IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

MATRIMONIAL APPEAL NO. 91539 OF 2023

(Arising from the Matrimonial Cause No. 09 of 2022 of Mwanga District Court)

PIUS ERASTO IKONGO ..... APPELLANT

VERSUS

FLAVIA FELICIAN KITIGWA ..... RESPONDENT

JUDGMENT

03/04/2024 & 22/04/2024

SIMFUKWE, J

This appeal arises from the judgment and decree of the District Court of Mwanga at Mwanga (the trial court) in Matrimonial Cause No. 09 of 2022 in which the Respondent, Flavia Felician Kitigwa sought dissolution of marriage, equal division of matrimonial assets, custody of children and an order for maintenance of children.

A brief factual background of this matter reveals that the Appellant and the Respondent contracted a Christian marriage on 20th June, 2010 at International Fellowship Church in Dar es-salaam region. The two lived together as husband and wife until 2021 when the Respondent alleged cruelty from the Appellant that he used to beat her in front of people, threatened to kill her several times and denial of her conjugal rights since 7th April 2021. During the existence of their marriage, the Appellant and the Respondent were blessed with two issues. The Respondent decided to file a petition for divorce in the trial court praying for the following orders: ***One,*** a declaration that their marriage is broken down beyond repair. ***Two,*** an order to dissolve the marriage and a decree for divorce to be granted. ***Three,*** division of matrimonial assets equally between the parties herein. ***Four,*** Court's order that the custody of children to be under care of the respondent. ***Five***, that maintenance of the children be done by the appellant at the tune of three Hundred Tanzania shillings per month. ***Six,*** the appellant to be ordered to provide medical treatment and school fees for the children. ***Seven,*** costs of the suit.

Before the trial court the appellant faulted the respondent's prayers, specifically on matrimonial assets acquired during the subsistence of their marriage. He contended that, two motor vehicles mentioned by the

respondent were disposed by way of gift deed after he noticed the conduct of the respondent. That, 25 acres of farm alleged by the respondent to be a matrimonial property was issued by the village government for the purpose of building the church, church media (TV and radio station), bible-college, hospital and pastor's houses. Thus, the said farm is the property of the church and not matrimonial asset. In respect of other properties, the appellant alleged that sound music system, generator, stationary accessories, brick machine and irrigation machine were the properties of the church.

After full trial, the trial court declared the marriage between the parties have been broken down beyond repair and dissolved it. The court divided the matrimonial properties equally. That is, the three motor vehicles, irrigation machine, 300 chickens, generator, music system, brick firing machine, stationary accessories and 25 acres of farm which contain three houses, church and the institute of bible college. Further to that, the court placed the custody of two issues of marriage to the respondent. Also, it ordered the appellant to maintain the said issues at the tune of TZS 200,000/= per month, payment for medical treatment and school fees. The court gave the appellant exclusive right of visitation to his children.

Aggrieved with the judgment and decree of the trial court, the appellant appeals to this court armed with seven grounds of appeal, that:

1. *That the trial court erred in law and facts when it proceeded to order division of purported matrimonial properties without regard to how the same were acquired and how each party contributed to their acquisition.*
2. *That the trial court erred in law and facts when it founded its decision on the division of matrimonial properties on ground that the parties did substantiate on how the properties were acquired without regard to the testimony by the appellant who stated categorically as to how the properties came into existence.*
3. *That the trial court erred in law and fact when it completely ignored the testimony by the appellant that the purported matrimonial properties were indeed not the properties of the spouses but rather the properties of the church in which, both the appellant and the respondent were employed and the respondent never disputed.*

4. *That the trial court erred in law and facts when it deliberately shifted the burden of proof from the respondent to the appellant on how the purported matrimonial properties came into being while it was the respondent who instituted the case against the appellant.*
5. *That the trial court erred in law and facts when it vested itself a duty to determine the legality of a contract (a deed of gift) between the appellant and his daughter, in a matrimonial proceeding thereby reaching to an erroneous conclusion that failure to register the said deed of gift, rendered it a nullity.*
6. *That the trial court erred in law and facts when it ordered the appellant to maintain the children at Tshs. 200,000/= per month without regard to its own order of division which would affect the appellant's earning by fifty percent.*
7. *That the trial court erred in law and facts when it remained silent on the appellant's right of access to his children.*

