IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 96 OF 2006

(Originating from the Matrimonial cause No. 31 of 1995 of Kisutu RMS Court by J. S. Mgeta)

DEBORA NALUMANSI LWIZA.....APPELLANT

VERSUS

MARCO KAMUGISHA LWIZA.....RESPONDENT

Date of last order 10/07/2008

Date of Judgment 17/7/2008

JUDGMENT

MWARIJA, J.

The respondent Marco Kamugisha Lwiza had instituted a petition in the Resident Magistrate's Court of Dar es Salaam at Kisutu against the appellant, Debora Nalumasi Lwiza. In the patition, the respondent sought for dissolusion of marriage between him and his wife, the appellant and division of matrimonial assets. The trial court found that the parties marriage had irreparably broken down and therefore granted divorce and ordered division of matrimonial assets.

The divided properties were three houses which are situated at Kijitonyama Dar es Salaam, Kigoma and Kanyigo, Bukoba. There were also two motor vehicles, a Toyota car Registration No. TZA 8993 and Land rover Registration No. TZ 42399. It was ordered that since the appellant had leased part of the Dar es Salaam house at a monthly rate of shs 500,000/= since 1994 to the date of the trial court's judgment, the respondent should possess the Kanyigo house as the sole owner. The Kigoma house was ordered to be sold and the proceeds be distributed equally between the parties. As to the Dar es Salaam (Kijitonyama) house which is a double storey house, the court ordered that the respondent should own the whole of the upper floor while the appellant should own the whole of the ground floor. The compound surrounding the house was ordered to be freely shared by both parties. The trial Resident Magistrate gave reasons for such a division as against disposal of the house to be the need for the parties children to have a home. With regard to the motor vehicles, the respondent was awarded the Land rover while the appellant was awarded the Toyota motor vehicle.

Both parties were aggrieved by the order of distribution of matrimonial assets and as a result the present appeal and cross-appeal have been preferred by them. In her appeal, the appellant has raised three grounds;

(1) That the learned Resident Magistrate grossly erred in law in ordering that the Kijitonyama house should not be disposed because it is the properly of the children.

(2) That the learned Resident Magistrate erred in law and in fact in ordering that the appellant should occupy/own the ground floor and the respondent should occupy/own the (upper) floor of the Kijitonyama house.

(3) That the learned Resident Magistrate erred in law and in fact in ordering that the Kigoma house should be sold and the proceeds of the sale should be distributed equally among the appellant and the respondent.

The appellant prayed, on the basis of the above grounds, that the orders in respect of matrimonial assets be vacated by this court and issue and order that the assets be equally distributed between the appellant and the respondent.

On his part, the respondent raised seven grounds of objection which can be consolidated into four grounds;

(1) That the learned Resident Magistrate misdirected himself by failing to hold that the appellant never contributed part of her salaries for the purpose of family upkeep, construction costs or to a joint account.

(2) That the learned Resident magistrate erred in law by failing to hold that the appellant's evidence was unworthy of belief and that she contradicted herself by assenting that her salaries and other earnings helped her together with children during the period of desertion while on the other hand she asserted that the amount shs. 500,000/= per month earned from a rented

Kijitonyama house was used for family upkeep during the period of desertion as from 1995.

(3) That the learned trial Resident Magistrate erred in law not only in awarding greater share to the appellant contrary to the law but also erred in law and fact by failing to hold that the appellant is not entitled to any share of the matrimonial assets given the availability of ample evidence that she misappropriated and squandered matrimonial properties the factors which are relevant in division of matrimonial assets.

4. That the learned Resident magistrate misdirected himself in equating and awarding the Kanyingo house to the respondent as a compensation for shs. 72,000,000/ earned by the appellant for 12 years from the rented part of Kijitonyama house.

The submissions by the learned counsel for the parties for and against the appeal and the cross-appeal were made by way of written submissions. In her submissions, Mrs. Rwechungura for the

appellant, raised a preliminary objection to the cross-appeal which I intend to deal with it first. The preliminary objection was two told:-

(1) That the respondent's memorandum of objection (cross appeal) has been filed out of time.

