IN THE HIGH COURT OF TANZANIA
At DAR ES SALAAM

Civil Appeal No. 87 of 2009

(Originating from Matrimonial Cause No. 7 of 2007 RM's Court at Kisutu-H.J. Mwankenja-RM)

IBRAHIM BAKIFU MWANJALA ..... APPELLANT

Vs

FLORINA PIUS MWANJALA ..... RESPONDENT

JUDGMENT

Date of last Order: 03/04/2010
Date of judgment: 03/05/2010

JUMA, J.:

The marriage between respondent (Florina Pius Mwanjala) and Appellant (Ibrahim Bakifu Mwanjala) had already subsisted for nine years when on 16 February 2007 the respondent petitioned for its dissolution at the Resident Magistrate Court-Kisutu. Apart from contending that the marriage had broken down beyond repair, respondent prayed for equal division of property which she and appellant acquired jointly during the subsistence of their marriage. Further, respondent wanted the appellant to provide her monthly maintenance allowance of Tshs. 300 000/= to be

calculated from March 2006 to the date of grant of divorce by the Resident Magistrate's Court.

There was no dispute at the trial magistrate's court that the marriage between the respondent and appellant had irretrievably broken down. The trial magistrate duly granted the dissolution of the marriage. Respondent and appellant led evidence on outstanding issues which were- identification of matrimonial assets and determination of respective shares of appellant and respondent on the jointly acquired assets. Finally the trial magistrate invited the parties to lead evidence on the issue of maintenance and reliefs to which parties were entitled. In the judgment that he read on 1st June 2009 the learned trial magistrate (H.J. Mwankenja-**RM**) ordered the distribution of identified matrimonial assets and chattels. Appellant was dissatisfied with the decision of the trial court hence this appeal.

In his first ground of appeal appellant is contending that the trial magistrate erred in law and fact when he ordered the division of matrimonial assets without conducting any valuation to ascertain the value of each of the enumerated matrimonial assets. Secondly, Appellant claims that the house built on plot number 39, Block 44 at Kijitonyama was built or otherwise acquired before the

marriage, and trial magistrate should not have ordered its distribution as matrimonial asset. The third ground of appeal centres on another house built on plot number 289/14 at Bunju Mpiji and several household items. With respect to these, appellant contends that the trial court erred by failing to distribute them as part of matrimonial assets. In the final ground of appeal appellant is aggrieved by the failure of the trial court to take into account household items respondent allegedly took to Kiluvya Gogoni before appellant filed his case at the Resident Magistrate's Court.

When this appeal came up for hearing on 10th February 2010, respondent appeared in person. Appellant was represented by Mr. Chuwa the learned Advocate holding brief for Mr. Ngundungi. Both sides requested, and this Court agreed that the hearing of this appeal should be by written submissions.

Submitting on the failure to conduct valuation to ascertain the value of matrimonial assets prior to division (the first ground), Mr. Ngundungi drew the attention of this Court to the evidence on trial record which shows difference in valuations of similar matrimonial assets by appellant and respondent necessitating a

neutral valuation. Mr. Ngundungi illustrated his point by reproducing the two differing valuations of houses:

(i) at Kijitonyama was valued by the Respondent at Tshs 70 million, whereas appellant did not attach value to this property;
(ii) at Kiluvya Gogoni was valued by Respondent at Tshs 50 million, while Appellant pegs the value of same house at Tshs. 25 million;
(iii) at Uyole, Mbeya was valued by the Respondent at Tshs. 20 million, while the Appellant pegs the value of the same house at Tshs 1 million; and
(iv) at Kibamba was valued by the Respondent at Tshs. 10 million, while the Appellant valued it at Tshs. 12 million.

It is Mr. Ngundungi's submission that faced by such opposing approaches to valuations, the trial magistrate had a duty to ascertain the market value of each of the houses concerned before conducting the division of assets.

Mr. Hyera, the learned Advocate for the respondent agreed with Mr. Ngundungi that indeed the trial court distributed the matrimonial assets without conducting valuation or causing valuation of the matrimonial assets to be conducted. Mr. Hyera does not however think that the trial court was under any legal duty to order valuation of the matrimonial assets. Furthermore, Mr. Hyera noted that both the appellant and respondent did not specifically request the trial court to conduct the evaluation.

According to Mr. Hyera, the differing valuations which appellant and respondent offered in evidence were estimates and no party to the matrimonial proceeding was prejudiced. In his rejoinder, Mr. Ngundungi drew the attention of this Court to the principle of law which the learned Advocate regards to be well established to the effect that matrimonial assets jointly acquired by the parties during their marriage is to be divided equally and fairly between the parties.

For purposes of determination of this first ground of appeal centring on valuation of assets for purposes of division, I will direct my mind to the question where do courts in Tanzania derive their power to divide matrimonial assets. With respect, the trial magistrate was correct to say that the land mark case of **BI HAWA MOHAMED Vs ALLY SEFU, CIVIL APPEAL NO. 9 OF 1983** has settled the law that the power of courts to divide matrimonial assets is derived from section 114-(1) of the **Law of Marriage Act, 1971** which states that:

> *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.*

Section 114-(1) of the **Law of Marriage Act, 1971** will therefore provide me with a benchmark that will guide my re-evaluation of the evidence tendered at the trial court. From this provision of the **Law of Marriage Act** I will ask myself whether the learned trial magistrate took the initial step to first of all identify matrimonial assets for purposes of division. With due respect, the trial magistrate properly and in my view adequately took the important initial step to identify the matrimonial assets of the appellant and respondent in the following way:

> *.....Be it as it may, in respect of the properties, from pleadings and evidence adduced, it is crystal clear that the properties allegedly to be matrimonial properties are the main remaining subject of dispute in this matter and they are.....:-....**page 2 of the Judgment***

The next level of my re-evaluation of evidence is whether in terms of section 114-(1) of the **Law of Marriage Act, 1971** the trial magistrate took the next step to identify or to determine which assets the opposing sides had acquired by their joint efforts during the subsistence of their marriage. Again, the trial magistrate properly addressed himself on the need to identify matrimonial assets that was acquired by joint efforts of the appellant and respondent.

The outstanding bone of contention in this appeal is methodology the trial magistrate had used to divide the identified matrimonial assets. Appellant contends that the trial magistrate should have caused the conducting of valuation of the assets in order to first ascertain the value of each of enumerated matrimonial asset before distribution. Respondent on the other hand, does not think the trial magistrate had any duty in law to cause evaluation to be conducted before dividing the assets.

It is my considered opinion that the answers to the opposing positions taken by the learned Advocates for the appellant and respondent is to be found in subsection (2) of section 114 of the **Law of Marriage Act, 1971** which provides guidance to the courts on modality of division of any assets acquired by divorcing couples during the marriage by their joint efforts. This section states:

> *(2) In exercising the power conferred by subsection (1), the court shall have regard–*
> *(a) to the customs of the community to which the parties belong;*
> *(b) to the extent of the contributions 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 their joint benefit; and*
> *(d) to the needs of the infant children, if any, of the marriage,*

and subject to those considerations, shall incline towards equality of division.

Although he did not say it in so many words, there is no doubt in my mind that the trial magistrate had guiding principles under section 114-(2) in his mind when he ordered physical division of matrimonial property. The judgment of the trial court shows how the trial magistrate considered improvements that were made on the house on Plot 39, Block 44 at Kijitonyama. The magistrate also took into account a house on developed plot at Uyole Mbeya which was left to be used by the appellant's mother. The trial court also considered the importance of letting the appellant and respondent to retain houses where each was living following the breakup of their marriage.

As a result of these considerations, appellant remained at Plot 39 Kijitonyama and respondent was left to occupy the un-surveyed land at Kiluvya Gogani. This and other evidence on record leaves me in no doubt that the trial magistrate was guided by guiding considerations mentioned in section 114-(2) of the **Law of Marriage Act, 1971** when he ordered the physical division of matrimonial assets instead of basing the division of assets on their prior valuations at market rates.

In my opinion, the value of matrimonial assets in Tanzania is not solely determined by market values of the assets. There are items

of matrimonial property that are invaluable or so priceless to a person concerned that they cannot be pegged on monetary or market values. The spirit behind section 114-(2) of the **Law of Marriage Act, 1971** for example values customs of the community to which parties belong, extent of contributions (monetary or non-monetary), debts contracted, needs of infant children and I must include also any special attachment to specific property a spouse may have, the future comfort and welfare needs of the divorced couple are some of the important factors which courts take into account when ordering the division of matrimonial property. There is no doubt in my mind that monetary evaluation is not a deciding factor under section 114-(2) to which courts are obliged to exclusively have regard to when dividing matrimonial assets. Furthermore, I will with respect agree with Mr. Hyera that both the appellant and respondent did not specifically request the trial court to conduct the evaluation.

I will for the foregoing reasons dismiss the first ground of appeal.

Appellant contended in his second ground of appeal that the house on Plot Number 39 Block 44 at Kijitonyama was not matrimonial asset since it was built or otherwise acquired before the marriage. In his submissions on this ground, Mr. Ngundungi the learned Advocate for the appellant relied on the rebuttable presumption under section 60 (a) of the **Law of Marriage Act** that

the property acquired before marriage belongs absolutely to that person under whose name the property is, to the exclusion of his or her spouse. Mr. Ngundungi was in other words submitting that the trial court should not have regarded the house on Plot Number 39 Block 44 as amongst the matrimonial assets. Section 60-(a) of the **Law of Marriage Act, 1971** provides:

> *Where during the subsistence of a marriage, any property is acquired–*
>
> *(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;*

Mr. Hyera, the learned Advocate for the Respondent does not dispute that the house on Plot Number 39 Block 44 at Kijitonyama was acquired before the marriage of the appellant and respondent. All the same, Mr. Hyera referred this Court to the evidence about the finishing and improvements that were made on that house during the subsistence of the marriage. Mr. Hyera referred also to the fixing of doors, burglar-proof grilling, and the construction of car park to have been amongst the improvements which respondent made on that house. Mr. Hyera was in no doubt that the house had been so improved that it has become a matrimonial asset instead of solely belonging to the appellant.

I have in this judgment restated the law governing the division of matrimonial assets as being found in section 114-(1) of the **Law of Marriage Act, 1971** which empowers courts when ordering divorce or separation to also issue appropriate orders dividing between the parties the assets that parties acquired during the marriage by their joint efforts. In my view, section 60-(a) of the **Law Marriage Act, 1971** on the rebuttable presumption that the property acquired before marriage belongs absolutely to that person who acquired that property is not in any conflict with the power of the courts to order division of jointly acquired matrimonial assets under section 114. Sections 60-(a) and 114 of the **Law of Marriage Act** are mutually supportive. Section 60-(a) falls under Part IV of the **Law of Marriage Act, 1971** governing property rights of spouses during the subsistence of their marriage. Section 114 on the other hand falls under Part VI of the same Act governing matrimonial proceedings and specifically the power of courts to order division of matrimonial assets guided by the principles provided under section 114-(1). Interpreted harmoniously, sections 60-(a) and 114 lead us to the following conclusions:

- first, in terms of section 60 (a) marriages in Tanzania do not take away the right of a wife or a husband to own non-matrimonial property; and property that were acquired in

the name of one of the spouses during subsistence of that marriage is presumed to belong to that named person.

- Second, the presumption of ownership of property by a spouse under section 60-(a) can be rebutted where for example the asset concerned has been substantially improved during the marriage by one of the parties or by their joint efforts in terms of section 114-(3) of the **Law of Marriage Act, 1971**. Following this improvement the property appearing under the name of one of the parties becomes matrimonial property for purposes of division in case of separation or divorce.

In his judgment the trial magistrate was in my opinion fully alive to the harmonious interpretation of sections 60-(a) and 114 of the **Law of Marriage Act, 1971**. The trial magistrate was aware that the house built on Plot Number 39 Block 44 at Kijitonyama was acquired by appellant before his marriage to respondent. All the same, the trial magistrate included this house in the list of matrimonial assets because he found that both the appellant and respondent were not only gainfully employed and capable of effecting further improvements on their matrimonial assets; but respondent did indeed effected improvements on the house. I am satisfied that the trial magistrate fully took into account the attachment the appellant had to the house on Plot Number 39

Block 44 and allowed the appellant to retain that house. In the circumstances, the trial magistrate was properly guided by section 114-(3) of the **Law of Marriage Act, 1971**.

On account of the foregoing the second ground of appeal also fails.

In his third ground of appeal the appellant cites the failure to divide other matrimonial properties which were in possession of the respondent i.e. house on plot No. 289/14 Bunju Mpiji and several household items and other properties indicated in the reply to Petition by the Appellant. Mr. Ngundungi has submitted on behalf of the appellant that trial magistrate did not order the division of the aforementioned items. In his replying submission Mr. Hyera for respondent contended that there is no evidence before the trial court showing that respondent had acquired a motor vehicle with registration number T252 AMS Nissan Caravan and other properties. Further, Mr. Hyera submitted that there was no evidence that the alleged properties were acquired through the joint efforts of appellant and respondent.

With due respect, I failed to discern the rationale behind this third ground of appeal. In his judgment the trial magistrate found that a piece of land at Bunju Mpiji had been sold and proceeds were applied first to construct the house at Kiluvya and secondly to repay a bank loan. I found it hard to grasp how the trial magistrate

could have divided an asset which had been sold before the breakup of the marriage. In the circumstances the third ground of appeal likewise fails and is dismissed.

Finally, appellant cites as his fourth ground the failure of the trial magistrate to take into account household items the petitioner took them to Kiluvya Gogoni before the case was filed. Mr. Ngundungi submitted on behalf of the appellant that it is evident on record that before the case was filed in the Resident Magistrate's Court, respondent took several household items to Kiluvya and the judgment of the trial court failed to address this matter and order these household items to be divided as matrimonial assets. On his part, Mr. Hyera submitted that all those mentioned items were properly dealt with by the trial court in accordance with the principles guiding the division of matrimonial property provided under section 114-(2) of the **Law of Marriage Act, 1971** and the Court of Appeal decision in **Bi Hawa Mohamed vs. Ally Sefu (supra).**

I have perused through the records of the trial magistrate and I found nowhere the appellant specifically bringing these items to the attention of the trial court as part of household chattels to be subjected to division. Without leading such evidence, an appellate court cannot interfere with the findings of the trial magistrate. Chattels which were brought to the attention of the trial

magistrate were divided accordingly. For instance on page 5 of his judgment, the trial magistrate divided items which were brought to his attention. These included two refrigerators, three deep freezers, two television and TV tables, sewing machine, two music system and speakers etc.

The fourth ground of appeal also fails.

All in all, the appeal is dismissed in its entirety with cost to the Respondent.

DATED and DELIVERED IN DAR ES SALAAM this 3th day of MAY 2010.

I. H. JUMA
JUDGE