IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 349 OF 2020

SHAKILA LUCAS ..... APPELLANT

VERSUS

RAMADHANI SADIKI ..... RESPONDENT

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

(Ismail, J.)

dated 20th day of January, 2020

in

PC Matrimonial Civil Appeal No. 18 of 2018

.....

JUDGMENT OF THE COURT

7th & 14th February, 2024

MLACHA, J.A.:

This is an appeal against the decision of the High Court of Tanzania sitting at Mwanza (the High Court), made in PC Matrimonial Appeal No. 18 of 2018 (Ismail J., as he then was), which upheld the decision of the District Court of Nyamagana in DC Matrimonial Appeal No. 16 of 2017 (the District Court), originating from Matrimonial Cause No. 55 of 2016 in the Primary Court of Nyamagana District at Nyamagana, Urban Court (the Primary Court). It is an appeal on division of matrimonial assets. The Primary Court had earlier on made orders for divorce and custody of children which were received and accepted by the parties.

To better appreciate the context of the case, it is pertinent to narrate the factual landscape albeit briefly. The appellant cohabited with the respondent from 1995 up to 2004 when they married officially under Islamic rites. They were blessed with two issues of marriage namely, Saidi Ramadhani and Omary Ramadhani. They managed to get a number of assets in a short period of time. The properties are the subject of the appeal before us following the divorce.

The record reveals that, despite blessings in the acquisition of a number of matrimonial assets, love diminished day after day making life uneasy. Conflicts followed. Amidst the conflicts, the respondent accused the appellant of making unauthorized trips, misuse of family funds and trapping him with some which craft. The appellant accused the respondent as having a plan to marry another wife. The dispute grew bigger and bigger. Family and religious leaders (BAKWATA) were engaged who tried to solve the dispute without success. The appellant decided to file Matrimonial Cause No. 93 of 2015 at the Primary Court seeking divorce. The Primary Court heard the dispute and found that the marriage had broken down beyond repair. It granted divorce on 16.1.2015. It also placed the two issues of marriage to the respondent. This decision was accepted by the parties as pointed above because as between them, there was no love any more. Thereafter followed a scramble for matrimonial assets.

As the issue of division of matrimonial assets was not determined by the Primary Court in the case, the appellant returned at the court and filed Matrimonial Cause No. 55 of 2016 seeking division of matrimonial assets. She gave evidence in support of her case and called her son, Said Ramadhani (PW2) and her father, Lucas Plus Kagasha (PW3), to support her. She gave her list of matrimonial assets. They are found at page 31 and 32 of the record of appeal as follows: (i) 10 houses (6 at Mabatini area, Nyerere A), 1 at Sayona Misungwi, 1 at Mandu, Igoma, 1 at Buswelu, Ilemela and a foundation of a house at Kakebe, Igoma; ii) 7 plots – 4 at Kisesa, 1 at Ilalia, Buswelu and 2 at Musoma Mara Region; iii) two farms, one at Matela Magu and the other at Kakebe Igoma; iv) 30 heads of cattle and 37 goats at Matela, Magu; v) 6 turkeys (bata mzinga) at Mabatini and vi) cash balance at Barclays Bank TZS. 150,000,000.00 and TZS. 40,000,000.00 capital for scrap metals.

The respondent denied the list. His list of matrimonial assets as seen at page 40 of the record of appeal is as follows: i) 6 houses, 3 at Mabatini area, 1 at Sayona, Misungwi and 2 at Bugarika; ii) cash TZS 2,800,000.00 at Barclays Bank. He called his brother, Ibrahim Sadiki (DW2) who supported the evidence. He said that the scrap metal business was run jointly with him and that it has no relation with the appellant who remained at home running

a small shop. He and his brother parted later after the scrap metal capital had grown up.

The primary court scrutinized the evidence and established the following as the list of matrimonial assets: i) 6 houses; ii) TZS 2, 800,000.00 and 6 turkeys. It found that there was no good evidence to support the claim for TZS. 150,000,000.00 from Barclays Bank, TZS. 40,000,000.00 being the scrap metal capital, additional houses, plots, farms and live stocks. After weighing the contribution of the appellant in the acquisition of the assets in terms of section 114 (2) (b) and (d) of The Law of Marriage Act, Cap. 29 R.E. 2002 (the Act), the appellant was given i) 3 houses: 2 at Mabatini Nyerere 'A' and 1 at Sayona Misungwi; ii) TZS. 1,000,000.00 from Barclays Bank and iii) 2 turkeys. The respondent was given 3 houses, TZS. 1,800,000.00 and 4 turkeys.

The appellant was aggrieved by the decision of the Primary Court and appealed to the District Court. The District Court agreed with the finding of the Primary Court that there was no good evidence to establish the existence of the additional assets. It found that the distribution was in line with the law and fair. On second appeal, the High Court made a slight correction in the decision of the District Court and reaffirmed the list of matrimonial assets and the distribution made.

