IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO.139 OF 2002

ELIESTER PHILEMON LIPANGAHELA.....APPELLANT

VERSUS

DAUD MAKUHANA .....RESPONDENT

JUDGMENT

ORIYO, J.

The appellant, Eliester P. Lipangahela, was married to the respondent, Daudi Makuhana, under Christian rites in 1992. Their marriage was blessed with two issues. Problems crept into their marriage and the appellant petitioned for divorce, custody of issues, maintenance and equal division of matrimonial assets. The trial court dissolved the marriage, granted custody of one issue to each party, ordered the respondent to pay shs.19,000/= maintenance per month and the Petitioner to collect the rent of 4,000/= from one of their tenants. The appellants claim for equal distribution of matrimonial assets was not granted and that forms the basis of the appeal.

The parties in both courts were unrepresented; they appeared in person. The appeal contained two grounds of appeal but when

consolidated, the trial court is being faulted for failing to consider the appellant's contribution and grant her a share of the matrimonial assets; in the form of three houses.

On perusal of the Kisutu Resident Magistrate's Court judgment in Matrimonial Cause No.104 of 1998; it is obvious that the the learned trial magistrate (J. Magere, RM), dismissed, the appellant's claim to equal distribution of matrimonial assets for 3 reasons. The court held that the appellant failed to adduce evidence on the extent of her direct, financial contribution to satisfy the requirements of Section 114(2) (b) of the Law of Marriage Act, 1971. Second and third reasons are interrelated in that the Court held that the appellant deserted the matrimonial home and left the respondent and the issues of the marriage alone. It was also held that when the appellant deserted the respondent, she took away with her some household items without notice or approval of the respondent.

With due respect to the learned trial magistrate, she was in obvious error by requiring evidence on the extent of direct, financial contribution by the appellant towards the acquisition of the assets. There is uncontroverted evidence of Pw1, Pw2 and Pw3 that the appellant, in addition to her housewifely duties she also engaged in the business of selling **"burns"** and **"vegetables".** By making this requirement against the appellant, the trial court contravened the letter and spirit of **SECTION 114 (2) (b)** and **(d),** the Law of

Marriage Act and the various interpretations made by courts in decided cases.

SECTION 114(2) provides :

> "(2) In exercising the power conferred by subsection (1), the court shall have regard –
>
> (a) .....N/A
>
> **(b)** to the extent of the contributions made by each party in money, property or **work** toward the acquiring of the assets;
>
> **(c)** N/A
>
> **(d)** To the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards **equality of division**." (emphasis supplied).

Under subsection 2(b), the law recognizes spouses contributions in terms of money, property or work. The appellant's contribution towards the acquisition of matrimonial assets was in terms of work, that is, including household chores, bearing and rearing of children, making the home comfortable for the respondent and the issues. In addition to her domestic duties, the appellant engaged herself in the sale of buns and vegetables. Undoubtedly, whatever the appellant

earned in the business, it went into the maintenance of the family and the assets. The matrimonial home at Ukonga Kipunguni was built during the marriage of parties and qualifies in law as a matrimonial asset acquired by the parties joint efforts; the appellants contribution being partly in the form of household chores and indirectly in monetary terms.

The other two reasons why the trial court disqualified the appellant from a share of the matrimonial home were desertion and mismanagement of the assets. Again, here, the trial court was carried away by the respondent's statements. In his Answer to the Petition filed on 19/4/1999, the respondent averred in paragraph 6 thereof that the appellant, the issues and the respondent himself were still living together at their matrimonial home at Kipunguni. One wonders where the trial court got the notion that the appellant deserted the respondent since April 1998; which clearly contradicts respondent's own contention above. On the appellant's mismanagement of household assets, it was an allegation of the respondent which was not supported even by his witnesses. The other two reasons advanced by the trial court were unsubstantiated and of no evidential value. The appellant is not guilty of desertion, mismanagement of assets or any misconduct; on the evidence on record. The trial court erred on this.

The appellant referred this court to the cases of **BI HAWA MOHAMED VS ALLY SEFU [1983] TLR 32** and **MOHAMED ABDALLAH VS HALIMA LISANGWE [1988] TLR 197** in support of her entitlement to a share of the matrimonial assets. I am in total agreement with her that the two decisions are good law on the meaning and the parameters of Section 114 of the Law of Marriage Act.

Pursuant to the provisions of Section 114, Law of Marriage Act and the above cited court decisions; the appellant is entitled to a share of the matrimonial assets. The trial court made a finding that there was only one matrimonial property (house) at Kipunguni where the parties lived. The house at Mahenge, the parties home area, was at first alleged by the respondent to have been built for the use of the respondent's parents. But later on in the proceedings, the respondent alleged that the house had been destroyed by heavy rains; so it is not in existence . The third house located near TAZARA, was, according to uncontroverted evidence on record, built by the respondent for his girl friend, one mama Theddy. The house was built during the marriage of the parties. Can this house be construed to be part of the matrimonial assets because the money used by the respondent to construct it was money diverted from the family's coffers; being the respondent's contribution ? The trial court ordered that the appellant was to collect rent of shs.4,000/= from one of the tenants. Though I highly doubt the sustainability of the

arrangement in the long run, but the record is not clear as to which house the rent was to be collected from. Was it from the Kipunguni or TAZARA house. If it is the latter, then it is part of the matrimonial assets; making a total of two houses. Each party was granted custody of one child. Taking into account the surrounding circumstances and in particular the needs of the children, I will award each party 50% share of the matrimonial assets. Each party is free to buy out the other by paying 50% value of the house(s) as to be determined by a government valuer. In the event of inability to buy either out, the house(s) are to be sold and the proceeds of sale to be equally divided among them.

The appeal therefore succeeds and is allowed. The trial court decision, on the division of matrimonial assets is faulty and is set aside. The appellant is awarded the costs of the appeal.

Before I conclude, I wish to place on record the fact that the above judgment was determined on merit notwithstanding the provisions of Act No.15 of 1980 which amended Section 80 of the Law of Marriage Act which deals with appeals in matrimonial matters. I am conscious that an appeal is a creature of statute and this court's powers to determine the appeal is derived from Section 80 above. Act 15 of 1980 does not provide for appeals from the courts of Resident Magistrate to this Court. Notwithstanding the amendment, the concurrent jurisdiction of Resident Magistrates Courts and District

Magistrates Courts was left undisturbed by the amendment above. It is the view of this Court that the situation created by the amendment must have been a result of an oversight, typing error, etc; on the part of the draftsman. Obviously the omission to provide for right of appeal from the Resident Magistrates decisions could not be intentional or deliberate as it contravenes the rules of natural justice and Article 13 of the Constitution of the United Republic of Tanzania, 1977, as amended. It is time the legislature took steps to rectify the anomaly.

Having stated the above, it is accordingly ordered.

K.K. Oriyo

JUDGE

25/2/2005

25/2/2005

Coram: S.A. Lila – DR

For the Appellant – Present in person

For the Respondent – Present in person

CC: Emmy

Order: Judgment delivered today in the presence of both parties in person.

S.A. Lila

DISTRICT REGISTRAR

25/2/2005