

TANZANIA / JUDGMENT

Pc Civil Appeal 10 of 2023 Judgment Mrisha J

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IN THE HIGH COURT OF TANZANIA (SUMBAWANGA DISTRICT REGISTRY) AT SUMBAWANGA
PC CIVIL APPEAL NO. 10 OF 2023 (Arising from the District Court of Mpanda at Mpanda in Civil
Appeal No. 47 of 2022 and originated from Shanwe Primary Court in Matrimonial Cause No. 11
of 2022) SALOME NYANDA..... .. APPELLANT VERSUS
MASUMBUKO VALENCY RESPONDENT

JUDGMENT

if' December, 2023 & 22M March, 2024 . MRISHA/X This is a matrimonial appeal case which originates from Shanwe Primary Court at Mpanda in Matrimonial Case No. 11 of 2022. In that case, the respondent Masumbuko Valency, petitioned to the abovementioned trial court for a decree of divorce. In his petition, the respondent claimed that the appellant had acts of stealing money and his properties; leave home without his permission i when he was out of home. On her side, the appellant denied the said claims and maintained that she is not ready to divorce her husband. After a full trial, the trial court did not grant decree of divorce as stipulated under section 110(l)(a) of the Law of Marriage Act, No. 5 of 1971 (the LMA) due to existence of presumption of marriage. However, having found that the said presumption had been rebutted under section 160 (1) of the LMA, the trial court ordered the matrimonial properties to be divided equally among the parties except the house located at Shanwe in which it was found that 70% of the value of such house had been contributed by the appellant before contracting marriage with the respondent which is why the trial court ordered the remaining 30% value of such house to be divided equally to the said parties. The fruit shop and its tools were found to be exclusively acquired by the respondent hence, not subject of division. Also, the custody of the said parties' two children was vested to the appellant and the respondent was ordered to pay a monthly maintenance of Tshs. 60,000/= for both children. Disgruntled with the decision of the trial court thus, the appellant lodged her appeal to the first appellate court which thereafter partly allowed the appeal by 2 upholding the decision with some few modifications regarding the contributing percentage of matrimonial house as it deducted the previous contributory percentage from 70% to 60%. In that regard the parties' contribution was 40% of which upon division, each party was entitled to take 20%. Regarding the fruit shop, the first appellate court maintained that it is not a matrimonial asset since no distribution was made. Further, the first appellate court uplifted the

monthly maintenance from Tshs. 60,000/= to 80,000/= per month for both children. Still aggrieved by the above decision, the District Court of Mpanda, the appellant filed this as a second appeal with the following grounds: -

1. That, the first appellate court erred in law and fact by its failure to evaluate properly evidence of the trial court which resulted to the awarding of the small share of the matrimonial house to the appellant without legal justification.
2. That, the first appellate court erred in law and fact to order that 60 percent of the matrimonial house value should be removed from matrimonial house share as the Respondent had prior building materials which was not proved by the Respondent.
3. That, the first appellate court erred in law and fact by ordering small amount of maintenance to the issues of marriage one Maliki Masumbuko Valecy and Emmanuel Masumbuko Valecy without justification. At the hearing of the instant appeal the appellant appeared in person and had a legal service of Mr. Laurence John, learned advocate whilst the respondent appeared in person, unrepresented. Commencing with the first ground of appeal, Mr. Laurence John submitted that it is a duty of the first appellate court to evaluate the evidence of the trial court and come up with its own conclusion. To support his position, he relied on the case of Future Centanry Ltd v Tanesco [2016] TLR 277. He added by referring to the book entitled Civil Procedure with Limitation Act, 1963 by C.K. Takwan, which elaborates the position of the appeal at the first appellate court, is in form of rehearing. It was the argument of Mr. Laurence that, the first appellate court failed to evaluate the evidence of the trial court, as is shown at pages 5, 6, 7 and 8 of the trial court proceedings where the respondent failed to prove why he was required to receive a big share of matrimonial house. 4 The learned counsel went on submitting that in his testimony, the respondent claimed to have purchased the land on 2015; however, he failed to tender a sale agreement. Nonetheless, the sale agreement was tendered and admitted after respondent closed his evidence, as is shown at page 26 and 27 of the trial court. In the circumstance, the appellant's counsel was of the view that such documentary evidence was tendered without a witness taking an oath which is contrary to Rule 46(2) of the Magistrate Courts Civil Procedure in in Primary Court Rules, GN No. 310 of 1964. Henceforth, he implored this court to expunge Exhibit "M1" (sale agreement) from the trial court records. In respect of equal contribution to the matrimonial properties, Mr. Laurence contended that both parties were entrepreneurs and the house was constructed when the two were already married thus, made it difficult for both the trial court and first appellate court to know exactly the amount contributed by each party. To buttress his position, he cited the case of Joyce Nyantori v Ibrahim Yereemiah Mwayela, PC Civil Appeal No. 12 of 2021 which insisted on the equal distribution of matrimonial properties and he also referred the court to the case 5 of Helmina Nyoni v Yereimia Magoti, Civil Appeal No. 61 of 2020 CAT Ta borafun reported). Stressing more on that point, the learned advocate argued that when the respondent was given right to cross examined the appellant, he did not do so on the issue of equal contribution of matrimonial properties which omission, the counsel argued, entailed that

the respondent admitted the appellant's evidence as can be reflected at page 31 of the trial court proceedings. In a bid to bolster his stance, the appellant's counsel made reliance on the case of DPP v Ngusa Kelega and another [2020] 2 Vol. TLR, 204. Turning to the second ground of appeal, the learned advocate for the appellant submitted that the burden of proof rests on the part who allege; he relied on the case of Anthony Masanga v Penina Kitila and another [2015] TLR 46 CAT. The counsel also argued that respondent testified that he had some building materials before having relationship with the appellant, but to the appellant's counsel, that is a new fact. As if that is not enough, Mr. Laurence submitted that the appellate court failed to consider the following facts; one, whether the building materials was were used to build the matrimonial house, two, no witness testified whether the building 6 materials were used to build the matrimonial house and three, the respondent did not tender the receipt to prove purchasing of those materials. The counsel added that although the respondent claimed to have lost the receipt, he failed to provide police lost report. Still arguing on the second ground of appeal which tackles on the point about acquisition of matrimonial properties during cohabitation, he referred to page 8 of the trial court proceedings which according to him proves that that fact. More so, he submitted that the respondent is barred by the principle of estoppel. He further claimed that the first appellate court did not consider the economic contribution or even wife re-services and to cement that argument he cited case of Hidaya Ally v Amir Mrugu [2016] 1 Vol. TLR 316 CAT. He further argued that the first appellate faulted the decision of the trial court without giving reasons. To support his proposition, he referred to page 5 of appellate court's impugned judgment. Again, he argued that the value of the material building was not mentioned by the respondent and the pleadings are silent on the value of the building materials, this according to him is contrary to the principle of the law that parties 7 are bound by their pleadings, as it was emphasized in the case of James Funke Gwagilo v Attorney General [2004] TLR 161, He concluded the second ground of appeal by urging this court to divide the matrimonial house on equal shares of 50% to the appellant and the respondent. In regard to the third ground of appeal, Mr. Laurence submitted that the first appellate court erred to order small amount of maintenance to the two issues without considering the present life style and wealth of the respondent on ordering the maintenance of the children which is contrary to section 129 of the Law of Marriage. In winding up his submission, Mr. Laurence John urged the court to order the respondent to pay 150,000/= for each child, the appeal be allowed and the court divide again the matrimonial house based on contribution of each party in line with the evidence adduced. In his reply, the respondent submitted by praying to adopt his reply to memorandum of appeal for it to form part of his submission in chief. He also prayed to this Court to uphold the decision of the trial court and first appellate court arguing that both courts decided the matrimonial dispute between him and 8 the appellant in accordance with the law and that the matrimonial properties were divided fairly. He further argued that the submission made by the appellants counsel has no merit and is baseless because he fabricates the evidence. The respondent submitted that he bought the building materials before he had relationship with the appellant and he kept his evidence in his mobile phone. The respondent had nothing more to add, but he requested

this court to read the proceedings of both lower courts in order to get real picture on what he submitted before those courts. Finally, he concluded by praying to this court to dismiss the appeal for want of merits. Rejoining, the appellants counsel reiterated what he submitted in chief. On the argument that the respondent has evidence in his mobile phone, he replied by submitting that this is a new issue/fact which was not raised or pleaded in the trial court and the alleged phone was not tendered in court as exhibit. Hence, he prayed to this court not to consider the respondent's submission and allow the appeal. Having considered all such grounds of appeal along with the rival submissions of the parties herein, the authorities cited by the appellant's counsel and entire 9 records of the trial court as well as the appellate court, I find that the determination of this appeal turns into two issues for determination. One, whether the matrimonial assets were fairly divided and two, whether the amount of maintenance ordered by the first appellate court to the issues are small. Starting with the first issue as to whether matrimonial assets were fairly divided, in its judgment, the first appellate court took the view and subscribed to the findings of the trial court, that the respondent proved what he alleged to have building materials before having relationship with the appellant. However, the first appellate court disagreed with the findings of the trial court that the said building materials plus a plot located at Shanwe, can be termed as 70% of the contribution and that the finishing costs of the house could not amount to 30% contribution. Hence, the said court deducted the previous contribution set by the trial court from 70% to 60%, thus making the parties' contribution to 40% and to be divided equally to each party at the rate of 20%. On my part, I have gone through the trial court records and found that when testifying before the trial court on 15th July, 2022, the respondent mentioned the items/properties which he acquired before having relationship with the appellant. io This is shown at page 7 to 8 of the trial court typed proceedings where it was recorded thus: "Ma/i alizonikuta nazo hi amenikuta nimenunua kiwahja Shanwe tarehe 4/6/2015, mabati bando saba, madirisha niiikuwa nirneshatengeneza, mi/ango ni/ikuwa nirneshatengeneza, vifaa vya umeme vi/ikuwepo na viikuwa na risit zote. Wakati anachukua vitu, risiti zote a/izibeba a/ikbidi hata had ya mauziano ni/ifuata kwa mwenyekiti tofari ziiikuwepo." From the above excerption, it is apparent that the respondent proved that he had some building materials before commencing his relationship with appellant, at the plot where the matrimonial house was constructed. Again, it was his testimony that he bought the said plot on 4/6/2015 before start living with the appellant. This evidence was corroborated by the evidence of SM5, SM6 and SM7. In my vibw, the respondent clearly demonstrated that he acquired the plot and building materials before he began to live under concubine relationship with the appellant. The totality of the foregoing is that I subscribe to the concurrent findings of the two lower courts on the fact that the plot and building materials were acquired ii by the respondent before having relationship with the appellant. Hence, the shares related to the plot and building materials remain to be 60% which is not subject of division between the parties, whilst the parties7 contribution of 40% upon division, will be 20% to each party. On the argument that the sale agreement was tendered arid.admitted after the respondent closed his evidence and that the exhibit was tendered without the respondent to have taken an oath, it is a principle of law that the primary court

is allowed to accept evidence as is pertinent and such proof as appears to be worth of belief. This position is stated under section 19(2) of the Magistrate's Courts Act [Cap 11 R.E. 2019]. That section enjoins the primary court to accept such evidence as is pertinent and such proof as appears to be worth of belief, according to the rule thereof and notwithstanding any other law relating to evidence or proof. The law ...allows the primary court to accept the evidence as is relevant to the case without violating other laws. In the present appeal, Mr. Laurence has argued that the trial court admitted the sale agreement without adhering to the procedure of tendering documents. He referred the court to pages 26 and 27 of the trial court typed records which according to him to show inconsistency. 12 Having gone through the typed records of the trial court, I agree with the submission of Mr. Laurence that the procedure of admitting document was violated by the trial court; hence, it was contrary to the provisions of Rule 46(2) of the Magistrate Courts (Civil Procedure in Primary Court Rules, GN No. 310 of 1964 (the Rules). It is a trite law that evidence of any witness except for a child of tender age, must be given on oath or affirmation; this is according to section 46(2) of the Rules which provides that: "The evidence of each witness shall be given on affirmation save in a case of a child of tender years, who in the opinion of the court, does not understand the nature of the affirmation. "[Emphasis mine] In the present case, the records reveal that on 25th August, 2022 when the case came for hearing, the appellant who had previously closed his testimony prayed to tender the sale agreement where after the same was admitted in court and marked exhibit "M1". It is with no doubt that the trial court proceeded to admit such documentary evidence without first subjecting the appellant to the making of an oath or affirmation which is contrary to the mandatory provisions of Rule 46(2) of the Rules. 13 The consequence for such failure is fatal and the remedy thereto is to expunge the exhibit from the records, as I hereby do; See SNV Netherlands Development Organization Tanzania v Anne Fidel, Civil Appeal No. 198 of 2019. The question to be asked at this juncture, is whether after expunging exhibit M1 (sale agreement), the remaining evidence can still prove that the appellant had some building materials and a plot where the matrimonial house was built before commencing concubine relationship with the respondent. In my view, the remaining evidence is intact as it has proved that the appellant had some building materials together with a plot where the matrimonial house was constructed, before initiating such kind of relationship with respondent; this is according to the reasons as I have earlier mentioned above. The last for my determination, is the question whether the amount of maintenance for the parties' issues ordered by the first appellate court, is small. It is the submission of the appellant's advocate that the first appellate court erred to order small amount of maintenance of the two issues whom the said parties were blessed with, without considering the present life style and wealth status of the respondent. 14 On the adversary side, the respondent has supported the decision of the first appellate court by arguing that the matter was decided in accordance with the (aw and the matrimonial assets were divided fairly to the parties herein. Legally, it is a responsibility and/or duty of a parent to provide maintenance to his/her children regardless whether the parents are married or not. This responsibility derived from the two different laws namely the LMA and the Law of the Child Act [Cap 13 R.E. 2019] henceforth the LCA. For instance,

under section 129(1) of the LMA it is provided inter alia that: "...it shall be a duty of a man to maintain his children whether they are In his custody or the custody of any person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regards to his means and station in life or by paying the cost thereof" The above provision provides a duty of a man to maintain his children whether in his custody or in the custody of any person, whereas section 8(1) of the LLA provides, inter alia, that: "It shall be the duty of a parent, guardian or any other person having custody of a child to maintain that child in particular that duty gives the rightto- 15

- (a) Food;
- (b) Shelter;
- (c) Clothing
- (d) Medical care including immunization;
- (e) Education and guidance;
- (f) Liberty and
- (g) Right to play and leisure" As it appears from the latter provision, the duty for the parent to maintain a child who is under his custody is not only limited to accommodation, clothing, food and education, but also to other entitlements, including medical care, as described in that provision of the Jaw. It is worth noting that apart from placing such legal duty to the parent, guardian or any other person with custody of a child, the LLA is there to promote, protect and maintain the welfare of the child. This position is reflected under section 44(a) of the LLA, which provides that: UA court shall consider the following matters when making a maintenance order. 16
- (a) The income and wealth of both parents of the child or any of the person legally liable to maintain the child." Back to the instant case, it appears that the trial court ordered Tsh 60,000/= per month as maintenance of two issues, whereas the first appellate court uplifted such amount up to Tshs 80,000/= per month. Also, the first appellate court determined such amount of money by considering that both parties are entrepreneurs. However, that does not waive the respondents duty of providing maintenance to his children. Having gone through the records and submission of the appellants advocate, Mr. Laurence averred that both parties are entrepreneurs, their contribution in the matrimonial house are equal, contrary to the issue of maintenance, the learned counsel argued that the appellant had no any income, this shown at page 6 of the typed proceedings of the appellate court the on the issue of maintenance. In my view, the learned counsel for the appellant attempted to escape the legal responsibility of parents to provide child maintenance, as described under section 44(a) of the Child Act. Nevertheless, the amount uplifted by the first appellate court is not enough due to the economic changes and number of issues. This court, therefore, considers 17 changing of economic life and number of children as well as lifestyle and wealth of the respondent. Further the court has considered that the appellant is doing business. Thus, I

hereby order that the maintenance cost to both children be Tsh 150,000/= per month. In the upshot, the appeal is partly allowed to the extent discussed herein above. Since, the matter was originated from the matrimonial cause; I make no order as to costs. It is so ordered. Right of appeal explained to the parties. 22.03.2024 DATED at SUMBAWANGA on this 22nd day of March, 2024. JUDGE 22.03.2024 18

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