IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., KOROSSO, J.A., and KITUSI, J.A.)

CIVIL APPEAL NO. 147 OF 2016

YESSE MRISHO ..... APPELLANT

VERSUS

SANIA ABDUL ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

Dated the 27th day of February, 2014
in
PC. Matrimonial Appeal No. 1 of 2014

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JUDGMENT OF THE COURT

21st October & 7th November, 2019

KOROSSO, J.A.:

The appellant Yesse Mrisho was aggrieved by the decision of the High Court of Tanzania at Mwanza (Mwangesi, J.) dated 27th February, 2014. To better appreciate the context of the case, it is pertinent to narrate the factual landscape albeit in brief. The respondent (the complainant in the trial court) after being granted a divorce against the appellant by

Ilemela Primary Court at Ilemela, filed claims at the same court for distribution of matrimonial property acquired during the pendency of their marriage.

The Primary court dismissed the claims stating that the respondent failed to prove her contribution in acquisition of the alleged jointly acquired matrimonial property. The respondent was dissatisfied with this decision and appealed to the District Court of Nyamagana at Mwanza, where (Moshi, RM) allowed the appeal finding that the domestic services and all other services rendered by the respondent (the appellant then) in the studio the parties owned, was contribution and amounted to there being joint efforts in acquisition of the claimed matrimonial assets. The first appellate court also ordered that the house which was the main matrimonial asset claimed, be sold and distributed equally between the appellant and respondent. With regard to the custody of the three children, the fruits of the union of the appellant and respondent, the first appellate court ordered that they should stay with their father (the appellant) who was to provide for them. The appeal was thus allowed and the decision of the primary court was set aside.

The appellant was aggrieved by the said decision and appealed to the High Court of Tanzania at Mwanza where the appeal was again dismissed. The High Court Judge also made an auxiliary order directing that:

> "*the respondent has to return to the matrimonial house and continue staying therein, until the process on how to share equally the proceeds from its sale has been effected.*"

The above order in effect meant that the trial court order which had not been addressed by the first appellate court requiring the respondent to vacate and leave the appellant to live in the matrimonial house so as to keep peace was also set aside.

The current appeal is a third appeal and the appellant sought orders that the appeal be allowed, the decision of the High Court be set aside and the appellant be awarded costs relying on four grounds of appeal filed, which are reproduced and they read as follows:-

1. *That, the second appellate court judge did erred in law when it allowed and realized the respondent has spouse who participate at time of Building the matrimonial house situated at Nyangusu Geita.*

2. *That, the second appellate Court judge did erred in law to order to sale of matrimonial property which obtained during marriage period and appellant contends that it was not acquired by the joint efforts of the spouses.*

3. *That, the second appellate court judge did erred in law for determination that the distribution of the matrimonial property is supposed to be sold and share in the proceeds while there are child who depend to live therein.*

4. *That, the second appellate court judge erred in law to consider the evidence of the respondent side to order to sale the matrimonial property without prove of evidence in record.*

At the hearing of this appeal the appellant and the respondent each appeared in person being unrepresented and at the same time each adopted relevant filed written submissions.

Before undertaking the task of amplifying the grounds of appeal before the Court, we queried the appellant on his awareness on the point of law certified by the High Court of Mwanza in its Ruling dated 10th November 2015 (Makaramba, J.), after his application for a certificate on the point of law was granted. The appellant conceded that there was only

one point of law that was certified by the High Court and that this should be the ground for this Court to consider and determine. Having stated this, the appellant had nothing much to submit to address the Court but prayed that the Court consider his written submissions in determination of his appeal. He also implored the Court to determine the legality of the order for 50-50 distribution of the matrimonial assets between the appellant and the respondent as ordered by the High Court. The appellant submitted that the order contravenes the import of section 114(1) of the Law of Marriage Act, Cap 29 RE 2002. He also questioned the validity of the order by the High Court that the respondent stay in the house in dispute until when distribution of the property is finalized.

In reply, the respondent having adopted the written submissions filed on the 21st of June 2016, contended that she contributed to the acquisition of the matrimonial assets in dispute from the housework and other services she rendered working in the photo studio they had. She also contended that she took part in the construction of their house. The respondent also submitted that she is currently the sole provider and the one who maintains the needs of all their children since the appellant refuses to contribute to the children's maintenance. The respondent intimated to the

Court that the best solution will be for the house to be sold and proceeds be distributed equally between them.

The appellant's rejoinder was brief, reiterating his earlier prayers for the Court to consider the legality of the order for distribution 50-50 of disputed matrimonial property, whilst at the same time acknowledging that there was minimal contribution by the respondent and urging the Court that if it is so inclined to award something to the respondent, then it should not exceed 10%. He also stated that the children the respondent claims to maintain are not very young and that one of them is now married and the respondent did not share with him the dowry she received for the daughter.

Having heard the submissions by the appellant and the respondent as expounded through written and oral submissions, it is clear that the only issue for determination by this Court, a fact also agreed to by the appellant, is the point of law certified by the High Court. We find it instructive at this juncture to import the said point of law certified by the High Court and found at page 97 of the record of appeal, which reads:-

> "*Whether once the issue of existence of marriage is established, the question of establishing joint*

contribution to the acquisition of matrimonial property does not arise."

This point arises and is grounded on the holdings of the first and second appellate courts in this case, where the first appellate court in its judgment found at page 55 of the record of appeal stated:-

> *"... there was joint effort of a wife by conducting domestic service and all other services which she was conducting in the studio while the respondent was conducting his duties out of the office"* (sic).

The second appellate court when discussing this issue, in its judgment found at pages 77 and 78 of the record of appeal stated:-

> *"Once it has been established that, there was marriage between the two and that what is being disputed is matrimonial property, the question of establishing as who contributed what in its acquisition is immaterial..."*

Therefore, the issue before us is whether once a marriage is established, it is not a requirement to establish if there was joint

contribution in acquisition of matrimonial property. For better scrutiny of this issue, we reproduce the provision addressing distribution of matrimonial property, that is, section 114 of the LMA, which states:-

"114 (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1), the court shall have regard–

(a) to the customs of the community to which the parties belong;

(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(c) to any debts owing by either party which were contracted for their joint benefit; and (d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage

by one party which have been substantially improved during the marriage by the other party or by their joint efforts".

In our view, the import of the above provision, is that distribution of matrimonial property is guided by the principles enshrined in the above quoted provision and understanding of what constitutes matrimonial property is also essential in determining the extent of contribution. Section 60 of the LMA, pronounces presumption of property acquired during marriage and states:-

"Where during the subsistence of a marriage, any property is acquired–

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;

(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal."

Section 114 of the LMA provides for division of properties acquired by parties by their efforts during the pendency of matrimony, and it requires the courts, when considering this issue, to ensure that the extent of

contribution of each party is the prime factor. The assets to be determined are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts. In ***Bi. Hawa Mohamed vs. Ally Seif (1983) TLR 32*** (supra), we stated that:-

> *"(i) Since the welfare of family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets; and*
>
> *(ii) the "joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts" or "work" of husband and wife".*

In **Robert Aranjo v. Zena Mwijuma** [1984] TLR 7, the Court further stated that:-

> *"With regards to the fear that the broad view might result in a wife being allowed to benefit from a marriage which she wrecked we think, with respect, that it is misguided because what is in issue is the wife's contribution or efforts towards the acquisition*

of matrimonial or family asserts, and not her contribution towards the breakdown of the marriage. Of cause there may be cases where a wife's misbehaviour may amount to failure to contribute towards the acquisition of matrimonial or family asserts, but this has to be decided in accordance with the facts of each individual case."

In the case of ***Bibie Maulidi v. Mohamed Ibrahim (1989) TLR 162,*** it was also held that:-

"Performance of domestic duties amounts to contribution towards acquisition but not necessarily 50%."

From the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets. Therefore with due respect, we are of the view that, the assertion by the second appellate judge that once marriage is established between the parties and where

there is dispute on matrimonial property then the question of establishing contribution of each of the parties to the acquired matrimonial property is not an issue is misconceived, and contrary to the provision of the law guiding on distribution of the matrimonial properties or the decisions of this Court on the matter as expounded herein above.

The principle drawn from **Bi Hawa Mohamed vs Ally Seif** (supra) is unambiguous, stating that the efforts made towards acquisition of the said matrimonial property must be assessed and determined, and as also discussed in **Bibie Maulid vs Mohamed Ibrahim** (supra), the contribution granted should not necessarily lead to 50% share each, since it is dependent on a party's contribution which is the determining factor of what share one should receive and each case has to be considered on its own circumstances.

Thus, applying the said holding to the present case, and recognizing that the first and second appellate courts made a finding of fact that the respondent contributed to the acquisition of the matrimonial assets, that is, the house through various means, including domestic work and duties she performed in the studio. At the same time having in mind that the appellant albeit reluctantly when asked by this Court, did concede to some

contribution by the respondent and in effect acknowledging the respondent's contribution, we find under the circumstances all these factors show that there were joint efforts by the appellant and the respondent in acquisition of the disputed matrimonial asset.

Having considered all the submissions before us and under the circumstances, we find nothing to lead or to convince us to depart from the concurrent findings of the 1st and 2nd appellate courts regarding the extent of contribution by the appellant and the respondent to the acquisition and improvement of their matrimonial asset in issue, since the first and 2nd appellate courts finding on the issue were guided by the law governing distribution of matrimonial asset. Therefore, we also hold that the respondent contributed equally to the acquisition of the house in issue, a matrimonial asset and thus each party is entitled to receive an equal share.

We further order that, the property in issue should undergo valuation prior to finalization of distribution. Each of the parties be accorded the first option to buy out the other party if so inclined.

In the event, the appeal is dismissed, and having regard to the circumstances of this case, each party to bear own costs.

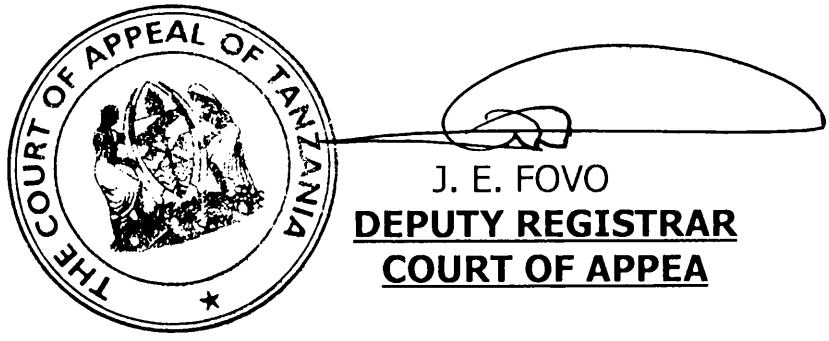
DATED at **MWANZA** this 6th day of November, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 7th day of November, 2019 in the presence of Appellant Yesse Mrisho appeared in person and Respondent Sania Abdul also appeared in person is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEA