IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MWARIJA, J.A., MASHAKA, J.A. And MAKUNGU, J.A.:)

CIVIL APPEAL NO. 117 OF 2022

TUMAINI M. SIMOGA ..... APPELLANT

VERSUS

LEONIA TUMAINI BALENGA ..... RESPONDENT

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

(Chaba, J.)

dated the 31st day of March, 2022

in

Civil Appeal No. 5 of 2021

JUDGMENT OF THE COURT

8th & 12th May, 2023

MASHAKA, J.A.:

The appellant, Tumaini Simoga and the respondent, Leonia Tumaini Balenga were husband and wife for fourteen (14) years, having celebrating a civil marriage on 8th May, 2005. Due to irreconcilable differences, the marriage was dissolved and divorce was granted by the District Court of Morogoro on 15th September, 2019 as the marriage had broken down irreparably. The remaining issue in the petition was the division of the assets which were considered to have been acquired jointly

during the subsistence of their marriage, the matrimonial properties culminating to the present appeal before us.

To appreciate the issues involved, it suffices to provide a factual background to the dispute involving the parties to this appeal. As alluded earlier, the appellant and respondent were married living a harmonious life from 2005 to 2015 when they started having problems. As evidenced, the respondent sought reconciliation through the Kingolwira Marriage Reconciliation Board which proved futile and a certificate dated 29th November, 2018 was issued as the Board had failed to reconcile the parties. Also, the respondent averred at paragraph 11 of her supporting affidavit that she duly filed the petition for dissolution of marriage against the appellant at the Morogoro Urban Primary Court vide Matrimonial Cause No. 76 of 2018 but, on 19th November, 2019 it was transferred to the District Court of Morogoro and registered as Matrimonial Cause No. 12 of 2019.

Before the trial court, the respondent claimed among other things, a declaration that the marriage had broken down irreparably, dissolution of the marriage and a decree for divorce to be granted, equal division of matrimonial properties and arrears of maintenance from 2014 up to 2019 at the rate of TZS 100,000.00 every month. After an analysis of the

evidence adduced by both parties, the trial court ordered division of matrimonial properties that the small house and the plot situated at at Kingolwira, Morogoro be sold and the proceeds obtained be deducted TZs 46,000,000.00 the pending unpaid loan for the tractor from Agricultural Inputs Trusts Fund and the remaining sum to be equally divided at 50/50 ratio. Also, the tractor with registration No. T 256 DFG be sold and the proceeds be divided at 50/50 ratio. The household utensils including but not limited to 6 beds, 6 mattresses, 3 Sim tanks, 1 dining table with 4 stools, 26 pieces of window clothes (curtains), 10 red-iron made chairs, 1 electric cooker, 1 gas cooker, 11 wooden doors, 13 wooden windows with frames, 1 bicycle, 2 Mihan gas cylinders, cane grinding machine and one incubator be divided equally at 50/50 ratio. Aggrieved, the respondent appealed to the High Court.

The High Court Judge having examined and analysed the evidence adduced at the trial court and after having considered the relevant provisions of the law, its finding was that the trial court erred for failing to hold that the respondent did deserve to obtain a share from the big house and the 100 acres farm at Ngerengere because it was in the name of the appellant and the respondent had not proven her contribution towards the acquisition. It was the observation of the first appellate judge

that not all assets owned by the name of one spouse are deemed properties of that spouse, as there are circumstances where the property may be under the name of the spouse but interest of the other spouse does exist having found that the facts did not separate the parties from owning the same jointly. Upon the analysis of the evidence, the High Court was of the opinion that the trial court ought to have strike a balance considering the circumstances of their case as there was no justification of excluding the 100 acres of farm situated at Ngerengere from division of matrimonial assets.

The High Court partly allowed the appeal on the division of matrimonial properties by reversing the order of the trial court faulting the order directing the loan of TZs 46,000,000.00 be deducted from the proceeds of the sale of the small house and ordered that the small house shall be distributed to the respondent for the reason that if at all there was an outstanding loan of 46,000,000/= the appellant had failed to prove by disclosing the sum of money so far paid to settle the debts associated with the monies borrowed from the bank and the outstanding balance as per the loan agreement. It also ordered that the respondent deserves to get her shares from the farm which is 40% shares from the 100 acres land to the tune of 40% of the value of the property which is equivalent

to 40 acres and that the big house situated at Kingolwira be placed in the ownership of the appellant and the small house be distributed to the appellant.

Dissatisfied with the decision of the first appellate court, the appellant preferred the present appeal on four grounds of appeal paraphrased as follows; **one**, that the District Court of Morogoro lacked jurisdiction to determine Matrimonial Cause No. 12 of 2019 based on a certificate from Kingolwira Marriage Reconciliation Board which had expired and the dissolution of marrlage was without proof of irreparable breakdown of marriage; **two**, that the parties being salaried workers, the High Court Judge erred in applying the principles developed in the cases of **Bi Hawa Mohamed v. Ally Sefu** [1983].TL.R. 23 and **Chakupewa v. Mapenzi and Another** upon the re – evaluation of evidence resulting in awarding 40% shares in 100 acres land and the small house situated at Kingolwira to the respondent; and **three**, that the first appellate Judge erred to hold that the respondent contributed towards the acquisition of the big house in Kingolwira.

The appellant filed written submission in support of the appeal in terms of section 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the

Rules) before hearing of the appeal. However, the respondent did not file her reply.

During the hearing of the appeal, the appellant had enjoyed the services of Mr. Jackson Liwewa, learned counsel, whereas Mr. Ali Jamal and Ms. Maria Pengo, learned counsel represented the respondent.

Mr. Liwewa, the learned counsel for the appellant prayed under rule 106 (3) (b) of the Rules to introduce an additional ground **four** of appeal as seen at page 5 of the written submission filed on 21st February, 2022 on whether mutual consent to a divorce decree is applicable in Tanzania, in which Mr. Jamal the learned counsel for the respondent did not raise any objection and we, on our part, allowed it.

Commencing with ground one, Mr. Liwewa argued that the certificate issued by the Marriage Reconciliation Board to the respondent had expired. Therefore, the petition for divorce which was filed before the District Court of Morogoro was supported by an expired certificate hence in contravention of section 106 (2) of the Law of Marriage Act [Cap 29 R.E 2019] (the LMA). He argued further that every petition for a decree of divorce is mandatorily required to be accompanied by a certificate issued by the Board not more than six months before filing the petition. It was his contention that when Matrimonial Cause No. 12 of

2019 was filed on 27th December, 2019 it was accompanied with a certificate which had already expired.

In reply, Ms. Pengo contended that the certificate was issued by the Board on 29th November, 2018 and the respondent filed a matrimonial case before the Morogoro Urban Primary Court vide Matrimonial Cause No. 76 of 2018 and was later on 19th November, 2019 ordered to be transferred to the District Court hence filing of Matrimonial Cause No. 12 of 2019. Concluding, she submitted that the certificate had not expired.

Having heard both submissions written and oral and perused the record of appeal, we commence with the first limb of ground one. It is undisputed that the Marriage Reconciliation Board issued the certificate dated 29th November, 2018 to the respondent on failing to reconcile the couples and the respondent filed the Matrimonial Cause No. 12 of 2019 before the District Court on 27th December, 2019. As calculated by the appellant that the certificate had expired pursuant to the requirements of section 106(2) of the LMA, we gathered from the record of appeal, in her petition of divorce, at paragraph 11, where the respondent averred that she lodged first, Matrimonial Cause No. 76 of 2018 which by an order dated 19th November, 2019, the presiding magistrate ordered it to be transferred to the District Court. In such circumstances, despite the fact

that Matrimonial Cause No. 12 of 2019 was filed as a fresh suit but its genesis emerged from Matrimonial Cause No. 76 of 2018 in which the reason for its transfer is unknown. Therefore, it is our considered view that, the certificate cannot be rendered to have expired as the matter remained in the courts of Law. We find that the District Court had jurisdiction to determine the petition as filed. The first limb of ground one lacks merit and we dismiss it.

The issue in second limb of ground one is whether there was proof that marriage had broken down irreparably warranting a grant of divorce. This issue will be determined at a later stage conjointly with the additional ground four which is whether mutual consent to divorce may be applied and granted by the courts in Tanzania.

