IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 97 OF 2016

AWADHI SAIDI YUSUPH ..... APPELLANT

AND

ASHA ABDALLAH .....RESPONDENT

7/12/2017 & 15/2/2018

JUDGMENT

I.P.KITUSI,J.

Most of the facts relevant to this case are not disputed. That Awadh Said Yusuph the appellant and Asha Abdallah the respondent, were married in 2004 under Islamic rites and thereafter had three children is not disputed. That, sometime in 2012 misunderstandings between the parties crept in and neither relatives (Zuzuna Hassan (SM2) Said Yusuf Abdallah (Su2),Ally Ndembo (SU3) nor BAKWATA could resolve the conflict out of the court. That the appellant issued the respondent with two talaks.

The respondent went to Ukonga Primary Court to have appellant's intimation to have divorce confirmed and the appellant reaffirmed his resolve to part ways with the respondent. The Primary Court issued the order of divorce being an uncontested relief sought by the respondent.

The respondent had also prayed for maintenance and division of matrimonial assets. It is the Court's order in respect of these two

prayers that prompted the appellant's appeal to Ilala District Court and finally to this Court. First let me highlight the evidence in relation to these prayers before referring to the orders that are being challenged.

The respondent testified that the couple have a house which they were residing in and that it was built during the subsistence of their marriage. According to her before they moved into their house they were living with her parents but since she had a piece of land she offered it for the couple to build their house. She went on to mention other assets as being two shops both dealing with glassware, a machine for cutting glass and a generator. She also mentioned a motor vehicle although she did not describe it.

Appellant's version was that all assets, except the vehicle which he denied ever having, were acquired by him before he married the respondent which was supported by SU2 and SU3. According to SU3 he is the one who got masons for the appellant in 1998 to build the house well before he married the respondent. The house was completed in 2001 when he moved in. They supported the appellant in his denial regarding ownership of a motorvehicle.

During the testimonies it became apparent that before celebrating their marriage in 2004 the parties had commenced cohabiting and the evidence of the respondent that her first child with the appellant was born in 2002 went unchallenged.

The Primary Court was satisfied that although the house was acquired by the appellant before he married the respondent it was

improved by joint efforts of the parties when they married. On the basis of Section 114(3) of the Law of Marriage Act Cap 29 he concluded that the house was a matrimonial asset jointly acquired by the parties. Finally it ordered custody of the children to be under the respondent who should retain the house as well as one shop and the machine for cutting glass. Further the appellant was ordered to provide maintanance of Shs 150,000/= per month.

The appellant's appeal to the District Court was partly successful. He had challenged, among other things, the Court's interpretation of section 114(3) of the Law of Marriage Act hereinafter the Act. However the District Court agreed with the learned Primary Court Magistrate citing the decision of this Court (the late Mwelusanya, J) in **Anna Karinga V. Andrew Karinga** [1996] T.R.L 195. My finding on this is that both court's correctly interpreted the law and correctly applied it, therefore this being a second appeal I cannot interfere with it.

The District court proceeded to quash the decision of the Primary Court awarding the whole house to the respondent and replaced it with an order that the house should be divided equally to the parties. This appeal seeks to impugn that decision. The appellant is represented by Mr. Abdul Aziz learned Councel whereas the respondent appeared in person. Considering this fact I ordered the appeal to be disposed of by way of written submissions. The appellant was supposed to file his written submission on 2nd November 2017 and the respondent's on 16th November, 2017.

The appellant filed his submissions on 2 November 2017 as per schedule but the respondent filed her's on 22nd November 2017. It is, I think, my duty to determine this issues first, namely whether the submissions presented by the respondent outside the prescribed time may be considered. This question was considered by my brother Mwambegele, J. (now Justice of the Court of Appeal) in **NIC Bank Tanzania Limited V. Patrick Edward Moshi and Janeth Patrick Mosha,** Misc. Commercial Application No. 327 of 2015(unreported) where his Lordship observed;

> *"A document filed out of the time frame ordered by, and without leave of the court is as good as if it was (not) filed at all"*

His Lordship proceeded to expunge the rejoinder submissions that had been filed out of time without leave. That decision inspires me to do the same in respect of the respondent's written submissions.

I now turn to the submissions by the appellant the best part of which re – evaluates evidence or introduces new evidence not adduced at the trial. The fact that this court sitting on second appeal cannot re – evaluate the evidence is a settled law. I have already accepted as correct the finding of the two Courts below that the house was improved when the marriage was in subsistence.

The question is whether that fact entitles the parties to equal shares.

Both statutory and case law provide guides to be followed by the court in determining shares of spouses to matrimonial assets. These are provided under section 114(2) (a)- (d) but for the purpose of this case conditions (b) and (d) are relevant. These relate to the parties contributions and the needs of the infant children in the marriage, if any.

Regarding the contributions which is the principle in the case of **Bibie Maulid V. Mohamed Ibrahim** [1989] TLR 102, referred to by the learned Resident Magistrate who sat on first appeal I agree with him that no party adduced evidence in proof of his or her contribution. The learned Resident Magistrate in accepting that improvements were made when the parties were already married stated that the mason (SU4) proved that the improvement he made were in a form of building a fence.

My conclusion on this point is that in the absence of proof to the contrary, contribution in improving the house was not the same as building it. To this extent I find the decision by the learned Resident Magistrate giving the parties equal shares to the house to have been inconsistent with the evidence on record. I quash it. I replace it with an order giving the appellant 65% of the house leaving 35% of it to the respondent. This considers any contribution that the respondent may have made in the form of love and care for the house, children and the appellant.

Perhaps it is time the trial courts were reminded to take the aspect of contribution more seriously and demand proof. It is now a tendency

for the parties to merely list down the assets that they consider are subject of distribution without going further to establish how they contributed to their acquisition. This denies appellate courts of valuable material on which to decide the issue of division of assets.

All said, this appeal is allowed to the extent that the appellant is given 65% of the house and the respondent takes 35%.

No costs ordered.

I.P.KITUSI

JUDGE

15/2/2018.