

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

PC. CIVIL APPEAL NO. 80 OF 2022

(Originating from DC. Misungwi Matrimonial Appeal No. 1/2022)

MODESTA ALOYS LUPANDE APPELLANT

VERSUS

LAMECK SELEMAN LUMEGH'ELE RESPONDENT

JUDGMENT

Sept. 20th & 27th, 2022

Morris, J

The Appellant, determined to protect her matrimonial rights, preferred this second appeal. Her first appellate attempt was made to the District Court of Misungwi. Initially, the respondent petitioned for the decree of divorce and custody of children at Misungwi Primary Court. The appellant supported the respondent's prayer for divorce but had issues with him regarding division of matrimonial property, custody of children and maintenance of both the children and her. Henceforth, the trial primary court had to make its finding on such aspects.



Consequently, the subject court distributed the property among the parties by giving the appellant a large part of the household items and 10% of the motor vehicle's value. Further, out of the three issues of the marriage, custody of the eldest was given to the respondent. He was, however, ordered to provide for all the children's maintenance including the two whose custody was placed under the appellant. The appellant was aggrieved by such decision. Her main grievances were based on having been denied any share in the house situate Plot No. 356 Block 'N' Mbela area, Misungwi District; equal share of the vehicle's value; custody of the eldest daughter; and specific amount of maintenance.

The foregoing dissatisfaction made the appellant to appeal to the District Court marshalled with eight grounds of appeal. The common denominator of all the grounds was faulting the manner in which the trial court evaluated evidence in her disfavor. The appeal at the District Court was unsuccessful. Consequently, she preferred the present appeal on an almost identical grounds of appeal to the ones filed before the first appellate court. This time, the appellant presented seven grounds of appeal. However, during hearing of this appeal, she prayed to consolidate them into three major grounds. Accordingly, she faulted the District Court's decision on triad aspects,

namely; distribution of matrimonial property, custody of children and maintenance of children. The appellant pursued the appeal unrepresented. The respondent enjoyed services of Mr. Erick Mutta, learned advocate.

Regarding the ground in relation to distribution of matrimonial property, the appellant submitted that the two subordinate courts' decisions were legally and factually a total error. She mentioned that matrimonial property which ought to have been divided on equal basis between parties includes a house at Plot No. 356 Block 'N' Mbela Misungwi in which the family resides; motor vehicle - Nissan X-trail No. T.245 DVV; and a Plot at Usagara-Sanjo area. She was insistent that evidence in the trial Primary Court indicates how she gloriously contributed to the acquisition of all matrimonial property. She submitted that although the respondent and appellant officially got married in 2014, cohabitation between them began in 2011. Thus, she submitted that her contribution towards acquisition of the matrimonial assets commenced effective 2011.

According to the appellant, the couple purchased Plot No. 356 at Misungwi on 28/06/2012 at TZS 1.5m/- out of which her contribution was a third of the total price (implying, TZS 500,000/-) and that they jointly developed the

whole house as was the common trend in acquisition of other matrimonial property. The appellant supported her contribution-argument with two justifications: firstly, that her testimony proving her contribution thereof was not contradicted anyhow during the trial in the Primary Court. Secondly, that the respondent's witnesses were contradicting one another particularly in regard to commencement of construction of the house. Citing examples, the appellant submitted that while both the respondent and his witness (Mzee Sonda-**SM4**), testified that the house was built from July, 2012 and completed in 2013; Marieta Jeremia (**SM5**), seller of the plot in question testified that construction started in August, 2013 and completion was in 2018. Further, **SM3** and **SM5** (pages 11 and 16 of the Primary Court's proceedings respectively) testified that the respondent was married to the appellant at the time of construction of the house.

Hence, the respondent submitted that the trial and 1st appellate courts erred to rule that the subject house solely belongs to the respondent and that she deserves only 10% of the vehicle's value in total disregard of all her proved extent of contribution regarding acquisition and/or development of such property. She insisted that the subordinate courts did not consider that the loan amounts she obtained from NMB and CRDB banks (page 21 of the

Primary Court's proceedings) were used in acquiring and developing the matrimonial property; whether fresh or "top-up" banks credits.

Regarding custody of children, the appellant submitted that the two courts' order for custody of children was improper too. She faulted the decisions which culminated in her getting custody of two of her three children instead of all. Appellant argued further that even the one placed under her father-respondent's custody still needs her mother's care because the child is around seven years old. She also added that apart from the subject child being young, the respondent is cruel as per testimony during the trial court (exhibit **SU6**). Consequently, the appellant reiterated her prayer for that child to be placed under her custody too.

The last consolidated ground is in respect of sustenance/maintenance of children. The appellant was very brief by arguing that the respondent should, not only be responsible to give allowance for maintenance of three children, but also the amount should be specifically stated by the court. She was emphatic that both the Primary and District Courts did not give an order for a specified amount of such maintenance though she had prayed for TZS 500,000/= maintenance fee per month for three (3) children on top of their

school fees at TZS 1,000,000/= per year per child. It was her additional prayer to this court that the appeal should be allowed by so ordering.

In the upshot the appellant prayed the appeal to be allowed with costs. In consequence, the 1st appellate court's decision should be set aside; all matrimonial property be redistributed on 50/50 basis; custody of all children be given to her; respondent be responsible for maintenance of children; and other reliefs as this court finds just be allowed in her favour.

Submitting against the three consolidated grounds seriatim, Advocate Mutta argued that distribution of matrimonial property by the Primary and District Courts were fair and legally justifiable. His submissions are five-fold: One, that the parties had no marriage until 2014. Hence, any property acquired by either party is exclusive of the other. The house in question falls in such exception because it was acquired and fully developed between 2012 and 2013 (pages 4, 13 and 14 of the Primary Court's proceedings) while the appellant was still a student at Kawekamo Teachers College (see p. 26 proceedings of the Primary Court). Two, the counsel submitted that the appellant's allegations that she contributed towards acquisition of alleged matrimonial property was not corroborated, whether through documentary

evidence or oral testimony from her witnesses. Further, even when the respondent testified that he personally/individually acquired the said property the appellant did not contradict him through cross-examination or otherwise. He cited specific examples to back up this argument. That proceeds of the send-off and marriage celebrations being utilized to develop the said property, (page 20 of the Primary Court's proceedings) could have been corroborated by any independent witness who attended any or both of such ceremonies.

Three, the contradictions of witnesses' evidence (**SM4** and **SM5** - as indicated by the appellant's submissions) is a mere semantic which does not vitiate the main gist of such testimonies. Four, the uncontroverted testimony of "*Shahidi wa Mahakama Na. 1*" (trial court's witness) at p. 31 of the Primary Court's proceedings, is definite that the appellant's bank statement (exhibit "**SMK5**") does not support the appellant's allegations that the loans taken by her could have significant contribution in acquiring the subject matrimonial assets. The analysis of the subject exhibit by the said witness, per the learned counsel, revealed that apart from her account having relatively small amount of balance, the appellant was making no lumpsum

withdrawals but also the subject exhibit related to the period when construction of the house had been completed by the respondent.

Five, the appellant did not prove how she contributed to the acquisition of the motor vehicle, her borrowing spree notwithstanding. Instead, the respondent's testimony that he bought the vehicle using his personal money was not contested by the appellant (page 4, line 13 of the Primary Court's proceedings), To him, the proportion allowed for the appellant by both subordinate courts in the subject vehicle is substantiated because courts also considered the depreciation to the vehicle due to the appellant's reckless use of it. The court was referred to the case of **Nacky Esther Nyange v Mihayo Marijani Wilmore**, Court of Appeal (Dar es Salaam) Civil appeal No. 169 of 2019 at page 22 to page 27 (unreported).

Regarding custody of children and provision of maintenance, the respondent's advocate submitted that while the respondent has had no issues with maintaining the children; he supports the findings of the trial and 1st appellate courts' findings in respect of custody of children. To him, the two courts paid necessary regard to the principle of the best welfare of the

children as enunciated in the **Nacky Esther Nyange's** case (*supra*; see pages 12 – 13). Finally, Mr. Mutta prayed for outright dismissal of the appeal.

The above lengthy account of rivalry submissions has been given so as to clearly grasp the parties' arguments in support and against the detailed petition of appeal. In my view, the court is invited to determine two major issues;

- 1) Whether or not the District Court justly distributed the matrimonial property amongst parties; and
- 2) Whether the order pertaining to custody of children appropriately considered welfare of the children.

In determining both issues, this court is mindful of not re-evaluating evidence of the two subordinate courts unless justice warrants so. This is in accordance with the firmly settled legal principle that the second appellate court should not interfere with concurrent findings of the lower courts save for compelling reasons in the interest of justice. The philosophy for such bar is not technical or hard to find: the two previous judicial fora, especially the trial one, have the privileged advantage of not only receiving the evidence but also examining the demeanor of the testifiers. The cases of **Benedict**



Buyobe@Bene v R, Crim. Appeal No.354 of 2016, CAT at Tabora (unreported); **and Michael Joseph v R**, Crim. Appeal No. 506 of 2016, CAT at Tabora (unreported) are justifying the legal position elucidated hereof.