Aggrieved by the decision of the High Court, the appellant is now before the Court armed with one ground of appeal which reads as under:

1. *That the learned judge erred in law and fact for failure to apply its appellate court's powers properly and scrutinized the contribution and efforts made by the appellant towards acquisition of matrimonial assets.*

As it is plain from the ground of appeal, the complaint of the appellant is on failure on the part of the High Court to find that there was ***contribution and efforts*** made by the appellant towards the acquisition of matrimonial assets. The Court is asked to find that the High Court, sitting as a third forum (second appeal) erred in its assessment of the evidence thereby confirming a wrong division of matrimonial assets.

We think the Court is being moved to make a fourth assessment of the evidence and we wonder if we have jurisdiction to do so. We shall try to show this later.

The parties who appeared in person made some oral submissions to amplify their written submissions earlier on filed.

In her written submissions, the appellant challenged the findings of the High Court which was in agreement with the lower courts that TZS. 40,000,000.00 capital for scrap metal and TZS. 150,000,000.00 from Barclays Bank are not matrimonial assets because the appellant had failed

to prove their existence. She submitted that these properties were excluded wrongly because they exist. She referred the Court to her testimony at page 31 of the record of appeal saying there was evidence showing that they existed. More so was the capital for M-Pesa TZS. 360,000.00 whose existence was denied. She added that the above testimony was not objected or cross examined leaving them unopposed and good evidence.

She went on to submit that, section 114 (2) of The Law of Marriage Act, Cap 29 R.E.2002 (the Act) was misinterpreted by the lower courts leading to a failure of justice. Making reference to **Director of Public Prosecutions v. Jafari Mfaume Kawawa** [1981] TLR 149, she urged the Court to give the correct interpretation and direct a fair division of matrimonial assets.

During the oral submissions she invited the Court to find that she worked hard, side with the respondent, but was given 3 houses, TZS. 1,000,000.00 and 2 turkeys only. She added that the houses allocated to her are weak, poor and are made of mud while the respondent was given cement block houses.

In reply to the written submissions, it was submitted by the respondent that the appellant was given 3 houses out of 6 despite the evidence that her contribution was small. It was submitted further that since the appellant had failed to establish the existence of other assets, it was not possible to give

her more than what was given to her. The burden of proof lay on her and she could not discharge it, it was submitted.

During oral submissions, the respondent submitted that he never happened to build a mud house. He had houses made of cement blocks and burnt blocks. He intimated that two out of the six houses are built of burnt bricks and have good finishing; with ceiling boards and electricity. They have tenants where he gets money to pay school fees for the children. These are those which were given to the appellant. He went on to submit that he never happened to have TZS. 150,000,000.00 in his account save for TZS. 2,800,000.00 which was seen in his bank statement.

In rejoinder, the appellant agreed that the houses given to her have tenants but said that they are located in squatter areas while the respondent's houses are in surveyed areas with title deeds. She said that the house at Sayona has tenants but has cracks.

We had time to examine the entire record of appeal, the written and oral submissions in line with the ground of appeal. We agree with the parties that, the relevant law is section 114 of the Act but we will hasten to say that we see no way in which this Court can come in and make another finding of facts and effect a new distribution. We don't have such a mandate. We will try to demonstrate.

We will start with the law. The relevant law is section 114 of the Act. It reads as under:

> *"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-*
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> *(a) to the customs of the community to which the parties belong;*
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> *(b)* ***to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;***
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> *(c) to any debts owing by either party which were contracted for their joint benefit; and*
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> *(d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.*
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> *(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****" (Emphasis added)*

According to the above excerpt, it is clear that section 114 (1) of the Act vests power to a court hearing a matrimonial dispute to order division of assets which were obtained by married people during the subsistence of the marriage through their joint efforts when granting or subsequent to the grant of a decree of separation or divorce. Section 114 (2) gives the Court the criteria or principles to follow in the division of matrimonial assets: **one**, the customs of the community; **two**, the extent of the contributions made by each party in money, property or work towards the acquisition of the assets; **three**, any debts owing by either party which were contracted for their joint benefit; and **four**, the needs of the infant children, if any, of the marriage, and **five**, subject to those considerations, the court to be inclined towards equality of division.

The law talks of matrimonial assets but has no definition of 'matrimonial assets'. Through case law, the Court has defined them to be those assets which were acquired by one or the other spouse before or during their marriage, with intention that there should be continuing provisions for them and their children during their joint lives. The law says that, they include assets which may have been owned by one party prior to the marriage but improved by the other party during the marriage on their joint efforts. See **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018, **National Bank of Commerce Limited v. Nurbano**

Abdallah Mulla, Civil Appeal No. 283 of 2017, **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 and **Tumaini M. Simonga v. Leonia Tumaini Balenga**, Civil Appeal No.117 of 2022 (all unreported) page 11.

