IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 521 OF 2021

LETICIA MTANI IHONDE ..... APPELLANT

VERSUS

ADVENTINA VALENTINA MASONYI
(Administratrix of Estate of the late Buhacha Bartazari Kichinda) ..... RESPONDENT

(Appeal from Judgment and Decree of the High Court of Tanzania at Musoma)

(Mahimbali, J.)

dated the 15th day of October, 2021
in
Civil Appeal No. 20 of 2021

.....

JUDGMENT OF THE COURT

10th & 15th June, 2022

KOROSSO, J.A.:

The appeal arises from the decision of the High Court of Tanzania sitting at Musoma in Civil Appeal No. 20 of 2021 which ruled in favour of the respondent. The background to the appeal albeit is briefly as follows:- In 1989, the appellant had contracted a customary marriage with Buhacha Bartazari Kichinda who died in 2020 (the deceased), and later a civil marriage on 16/6/1994 as shown by exhibit P1. The appellant and her

husband lived together in matrimonial bliss and were blessed with five children. They acquired some properties during the subsistence of their marriage. Sometime in 2008, the deceased was transferred to Singida for work purposes which resulted in problems in their marriage. The deceased filed for divorce on 14/1/2016 Musoma Urban Primary Court granted him the decree *ex parte* in Matrimonial Cause No. 96 of 2015. According to the record, the appellant's efforts to set aside the *ex parte* decision ran futile. The deceased, having been granted divorce remarried one Adventina Valentine Masonyi.

After learning of the death of her ex-husband, the appellant started a follow-up of properties she claimed had been acquired jointly with the deceased. She lodged Probate Cause No. 79 of 2020 at Musoma Urban Primary Court against the respondent, the appointed administratrix of the estate of the late Buhacha Bartazari Kichinda (appellant's ex-husband) claiming distribution of matrimonial property jointly acquired with the deceased during the subsistence of their marriage and was part of the deceased's estate. At the trial, the respondent refused to bequeath properties listed by the appellant as matrimonial assets stating that she got married to the deceased in 2019 and they were blessed with three issues and that the properties in the estate of the deceased were jointly acquired with the deceased and that she had information that the

appellant had been given her share before the deceased died. Subsequently, the appellant lodged a matrimonial cause with claims of matrimonial nature as seen on page 13 of the record of appeal. The trial court decided in favour of the respondent finding the appellant failed to prove her claims.

The appellant's appeal to the District Court of Musoma in Civil Appeal No. 74 of 2020 succeeded. Aggrieved, the respondent successfully appealed to the High Court of Tanzania (Mahimbali, J.) in Civil Appeal No. 20 of 2021. Dissatisfied, the appellant has now appealed to this Court by way of a memorandum of appeal premised on the following five complaints faulting the High Court Judge that:

1. *For failure to notice that matrimonial property owned jointly between the appellant and the deceased husband during the subsistence of their marriage have a right of survivorship and the appellant ought to have an equal share in the same property in question.*
2. *There being a misapprehension of the evidence on record by 2nd appellate court that led to injustice to the appellant as she probed on balance of probabilities that she contributed to the share of matrimonial asset during subsistence of their marriage.*
3. *That the respondent being administratrix of the estate of the late Buhacha Bartaza Kichinda was properly impleaded in the cause of the division of matrimonial assets filed in the trial court.*

On the day this appeal came for hearing, the appellant enjoyed the services of Mr. Cosmas Tuthuru, learned Advocate while Mr. Kiwengwa Ndunjekwa, also learned Advocate entered appearance for the respondent. Before the trial hearing commenced, Mr. Ndunjekwa sought and obtained leave of the Court to withdraw the notice of preliminary objection he had filed on 17/3/2022.