Regarding distribution of matrimonial property to the parties, one would start from what the term 'matrimonial property' means in our regime. Though the relevant principal legislation – the **Law of Marriage Act**, Cap 29 R.E. 2019 does not define it, case law has done justice in its stead. One of such judicial pronouncements is **Bi Hawa Mohamed v Ally Sefu** [1983] T.L.R. 32 which defined the subject term to mean:

'..things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of capital nature, such as matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife.'

From the foregoing excerpt, for the property to qualify as a matrimonial one, various tests should be passed. These tests include; acquisition by a

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party/parties to a marriage, individually or jointly; with intention that the property is a continuous joint-life asset; and the aim is benefiting both the spouses and their children (if any). Another equally important aspect in this connection, is the categories of matrimonial property. According to **Habiba Ahmadi Nangulukuta and 2 Others v. Hassaniausi Mchopa and Another**, CAT (Mtwara) Civil Appeal No. 10 of 2022(unreported) matrimonial properties are either jointly acquired by the spouses prior or during the subsistence of their marriage and/or those acquired by individual spouses in their own names. All that matters most is the proof by the alleging party in matrimonial proceedings that a given item is a matrimonial property.

Applying the above conditions to the present appeal, it was thus important for the appellant to prove that each of property in question, was either jointly acquired by the respondent and her; or if it was separately acquired by the respondent, it was the latter's intention to have it transformed into a joint property later; or that her contribution efforts were exerted therein in order to improve the same on a mutual understanding that such improvement was aimed at benefiting both spouses and their children. Looking at the records availed to this court, one hardly sees where the appellant discharged the said duty, particularly for the property at Plot No. 356 Block 'N' Mbela-

Misungwi. Her submissions regarding the ground of appeal that the first appellate court failed to consider evidence that established that the said property was acquired jointly is, with respect, less convincing. All the appellant is doing is to shift the burden of proving that she contributed to the subject property to the respondent.

Going through what the appellant has submitted hereto, the court realizes that she greatly banks her arguments on the contradictions apparent in the respondent's witness to prove her case. That is, instead of procuring witnesses or mobilizing evidence which would prove that she actually contributed to the acquisition of the property, the appellant in its place relied on the opposite party's set of evidence. This is, in law, not correct. Firstly, the standard of proof in civil cases is balance/preponderance of probability not beyond reasonable doubt, See, for example, **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama**, CAT (Bukoba) Civ. Appeal No. 305 of 2020 (unreported). It would have made a great difference if the appellant's side of the proof/evidence corroborated the respondent's evidence in her favour.



Secondly, the cardinal principle in this regard is that the alleging party should not shift the burden to the opposite side. See for instance, **Barelia Karangirangi v Ateria Nyakwambwa**, Civ. Appeal No. 237 Of 2007, CAT-Mwanza (unreported); **AG & Others v Eligi Edward Massawe & Others**, Civ. Appeal No. 86 of 2002, CAT (unreported); and **Ikizu Secondary School v Sarawe Village Council**, Civ. Appeal No. 163 of 2016 CAT (unreported). In **Habiba Ahmadi Nangulukuta** (*supra*), the Court of Appeal is categorical thus:

'It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, [Cap. 6 R.E. 2019]. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/hers and the said burden is not diluted on account of the weakness of the opposite party's case.'

So, the appellant's submissions which tend to drag the respondent to the negative side of the scale of justice by using part of evidence from **SM3**,

SM4, and **SM5** fail from the shortfalls inherent in the scheme. It is on such basis that this court finds, as it hereby does, that the first appellate court was justified in holding that the appellant's evidence did not sufficiently establish her contribution towards acquisition of Plot No. 356 Block 'N' Mbela. The above finding notwithstanding, the position is not similar in respect of the vehicle (T 245 DVV, Nissan X-trail). The appellant strongly submitted against the awarded 10% share of the vehicle's value. She based her argument on the ground that the District Court did not consider the loan amounts she obtained from NMB and CRDB banks out of which she contributed towards purchasing the vehicle. With respect, I do not subscribe wholly to the findings of the District Court in this regard. Both the appellate District Court and the respondent's counsel hold the view that the loan amount obtained by the appellant was insufficient to justify appellant's contribution to the purchase of the vehicle.

The foregoing view, in my painstaking opinion, is misplaced. The focus while analyzing appellant's evidence should have been the extent to which she contributed to the purchase instead of the discrepancies in the bank statement (exhibit **SU4**); or the actual amount available in the account; or the pattern of cash withdrawals. Further, this court hardly agrees with the



respondent's submissions that the appellant failed to prove handing the money to the respondent for eventual purchase of the vehicle. Ideally, it would defeat core values of matrimony if spouses operate on the basis of signing agreements or calling eye witness/es as they exchange money for mutual family upkeep or acquisition of matrimonial properties.

Further, I hold that the finding of the first appellate court and support by the respondent that 10% share of the vehicle's value to the appellant was justified because of depreciation of the vehicle due to the appellant's use is incorrect. The principle to guide the court in arriving at the proportion of the distribution is the extent of a spouse's contribution instead of the actual value or state of the property at the time of the division. Further, having determined that the loans were taken by the appellant in the period which squarely falls within subsistence of marriage; and the fact that even if she had not had money, domestic chores would have entitled her to a share of the matrimonial property [**Bi Hawa Mohamed's case** (*supra*) followed], the District Court used an erroneous gauge to arrive at the awarded 10% share. On the basis of the stated reasons, I revise the subject proportion upwards to 50% share in the appellant's favour.



The court now embarks on the consolidated aspects of custody of and maintenance for children. The appellant's dissatisfaction in this connection is that the child whose custody was placed under the respondent is too young to be separated from her mother, on the one hand, and that the amount of maintenance remains unquantified, on the other. Her submissions are uncompromising in such direction. She is vehement that the respondent is cruel (exhibit **SUK6**); and the nature of his employment does not accord him requisite time for good care for the child. I am inclined to differ with the appellant's submissions in this regard. I will elaborate below.

Heedful of the provisions of the **Law of the Child Act**, Cap 13 R.E. 2019 especially sections 4, 26, 37 and 39; this court finds no justification in interfering with the District Court's holding in this respect. The reasons for the court's hesitancy include; evidence of the cruelty was not directed to the child but to the appellant; the respondent was actively involved in the welfare of all children throughout times of conflict with the appellant; and the fact that he repeatedly records his willingness to provide maintenance for the three children irrespective of two of them being under the appellant's custody.

As for the determination of the amount to be paid as maintenance, this court is of the view that such argument is, with respect, being fronted and litigated by the appellant on afterthought strategy. Maintenance of issues of marriage particularly after the marriage is dissolved is fundamental and cannot be taken lightly. It requires adequate attention. See, for instance decision of courts in **Basiliza B. Nyimbo v Henry Simon Nyimbo** [1986] T.L.R. 93; **Festina Kibutu v Mbaya Ngajimba** [1985] T.L.R.42; **Juma Kisuda v. Hema Mjie** (1967) HCD n.188; and **Abdalah Salum v. Ramadhani Shemdoe** [1968] HCD n.129; Or, [1967] HCD n. 55. In the present appeal, records of the two lower courts do not reveal the adequacy of the degree of attention in this connection.

Thus, the order of the trial court and confirmation of the same by the District Court that the respondent should be responsible for maintenance of the children is, in my view, incapable of execution. In its current context, the order is unspecific. It does not, for instance, state how much the respondent will be responsible to give to the appellant for maintenance of the children. More so, even the duration within which to pay is not stated. So, it may be a week, a month, quarter a year or year. In the main, such order remain imprecise

Having taken keen cognizance of this aspect, I have to be downright that this state of affair resulted from the appellant's failure to specifically plead and prove the required amount so as to give the trial the benefit of making necessary enquiry of pertinent matters such as the respondent's source of income, his monthly earnings, capacity to pay ascertainable sum, *et-cetera*, *et-cetera*! Consequently, the District Court lacked the legal justification of dealing with this matter decisively. Hence, being the second appellate court, I too cannot determine it without underlying evidential backing.

This court holds that the appellant, if still interested, is at liberty to pursue this aspect (maintenance of children only) before Misungwi Primary Court afresh. Therefrom, the trial court will receive and analyze parties' relevant evidence in that regard and settle the anomaly apparent in its present proceedings conclusively.

Towards the end of this judgement, I partly allow the appeal. The appellant is entitled to 50% share of the value of the vehicle. The rest of the District Court's holding is left intact, save for the order of maintenance of children which parties may re-initiate it before the trial court as shown above. Each party will bear own costs.



It is accordingly ordered.



C.K.K. Morris
Judge
September, 27th 2022

Court: Judgement delivered in the presence of Modesta Aloys Lupande, appellant and in the absence of respondent.

C.K.K. Morris
Judge
September, 27th 2022