IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 51 OF 2022

(Arising from the Matrimonial Case No 02 of 2020 at Nyamagana District Court)

DR. OLIVIA MICHAEL KIMARO.....APPELLANT

VERSUS

DR. DERICK DAVID NYASEBWA..... RESPONDENT

JUDGMENT

Last Order: 23/05/2023
Judgment date: 25/05/2023

M. MNYUKWA, J.

This is the first appeal. In the District Court of Nyamagana at Mwanza, the respondent (the then petitioner) sued the appellant (the then respondent) in the Matrimonial Cause No. 02 of 2020 claiming for the Judgment and Decree as follows:

(a) A declaration that the marriage between the parties herein has irreparably broken down.

(b) A decree of divorce.

(c) *The custody of the children be in the hands of the petitioner at the free access of the children by both parties.*

(d) *Costs of the suit be paid by the respondent.*

(e) *Any other relief(s) that this honourable court may deem fit to grant.*

For ease of understanding what actually took place in the trial court, it is apt to give factual background of the matter. In brief, as gathered from the available court's records it goes thus; the appellant and the respondent were the wife and husband who celebrated their marriage in Christian rites. It is on record that, before celebrating their Christian marriage, parties lived together as husband and wife and during their cohabitation, they were blessed with two issues. One issue was born in the year 2015 and the other issue was born in the year 2019. The records reveal that, in the earliest stage of their trial, parties agreed on the issue of dissolving marriage and therefore, the court entered judgment on admission on the issue of divorce.

The appellant's evidence shows that the couple lived a happy marriage until on 2019 when their marriage turned sour. Her evidence further revealed that, during their cohabitation, they managed to acquire different properties including; plot No. 152 Block D at Isenyi, Nyegezi,

motor vehicles with Registration No. T.422 DRM make Ford Ranger, Ambulance motor vehicle with Registration No. T 471 DRC, two hospitals located at plot No. 5 block No. P, Rufiji Street and Tanzanite Hospital located at plot No. 152 block D at Isenyi, Nyegezi. The appellant also claimed to be the sole owner of the above-mentioned properties as she alleged that the respondent contributed nothing towards the acquisition of the same though she categorically testified that, she had nothing to tender to prove the ownership of the properties in question for the reason that, she left the documents concerning the said properties to the respondent's house following the misunderstanding between them in their marriage.

On his part, the respondent's testimony is to the effect that, he has never acquired any property with the appellant during the subsistence of their marriage and if there is proof of any property acquired during the subsistence of their marriage, it is not his and the same belonged to the appellant. The evidence on record also reveals that when the respondent testified, they were married couples for about three years.

It is also on record that, during the pendency of the Matrimonial Cause before the trial court, following the application on the issue of the custody of a child made by the respondent, the Court placed the custody

of the child born in 2015 to the appellant pending the final determination of the matter.

As the issue of granting a decree of divorce entered on admission, the trial court framed four issues for determination. The issues were:

i. *Whether the respondent should take custody of the children*
ii. *Whether parties acquired matrimonial properties during the subsistence of their marriage*
iii. *If the 2nd issue is answered in the affirmative, whether the respondent is entitled to the division of matrimonial assets*
iv. *To what reliefs parties entitled to*

At the end of the trial, the trial court ordered the custody of the child born in 2015 to be placed to the respondent while the child born in 2019 was placed to the appellant. On the issue of the division of the alleged matrimonial properties, the trial court ruled out that, the two hospitals and their properties belonged to the company which is not subject to division. Other properties alleged to be matrimonial properties, the trial court held that, their existence and ownership were not proved and therefore the same is not worth for determination. The trial court further ordered that, parties have the right to access to the issues.

As she was not amused by the decision of the trial court, the appellant filed a petition of appeal before this Court with seven grounds of appeal mainly challenging the placement of the child born in 2015 into the custody of the respondent and the way the issues of matrimonial properties was dealt with.

At the hearing of the appeal, both parties enjoyed legal representation. The appellant was represented by the learned advocate, Mr. Sekundi B. Sekundi, while the respondent enjoyed the legal services of Mr. Kevin Mtatina, the learned counsel too. The appeal was argued orally.

Getting the ball rolling, the appellant's counsel adopted the petition of appeal filed in this Court to form part of his submissions. He then chose to start arguing the appeal by submitting on the fourth ground of appeal which challenged the trial court's findings that, the appellant and the respondent did not acquire properties during the subsistence of their marriage. The counsel referred this Court to the trial court's proceedings specifically on pages 47, 51, 52 and 53 and claimed that the appellant testified on how she contributed to the acquisition of the matrimonial properties.

The counsel further submitted that, the appellant took loans of Tshs. 27,000,000/= and 7,000,000/=, and they then jointly took a loan of Tshs. 20,000,000/= with the respondent, to acquire different properties including the two hospitals, medical equipment, landed properties and motor vehicles including the Ambulance that was used in their hospitals.

Arguing in support of the fifth ground of appeal which also challenged the trial court's findings which ruled out the properties belonged to the company without any proof, the counsel submitted that, there is no proof based on the evidence on record which proved that the properties belonged to the company. He avers that, the appellant testified about the acquisition of those properties and that, she testified that all the documents proving ownership were in the possession of the respondent as reflected on page 40 of the trial court's proceedings.

On the sixth grounds of appeal that challenged the trial court's finding to enter judgment in favour of the respondent against the weight of evidence, the counsel for the appellant mainly claimed that the trial court did not consider the evidence tendered since the appellant proved how the matrimonial properties were acquired and the same were not divided to the parties.

The counsel for the appellant abandoned the seventh ground of appeal as it intertwined with the sixth ground of appeal as all challenging the evaluation of the evidence on record.

In arguing further to support the appeal, the counsel for the appellant argued jointly the first, second and third grounds of appeal which challenged the order on the custody of the children. He mainly complained about the act of the trial court to order the child born in 2015 to be under the custody of the respondent while he failed to pay the school fees for that child which resulted in the child not being accepted at Mwanza International School and therefore compelled the appellant to find another school for the child.

The counsel for the appellant retires his submissions by claiming that, the trial court did not give an opportunity for a child to express her view on whose parent she would like to live with. He finally prayed the appeal to be allowed and the decision of the trial court to be set aside with costs.

Opposing, the counsel for the respondent responded the way the grounds of appeal was submitted by the learned counsel for the appellant. On the fourth ground, he remarked that, there was no evidence tendered in the trial court to prove the existence of the properties alleged to be

matrimonial properties. He strengthened that, it is a trite position of the law that the one who alleges must prove his allegation. He claimed that, as the appellant alleged the existence of the matrimonial properties she was bound to prove their existence with the proof of documentary evidence like the registration card for the case of the motor vehicle, sale agreement to prove the landed properties and the laboratory equipment. He ended up praying this ground to be dismissed.

In regards to the fifth ground of appeal, he argued that, if the documents to prove ownership were in the possession of the respondent as claimed, the appellant had the chance under section 67 of the Law of Evidence Act, Cap. 6 R.E 2019, to compel the respondent to reproduce the said documents by filling before the court the notice to produce as the law requires. He claimed that, the appellant slept on her right for failure to file the notice to produce. He added that, despite the other documents like the loan agreement to be in between the appellant and her bank, and on top of that the same were not tendered.

Arguing in opposing the sixth ground of appeal, he briefly submitted that, mere words cannot prove the fact in issue. He retires stating that, as there was no evidence tendered in the trial Court that is why her mere words were not considered for lack of documentary evidence.

On the joint ground of appeal which challenged the order of the custody of the child to be placed to the respondent, the learned counsel started to submit on the issue of the trial court's failure to take the independent views of the child, as to whom parent she would like to stay with. He avers that, this issue is an afterthought because by that time when the trial proceeded, the child was in the custody of the appellant and that she did not pray the court for the child to express her views. On the issue of the rejection of the child at Mwanza International School for nonpayment of the school fees by the respondent, he strongly disputed that there was no official document to substantiate the same and those are just mere words which lack proof as there was no proof that the respondent did not pay school fees.

He retires his submission by referring to page 53 of the trial court's proceedings to elaborate that, the child whose interim custody was placed to the appellant, was not living with the appellant as she was living at Moshi. She complained that, the appellant who prayed for custody of the child is not able to take care of the child. He, therefore, prays for the appeal to be dismissed and that he will not pray for the costs as the disputes involve spouses.

In a short rejoinder, the appellant's counsel reiterated what he had submitted in chief and prayed the appeal to be allowed as the Court's record bears the testimony of what transpired in court.

Upon hearing the rival submission from both parties, the main issue for consideration and determination is whether the parties acquired matrimonial properties which are subject to division after the decree of divorce is issued and whether it was proper for the trial court to have placed custody of the child to the respondent.

In determining this appeal, I will start by disposing of the fourth, fifth and sixth grounds of appeal as they are all related to the issue of analysis of the evidence on record in relation to the division of the alleged matrimonial properties and then I will jointly determine the first, second and third ground of appeal as they have a bearing to each other on the issue of the custody of the child.

Before I proceed to determine the appeal, I wish to state that, this being the first appeal, I am enjoined to reconsider and reevaluate the evidence on record and if the need arises, draw my own conclusion. This is a settled position of the law in a plethora of authorities including the case of **Okeno vs R,** (1957) EA 32 and **Tanzania Sewing Machine Co. Ltd vs Njake Enterprises Ltd,** Civil Appeal No. 15 of 2016.

To begin with, as I have earlier indicated, I will dispose of the fourth, fifth, and sixth grounds of appeal which challenged the way the trial court evaluated the evidence on record and reached a conclusion that there is no proof of the existence and ownership of the matrimonial properties subject to division among the parties.

It is a cherished principle of law that, the one who alleges must prove his allegation. It is also a trite law that in civil cases, the burden of proof is on the one who alleges and the standard of proof is on the balance of the probability. That means, a party who has a legal burden also bears the evidential burden. Reverting to our case at hand, since the appellant is the one who alleges the existence and ownership of the matrimonial properties by the spouse, the law requires her to prove on their existence by cogent evidence.

I am fortified by the above principle of law in view of the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E 2019 which provides that: -

> *"110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."

In expounding on the principle of who bears the evidential burden in civil cases the Court of Appeal of Tanzania in **Antony M Masanga vs Penina (Mama Ngesi) and another,** Civil Appeal No 118 of 2014 cited with approval the case of **In Re B** (2008) UKHL 35, where Lord Hoffman in defining the term balance of probabilities states that: -

"It is a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to add the fact is treated as being happened".

Furthermore, in the case of **Charles Christopher Humphrey Richard Kombe t/a Humphrey Building Materials vs Kinondoni Municipal Council,** Civil Appeal No. 125 of 2016 when subscribing to the

commentaries in the book of *Sarkar's Law of Evidence*. 18th Edition, M.C Sarkar, S.C Sarkar and P.C Sarkar published by Lexis Nexis thus:

> *"...The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is usually incapable of proof... The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*

In the matter under scrutiny, since it is the appellant who alleged the existence and the joint ownership of the matrimonial properties, the burden of proof rests on her. The question now is whether she successfully discharged her burden as it is required by the law.

I had time to go through the entire record with an eye of caution, only to find that in her evidence, the appellant mentioned a number of properties alleged to be matrimonial properties as reflected on pages 47, 51, 52 and 53 as it was rightly submitted by his counsel. However, it is my firm view that mentioning of the properties without proving the existence and ownership of the same is not enough. I say so because, the appellant did not tender any document showing proof of joint ownership or sole ownership of the alleged matrimonial properties by the parties. It

could be lucky on her party if the respondent could have admitted on the existence and ownership of the alleged matrimonial properties. Unfortunately, this was not the case as it is reflected on page 40 of the trial court's proceedings as he categorically stated that if there is proof of any property acquired during the subsistence, the said property belonged to the appellant.

Admittedly, the record bears testimony that, the appellant pleaded and annexed documents showing ownership by the parties of the alleged matrimonial properties in her amended reply to the petition of divorce. Nevertheless, those documents were not tendered before the trial court and therefore did not form part of the record for the trial court to consider in its decision. The law is settled that, the purpose of annexure is to inform the other party of the document wished to be relied on by the other party and to inform him of the case he is going to face and not to have taken him by surprise. If the annexures are not tendered, the other party has no burden to disprove them because they are not part of the evidence.

In **Sabry Hafidh Khalifa v Zanzibar Telecom Ltd (Zantel) Zanzibar,** Civil Appeal No. 47 of 2009, the Court of Appeal stated that: -

> *"We wish to point out that annexture attached along with either the plaint or written statement of defence are not*

evidence. Probably, it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or the written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprise. But annextures are not evidence".

Guided by the above decision and my perusal of the available court's records, I didn't see any document which was tendered by the appellant to prove that, the two hospitals and the laboratory equipment alleged to have been acquired during the subsistence of the marriage belongs to the parties and therefore subject to division between them. I wonder how did the trial court ruled out that those properties belonged to the company and they are not matrimonial properties for the purpose of division.

In addition to that, even the other alleged matrimonial properties like the landed properties and the motor vehicles were not exhibited before the trial court and no independent witness was called to testify despite the fact that, the appellant alleged that they bought one of the landed property from a person named as Multaza Alou and that they were paying the sale amount on monthly basis, but still that person was not called by the appellant to prove that he sold that landed properties to parties.

In short, what was pleaded by the appellant at the trial court in regards to the matrimonial property is not entirely supported by the evidence. The appellant testified in the trial court and indeed failed to prove her assertion on the existence of those properties on the balance of probabilities. This Court finds it very hard to believe the mere words of the appellant on the existence of the alleged matrimonial properties without cogent evidence from her.

Therefore, this Court cannot order the division of the alleged matrimonial properties whose existence is not proved before the trial court. It is illogical for this Court to order the division of the properties whose existence and ownership is not proved. It is so because it will go against the well-established principle provided for under section 114 (1) of the Law of Marriage Act, Cap 29 R.E 2019 which requires the Court to divide the properties acquired by the parties during the subsistence of their marriage or substantially improved by the other party during the subsistence of the marriage as it is provided for under section of 114(3) the Law of Marriage Act, Cap 29 R.E 2019 which is also elaborated in the case of **Anna Kanungha vs Andrea Kanungha** [1996] TLR 195.

Believing the mere words of the appellant without the Court satisfying itself on the existence and ownership of the alleged matrimonial

properties, might result in the properties of somebody else to be subjected to division which ultimately may result in unnecessary chaos and litigation which goes contrary to the mission of the Judiciary of Tanzania of carrying out the administration of justice to the general public in dealing with disposal of cases effectively and efficiently.

In view of the above discussion, my mind is settled that the appellant failed to prove the existence and the ownership of the properties alleged to be matrimonial properties and to that end, it is my finding that the fourth, fifth and sixth grounds of appeal lacks merit and they are hereby dismissed.

Turning now to the issue of the custody of the child, who is born in the year 2015. It is the complaint of the appellant that, the trial court erred to order the child to be placed into the custody of the respondent for the reason that the child's opinion was not taken and the social welfare report was not considered.

In determining this issue, I wish to put it clear that in deciding whose parent the custody of the child to be placed, the Court consider the best interest of the child. This is the position of the law under section 125 of the Law of Marriage Act, Cap. 29 R.E 2019 as well as the Law of the Child Act, Cap 13 R.E 2019 and a number of case laws including the

case of **Glory Thobias Salema vs Philemon Mbaga,** (Civil Appeal No. 46 of 2019) [2020] TZHC 3794 (13 November 2020))

The term best interest of the child is not defined neither in the Law of Marriage Act, Cap 29 R.E 2019 nor the Law of the Child Act, Cap. 13 R.E 2019. To my understanding the term may include but not limited to what is seems to be best suited interest to a child in a particular circumstance in terms of services and the provision of all necessary needs according to his age and needs that will ensure the child's survival, development and upbringing of a child in terms of physical, psychological, emotional and spiritual.

Again, I wish to put it clear that, in deciding on whose custody of the child should be placed, the parents of the child are given a high chance to stay with the child as the law prefer a child to be with his parents except if his rights are persistently being abused by the parent or it is established through evidence that the parent is incapable of taking care to a child and that the best interest of the child is in danger. (See section 39(2)(c) of the Law of the Child Act, Cap 29 R.E 2019.)

Reverting to our appeal at hand, the appellant's counsel complained that the view of the child was not taken by the trial court for a child to chose on whom parent she want to stay with. As it was rightly submitted

by the counsel for the respondent, this argument is an afterthought for the following reason. First, when the trial was conducted in the trial court, the child was in the custody of the appellant and therefore, she could be in a better position to pray the court for the views of the child to be taken. Second, as reflected on page 57 of the trial court's proceedings, the counsel for the respondent prayed the child to be called but the appellant's counsel argued that it is not mandatory for the child to be called based on her age and the court may consider the best interest of the child in ordering on whose parent the custody of the child should be placed.

Based on the above reason, I don't agree that in every case the view of the child should be taken as this depend on the circumstances of each and particular case.

On the other hand, the appellant's counsel avers that, the social welfare officer's report was not considered in ordering the custody of the child. Going into records, I find that the social welfare officer report does not state that the respondent is not capable to take care of the child or that his living environment does not suit the child. Further to that, it has to be remembered that, it is the appellant who was given custody of the child pending the determination of the main suit. Worse enough, the appellant was not staying with the child depite the court's order as the

child was transferred to another place that's why the trial court decided to give an order of custody to the respondent so that the child has to enjoy the love of his parent.

In totality, I don't see any reason to fault the trial court's findings on the issue of the custody of both children for I agree with the reasons assigned by the trial Magistrate in addition to the reasons that I have shown above.

Before I conclude, I find it pertinent to state that, I also agree with the order of access given by the trial court and how it should be implemented by the parties.

All said and considered, for the aforesaid analysis, I find no merit in the appeal and the same is hereby dismissed. No order as to costs.

It is so ordered.

M.MNYUKWA
JUDGE
25/05/2023

Court: Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
25/05/2023

Court: Judgement delivered in the absence of parties.

M.MNYUKWA
JUDGE
25/05/2023