(2) That the respondent's memorandum of objection does not comply with the requirements of 0.XXXIX r. 22 (2) of the Civil Procedure Act (herein after referred to as "the CPC")

Submitting on ground (1) of the preliminary objection, Mrs. Rwechungura argued that since he memorandum of appeal was lodged in court on 29/6/2006 and the respondent was served with a copy thereof on 11/9/2007, under the provisions of 0.XXXIX r. 22 (2) of the CPC, the respondent was supposed to have filed his cross-appeal within 30 days from the date on which he was served. The latest date for filing the same was thus on 11/10/2007. The learned counsel submitted therefore that by filing the cross-appeal on 2/11/2007 the same is time barred and should be dismissed.

Responding to that ground of the preliminary objection, the learned counsel for the respondent submitted that according to the provision of the law cited by the learned counsel for the appellant (0.XXXIX r.22 (1) of the CPC), the period of thirty days is computed from the date of service to the respondent of notice of hearing of appeal and not from the date of service of the memorandum of appeal. It was submitted further that even if there would have been a delay in the institution of the cross-appeal, its institution was done pursuant to the order of the court dated 29/10/2007. The learned counsel for the appellant conceded to the alternative argument by the respondent's counsel that the cross-appeal was filed with the leave of the court.

On the second ground of the preliminary objection, the learned counsel for the appellant submitted that the memorandum of cross-appeal ought to have been accompanied by a copy of the decree appealed from and (unless the court dispenses with) a copy of judgment on which it is founded. According to the learned counsel,

that is a requirement under 0.XXIX r. 1 of the CPC. It was therefore her argument that since the memorandum was not so accompanied by the said copies, the cross-appeal/memorandum of objection is incompetent.

Replying to the submissions in the second ground of the preliminary objection, the learned counsel for the respondent submitted for the respondent that although it is agreeable that Rule 38 of the Law of marriage (matrimonial proceedings) Rules provides for application of 0.XXXIX, of the CPC the applicable rules of that order are rules 9 – 37 (inclusive). He argued therefore that rule 1 is not applicable. But even if that rule would have been applicable, lit would be to the extend only of the form and contents of the memorandum of objection, the respondent's counsel argued.

As agreed by both learned counsel for the parties, matrimonial proceedings are governed by the law of marriage (matrimonial proceedings) Rules (herein after referred to as "the Rules") made

under s.162 (1) of the Law of marriage Act, Cap. 29 RE 2002. Rule 38 of the Rules provides as follows;

"The provisions of rules 9-37 (inclusive) of Order XXXIX of the Civil Procedure Code, shall apply Mutatis Mutandis to an appeal to which this part applies;

Provided that:-

(a) Where a respondent wished to take any cross - objection to the decree, he may do so without being required to file a memorandum of such cross objection,

(b) In determining any appeal, the court shall not be confined to the grounds of objection raised in the memorandum of appeal but may, after giving the parties an opportunity of being heard thereupon, decide the appeal on any ground not raised in the memorandum of appeal, and

(c) The High Court shall decide every appeal according to substantial justice without undue regard to technicalities of procedure and without undue delay."

Form the wording of the above cited provision, I am inclined to the view expressed by the learned counsel for the respondent that the requirement of accompanying a copy of a decree with memorandum of appeal is not applicable to the cross-appeal /memorandum objection in respect of an appeal in matrimonial proceedings. If it was an intention that the memorandum of cross-appeal/Objection be accompanied with a copy of a decree, then application of rule 1 of O.XXXIX of the CPC should not have been excluded by S.38 of the Rules. I therefore find that it is not a requirement under the Rules that a memorandum of objection or cross-appeal in matrimonial proceedings should be accompanied by a copy of a decree and judgment being objected. As a result therefore, as the two grounds of preliminary objection are not sustainable, I overrule the preliminary objection.

Tuning now to the grounds of appeal and grounds of objection, before I consider the submissions filed by the learned counsel for the parties, as the parties' dissatisfaction with the decision of trial court was with regard to the order of division of matrimonial assets, I find

it pertinent to quote the provisions of s.114 of the law of marriage Act Cap. 29 RE 2002 which is the relevant provision as far as the division of matrimonial assets is concerned. It provides as follows;

> "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 assets 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:
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> (a) To the custom of the community to which the parties belong;

(b) To the extent of the contribution 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 the joint benefit; and

(d) To the needs of the infant children, if any, of the marriage, and subject to those consideration, 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".

On these guiding provisions of the law, I now proceed to consider the grounds of appeal and objection on the basis of the parties submissions. In so doing I purpose to consider each ground of appeal and objection separately or jointly as and when necessary and at an each opportune time. In the first and second grounds of appeal, the appellant has submitted that the learned Resident Magistrate erred in ordering that the Kijitonyama house should not be disposed because it is the property of the children and further that the order of joint occupation by the parties was erroneously made. Submitting on those of grounds, Mrs. Rwechungura, learned counsel, argued that apart from the evidence made available to the trial court that the house was built through the joint efforts of the appellant and the respondent, the issues of marriage were, at the time of grant of the decree of divorce, above the age of majority. Relying on s. 114 (1) of the Law of marriage Act, Cap. 29 RE 2002 (hereinafter referred to as "the Act"), the learned counsel submitted that the property was

subject to distribution. She further argued that upon the grant of divorce, the order by the trial court that the respondent and the appellant occupy separately a portion of the house each (upper and ground floors respectively) was not proper as that amounted to compelling them to cohabit in the same compound hence defeating the purpose of divorce.

Responding to the submissions on the two grounds above, the learned counsel for the respondent while conceding that it was wrong for the trial court to have arrived at a finding that Kijitonyama house belonged to the children of the parties because the court did not have the right of transferring the house to said children, it was right for the court to have exercised its powers under s. 114 (1) of the Act to order that the house should not be disposed. As to the submissions on the second ground of appeal, the learned counsel for the respondent supported the submissions by the learned counsel for the appellant that the learned trial Resident Magistrate erred in ordering the parties to occupy the house jointly. His reasons were however founded on different grounds; that by being awarded the

ground floor of the house, she was awarded more than what she deserved.

I think the arguments by the learned counsel for the parties on the 1st and 2nd grounds of appeal are to a great extent meritorious. Although I do not agree that by his order, the learned Resident magistrate awarded the house to the children of the parties, his decision that the house should not be disposed was due to his consideration that the "children should have a home to go". I don't however think that he meant that the house should be their property. Now, even if his consideration was the welfare of the children, that was not a sufficient reason to preclude him from disposing the house. The consideration to be had to the children during division of matrimonial assets under s.114 (2) (d) of the Act is with respect to infant children not the issue of marriage who are above the age of majority.

As to the order of sharing the Kijitonyama house I agree that such an order is not proper for the reasons advanced by the learned

counsel for the appellant. In my view, an order of division of matrimonial asserts which compel the parties to continue living in the same compound is not an appropriate one as it defeats the purpose of divorce which is a final remedy to the parties' irreparable matrimonial difficulties. As submitted by the learned counsel for the appellant, since the parties have been found to be incompatible with each other, an order which compels them, to live in the same compound, will sustain their pain and anger which the divorce intended to relief them from. For the reasons stated above, I uphold the 1st and 2nd grounds of appeal to the extent shown. The learned Resident magistrate erred in holding that the Kijitonyama house cannot be disposed because it provides a home to the children. He erred also in making an order of division of the house through joint occupation by the parties.

Before considering ground No. 3 of the grounds of appeal, I intend to first consider grounds I and 2 of the cross-appeal which concern evidence of contribution to the acquisition of matrimonial properties by the appellant. The learned counsel for the respondent

has argued in his submissions that although the issue on whether the appellant is entitled to equal division of matrimonial properties was framed during the trial, that issue was not answered. He submitted that apart from the fact that the appellant did not contribute towards acquisition of the matrimonial assets, she squandered matrimonial properties worth shs. 110,000,000/=. As regards the appellant's contribution, the learned counsel submitted that while the Kanyingo house was built on the clan land through joint efforts of the respondent's clan members, the Kigoma house was built without any contribution from the appellant. This is said to be clear from the appellant's evidence during the trial; that the respondent was not sanding money to her from Kigoma where he had been transferred and as a result she depended upon assistance from her brother and father. From that evidence, the learned counsel argued, it is obvious that the appellant did not contribute anything for construction of Kigoma house. It was argued father that the mere fact that the parties maintained a joint account is not a conclusive evidence that the appellant contributed towards acquisition of matrimonial properties. On the evidence that she redeemed Kijitonyama house

from THB by paying Shs. 1,890,427.65, the counsel argued for the respondent that at no point in time did the THB want to sale the house. On her participation in clearing the site, paying a watchman and supervising bricks making, the learned counsel submitted that the appellant could not have time to do so as she had said that she was running tuition classes after normal working hours. She however said that even if she made such contributions, the value of it should not have exceeded shs 3,000,000/= which is only 2% of the construction value of the house valued at shs. 145,000,000/=.

Responding to the two grounds of the cross-appeal, the learned counsel for the appellant submitted that the appellant contributed to the acquisition of the matrimonial properties as per the evidence which was recited by the learned counsel for the respondent who contested it. Citing the case of **Bi Hawa Mohamed V. Ally Sefu** (1983) TLR 32 and s.114 (1) of the Act, Mrs. Rwechungura submitted that the appellant was entitled to a share of matrimonial assets.

Now, in deciding the 1st and 2nd grounds of the cross appeal, the grounds by the respondent placed more emphasis on the appellant's contribution through her salary towards acquisition of property and family upkeep. I think that fact cannot be disputed in view of the evidence made available that the parties went to the extent of operating a joint account and for all that time before their marriage had entered into difficulties, struggled together towards improvement of their lives. They were both employed and earned salary. Even if there will be no direct evidence of contribution in the construction of the house, in law joint efforts embraces the domestic efforts or work of husband and wife. In the case of **Bi Hawa** (Supra), the court of Appeal held as follows with regard to contribution by a wife towards acquisition of matrimonial assets;

> (i) Since the welfare of the family is an essential component of the economic it is proper to consider contribution by a spouse to welfare of acquisition of matrimonial or family assets.

(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."

On the above authority, it will be wrong to hold a view that a wife who did not contribute in monetary terms cannot be entitled to part of the matrimonial property. In the appellant's case she did both contribute through domestic work to the family at all times before the respondent was transferred to Kigoma and to the children and care for the matrimonial home after the transfer of the respondent as well as contribution through earning a salary for which no evidence was produced to the contrary that it did not at all benefit the family before the respondent was transferred to Kigoma. The tendered evidence was that which was from the appellant's assertion that he used the collected rent of Shs. 500,000/= per month for family upkeep and that upon the transfer of the respondent and following his failure to send her money, she had to depend on her brother and father for her maintenance. As that evidence refers to

the properties acquired after the respondent had shifted to Kigoma, I will deal with it when considering the fourth ground of the cross-appeal and the third ground of appeal.

Before doing so, I have to dispose first the third ground of the cross-appeal. It was submitted by the learned counsel for the respondent that the appellant appropriated properties, the list of which was tendered in the trial court. The properties were alleged to be worth shs.20,000,000/=. It was argued further that the appellant did not dispute that allegation. On the principle enunciated in the case of **Omari Chikauka V. Fatuma Mohamed Malunga** (1989) TLR 39, that fact ought to have been considered. In response, the learned counsel for the appellant. Submitted that no evidence was led to implicate the appellant with an appropriation of matrimonial properties.

It is true that the respondent gave evidence in the trial court that the appellant misappropriated some matrimonial puppetries including a motor vehicle Reg. No. TZA 8399. In her defence, the

appellant said that she shifted from the Upanga house where they were living with the respondent because she feared that he was going to bring another woman into their Kijitonyama house. Her further evidence which was not rubbuted by the respondent was that the matter was reported to police but later the police file was closed. Under the circumstances I agree with the learned counsel for the appellant that there in no evidence of misappropriation to be relied upon for adverse consideration in the distribution of the matrimonial assets. Actually the motor vehicle which was Said to have been misappropriated Toyota TZA 8399 was awarded to the appellant by the trial court when discharging the duty of distributing matrimonial assets and that has not been a subject of appeal.

Coming now to the 3rd ground of appeal and the 4th ground of cross - appeal, it was argued that as the parties acquired the three houses during the subsistence of their marriage, it was wrong to order sale of Kigoma house and the proceeds be equally shared by the parties. It was argued further that the appellant ought to have been awarded one of the houses considering that the parties do not

belong to the save community. As to the proper house to be awarded to the appellant, Mrs. Rwechungura learned counsel invited the court to follow the principle in the case of **Pulcheria Pundugu V. Samuel Huma Paundugu**_(1985) TLR 7 In that case, convenience of the parties was a factor which was considered during the division of matrimonial properties. The learned counsel argued that as the Kanyigo house has been built in the respondent's clan land and because the appellant has not seen the Kigoma house which now the respondent occupies with another woman, the only appropriate house to be awarded to the appellant is the Kijitonyama house which she now resides in.

Responding to that ground, the learned counsel for the respondent re-iterated the submissions that the appellant did not contribute anything towards construction of the Kigoma house and therefore the learned Resident Magistrate erred in ordering that the house be sold and that the proceeds be shared equally by the parties. As to the case of **Pulcheria** (Supra) cited by Mrs. Rwechugura, the learned counsel for the respondent argued that the

same is distinguishable with the present case mainly because in the pulcharia case, the wife was grated the custody of children while in this case the children are all above the age of majority.

As to the Kanyigo house, the subject matter of ground No. 4 of the Cross- appeal, it was the submission from the respondent that the appellant is not entitled to that house because, firstly, she did not contribute towards its acquisition and secondly, because she squandered the matrimonial properties which include shs. 72,000,000/= earned from renting part of Kijitonyama house for 12 years or shs. 84,000,000/= for 14 years as he puts it now.

I think, with due respect to the learned counsel for the respondent, as found earlier, the issue of misappropriation was not established. Further, according to the provisions of S. 114 of the Act and the decision in the case of **Bi Hawa,** (Supra) there in no doubt that the appellant contributed to the acquisition of the three houses. Although I am certain in holding that her contribution was not equal to that made by the respondent. In the first place his in - come as

Chief Executive Engineer was much higher than that of the appellant, a primary school teacher. Secondly, her contribution towards acquisition of Kigoma and Kanyigo houses cannot be equated with that of the respondent. There is an argument by the respondent's counsel that because the appellant collected rent from Kijitonyama house since 1996, the learned Resident Magistrate erred in awarding the respondent the Kanyigo house vis a vis the amount of shs. 72,000,000/= she had collected.

Having considered the submissions, I find no reason in faulting the learned trial Resident Magistrate. The appellant had stated that he used part of the rent to pay for children's school fees and for family upkeep given the undisputed fact that the respondent was not supporting her after he had shifted to Kigoma. Because she had retired, it is not impossible to find that part of the rent enabled her to meet her needs including the fees and family upkeep.

All the above having been decided, I now come to the prayer by the appellant in her appeal that the three houses which were

acquired jointly during the subsistence of the parties' marriage be distributed equally among them. Admittedly, making decision on division of matrimonial assets is the most difficult task in matrimonial proceedings. This is became during their joint efforts aimed at building their future, the parties through trust to each other, do not keep records of what each of them has done for their future needs. Each one of them aims at living a better life in future. When it comes to division of those properties, it usually becomes difficult to ascertain the exact amount of contribution made by each one of them.

In determining this appeal therefore I have borne in mind that fact and the position of the law that the division of matrimonial assets shall depend on the extent of contribution by each party. Now like the learned Resident Magistrate I find that the award of Kanyigo house to the respondent because of the value of the rent which the appellant collected from Kijitonyama house was proper for the reasons I have advance earlier. I would add that there is another factor which is that the contribution towards construction of that

house was largely made by the respondent. As to Kijitonyama house, that is where both parties did put their effort as from the early years of their matrimonial life. The respondent did contribute more in financial terms but the appellant's efforts were equally substantive. She contributed through sharing of her salary with the respondent through operating a joint account as well as domestic services and upkeep. For those reasons therefore, I find that she is entitled to 45% of the current value of the house while the respondent is entitled to 55% of its current value. As to Kigoma house, the respondent is entitled to 60% while the appellant is entitled to 40% of the current value of the house.

As said earlier because the parties have worked for their better life and have now retired, it is important that they should have accommodation. The appellant shall therefore remain to occupy the Kijitonyama house unless she is paid her share of the two houses within one year so that she could buy or construct her own residence. Failure to be paid, the said house shall be sold and the appellant shall be paid her share of the two houses.

On the above findings therefore the appeal and cross appeal succeeds to the extent above shown. No order as to costs.

A. G. Mwarija

JUDGE

17/07/2008

17/7/2008

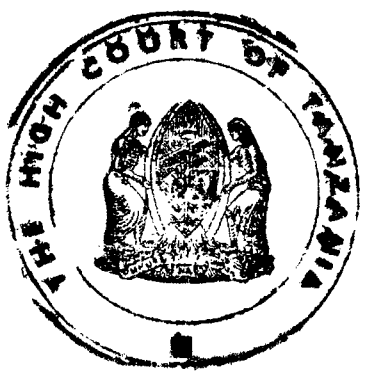
Coram: Hon A. G. Mwarija, J.

For the appellant/Respondent - Mrs Rwechugura

For the Respondent - Mr. Makulilo

CC. Nailejilej

Judgment delivered.



A. G. Mwarija

JUDGE

17/7/2008