Mr. Tuthuru commenced his submissions by adopting the grounds of appeal, the appellant's written submission filed on 24/1/2022, and the list of authorities. He subscribed to what is propounded in the appellant's written submission and he preferred to only clarify essential matters and decided to first submit on the first and third grounds of appeal conjointly. He argued that the High Court misdirected itself in failing to recognize the appellant's rights to matrimonial property acquired with her deceased husband when she had proved her contribution to the acquisition of the said property as shown in Exhibit P4. According to Mr. Tuthuru, the holding by the High Court judge that the appellant should have pursued her rights through the Probate Cause No. 15 of 2016 was not based on evidence on record, since her evidence in the trial court alluded the fact that the appellant was unaware of the proceedings of the said matter, or when the respondent was appointed the administratrix of the estate of her deceased ex-husband and thus she had no opportunity to raise any

concerns she had or demand for her share in the deceased's estate. Mr. Tuthuru highlighted the fact that the appellant did not take part in the divorce proceedings initiated by her deceased ex-husband hence the *ex parte* order granting the divorce. He contended that the appellant became aware she was divorced from the deceased when she took part in the funeral of the deceased in the year 2020, information which prompted her to file matrimonial proceedings No. 79/2020 claiming division of matrimonial assets against the respondent as the appointed administratrix of the deceased's estate of her late ex-husband.

The essence of the written submissions was venting complaints against the High Court for failure to acknowledge claimed matrimonial properties which had been jointly acquired and owned by the appellant and her late ex-husband within the 27 years of the subsistence of their marriage.

It was his argument that the appellant derives her rights in the context of the principle of the right to survivorship and cited the case of **Hawa Mohamed Vs Ally Seifu** [1985] TLR 32 which stated that a married woman had a vital contribution to the family life and had a share in family properties. It was the learned counsel's assertion that the death of a husband should not deny a wife her share in the estate of the deceased and thus faulted the High Court judge's holding that a co-wife

cannot in law enter the shoes of the deceased husband and be held accountable for division of matrimonial properties jointly acquired. The learned counsel reasoned that the respondent was only impleaded in Civil Case No. 79 of 2020 because she is the administratrix of the estate of the appellant's ex-husband.

When the respondent's counsel had an opportunity to respond, he was brief, adopting his written submissions and list of authorities, and informed the Court that the written submission will suffice without the need to explain anything unless the Court sought clarifications. In the written submissions, the respondent concedes the fact that properties that are jointly owned by spouses should be distributed subject to the contribution of both parties in their acquisition, in view of the provision of section 114(2)(b) of the Law of Marriage Act, Cap 29 R.E 2019 (Law of Marriage Act) and the holding in the case of **Bi Hawa Mohamed** (supra). The learned counsel contended that subject to the law and the finding in the case referred to, it is imperative to adduce evidence to prove one's contribution in the acquisition of the said properties, with locations, specifications, and period of acquisition and related matters.

According to the respondent, the fact that parties lived together is not *per se* conclusive evidence of joint acquisition of matrimonial properties during the existence of marriage. He argued that the appellant

failed to establish evidence of her contribution, especially since all the properties she listed as matrimonial properties have the name of the deceased. He thus prayed the Court to find that the appellant has on the balance of probabilities failed to call witnesses to substantiate and prove her claims. The respondent's counsel argued further that to cap it all, the appellant failed to call any witnesses to substantiate her claims. The respondent asserted that there is nothing to fault the High Court's decision since no injustice was occasioned to the appellant in the distribution of the matrimonial assets in the decree of the second appellate court in Civil Appeal No. 20 of 2021.

Responding to the third ground of appeal, the respondent's counsel in essence supported the fact that she was impleaded by the appellant in a matrimonial cause stating that as the appointed legal representative of the deceased Buhacha Baltazar Kichinda, in accordance with section 6 of part II of Fifth Schedule of the Magistrates Courts' Act, Cap 11 R.E 2019 (the MCA) and or section 100 of the Probate and Administration of Estates Act, Cap 352, R.E. 2019 (The Probate Act), the respondent is legally required to stand in the shoes of or act as if the deceased person is still alive, even in the court of law for, and, or against any party when it comes to the distribution of and demand from any person on matters related to the estate of the deceased. The respondent thus prayed that the Court

upholds the decision of the second appellate court and dismisses the appeal with costs for lack of merit.

We have examined the contending oral and written submissions by the parties in light of the first and third grounds of appeal with the weight they deserve. Considering that the third ground of appeal raises procedural concerns we shall address it first. The essence of this complaint is whether the respondent as the administratrix of the estate of the late Buhacha Baraza Kichinda was properly impleaded in the cause seeking division of matrimonial assets. Both sides argued that the impleading of the appellant was proper in view of her role as the administratrix of the estate of the deceased.