The appellant prayed for the following orders:

i. That this Court be pleased to quash and set aside the findings of the trial court on what constituted matrimonial properties and the manner the same were acquired.

ii. That this Court be pleased to reverse the orders on the division of the purported matrimonial properties, and upon reversal, an equitable and just division of matrimonial properties be made based on what were actual matrimonial properties.

iii. That this Court be pleased to reverse the order of maintenance of the children and make its own order of maintenance based on the Appellant's station of life as well as other financial obligations.

iv. That this Court be pleased to state the appellant's right of access to his children.

v. That this Court be pleased to make any other orders it deems fit and just to grant.

The appeal was argued orally. The appellant was represented by Mr. George Mwiga, learned counsel while the respondent was unrepresented.

In support of the appeal; Mr. Mwiga submitted on the 1st, 2nd and 3rd grounds of appeal jointly as the same are in respect of distribution of matrimonial assets. He started his submission by referring to **section 114 (1) and (2) of the Law of Marriage Act** (Cap 29 R.E 2019). He argued

that, **section 114 (1) of the Law of Marriage** (supra) confers powers to the court to dissolve marriage and to distribute matrimonial assets. However, the power to distribute matrimonial assets is subject to conditions set under **section 114(2) (b) of the Law of Marriage Act** (supra). That is the extent of contribution of each spouse to the acquisition of matrimonial assets. That, pursuant to that section and various court decisions, **first** each spouse has a right to distribution of matrimonial assets as it was held in the case of **Bi Hawa Mohamed v. Ally Seif [1983] T.L.R 12** (CAT); **Second,** the matrimonial assets which are subject of distribution are those which pursuant to the evidence have been proved before the court that where jointly acquired by the spouses. The learned counsel cemented his assertion by referring the case of **Mariam Tumbo v. Harold Tumbo [1983] T.L.R 4.**

In that regard, Mr. Mwiga submitted that, in our case apart from the farm of two acres which the appellant agreed that they were given as husband and wife, the rest of the properties, including 18 acres which are located at Kisangiro village within Mwanga District were not acquired jointly as matrimonial properties.

The learned counsel for the appellant explained that, during the hearing at the trial court, the appellant was supported by DW3, DW5 and DW6 as

reflected at page 9 to 14 of the trial court proceedings. That, the farm of 18 acres was not acquired jointly by the parties as it was allocated to the parties by the village government for church use and Compassion Group. He further stated that, on that land there is a church building, Bible College, three houses for Compassion Group and accommodation for the parties, playground and several washrooms. The learned counsel contended that, the properties were not properties of either party.

Mr. Mwiga continued to explain that, apart from the fact that the said properties were the properties of the church, evidence of the respondent apart from listing down the said properties including 18 acres, she had no sufficient evidence showing how the respondent or the appellant acquired the said farm as required by the law under **section 114 (2) (b) of the Law of Marriage** (supra). In that regard, the learned counsel for the appellant opined that it was not correct for the trial court to come up with the decision that 18 acres were part of matrimonial assets. That, the evidence was not shaken during cross examination. Mr. Mwiga made reference to page 13, 2nd paragraph of the impugned decision, where the trial magistrate acknowledged that there was no sufficient evidence showing that the parties acquired the disputed properties jointly. Mr.

Mwiga faulted the allegation by the trial court that there was no declaration of the village that the said land was allocated to the church.

Concerning the three motor vehicles: Toyota ipsum with registration No. T.334 AWP, Toyota pickup with registration No. T.311 ADU and Toyota Land cruiser with registration T.622 ABH, 300 chickens, one generator, block making machine, music system and stationary accessories (printer and computer; those properties were for the use of Compassion Group and the church. That, when this case was instituted, the motor vehicle Toyota Land cruiser had been given to the daughter of the parties. The learned counsel cited the case of **Shakila Lucas v. Ramadhani Sadiki,** Civil Appeal No. 349 of 2020, at page 8-11 where the Court elaborated the different between matrimonial assets and personal assets. Moreover, the learned counsel cited the case of **Paulo Masuka v Juliana d/o Rugasila,** Matrimonial Appeal No. 1 of 2020 at page 5-6 (H.C), which emphasized the same issue. Also, he referred to the case of **Deodatus Lutagwerera v. Deogratius Ramadhani Mtego**, Matrimonial Appeal No. 05 of 2020, at page 12 and 17 to buttress his submission.

On the 4th ground of appeal, the learned counsel for the appellant blamed the trial court for shifting the onus of proving that joint properties were not joint properties as shown; and required the appellant to prove the

same. Mr. Mwiga insisted that, those properties were not matrimonial assets and the respondent had the onus of proof that the listed properties were acquired by the effort of the appellant alone and not jointly with the respondent. The learned counsel cited **section 110 (1) and (2) of the Evidence Act** as the relevant provision to what he averred. It was the opinion of Mr. Mwiga that pursuant to the law it was not correct for the court to require the appellant to prove that the said properties were not matrimonial properties as shown at page 13 of the judgment, where the court held that, the appellant failed to prove that the disputed properties were not matrimonial properties. He insisted that the trial court violated **section 110 of the Evidence Act** (supra) which led to erroneous decision by dividing the matrimonial assets 50/50. To fortify his argument, he referred the case of **Paulina Samson Ndawanya v. Theresia Thomas Madaha,** Civil Appeal No. 45 of the 2017, CAT, at page 14-16 where the Court stated that the onus of proof lies to the party who alleges.

On the 5th ground of appeal, Mr. Mwiga submitted that there was evidence that the motor vehicle Toyota land cruiser No. T 620 ABH and Toyota Ipsum No. T. 334 AWP were given as gifts to the daughter of the appellant through the deed of gift. He further stated that, the daughter was from the first wife. The court found that the deed of gift was not registered.

In that regard, the learned counsel submitted that the court acted ultra vires its powers in determining matrimonial matters. That, registration or non-registration does not render the property to be a matrimonial asset. He insisted that, joint ownership of the property cannot be acquired through invalidity of the deed of gift which was not registered. That, there was no evidence from the respondent showing that the noted motor vehicles have never been disposed of as gifts.

On the 6th ground of appeal, the learned counsel for the appellant asserted that, the appellant was aggrieved by the order of the trial court ordering him to issue maintenance at the tune of TZS 200,000/= per month. He stated that, the said order did not consider the actual circumstances of life. The learned counsel referred to **section 129 of the Law of Marriage Act** (supra) which prescribes that when the court issues the maintenance order, it should consider the economic status of the concerned person. That, the appellant survives through the offerings of church members. That, anything which he has, was either bought by using offerings or was given by his church members. Second, the appellant is sick as his color is not the original color, he was abducted and given poison which affected his skin pigment. Also, the court ordered the appellant to pay school fees for their children and treatment expenses.

The learned counsel urged this court to reduce the amount of maintenance from TZS 200,000/= to 100,000/= per month.

On the last ground of appeal; Mr. Mwiga submitted that, after the issuance of the order that children should be under custody of the respondent, there was no order or directives how the appellant will be accessing his children. That, the decision of the trial court is silent on that issue. He continued to state that, the appellant has the right to see their children and the children have the right to see their father. Therefore, the learned counsel implored this court to order the respondent to explain where the children are and allow the appellant to see them.

Apart from the reliefs prayed in the memorandum of appeal, the learned counsel urged this court as the first appellate court, to re-evaluate the evidence on the record, scrutinize it and come up with the fair decision reflecting the actual situation as shown in his submission.

In her reply, the respondent opposed the 1st, 2nd, 3rd and 4th grounds of appeal jointly. She explained that TAGC Church was registered on 30th November, 2015. By then the respondent was the principal secretary of TAGC while the appellant was the chairman. She explained further that at that time they had a farm of 25 acres as the matrimonial asset. The said farm is located at Kisangiro hamlet within Mwanga Ward in Mwanga

District. The respondent contended that, in that farm they built three houses, one of the houses have twelve rooms which were used for keeping chickens. The said chickens were the source of their income and the respondent was the one who was keeping those chickens. She used to feed them, clean the huts and vaccinate them with Gumbolo and Newcastle vaccines.

Elaborating more on their joint properties, the respondent stated that, they had stationary in which they were publishing constitutions and were selling one copy for TZS 500,000/=. She continued to state that, they had music system which they used for hiring in campaigns and crusades. That, during the period of her tenure as the secretary and the appellant as the chairman of TAGC, the institution has never owned anything apart from the registration certificate with No. SA18218. The respondent insisted that, the farm belongs to her and the appellant as they purchased it in 2014 while TAGC was registered in 2015. She insisted further that the money which they used to buy the said farm were the proceeds of their irrigation farm which was located at Kilosa at Kilangali village in Morogoro Region which they sold. The respondent continued to lament that, in 2021 after matrimonial dispute had begun the appellant took from her all the documents of the farm, registration cards of motor vehicles, church

registration certificate and keys of the houses. Thereafter, the appellant started to say that everything that they acquired together were properties of the church.

The respondent continued to aver that, before the trial court she required the appellant to prove that the said properties belonged to the church but he failed to do so. He asked the chairman of Kisangiro hamlet to write an introductory letter stating that the farm belonged to the institution. The said letter was written on 23rd November 2022 after the case had already been filed. That, the hamlet chairperson was among the witnesses of the appellant. In that regard, the respondent commented that, the appellant totally failed to prove through documents that the said farm was the property of the institution. That, when she required the appellant to produce documents in order to verify whether her signature was there as the principal secretary, he failed to produce and said that he did not have any document. The respondent condemned the appellant for abusing his position as the chairman by convincing pastors to join TAGC institution.

Countering the 5th ground of appeal, the respondent strongly contended that the motor vehicles with the registration No. T.434 AWP Toyota ipsum, No. 622 ADH Toyota Land cruiser and Toyota pickup with registration No. 311 ADU were matrimonial properties.

Opposing the sixth ground of appeal which concerns maintenance of children, the respondent submitted that, the appellant is capable of providing Tsh 200,000/= per month as maintenance to their children due to the fact that, the appellant moves by using a motor vehicle with full tank fuel. In this case, he has hired an advocate to represent him, thus he can provide for his children. The respondent complained that the appellant does not want to take care of his children deliberately as he deserted them since 2021. That, the appellant was staying in big hotels and eating well. She alleged that on 20th March, 2021 the appellant uttered that he won't give them anything and that they will eat dust until their death; and he made the said statement in the presence of people.

Further to that, the respondent averred that, she underwent five operations as her children were born through caesarian section. She has been affected to the extent that she cannot do any manual work. That the appellant has been cruel to her and children by depriving them with food and treatment. She stated that food is very expensive where she resides thus, TZS 200,000/= is insufficient. In that regard, the respondent implored this court to order the appellant to provide TZS 300,000/= as maintenance, plus school expenses, etc. In addition, the respondent

averred that, the children are supposed to be given pocket money when they go to school as ordered by the Ministry of Education.

In her conclusion, the respondent prayed this court to divide equally matrimonial assets which she acquired jointly with the appellant. Also, she urged this court to order the appellant to take care of his children and provide for them.

In his brief rejoinder, Mr. Mwiga submitted that, the issue before this court is how the purported 25 acres were acquired. That, the respondent has informed this court that they purchased 25 acres but she did not state to whom did they purchase the said land. He insisted that, the farm was acquired from the village freely and the same was allocated to Compassion Group and the church and that DW5 testified it well. Mr. Mwiga was of the view that even if the court visits the locus in quo, it will find construction of the church in progress. The learned counsel reiterated that the respondent does not dispute that two acres were allocated to them personally and the electricity meter has the name of the church.

It was rejoined further that; the respondent did not state how much did they sell the land at Kilosa and how much they bought the 25 acres. That, the trial Magistrate found that the parties had failed to prove how they

jointly acquired the matrimonial assets. The learned counsel informed this court that the landed property of the church was 18 acres.

Mr. Mwiga reiterated his submission in chief that the respondent had the onus to prove that the said propertied were acquired jointly and that the same were not assets of the church. How much they earned from the stationery and music system was not stated at the trial court. Thus, the same cannot be part of this appeal.

Moreover, the learned counsel averred that, it was not true that the church did not earn anything as it has 18 acres. Also, it was not true that the appellant took all the documents from the respondent.

Mr. Mwiga disputed the allegation by the respondent that the appellant asked the hamlet chairman to write an introductory letter for him and averred that, the same was not raised before the trial court nor in cross examination. That, the respondent is aware that at the disputed premises there are various activities of the church which are in progress hence, she failed to prove her case.

Concerning the issue of registration numbers of the motor vehicles, the learned counsel agreed that he erred in mentioning the numbers. However, the respondent has not contested the fact that the motor vehicles were given to the daughter of the appellant. Regarding ownership

of the said motor vehicles, the learned counsel reiterated his submission in chief.

On the 6th ground of appeal, the learned counsel reiterated that the fact that the appellant moves by using a motor vehicle is necessitated by his health and that he survives by offerings of church members.

Regarding the allegation that the appellant has deserted the respondent and the children; the learned counsel objected the same and stated that the appellant does not know the place where the appellant and the children are staying. That, the appellant is willing to provide for the children according to what he earns. The challenge was how to reach them. The learned counsel disputed the allegation that the appellant is cruel to his children and the respondent.

In conclusion Mr. Mwiga reiterate his submission in chief in respect of his prayer to reduce the amount of TZS 200,000/= to 100,000/=. Concerning school expenses, the learned advocate submitted that there was no consensus between the parties to take the children to expensive school. That, the respondent was supposed to take the children to the school which was within their income.

On the issue of division of matrimonial assets equally, the learned counsel agreed with the respondent except for properties owned by church.

I have keenly gone through the grounds of the appeal, submissions by both parties and trial court's records. The grounds of appeal cut across three main issues: division of matrimonial assets as reflected under the 1st, 2nd, 3rd,4th and 5th grounds of appeal, maintenance and access of children as reflected under the 6th and 7th grounds of appeal. I will resolve these issues having in mind the fact that this being the first appellate court, the court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact if necessary. This position has been held in numerous decisions. For instance, in the case of **Future Century Limited vs TANESCO (Civil Appeal 5 of 2009) [2016] TZCA 200 (4 February 2016) Tanzlii** the Court of Appeal held that:

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

Starting with the issue of division of matrimonial assets; the law is very clear that the properties which are subject to distribution are properties which were acquired by joint efforts of the spouses. **Section 114(2) (a)**

to (d) of the Law of Marriage Act (supra) plainly prescribes factors to be considered when ordering division of matrimonial properties as follows:

> *(2) In exercising the power conferred by subsection (1), the court shall have regard to -*
>
> > *(a) The customs of the community to which the parties belong;*
> >
> > *(b) The extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
> >
> > *(c) Any debts owing by either party which were contracted for their joint benefit and*
> >
> > *(d) The needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division*.

In the case of **Tumaini M. Simoga v. Leonia Tumaini Balenga (Civil Appeal 117 of 2022) [2023] TZCA 249 (12 May 2023)** Tanzlii, the Court of Appeal at page 10 held that:

> *"… there is no dispute that section 114(1) vests powers to the court to order division of assets between the*

parties which were jointly acquired during subsistence of their marriage. Nonetheless, before exercising such powers, it must be established that, first, there are matrimonial assets, secondly, the assets must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts."

In this appeal, according to the respondent, the matrimonial assets are: 25 acres of farm located at Kisangiro hamlet within Mwanga District, three houses built at the farm, one of the houses has twelve rooms which were used for keeping chickens. The chickens were the source of their income. The respondent mentioned other properties owned jointly with the appellant to be: three cars namely Toyota Ipsum with registration No. T. 434 AWP, Toyota Land cruiser with registration No. T. 622 ADH, Toyota Pickup with registration No. T. 311 ADU, music system, one generator, and stationary accessories which were computer, laptop and printer.

Concerning 25 acres of the farm, the appellant alleged that, it was allocated to them by the village government for the purpose of building the church, church media (TV and radio station), bible-college, hospital and pastor's houses. Thus, the said farm is the property of the church and not matrimonial asset. In respect of other properties, the appellant alleged

that sound music system, generator, stationary accessories, brick making machine and irrigation machine were the properties of the church.

On the other hand, the respondent alleged that they bought the said farm jointly with the appellant in 2021 after they had sold their irrigation farm at Kilosa in Morogoro Region.

From the above arguments, the issue to be determined is whether the said farm is matrimonial property subject to distribution. This being a civil case, it is a principle of law as provided under **section 3(2)(b)** and **section 110 of the Law of Evidence Act**, Cap 6 R.E 2019 that the standard of proof in civil cases is on balance of probabilities. The burden to prove is on the shoulder of the person who wants the court to decide in his or her favour. In the case of **Mary Agnes v. Shekha Nasser Hamad,** Civil Appeal No. 136 of 2021, (CAT), it was held that:

> *"We are also guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019. (ii)* ***Standard of proof in a civil case is on a preponderance of probabilities, meaning that the Court will sustain such evidence that is more credible than the other on a particular fact to be proved.*** *(iii). The burden of*

proof never shifts to the adverse party until the party on whom the onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case." Emphasis added

Basing on the above position, before the trial court and during the hearing of this appeal, the respondent maintained that they jointly acquired the said farm. She went further by explaining the source of money used to buy the farm and the year when the farm was purchased. In such circumstances, I am of considered opinion that the respondent sufficiently proved that the said farm forms part of matrimonial assets and it is not the property of the church as the appellant tried to insinuate. The respondent explained before the trial court that the money which they used to buy the said farm were the proceeds of sale of their irrigation farm which was located at Kilangali village within Kilosa district in Morogoro Region. With due respect to the learned counsel for the appellant, the appellant was duty bound to substantiate his allegation that the farm was the property of the church through documentary evidence as the properties of the church are owned by the Registered Trustees of the Church. I am of settled opinion that mere allegations were not sufficient to establish that the disputed farm was allocated to the church

by the village. **Section 2 (1) of the Trustees' Incorporation Act, Cap 318 R.E 2022** provides that:

> *"2. (1) A trustee or trustees appointed by a body or association of persons bound together by custom,* ***religion,*** *kinship or nationality, or establishment for* ***any religious****, educational, literary, scientific, social or charitable purpose, and* ***any person or persons holding any property on trust for any religious,*** *educational, literary, scientific, social or charitable purpose, may apply to the Administrator - General for incorporation as a body corporate."* Emphasis added

Section 5 (1) of Cap 318 provides that:

> *"(1) If the Administrator – General shall consider such incorporation expedient, he may grant a certificate of incorporation, subject to such conditions or directions generally as he shall think fit to insert in such certificate, and in particular, but without prejudice to the generality of the foregoing,* ***may impose restrictions on the amount of land which such body corporate may hold, and the uses to which such land may be put****."* Emphasis added

Section 9 of the same Act provides that all movable and immovable properties shall be vested in such body corporate.

Guided by the above quoted provisions and from the foregoing testimony of the parties, I am convinced that the disputed farm and everything attached to it, is matrimonial property subject to equal distribution as rightly decided by the trial court, since evidence adduced by the respondent sufficiently proved the same on balance of probabilities as required by the law. The appellant did not bother to produce any documentary evidence to prove that the farm was the property of the incorporated trustees of the church. Therefore, the trial court did not err by requiring the appellant to prove that the disputed properties were the properties of the church pursuant to **section 110 of the Evidence Act** (supra).

In respect of other properties to wit: three motor vehicles mentioned hereinabove, music system, one generator, block making machine and stationary accessories which are computer, laptop and printer; I have keenly scrutinized the trial court proceedings together with the grounds of appeal. I have discovered that the appellant did not testify on the extent of his contribution towards the acquisition of the properties mentioned hereinabove. The respondent stated that she was the one who was keeping the chickens which were the source of their income.

The position of the law is that, parties must testify on the extent of contribution towards the acquisition of matrimonial properties. Moreover, the contribution is not restricted to material or monetary contribution only, it extends to their matrimonial obligations or work or intangible consideration such as love, comfort, and consolation of wife to her husband and vice versa. See the decision of the Court of Appeal in the case of **Tumaini M. Simonga v. Leonia Tumani Balenga**, Civil Appeal No.117 of 2022 [2023] TZA 249 (12 May 2023) (Tanzlii)

The appellant was required to prove either that the properties were acquired by his sole effort or that the properties were acquired before the existence of their marriage or that it was the property of the church. However, it is not disputed that the properties were acquired during the subsistence of the marriage. Since the parties contracted a Christian marriage on 20th June 2010 and there is no evidence to prove that either of them had any property before the marriage; I support the findings of the trial court that all the properties mentioned hereinabove were jointly acquired and are subject to equal distribution. There is no evidence showing that either party exceeded the other party in acquisition of the properties. According to the record, the appellant and the respondent are founders of **TAGC,** as Chairman and Principal Secretary respectively.

Regarding the issue of transfer of motor vehicles, before the trial court, the appellant testified that he transferred the two-motor vehicles to his daughter one Catherine Pius Ikongo. He tendered exhibit PE1-02, a deed of gift to support his evidence. According to the said exhibit, the transfer was done on 25th December 2020 when the marriage had 10 years. Since the transfer was done during the subsistence of marriage and there is no evidence to prove that the said vehicles were individually owned by the appellant, it is my firm opinion that the consent of the respondent was inevitable. Moreover, it was not clearly stipulated as to why the appellant decided to transfer the two vehicles to the said Catherine while he has other children. The consideration of natural love and affection is insufficient to bequeath two motor vehicles to one child.

Turning to the 6th ground of appeal, the appellant was irritated by the order of TZS 200,000/= as maintenance without considering his economic status as he is surviving through the offerings. He prayed this court to reduce the amount to TZS 100,000/=. To the contrary, the respondent was also not happy with the awarded TZS 200,000/=. She prayed the amount to be increased to TZS 300,000/= on the reason that the same is not enough to maintain the children.

Section 129(1) of the Law of Marriage Act (supra) provides that:

"129. -(1) Save where an agreement or order of court otherwise provides, ***it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, 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.***

(2) Subject to the provisions of subsection (1), ***it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown*** *or if and so far, as he is unable to maintain them."*

Emphasis supplied

The above quoted provisions place the duty to maintain the child to the father. Also, **section 44 of the Law of the Child Act, Cap 13 R.E 2019** provides that the court should consider the income and wealth of both parents of the child or of the person legally liable to maintain the child when ordering the maintenance. **Section 44 of the Law of the Child Act**, Cap 13 R.E 2019 requires the court before issuing the order of maintenance to consider the following factors:

(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;

(b) any impairment of the earning capacity of the person with a duty to maintain the child;

(c) the financial responsibility of the person with respect to the maintenance of other children;

(d) the cost of living in the area where the child is resident; and

(e) the rights of the child under this Act.

In the case of **Jerome Chilumba vs. Amina Adamu [1989] TLR 117** it was held that:

"In a case of maintenance, it is important for a trial court to find out the income of the person sued in order to be able to decide the amount to be paid."

Section 43 of the Law of the Child Act (supra) provides that:

"43. -(1) An application for maintenance order may be made against the alleged biological father to the court in respect of the child-....."

Basing on the above provisions of the law and case law, as a general rule it the duty of the father to maintain his biological child. In this matter, at the trial court the respondent prayed for Tshs. 300,000 as maintenance of her two children aged 8years and 5years. However, the trial magistrate reduced the amount and ordered the appellant to maintain the children to the tune of Tshs 200,000/= per month, on the reason that the appellant earns a living through the church and the NGO. Also, the appellant was ordered to pay school fees and medical expenses for their children. Thus, the allegation that the trial magistrate failed to consider the economic status of the appellant has no basis.

In this matter, I am of considered view that since the matrimonial properties were ordered to be divided equally between the parties, then each of them has the duty to maintain their issues, though the duty is not 50/50. Hence, in addition to TZS 200,000/= the appellant is hereby ordered to pay school fees for both children while the respondent is ordered to provide for medical expenses and other school expenses for both children. It is noteworthy and it should be understood by the appellant that, staying with children costs more than monetary value to the extent that some expenses cannot be estimated in monetary terms.

The final issue for determination is the issue of access to the children. On the 7th ground of appeal, the appellant complained that the trial court failed to issue directives on how the appellant will access his children. This issue will not detain me much since the law is straight forward on that issue. **Section 38 of the Law of the Child** provides that:

> "*38. A parent, guardian or a relative who has been caring for a child prior to the court order placing the custody of that child to another person may apply to a court for periodic access to the child.*"

In this matter, the trial court granted the appellant right to access his children as seen at page 16 of the trial court judgment. Therefore, the 7th ground of appeal is unfounded.

Having said that and done, this appeal is partly allowed to the extent explained herein above. Considering the nature of the matter, I make no order for costs. It is so ordered.

Dated and delivered at Moshi this 22nd day of April, 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ★ MOSHI SUB REGISTRY ★

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

22/04/2024