IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 195 OF 2016

(Arising from Civil Appeal No. 56 of 2016 in the District Court of Temeke. Orig. Matr. Cause No.44 of 2015 of Kigamboni Primary Court)

AMINA RAMADHAN..APPELLANT

VERSUS

MMASA JUMA..RESPONDENT

JUDGMENT

16 & 20 February, 2018

DYANSOBERA, J:

This is a second appeal. The appellant Amina Ramadhan is appealing against the judgment of the District Court of Temeke in Civil Appeal No. 56 of 2016. The respondent is Mmasa Juma.

The brief background of the matter is that the parties were married in 1996 under Islamic law and resided both in Kilimanjaro and Dar es Salaam. Their marriage was sored on account of the alleged cruelty and denial of conjugal rights. The efforts to reconcile

them proved futile and consequently, the appellant successfully petitioned before the Primary court of Temeke District at Kigamboni vide Matrimonial Cause No. 44 of 2015 for dissolution of marriage and division of matrimonial assets. The trial court was satisfied that the marriage between the parties was irreparably broken down and granted a divorce decree. As to the division of matrimonial property, an equal division was ordered.

The respondent thought that the decision flew into his face and appealed to the District Court. The court found that the evidence on acquisition and contribution of the matrimonial property was lacking at the trial and ordered a re-trial. During the re-trial, the Primary Court was satisfied that the properties which were jointly acquired included a house at Same, two houses at Gezaulole, a house at Tungi, three farms at Mkuranga and household assets. The trial Primary Court was satisfied that these are the properties which were in existence. It ordered an equal division. As to the rest of the properties that is a farm at Bagamoyo, a piece of land at Tunduri, a farm at Mwasanga, a farm at Mbutu, a piece of land at Vijibweni, a motor vehicle make Subaru, a farm at Chanika, a piece of land at Kisarawe, a house at Mahubike, a piece of land at Mchikichini, payments from the house, a piece of

land at Mwasanga and proceeds from the shops, the trial court was satisfied and found that those properties, though matrimonial, were sold with the consent of the appellant as she knew and was aware that that was occupation of the respondent of buying and selling those properties at profit. That since the said assets were no longer in existence, they could not form the subject of division. It also found that eight heads of cattle, fifty goats and three sheep were not jointly acquired.

Again, the appellant was not satisfied with that decision and appealed to the District Court on the grounds that the Primary Court erred in not including the properties sold without her consent in the division, the holding that the 8 head of cattle, 50 goats and 3 sheep were personal properties and not matrimonial property subject to division.

Upon hearing the appeal, the District Court partly allowed the appeal by ordering the 3 heads of cattle and 20 goats to be given to the appellant as her share and the existing properties be distributed equally. The first appellate court declined to include the sold property by the respondent without the consent of the appellant on the ground that there was the appellant's implied or express consent.

Still aggrieved, the appellant has appealed to this court challenging the District Court's decision in Civil Appeal No. 56 of 2016. The appeal is premised on the following grounds:

1. That the learned appellate Resident Magistrate erred in law and fact to hold that there was an implied or expressed consent of the appellant in disposing of the matrimonial properties.
2. The learned appellate Resident Magistrate erred in law and in fact in not including all the matrimonial properties in the division of matrimonial properties
3. The learned appellate Resident Magistrate erred in law and in fact in holding that there was/is no evidence to establish that some of the mat4imonial properties are still existing and not sold as alleged by the respondent
4. The learned appellate Resident Magistrate erred in law and in fact to order the division of cows and goats only and leaving other properties undivided.
5. The learned appellate Resident Magistrate erred in law and in fact in refusing to order that the respondent is not to get the existing matrimonial properties as he had already sold his properties

6. The learned appellate Resident Magistrate erred in law and in fact in holding that the learned trial magistrate did not base on the insufficient evidence of the respondent to distribute the matrimonial properties.

The appeal was resisted by the respondent who paddled his own canoe. The appellant was represented by Mr. Hamza Abraham Senguji, learned counsel. By consent of the parties, the appeal was argued in writing.

Supporting the appeal, learned counsel for the appellant, after detailing the historical background commenced with the first ground of appeal. He submitted that there was no evidence in record that the appellant impliedly or expressly consented to the disposition of the matrimonial assets. Instead, there is ample evidence that the respondent sold the Bagamoyo farm without the consent of the spouse as admitted by the respondent. Learned counsel contended that the respondent sold a big part of the matrimonial assets such as farms and plots without the consent of the appellant who was busy selling in the shop and was not informed of the sale and there was no means that she could have known and then give a consent as she was not aware.

On the second ground of appeal, Mr. Senguji contended that the evidence shows that the source of all matrimonial assets were the shops which were properly managed by the appellant. He supported this by quoting the respondent who testified that *"...yeye akawa yupo dukani, alisimamia duka vizuri likatengeneza mali, likajenga nyumba nne (4) moja ipo Tungi, mbili zipo Gezaulole na moja Same.."*. Further that this evidence was corroborated by that of the appellant. Counsel was of the view that since the said matrimonial properties were sold without her consent and the proceeds were not included in developing other matrimonial assets, the respondent was, therefore, required to compensate the appellant the money or proceeds acquired through the sale of the matrimonial assets.

Regarding the third ground, it was submitted that the respondent bought several plots/shamba using money obtained from the shops managed by the appellant. Further that the properties sold by the respondent was sold to unknown persons with no prices which casts doubt that the properties were really sold as there is no proof to that effect. Counsel for the appellant was of the view that the properties are still in existence and are concealed by the respondent.

As to the fourth ground, the complaint is that there was no equal division of the stock, instead the respondent was given a big share. Besides, the first appellate court was required also to distribute or divide properties that is one house at Tungi, two houses at Gezaulole and one house at Same.

On the fifth ground of appeal it is argued that the two courts below were to accept that since the respondent got a big share, he is entitled to nothing and that it was wrong for the respondent to give some matrimonaial assets to his other wife.

Finally, that since the respondent accepts that the source of the matrimonial properties was/is from the shops which were under the management of the appellant, his argument that the source of the matrimonial property was the buying and selling the plots/shamba, is a contradiction.

It is prayed on part of the appellant that the matrimonial assets which are not in dispute should be divided. The said properties were listed to be one house at Tungi, two houses at Gezaulole, one house at Same and three farms at Mkuranga and that those properties which were sold by the respondent without the consent of the appellant should be include in the division.

In his reply, the respondent told this court that the two lower courts were correct to state that the properties on which order of division was made are a house at Tungi, two houses at Gezaulole, a house at Same, three farms at Mkuranga and several house hold assets. He said that these items were jointly acquired. As to the 2nd ground of appeal, the respondent stated that the lower courts were correct to exclude in the division the properties located at Bagamoyo, Mwasonga, Mwongozo, Gezaulole, Tundwi Centre, Kigamboni Vijibweni, Gongo la Mboto, Kisarani and Tungi. The reason the respondent gave is that the said items were disposed of by the appellant while they were still in good terms and that the proceeds were used to pay school fees for the children, injected in small family business which produced the current matrimonial properties which the District Court ordered to be divided equally. The respondent further argued that the cattle and goats were not matrimonial property.

He concluded that the two lower courts correctly evaluated the evidence and arrived at the right decision.

Counsel for the appellant, in rejoinder, stated that the appellant was instrumental to the acquisition of all matrimonial assets. That the respondent's business of buying and selling plots

did not contribute towards the acquisition of the matrimonial assets otherwise, his contribution was minimal, learned counsel contended. He further submitted that the matrimonial property was sold without the appellant's consent and she did not enjoy the proceeds; only that the District Court was corrcct to order the division of the stock as the appellant had assisted in developing them. Counsel for the appellant relied on the case of **Anna Kanugha v. Andrea Kanugha** [1996] TLR 195 where this court said:

> "Personal property is liable for distribution in terms of section 114 (3) of the Law of Marriage Act when such property has been substantially improved during the marriage by joint efforts of spouses."

I have considered the lower courts' records, the grounds of appeal and the submissions from both sides. I have no scintilla of doubt that the appeal is devoid of legal merit.

Section 114 (1) and (2) of the Law of Marriage Act, Cap.29 R. E. 2002 on powers of court to order division of matrimonial assets 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.

(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.

(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.

As the law stands, subject to the factors stipulated under section 114 of the Law of Marriage Act, Cap. 29 R.E. 2002, the court may divide the assets or the sale proceeds in such proportions as it thinks reasonable.

In the instant case, the trial Primary Court which heard and considered the evidence of both parties did, its judgment dated 10th day of June, 2016 make the following order:

"....Mahakama imeamua ifuatavyo:

a. Mali za ndoa zilizochumwa kwa pamoja na wadaawa na ambazo zipo ni

    i. Nyumba moja Same,
    ii. Nyumba mbili (2) Gezaulole
    iii. Nyumba moja Tungi
    iv. Mashamba matatu Mkuranga
    v. Vyombo vyote vya ndani

b. Mgao wa mali hizo umezingatia fungu la 114(2) (b) Sheria ya Ndoa (R.E.2002) Cap. 29 kwa ushiriki wa kila mmoja katika upatikanaji wa mali hizo na hivyo mali zigawiwe kwa asilimia 50% kwa 50% kila mmoja.

The appellant's first appeal to the District Court at Temeke was partly allowed in that she was awarded two cows and 20 goats out of 5 cows and 20 goats which were in the farm.

As far as the first ground of appeal is concerned, I find the appellant's complaint that there was no implied or express consent of the appellant in disposing the matrimonial properties lacking merit.

First, the trial court was satisfied, on the evidence, that the disposal of the said matrimonial assets were with the appellant's consent. At p. of the trial court's judgment, it is recorded:

> "SU anasema hakuwa na taarifa ya uuzaji huo ila hajaeleza hapa mahakamani kwamba mali hizo ziliuzwa lini bila ridhaa yake, sababu kama zingekuwa ziliuzwa baada ya shauri la talaka kufunguliwa angeomba zuio Mahakamani uuzaji usiendelee kwa kuwa hakukuwa na kitu kama hicho basi mahakam inaamua kuwa mali hizo ziliuzwa wadaawa wakiwa katika ndoa na kila mmoja alikuwa na taarifa za uuzaji huo na hivyo basi ni mali ambazo hazipo na hivyo haziwezi kuingizwa katika mgao..."

This finding was confirmed by the District Court on appeal.

Second, it was in evidence which fact was accepted by both the courts below that the respondent was buying some pieces of land and farms and selling them on profit, and that was his daily occupation while the appellant was selling in the shops. There is nowhere in evidence that he appellant protested the business of her partner. In such circumstances, the finding by the two courts below that the appellant either expressly or impliedly had consented to the sale cannot be assailed. The first ground of appeal crumbles.

Regarding the second ground of appeal, the two courts below were clear that since those other matrimonial properties were not in existence, they could not be included in the division. The respondent maintained that those other matrimonial assets were disposed of on profit and were therefore no longer there. The appellant was clear that she was not sure whether or not they were sold. As the maxim Latin maxim goes ***Ei qui affirmat non ei qui negat incumbit probatio*** meaning that he who affirms must prove. It was, therefore, upon the appellant to prove that those matrimonial properties were not sold and are in existence. That is the law. The second ground of appeal fails.

On the third ground of appeal, there was no evidence proving that such matrimonial assets were in existence otherwise, the appellant would have identified them and stated their whereabouts.

The learned appellate Magistrate was right in ordering division of cows and goats only as those are the matrimonial assets which were acquired by the respondent and substantially developed by the appellant. It would have been a wrong approach on either courts to order division of matrimonial assets which were not existent. That disposes the fourth ground of appeal.

I now turn to the fifth ground of appeal. The evidence on record is clear that the respondent's daily occupation and business was buying and selling pieces of land and farms on profit. The respondent proved that such proceeds from the sale of the said properties were not only the source of the matrimonial properties that were equally divided by the trial court but also assisted in paying school fees for their children. The refusal to order that the respondent was not entitled to get the existing matrimonial properties as he had already sold his properties was legally justified.

Lastly, there is the sixth ground of appeal. Having considered the records of the two courts below, I am satisfied that this ground lacks merit. This is so because, at first when the matter was tried in the Primary Court, the District Court, on the first appeal, ordered a re-trial so that evidence on participation and contribution of the matrimonial properties by the parties was taken. This order was complied with and the trial court heard both parties and made a record and finding to this effect in the following words:

> *".Katika kusikiliza upya shauri hili Mahakama pamoja na wadaawa kwa pamoja walikaa na kuchambua matukio yenye ubishi katika machumo. Na yafuatayo ndiyo yalikuwa matukio yenye ubishi*
>
> 1. *Je, mali za ndoa ni zipi?*
> 2. *Je, mgao utakuwa kwa asilimia ngapi kulingana na ushiriki wa kila mmoja katika upatikanaji wa mali hizo, na matakwa mengine ya sheria*
>
> *Katika kujadili hilo na kuthibitisha madai kila mdaawa walieleza shauri lake an alileta mashahidi wake kuthibitisha madai yake".*

Indeed, the record of the trial court is clear that the appellant ushered in a total of five witnesses while the respondent had three witnesses. The trial court, apart from considering the evidence tendered before it, it also took into consideration the provisions of section 114 (2) (b) of the Law of Marriage Act in the division of the matrimonial assets. This ground also fails.

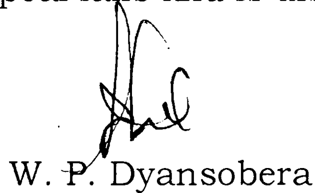
Before I pen down, I must observe that I have found nothing material to fault the findings of the two courts below. In coming to this conclusion, I have borne in mind two important principles that is when should the appellate court disturb the concurrent findings of facts of the two lower courts and the domain of the trial court in assessment of the credibility of a witness. The Court of Appeal of Tanzania in the case of **Salum Ally v. R,** Criminal Appeal No. 106 of 2013, stated:

> "*The first principle is that a second appellate court is required to be very slow in disturbing the concurrent findings of fact of the two courts below unless they completely misapprehended the substance, nature and quality of the evidence resulting into an unfair conviction....The second principle is that, as often expressed by this Court in previous such situations, the privilege of assessing the demeanour of the witness resides in*

the trial court which had the advantage of seeing and observing any such witness testify.

Although those principles featured in a criminal case, I have no doubt that the same principles apply also in civil cases like the present and my evaluation of the evidence and findings of the two courts below leads me to the conclusion that such principles also apply in this matter.

In the upshot, the appeal fails and is dismissed with no order as to costs.

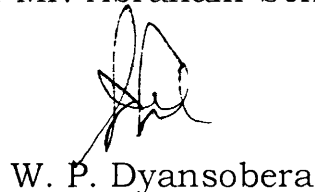


W. P. Dyansobera

JUDGE

20.2.2018

Delivered this 20th day of February, 2018 in the presence of the respondent in person and Mr. Abraham Senguji, learned counsel for the appellant.



W. P. Dyansobera

JUDGE