According to the record of appeal on page 13, the appellant filed claims against the respondent in the Primary Court of Musoma Urban, Matrimonial Cause No. 79 of 2020. The particulars of the claims were as follows:

> *"Madai ya mgawanyo wa mali toka kwenye mali za marehemu Buhacha B. Kichinda. Kwamba mimi na marehemu Buhacha B. Klchinda tulioana mwaka 1984. Kwa kuwa marehemu alitoa talaka bila kuniita na baadaye akafariki. Wakati wa mirathi inaendelea niliona na kupata talaka hiyo ni katika shauri la talaka No. 96/2015 sikupewa mgawanyo wa mali za ndoa ambazo*

ni stahiki yangu. Hivyo naomba mdaiwa ambaye ndiye msimamizi wa mirathi mgao wa mali za marehemu kama haki yangu."

Unofficially translated it states:

"My claims involve division of properties from the estate of the deceased Buhacha B. Kichinda. That I and the deceased Buhacha B. Kichinda married in 1984. The deceased granted me a divorce without informing me of it and he later died. During the inheritance discussion meeting that is when I became aware and was shown the divorce arising from Matrimonial Cause No. 96/2015, I received nothing from the properties we acquired during the subsistence of the marriage and which was my right. Therefore, I pray that the respondent who is the administratrix of the estate of the deceased to give me my share as a matter of right."

Certainly, the above claims relate to matrimonial concerns. The trial court upon hearing both parties decided in favour of the respondent. In an appeal to the District Court of Musoma (Rujwahuka, SRM), judgment was entered for the appellant. The appeal by the respondent to the High Court (Mahimbali, J.), was allowed. In his deliberation, the High Court Judge observed:

"... In my considered view, the right cause by the respondent after the verdict of inter partes proceedings

in Matrimonial Cause No. 15 of 2016, was to appeal against that decision if at all she was dissatisfied by it. Otherwise, she ought to have raised her concern in the probate court if she really had interests in any of the alleged properties owned by the deceased but now believed in the hands of the appellant. For her to claim the division of matrimonial properties against the co-spouse (wife) after the demise of her ex-husband in a civil suit can be a misplaced proceeding and unjustified. A co-wife cannot in law enter into the shoes of the deceased husband and be held accountable for division of matrimonial properties jointly acquired between the respondent and the deceased husband in a normal civil suit."

Indeed, the above holding of the learned High Court judge gives rise to the following issues: One, the fact that the learned counsel for the appellant was misconceived when he faulted the learned High Court Judge's assertion that the appellant should have appealed against the dismissal of matrimonial proceedings *Matrimonial Cause No.* 15 of 2016 *Shauri la Kurejesha Kesi ya Talaka Namba 96/2015- Na. 15/2016*, at Musoma Urban Primary Court, is recorded to have been filed by the appellant and to have proceeded *inter partes* where the appellant was the claimant against the deceased. According to the record of appeal, pages 2 and 6, the Matrimonial cause in the Primary Court of Musoma Urban,

titled "*Shauri la Talaka Na. 96/2015*" filed by the deceased preceded Matrimonial Cause No. 15/2016, proceeded *ex parte* and granted the deceased the divorce sought against the appellant.

Therefore, the query by the learned High Court Judge on why the appellant did not appeal against the decision therein is based on the record showing there was such a case where the appellant was recorded as present and if she was not satisfied, she could have appealed against the dismissal order. Two, the learned High Court judge, in essence, queried whether it was proper for the appellant to claim for her share in the acquired matrimonial property by way of a matrimonial cause, through his legal representative of the deceased, the respondent, after the death of the husband.

We believe that under the circumstances this is an important question for determination. The issue also arises from the third ground of appeal. Both the counsel for the appellant and the respondent contended that it was proper since the appellant's filed claims were against the respondent, as the administratrix of the estate of the deceased and not in her personal capacity.

We are alive to the fact that in our jurisdiction, matters related to matrimonial properties are regulated by the Law of Marriage Act, and

therefore, we sought guidance on the modality for processing claims related to the same. Section 76 of the Law of Marriage Act states that original jurisdiction in matrimonial proceedings is vested concurrently in the High Court, a court of the Resident magistrate, a district court and a primary court. Section 77(4) of Law of Marriage Act states:

> *"Any person may apply to the court for maintenance or for custody of children or for any other matrimonial relief if-*
>
> *(a) He or she is domiciled in Tanzania.*
>
> *(b) He or she is resident in Tanzania at the time of the application; or*
>
> (c) ***Both parties to the marriage are present in Tanzania at the time of the application***"
>
> [Emphasis Added].

