IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 144 OF 2020

(Arising from the judgment and decree of the District Court of Ilala in Matrimonial Cause no. 6 of 2019)

LADISLAUS MUTASHUBIRWA..... APPELLANT

VERSUS

EDNA JOSEPHAT RUGANISA.....RESPONDENT

JUDGEMENT

04th March, 2021 & 28th May, 2021

EBRAHIM, J;

This appeal originates from the decision of the District Court of Ilala in Matrimonial Cause No. 6/2019. In that case, the herein respondent petitioned before the trial court for divorce and consequential orders of equal division of matrimonial assets. The respondent also prayed for custody of two issues to be under the appellant and (she) be availed access to the issues and costs.

Having found that the duo were not married, the trial court neglected the issue for an order of divorce and proceeded to award a relief of custody as requested. No costs were awarded. The trial court further divided assets to a ratio of 60% to the

appellant and 40% to the respondent in reliant to valuation results by a qualified valuer.

Disgruntled the appellant herein appealed to this court raising the following grounds;

1. **THAT, the trial magistrate erred in law and fact by treating the appellant's properties as matrimonial assets subject to division despite the strong evidence produced by the appellant showing that the properties exclusively belong to the appellant.**
2. **THAT, the trial magistrate erred in law and fact in holding that the respondent is entitled to 40% of appellant's properties without showing the respondent's efforts in acquisition of the said properties.**
3. **THAT, the trial magistrate erred in law and fact by deciding on distribution of properties which do not exist or not part of matrimonial assets.**

Tnis instant appeal was argued by way of written submission. The appellant was represented by Ms. Rehema Samwel, learned advocate while the respondent was legally assisted under the probono parccea by Ms. Grace Daffa, learned advocate.

To support tne first ground of appeal; Ms. Rehema submitted that it was the respondent who had onus to prove the allegations on acquisition of the lisled properties as per ***section 110 (1) (2) and***

***112 of* the Law of Evidence Act, Cap 6; RE 2019** but failed to do so. He added that the appellant was the one who adduced the strong evidence on sole acquisition of the properties hence they were not subject to division.

Ms. Rehema explaine that from the list of properties provided by the respondent; some of the properties are appellant's personal properties as testified before the trial court and some are owned by Power Food Company where the appellant has been working for gain. Those properties include one house and vacant land situated at Kitunda Kinyantira-Ilala Dar es salaam, one vehicle make Suzuki Carry, one Motorcycle make Fekon, chips and soft drinks business located at Mwembeyanga-Temeke-Dar es salaam including the equipment, household utensils and eight (8) livestock pigs. She contended that all the properties were divided by the trial magistrate without considering that **section 60 (a) of the Law of Marriage Act, Cap 29 RE: 2019** allows spouses to have personal properties.

Quintessence on personal properties; the appellant's counsel accentuated that the appellant proved ownership of a landed property based on the documentary evidence of a sale

agreement which reveals the appellant to have purchased the same and the respondent therein was just a witness. He believed the trial magistrate misdirected himself to divide the said property since it bears the name of the husband and there is a rebuttable presumption that the property belongs absolutely to the appellant. It was further submitted that the soft drinks business belongs to the appellant as a lease agreement (exhibit D2) of a shop was executed by the appellant and excludes the respondent. Again, counsel for the appellant contended that the respondent did not prove on existence of 8 pigs which she claimed to own jointly with the appellant.

On properties owned by the company, Ms. Rehema while arguing on the second ground of appeal specifically touched the said issue that the respondent's testimony which demonstrates that the car (Suzuki Carry) was a matrimonial property costing TZS 700,000/= and a motorcycle with registration number T924 AAC Fekon costing TSHS. 2,000,000/=; had been strongly denied by the appellant's testimony as he claimed that the car was the property of the Power Food Company. She said the appellant appealed that the mentioned motorcycle never existed but the respondent

instead mentioned another motorcycle with registration no. T 962 BWS Linken Model owned by PAN AFRICA ENTERPRISES LTD which is the place where the appellant was working. Counsel for the appellant contended therefore that the trial court erred to divide the two without sufficient proof from the respondent on their existence.

Submitting further on the second ground of appeal, Ms. Rehema submitted that the court erred to award 40% share of properties to the respondent since she did not prove her efforts towards acquisition of the same. To substantiate her arguments, she cited the provisions of **section *114 (2)* of the Marriage Act, Cap 29 RE: 2019** and the case of ***Gabriel Nimrod Kurwijila vs. Hassan Malongo, Civil Appeal No. 102 of 2018 (unreported)***. She further prayed the court not to grant anything to the respondent. She explained the reason being that the appellant is the one who shall suffer irreparable loss because he is maintaining the 1st child who is mentally ill and unarguably needs more attention. Moreover, all the expenses on food, shelter etc of the issues are on him.

In elaborating the 3rd ground of appeal, counsel for the appellant submitted that the trial magistrate did not take into

consideration his testimony and the evidence adduced by the appellant as required by law. She urged this court being the first appellate court, to re-evaluate the evidence afresh. To support her contention, she cited the cases of ***Martha Michael Weja vs. Hon. Attorney General and 3 others, Civil Appeal No. 3 of 1982; Hosea Katampa vs. The Ministry of Energy and Minerals and 2 others (unreported;*** and the case of ***Jamal Tamim vs. Felix Francis Mkosamali & Attorney General, Civil Appeal No. 110 of 2012 (unreported)***. She prayed for the appeal to be allowed with costs.

In reply, Ms. Grace countering the arguments; replied on the 1st ground that the parties did cohabitate ever since 1998 and for all that time the respondent performed wifely and motherly duties. She contended that the trial court was right when it decided all the listed properties were matrimonial assets jointly acquired by the parties as the trial magistrate directed himself correctly from the evidence in records that there was no dispute that all the properties were acquired during cohabitation. Respondent's counsel further quoted and invited the court to make reference at page 19 of the trial court's judgment. The learned counsel accentuated that the matrimonial properties subject to division

includes both properties acquired and the ones acquired by either party prior to the cohabitation but substantially improved during subsistence of their cohabitation through joint efforts. To substantiate her arguments, she cited the provisions of **section *114* *(3)* of the Marriage Act, Cap 29 RE: 2019.**

Ms. Grace emphasised and replicated what the trial court reasoned that a document pertaining to ownership of a property by having a name of one party alone, cannot be a ground for not dividing the same to both spouses.

On the second ground of appeal, it was argued that the trial court was correct to award the respondent 40% share of each listed property since the respondent contributed in labour through domestic services for the welfare of the family. To support her argument, she invited the court to make reference to **section *114* of the Marriage Act, Cap 29 RE: 2019** respectively and also cited the prominent case of **BI HAWA MOHAMED vs. ALLY SEFU [1983] TLR 32 (CA)** and **ELIESTER PHILEMON LIPANGAMAHELA vs. DAUD MAKUHUNA, CIVIL APPEAL NO. 139 OF 2002, HC AT DSM.**

On the third ground of appeal, the learned counsel submitted stiffly that it of the appellant had a burden to prove

that the assets which the respondent claimed to have been acquired during cohabitation and which she believed to be matrimonial assets were not theirs. To support her argument, she cited **section 111 and 112 of the Evidence Act, Cap 6 RE: 2019.** The counsel further contented that the trial court well considered evidence adduced by the parties during trial and arrived to correct findings. The counsel then prayed for the three grounds to be dismissed with costs as they lack merit.

In rejoinder, Ms. Rehema persistently emphasised on what she had submitted prior in her submission in chief and supplemented that the respondent did neither contribute to acquisition nor improve of any property acquired by the appellant hence she is not entitled to a share. She therefore stated that the cited cases by the trial court of **Chakupewa vs. Mpenzi and another [1999] 1 EA 32** and other cited cases of **Nderetu vs. Nderetu 1995 1 EA 235 and, Eliester Philemon Lipangahela (supra), are** inconsequential to this appeal. She also claimed that the case of **Bi Hawa Mohamed** (supra) is irrelevant in this case since the parties were not married. He finally prayed for this appeal be

allowed and the decision of the first appellate court be quashed and set aside.

I have dispassionately considered the grounds of appeal in the light of the submissions of both parties. In essence all three grounds of appeal are intertwined, them generally.

The issue for determination that comes out of the three grounds is ***Whether the trial court was right to divide all the listed properties in a ratio of 60% to the appellant and 40% to the respondent***

I have painstakingly examined the evidence on record and submissions by the learned counsels and I proceed to enlighten on the following;

One, the respondent (who was PW1) gave testimony that she and the appellant started living together since the year 1997. They separated in 2016, hence falling within the definition of presumption of marriage **(section 160 of the Law of Marriage Act, Cap 89)** She had demonstrated to have performed domestic duties as a wife and involved herself in various businesses like selling fish at the market and paid some expenses. Whilst the

appellant contends that the respondent has contributed nothing since she was a house wife and neither employed. However, from the records, there was no evidence tendered by either party which suggest that neither of the listed properties was not acquired during cohabitation period. For that reason, it is prudent to state clearly that even if the appellant was the one who went out to earn for the family, the respondent on the other hand brought up a family and maintained a home. Thereby, she was actually supporting the appellant in his bread-winning activities by relieving him from family duties. This is also a contribution and when their relationship came to an end, she had a right to claim the share of the properties basing on her vital contribution towards maintaining and nurturing the family as illustrated in the prominent case of **Bi hawa Mohamed vs. Ally Seif [1983] TLR 32**. Basing on this point of view, I do not agree with the appellant's counsel contention that the respondent contributed nothing. The trial court's decision made it clear while reflecting on its records that the respondent testified to have been performing the domestic activities at home for the betterment of the family and the appellant never disputed on that aspect. The law is clear that

failure to challenge an important fact during cross examination, implies admission of that fact. The respondent therefore is entitled to a share on all properties acquired in the subsistence of cohabitation including the landed property.

Second, As for the car (Suzuki Carry) which was claimed by the appellant to be the property of the Power Food Company: and the mentioned motorcycle with registration number T924 AAC Fekon and 8 pigs (livestock) which the appellant claimed that they never existed; it was the contention of the appellant's counsel that the respondent was duty bound to prove both that the car and the motorcycle are matrimonial properties and that the said 8 pigs are existing. Keenly from the records, the respondent testified that they bought the said car for Tshs. 700,000/= and later on they managed to buy a motorcycle for Tshs. 2,000,000/=. She also testified that at first, they had 2 pigs and as time passed the two managed to have 8 pigs. But on the other hand, the appellant just in a narrow manner testified that he is not the lawful owner of both the car and motorcycle but rather the motorcycle was the property of Pan African Company. Yet again he denied the existence of the 8 pigs.

Principally, in civil cases the burden of proof lies on a party who alleges anything in his favour. (see the case of ***Antony M. Masanga v. (1) Penina (Mama Mgesi) (2) Lucia (Mama Anna)***, Civil Appeal No. 118 of 2014, CAT (unreported). It is a common knowledge that in civil proceedings the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. Again, it is a trite law that both parties to suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win as in the English case of **Re B L[2008]UKHL 35**, the court made it clear that;

> *"if 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 a binary system in which the only values are 0 and 1. The fact either happened or it did not."*

Basing on that position and on, measuring the testimonies given by the parties at the trial from records on the aspect of the car (Suzuki Carry), motorcycle and 8 pigs; I see the respondent's evidence is heavier compared to the denial on the existence and ownership of the said properties. If the appellant desired the trial court to decide dependent on the existence of facts that the

properties were owned by the companies which he used to work with as he had asserted, he should have proved those fact by offering evidence to support. Instead, he just made a denial while he had an opportunity to bring evidence from the respective companies. For that reason, their existence and ownership as family assets is undisputed. In measuring the weight of the two; the respondent's evidence, is heavier compared to the appellant's hence the existence of assets is in-disputed.

Third, the trial court held that the two were not under presumption of marriage due to the fact that there was no proof given by the petitioner (herein the respondent) that the two had acquired the reputation of being husband and wife. With all due respect to the learned trial magistrate, this was an erroneous approach since the records reveals that respondent's witness (PW3) who was the respondent's mother testified that the appellant went to introduce himself at the respondent's family. In a number of occasions she tried to reconcile them whenever they had disputes like couples. She also said that she advised them to go to court after she failed to reconcile their squabbles and in her testimony she referred the appellant as a husband to her

daughter and the respondent as a wife of the appellant. For that reason, the provision of **section 160 (2) of the Law of Marriage Act, Cap 29** was appropriately invoked to order division of matrimonial properties and custody of the issues. The appellant's counsel has contended that the case of **Bi Hawa Mohamed** (supra) was irrelevant since the parties were not married couples. With all due respect and without prejudice, that argument is groundless for the very reason that the said case entails most on the aspect of division of matrimonial properties in connection to the provisions of the **Law of Marriage Act, Cap 29**. The wording of **section 160 (2) of Cap 29** allows the provisions of the Act which are relating to reliefs to the married couples to be applied when resorting parties who have lived under presumption of marriage. The section reads;

> *(2)When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make an order or orders for maintenance*

and, upon application made therefor either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, ***and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section.***

From the above provision of the law, the Bi Hawa case (supra) fits in four with the circumstances of the instant appeal.

Fourth and Last, the trial court ordered the division of the matrimonial assets in a ratio of 60% to the appellant and 40% to the respondent in reliant to valuation fallouts by a qualified valuer. But again, the two issues Rinus Ladislaus and Henreietha Ladislaus were placed under the custody of the appellant which of course he is also responsible for their maintenance. Considering the fact that the appellant was the key player in acquisition of the family assets and the maintenance obligation he faces bearing in mind one of the children is mentally ill which calls for an optimum care

inevitable for him; to award 60% share properties to him and 40% to the respondent, is unproportionate. Upon identifying the obligations that the appellant shall be encountering towards the issues and his contribution which played a key role to acquisition of the properties, I vary the ratio of division of all the matrimonial properties to 80% for the appellant and 20% to the respondent in reliant to valuation fallouts by a qualified valuer.

Therefore, basing on the above four (4) rudiments which I have expounded, the appeal partly succeeds. Taking into account of the nature of this matter being matrimonial, each party shall bear its own costs.

It is ordered accordingly.

R. A. Ebrahim

JUDGE

DAR ES SALAAM

28.05.2021