Mr. Liwewa contended in respect of grounds two and three that the High Court erred in applying the principles developed in **Bi Hawa Mohamed v. Ally Sefu** *(supra)* and **Chakupewa v. Mapenzi and Another,** EALR (1999) 1 EA 32a when re-evaluating evidence which was adduced before the District Court for circumstances concerning the appellant and respondent who were working and received salaries which resulted in awarding the respondent 40% shares in the 100 acres land and the small house situate at Kingolwira to the respondent. Further he

contended that, the first appellate judge erred to hold that the respondent contributed towards the acquisition of the big house.

In reply, Ms. Pengo argued that the High Court Judge correctly considered the contribution of the respondent as a wife during the subsistence of their marriage through house work and matrimonial obligations even though the respondent was honest in her evidence that she neither contributed cash in the purchase of the plot nor construction of the house which led to the application of the principles underscored by the Court in **Bi Hawa Mohamed v. Ally Sefu** *(supra)* and **Chakupewa v. Mapenzi and Another** (supra).

Section 114 (1) of the LMA provides that: -

> *"(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.*
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> *(2) In exercising the power conferred by subsection (1), the court shall have regard to : –*
>
> > *(a) the customs of the community to which the parties belong;*

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

(c) not relevant;

(d) not relevant.

(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".

According to the above excerpt, there is no dispute that section 114(1) vests powers to the court to order division of assets between the parties which were jointly acquired during subsistence of their marriage. Nonetheless, before exercising such powers, it must be established that, first, there are matrimonial assets, secondly, the assets must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts. See **Bi Hawa Mohamed v. Ally Sefu** (supra) and **Samwel Moyo v. Mary Cassian Kayombo** [1999] T.L.R. 197.

Though what constitutes matrimonial assets/properties for the purposes of section 114 has not been defined under the LMA, in **Gabriel**

Nimrod Kurwijila v. Theresia Hassani Malongo, Civil Appeal No. 102 of 2018 and **National Bank of Commerce Limited v. Nurbano Abdallah Mulla**, Civil Appeal No. 283 of 2017 (both unreported), the Court defined matrimonial properties as those properties acquired by one or the other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives. Likewise, the Court emphasised in **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 (unreported) that matrimonial properties are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts.

Section 114 of the LMA has been a subject of interpretation by the Court in a number of cases, in particular, **Bi Hawa Mohamed v. Ally Sefu** (supra). The Court has underscored the principle envisaged in section 114 of the LMA as compensation for the contribution towards acquisition of matrimonial property regardless whether the contribution is direct or otherwise see: **Mohamed Abdallah v. Halima Lisangwe** [1988] T.L.R. 197. Further, the Court emphasised that services of a wife entitle her to division of matrimonial properties regardless of her direct contribution or otherwise. In one of our recent decisions in **Reginald Danda v. Felichina Wikesi**, Civil Appel No. 265 of 2018 (unreported),

we held that a wife is entitled to division of matrimonial properties even if she had not made any direct contribution to their acquisition for, she has that entitlement so long as she was a wife who made indirect contribution through domestic chores.

In the instant appeal, the appellant did not dispute the fact that the properties were acquired during subsistence of their marriage, however, his dispute is on the contribution of the respondent towards the acquisition of the properties. As the Court held in **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** (supra), the extent of contribution is of utmost importance to be determined when a court is faced with a predicament of the division of matrimonial property; and in so doing the court should always rely on the evidence adduced by the parties to prove the extent of contribution. See: **Charles Manoo Kasara & Another v. Apolina Manoo Kasara** [2003] T.L.R. 45, **Reginald Danda v. Felichina Wikesi** (supra) and **Mohamed Abdallah v. Halima Lisangwe** (supra).

In the present appeal, the finding of the High Court was that though the respondent honestly admitted that she never contributed any monies to the acquisition of the big house and the plot, she stated that her contribution was indirectly through her salary which she used to maintain

the family while the appellant was repaying the loan, so she did indirectly contribute towards acquisition of matrimonial properties. The first appellate court rightly held that the principles advanced in **Bi Hawa Mohamed** (supra) and **Chakupewa** (supra) were relevant to this case. In essence, the extent of contribution made by each spouse is not restricted only to material or monetary contribution, that it can extend to either matrimonial obligation or work or intangible considerations such as love, comfort and consolation of wife to her husband, the peace of mind and the food prepared by the wife for her husband as observed by the High Court. Therefore, the assertion by the appellant that the respondent was paid a salary and therefore ought to have contributed in monetary terms is farfetched, as there is no hard and fast rule that contribution towards acquisition of the matrimonial properties should be in monetary terms. In that circumstance, we find no justifiable reasons to fault the decision of the High Court.

Arguing in support of ground three, Mr. Liwewa submitted that the first appellate judge erred in holding that the respondent contributed to the big house after re - evaluating the evidence based on the principles stated above and awarded the said house to the respondent. Ms. Pengo maintained that the decree of the High Court is crystal clear that the big

house shall be placed in the ownership of the appellant herein, hence misconceived. Ms. Pengo prayed to the Court not to disturb the findings of the High Court.

As correctly argued by Ms. Pengo, we agree with her submission that in ground three, Mr. Liwewa had misconceived the decree of the High Court which had ordered that the big house shall be in the ownership of the respondent. This ground fails and is dismissed.

Now we shall move to the second limb of ground one and the additional ground four. On the second limb, Mr. Liwewa argued that there was no proof tendered to establish that the marriage had broken down irreparably to deserve the dissolution of marriage.

Mr. Liwewa argued that section 108 (a) of the LMA imposes a duty to courts presiding over a petition to inquire so far as it can necessarily do, the facts alleged or proved showing that the marriage has broken down. He emphasised that, section 99 of the LMA stipulates that no decree of divorce shall be granted unless the court is satisfied that the breakdown is irreparable. He further argued that the trial court had concluded that, after its scrutiny of the evidence adduced by both the petitioner and the respondent, there was no direct and proved ground to grant divorce in terms of section 107 of the LMA apart from the adultery

allegations by the petitioner to the respondent. It was his contention that, from the observations of the trial magistrate that both the petitioner and the respondent did not object that a divorce be granted, which was a mutual consent to divorce, persuaded the decision of the trial court to grant a decree of divorce.

While Ms. Pengo contended that at all times until the issuance of the certificate by the Board and the steps taken by the respondent to file her petition, there were no efforts undertaken or shown by the appellant during that period of time which exhibited intention for any reconciliation between the parties.

We have examined the record of appeal and the submissions in the light of the judgment of the trial court as this issue was not a ground of appeal before the first appellate court, but it was raised as an additional ground by Mr. Liwewa as an issue of law, on whether there is mutual consent to divorce in Tanzania. We have referred to the evidence adduced at the trial court where it was persuaded by evidence of the petitioner and the respondent that there was no more love existing between them as stated by DW 2 one Magelengo Mashauri, brother of the respondent as gleaned at page 53 of the record of appeal who had this to say:

"The petitioner and the respondent separated for two years now. The petitioner complained that the respondent was impotent, troublesome marriage. I have been in reconciling the marriage in vain."

The trial magistrate being alive of section 107 of the LMA, was persuaded by the position of the High Court in the case of **John David Mayengo v. Catherina Malembeka**, PC Civil Appeal No. 32 of 2003, which is persuasive to the Court that:

"Marriage being a voluntary union of a man and a woman intended to last for their joint lives. It is the parties themselves who are the best judges on what is going on in their joint lives. A crucial ingredient is love. Once disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him".

Be it as it may, we subscribe to the persuasive decision and satisfied that the trial court had properly analysed the evidence and considered that the petitioner and the respondent had lost love with each other and denied each other conjugal rights for more than two years. Also, family, church members and the Kingolwira Reconciliation Board had failed to reconcile them. Therefore, the marriage had broken down irreparably

beyond recovery, and in consequence granted a decree of divorce to mark the end of the petitioner and the respondent civil marriage. We find that the District Court of Morogoro dissolved the marriage and not by mutual consent of parties.

In the circumstances, we find no reason to fault the decision of the High Court. That said, the appeal fails. As the appeal arises from matrimonial proceedings, we make no order as to costs.

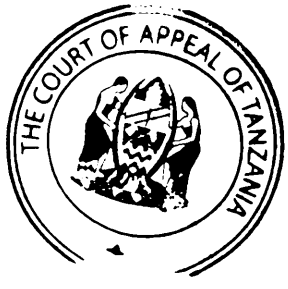
DATED at **MOROGORO** this 12th day of May, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 12th day of May, 2023 in the presence of Ms. Ester Shoo, learned counsel for the appellant and the respondent appeared in person, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL