first appellate court partly allowed the appeal. First, it quashed the order of dissolution of marriage as the appellant and the respondent were living as husband and wife under the presumption of marriage. It also rectified the order of granting the house at Kyakailabwa to the appellant and children by removing children. Likewise, the business container was given to the appellant on the ground that, the appellant was given duty to maintain children by providing them with necessaries of life. As far as monthly maintenance of Tshs.70,000/=, the first appellate court enhanced to Tshs.300,000/= after considering current economic standard of life. Still aggrieved, the appellant filed petition of appeal before this Court containing two grounds thus:

1. *That, the appellate court Magistrate erred in law and facts by upholding the decision of trial court as to distribution of property despite of the unjustified contribution made by the respondent towards acquisition of properties.*
2. *That, the appellate court erred in law and facts by ordering payment of Tsh 300,000/= per month for children's maintenance despite of other duties upon the appellant.*

At the hearing, the appellant was represented by Mr. Victor Blasio, learned advocate, whereas the respondent appeared in person, unrepresented.

Arguing in support of the first ground, Mr. Blasio submitted that, there was no evidence adduced by the respondent to prove joint acquisition of the properties she mentioned as well as the extent of her contribution. He further challenged inclusion of non-existing properties in the distribution *i.e.,* the sold farms. He added that, the house at Kyakailabwa and the one the appellant is living in are not matrimonial properties as, the former was acquired prior to their union and the latter belongs to his current wife. In that regard, it was wrong to include those properties in distribution. He cited the case of **Nacky Esther Nyange v. Mihayo Marijani Wilmore** [2022] TZCA 507 TanzLII to buttress his argument. Concerning the second ground, he argued that, the fact that the appellant was given business container is not a justifiable reason to enhance maintenance amount from Tshs.70,000/= to Tshs.300,000/=. According to him, the first appellate court was supposed to inquire to parties about their income before enhancing the amount. He urged this court to consider the case of **Moses William Mlagula v. Veronica Selestine Mbuga** [2022] TZHC 12178 TanzLII which emphasised on taking into consideration section 44 of the Law of the Child Act in dealing

with maintenance of children. Therefore, he prayed for the appeal to be allowed by varying the order of distribution properties depending on evidence of proving their joint acquisition and setting aside the maintenance of Tshs.300,000/= and restoring the order issued by trial court.

In response, the respondent submitted that, all properties distributed by trial court were jointly acquired by them save for the house at Kyakailabwa which was acquired before their union but she contributed to its development. Besides, the appellant did not adduced evidence to prove that, he sold that house. As far as the second ground is concerned, she argued that, the act of giving the appellant the business container justified the enhancement order. Finally, she urged this court to consider current economic situation before varying the maintenance order issued by the first appellate court.

In his short rejoinder, Mr. Blasio contended that, the issue of respondent to contribute on development of the house at Kyakailabwa is new fact which is not in evidence before the trial court and urged this court not to consider the same. He further insisted that, there was no justification in enhancing the maintenance amount.

Having considered the submissions from both sides and having perused the records of the lower courts, the issues for determination are **one**, *whether the properties were fairly distributed* and **two**, *whether the first appellate court was justified to enhance the maintenance amount from Tshs.70,000/= to Tshs.300,000/=*

It is apparent from the record that, there was no proof of formal marriage between the appellant and the respondent. However, it is undisputed that, the appellant and the respondent were living as husband and wife since 2010. Thus, pursuant to section 160 (2) of the Law of Marriage Act [Cap. 29 R.E. 2019] (the LMA), and upon application by either party, the trial court had power to grant such other reliefs which are granted subsequent to dissolution of marriage. The reliefs include, custody and maintenance of children as well division of matrimonial properties.

Starting with the first ground, it was the contention of learned counsel for the appellant that, the trial court distributed properties which were already sold and others were not jointly acquired by parties. In division of matrimonial properties, the court has to consider among other things, the extent of the contributions made by each party in money, property or work towards the acquiring of the assets. It is settled law that, in resolving the issue of extent of contribution, the court will mostly rely on the evidence

adduced by parties to prove such contribution. See the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** [2020] TZCA 31 TanzLII.

In the matter at hand, neither the appellant nor the respondent had produced any documentary evidence to prove his or her contribution towards acquisition of properties in question. The respondent just mentioned the properties alleged to be acquired jointly without stating when and how those properties were acquired. However, when she was questioned by court, the respondent admitted that, the house at Kyakailabwa was acquired by the appellant prior to their union. Likewise, the appellant did not testify on how and when he acquired the properties in question. Apart from that, the appellant claimed that, the farm located at kwa Ma Teonestina does not belong to him but he failed to mention even the name of the person who owns that farm. Moreover, he failed to state when and to whom he sold the two farms. He neither produced any deed to prove disposition of those farms. In the absence of evidence proving disposition of those properties, it was right for the trial magistrate to conclude that, the farms still exist. Under these circumstances, the case of **Nacky Esther Nyange v. Mihayo Marijani Wilmore** cited by Mr. Blasio is distinguishable because in that case there was clear proof about the ownership of properties alleged to belong to

third party. In that regard, and due to prevailed circumstances, the trial magistrate had to consider their oral testimony and made the distribution as she though just. I find no reason to fault the decision of the trial court in respect of distribution of properties save for order of the distribution of the house of Kyakailabwa in favour of children that was varied by the first appellate court. Thus, I find no merit on the first ground and it is hereby dismissed.

Reverting to the second ground, it was the contention of Mr. Blasio that, the order of enhancing maintenance of children from Tshs.70,000/= to Tshs.300,000/= per month was made without justification. However, according to section 129 (1) of the LMA, the duty to maintain children either by providing them with accommodation, clothing, food and education is vested on a man considering his means and station in life. In our case, before enhancing the amount in question, the first appellate court varied the distribution order and granted the appellant the business container. It also considered the current economic situation. Mr. Blasio urged this court to consider section 44 of the Law of the Child Act which requires the court to consider among other things the income and wealth of parents before making maintenance order. By granting the appellant the business container which was initially given to the respondent, it is obvious that the appellant's

income will increase. For those reasons, the first appellate court was justified to enhance maintenance amount from Tshs.70,000/= to Tshs.300,000/=. Therefore, the second ground also lacks merit.

That being said, I find nothing to fault the decision of the first appellate court which is hereby upheld. As a result, I dismiss the appeal for want of merit. Owing to the nature of the matter, I make no orders as to costs.

I. K. BANZI
JUDGE
16/02/2024

Delivered this 16th day of February, 2024 in the presence of the respondent, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, B/C and in the absence of the appellant. Right of appeal duly explained.

THE HIGH COURT OF TANZANIA
BUKOBA

I. K. BANZI
JUDGE
16/02/2024