Next is case law. We have many authorities on division of matrimonial assets some of which are those already cited. Faced with the question of division of matrimonial assets in **Bi Hawa Mohamed v Ally Sefu,** [1983] TLR, 32, we stated thus:

> *"... the assets envisaged thereat must firstly be **matrimonial assets**; and secondly, they must have been acquired by them during the marriage by **their joint efforts**". (Emphasis supplied)*

In **Yesse Mrisho** (supra), we stated as under:

> *"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 matrimoniai assets."** (Emphasis added)*

This was also the import of our decision in **Gabriel Nimrod Kurwijila** (supra), where we stated as follows:

> *"**The extent of contribution is of utmost importance** to be determined when the court is faced with a predicament of division of matrimonial property ... In resolving the issue of extent of contribution, the court will mostly rely on **the evidence adduced by the***

parties to prove the extent of contribution".*(Emphasis added)*

The Court went on to state the following:

> *"It is clear therefore that* ***extent of contribution by a party in a matrimonial proceeding is a question of evidence****. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision".(Emphasis added)*

In the instant case, while making reference to section 114 (1) of the Act and being guided by the above principles, the High Court had this to say at pages 279 and 280 of the record:

> *"Such decision is made after parties had submitted their testimony to prove that such assets existed and that their acquisition was a result of their joint efforts. As did the trial court, the first appellate court confined its findings to the evidence which was adduced by witnesses during trial and nothing else. Upon evaluation of such evidence and having assessed the demeanour of witnesses, the trial court found that some of the testimony of some of the appellant's witnesses fell short of the requisite threshold for its reliance. This includes the evidence of PW3 which was considered to be hearsay....the evidence of PW3 is what the appellant relies on in staking a claim of the assets they jointly acquired. My scrupulous assessment of PW3's testimony leads to the same*

conclusion as that of the lower courts. It is a sheer hearsay narration that is abhorred by section 62 of cap. 6, and in no way would it be used to support the contention that some other assets existed... the appellant's own account of acts carried with them, some outrageous narration, especially about the sum of money that allegedly constituted the balance in Baclays Bank account. She alleged that there was a balance of TZS 150,000,000/= while the bank statement revealed that the balance was actually a paltry TZS. 2,800,000/=... The evidence of PW2, the parties' issue of marriage, stated that the appellant was merely a petty trader who owned a small kiosk within their residence. In no way did he participate in the business of metal scrap materials.... PW2 denied any knowledge of any sum of money amounting to TZS. 40,000,000/= that was allegedly raised to initiate business in which they were involved."

The appellate Judge said further as follows:

"... the appellant's contention on these "excluded" assets was nothing more than a mere conjuncture which is underwhelming, and failing the test of sufficiency required by the law."

Ordinarily, a court can rarely interfere with concurrent findings of facts by two courts below save where there are mis-directions or non-directions on the evidence, or where there was a miscarriage of justice or a violation of some principle of law or practice – see: **The Director of Public**

Prosecutions v. Jaffari Mfaume Kawawa [1981] T.L.R. 149, **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387 and **Neli Manase Foya v. Damian Mlinga,** Civil Appeal No. 25 of 2002 (unreported). We put the point clearly in **Nelly Manase Foya** (supra) where we said:

> *"It has often been stated that* ***a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact.*** *... As was said by Sir Kenneth O'Connor, P. of the defunct Court of Appeal for Eastern Africa in the case of* ***Peters versus Sunday Post Limited*** *(1958) EA 424 at page 429.*
>
> *'It is a strong thing for an appeliate court to differ with the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself come to a different conclusion (see also Watt or Thomas v. Thomas (1047 AC 484))"*

Looking through the record, we could not see any mis-directions or non-directions on the evidence, or a miscarriage of justice or a violation of

some principle of law or practice in the proceedings of the Primary Court and the District Court calling for the intervention of the High Court. Nevertheless, the High Court took trouble to make a third evaluation of evidence which came out with the same conclusion. Like the Primary and District Courts, the Judge found that the appellant had no good evidence to prove the existence assets in excess of those which had been established by the Primary Court. He also found that the distribution made was fair. The appellant is inviting us to make a fresh evaluation and make a fourth finding of facts. We think we do not have mandate to do so for even the High Court (second appeal) does not have automatic entry. It can enter only where there are mis-directions or non-directions on the evidence, or where there was a miscarriage of justice or a violation of some principle of law or practice.

We have no mandate to make a fourth finding of facts and make a different decision. We can only comment that the appellant was given a good portion and must now cool down, stop fighting and pick what was given to her, namely: i) 3 houses: 2 at Mabatini Nyerere 'A' and 1 at Sayona Misungwi; ii) TZS. 1,000,000.00 being a balance from Barclays Bank and iii) 2 turkeys and move to start a new life somewhere else. If the funds in the Barclays bank and the two turkeys are no longer in existence, she must be given monetary compensation of the same value.

In view of the foregoing, we find this appeal to be devoid of merit and consequently dismiss it. Given the fact that this a matrimonial case, we make no order as to costs.

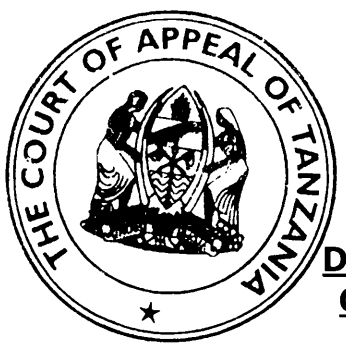
DATED at **MWANZA** this 13th day of February, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February, 2024 in the presence of Appellant and the respondent both appeared in person, is hereby certified as a true copy of the original.



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