Undoubtedly, the above provision envisages the availability of both parties when reliefs related to matrimonial proceedings are sought, the expectation being that all reliefs that emanate from matrimonial concerns be governed by the Law of Marriage Act. We find it imperative to reflect on what are matrimonial assets or properties? In the celebrated case of **Bi. Hawa Mohamed (supra)**, guided by section 114 of the Law of Marriage Act attempted to define what comprises "matrimonial assets" and the Court stated: -

" In our considered view the term 'matrimonial assets' means the same thing as what is otherwise described as family assets."

Under paragraph 1064 of Lord Hailsham's HALBURY'S LAW OF ENGLAND, 4th Edition, p. 419, it is stated-

"The phrase 'family assets' has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of capital nature, such as matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife."

Following the above position, without doubt, matrimonial assets refer to properties acquired by any of the spouses during the pendency of their marriage, to provide for them and their children during their joint lives.

In the present case, with claims to be provided with her share of matrimonial properties allegedly acquired during the subsistence of the appellant's marriage with the deceased, the appellant sought relief in a

matrimonial cause against the administratrix of the estate of the deceased. We are of settled minds that since the spouse was dead, the proper avenue for the appellant's claims should have been a Probate and Administration cause and not a matrimonial cause. In the case of **Mr. Anjum Vical Saleem Abdi Vs Mrs. Naseem Akhtar Saleem Zangie**, Civil Appeal No. 73 of 2003 (unreported) the Court in the course of determination of the case observed:

> "*There is no gainsaying that the respondent never went to the* ***High Court seeking division of matrimonial assets jointly with her deceased husband. That would have been inconceivable as well as risible as her husband had long passed away.***" [Emphasis Added].

At the later stage the Court further held:

> "*...the suit land or the matrimonial home or property as the trial High Court labelled it, formed part of the estate of the deceased following his death. Whether the deceased died testate or intestate,* ***its distribution to its beneficiary or beneficiaries, provided it was not disposed of by the deceased inter vivos, was governed by the laws of probate and administration of deceased estates****.... Indeed, after the learned trial judge had annulled the earlier probate proceedings (and all the transactions made on the authority of the annulled granted probate), the only*

logical thing to have been done was to advise the parties to apply for probate letters of administration in a court of competent jurisdiction."

We are aware that the facts in the above case may differ from the instant case, however the principle pronounced in the above holding is clear and applicable in the present case, that where the husband has died the surviving spouse cannot seek distribution of matrimonial assets in a matrimonial cause, and any claims or perceived rights thereto must be sought in a Probate and Administration cause.

Applying the restated position in the instant appeal, we are enjoined to hold that the avenue taken by the appellant in filing claims in a matrimonial cause was improper and misguided. Thus, ground number three fails. In the circumstances, we find that this ground is sufficient to dispose of this appeal therefore and we shall refrain from addressing the remaining grounds.

In the premises, we invoke our powers of revision bestowed upon us by the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap 41 R.E ,2019 to nullify the proceedings before the trial court. We also nullify the proceedings before the first and second appellate courts. In consequences whereof, we quash the judgment of the trial court as well

as that of the first and second appellate courts and set aside any consequential orders thereto.

If the appellant wishes to further pursue her rights, she should institute a fresh cause in a court of competent jurisdiction.

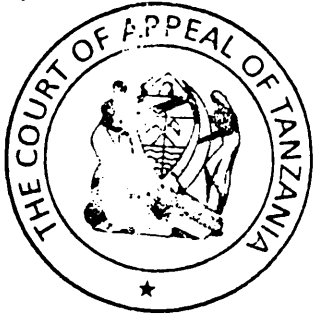
DATED at **MUSOMA** this 14th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 15th day of June, 2022 in the presence of Mr. Cosmas Tuthuru, learned counsel for the Appellant and also holding brief of Mr. Kiwengwa Ndunjekwa, learned counsel for the Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL