IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 100 OF 2016

BLASIUS FRANK KAVISHE ..... APPELLANT

VERSUS

DEVOTA PHILIPO URIO ..... RESPONDENT

12/04&25/05/2018

JUDGMENT

MWANDAMBO, J:-

The parties to this appeal are estranged couple. Their marriage duly celebrated under Christian rites in 1996 came to formal dissolution on 27th May, 2015 through a decree of divorce granted by the District Court of Ilala in Matrimonial Cause No. 19 of 2008. The appeal by the Appellant who was found to have been the source of the dispute leading to the divorce is not against anything else than his dissatisfaction against the order for division of matrimonial assets. The grievances against the trial court's decision are made of two points memorandum of appeal which will become apparent shortly.

To the extent necessary for the purpose of this appeal, the facts that led to the proceedings and judgment appealed are against fairly articulated in the judgment of the trial court. Briefly, the Appellant and the Respondent became intimate lovers way back in 1992 and entered into cohabitation from that moment. Subsequently, they celebrated a Christian marriage in 1996 and lived a happy marriage life until 2002 when feuds and tensions started rocking their happiness primarily the Respondent's suspicion of the Appellant's conduct and behaviour. The Respondent's efforts for conciliation did not bear fruits which resulted in her

petitioning for divorce and ancillary reliefs before the trial court in 2008. Specifically, the Appellant prayed for an order for equal division of jointly acquired matrimonial properties appearing in a list annexed to the petition for divorce. The list included the following assets: a house at Segerea, a *banda* of five bedrooms, one sofa set, 3 beds and mattresses, radio and household items. In his answer to the petition, the Appellant denied that the house at Tabata Segerea was jointly acquired during the subsistence of the marriage and thus it was not subject to any order for division.

By reason of the Appellant's denial on the matrimonial, the trial court framed an issue whether the Appellant and the Respondent had acquired joint matrimonial assets during the subsistence of their marriage subject of division upon dissolution of their marriage.

After hearing evidence from both of them, the trial court found sufficient evidence for an affirmative answer to that issue. The trial court became satisfied on the evidence that the house at Segerea was constructed during the subsistence of the marriage and so it was a matrimonial asset which was subject to division to the parties upon the grant of the decree of divorce so were the household items. The learned trial Resident Magistrate found no evidence of other properties the Respondent had claimed and so the order of division was limited to the matrimonial house at Segerea as well as the household items including furniture. Having regard to the provisions of section 114(2) of The Law of Marriage Act, Cap 29 [R.E 2002] "the Act" as well as the interpretation of it in **Bi. Hawa Mohamed Vs. Ally Sefu** [1983] TLR 32 in the light of the evidence before it the trial court made a division of 60% to the Respondent and 40% to the Appellant. The Appellant criticises the division on the following grounds namely;

1. *That the learned Honourable Magistrate erred in law and fact for holding that the Appellant to be awarded 40% and Respondent 60% of*

the matrimonial properties without justification and/or giving the basis for such distribution.

2. *That the learned Honourable Magistrate erred in law and fact for failure to evaluate evidence tendered by the Appellant and Respondent and reached to unfair decision against the appellant in respect of the acquisition of matrimonial assets.*

At the request of the parties/Advocates the appeal was argues by way of written submissions to which I now turn my attention. The essence of the submissions by the Appellant through Mr. Living Raphael Kimaro learned Advocate is that there was no evidence to justify a division of 60% to the Respondent more so when she had prayed for equal division in her petition. The learned Advocate argues that the trial court failed to direct its mind to section 114 (2) of the Act in relation to the extent of the contribution made by each of the parties in money, property or work towards the acquiring of the assets. According to the learned Advocate, what was important before the lower court was satisfactory proof of her contribution in terms of money or labour to justify that award rather than mere reference to **Bi. Hawa Mohamed vs Ally Sefu** (supra) which was not relevant. Submitting on the second ground, the Advocate argues that the trial court failed to evaluate the evidence properly on the acquisition of the house at Tabata Segera which showed that it was acquired before the celebration of the marriage and that was inconsistent with this Court's holding in **Samweli Moyo vs Mary Cassian Kayombo** [1999] TLR 197. The learned Advocate argues further that failure to appreciate the evidence adduced by the Appellant resulted into an erroneous finding that the house was acquired during the subsistence of the marriage as a result of which the trial court held that the house was a matrimonial property and thus subject of the division when in fact it was not. On the basis of the foregoing the learned Advocate urges the court to find that the trial court's findings were a result

of serious misdirections and should be quashed resulting into an order allowing the appeal.

Not surprisingly, Ms. Nancy J. Mosha learned Advocate for the Respondent supports the trial court's judgment and urges the Court to dismiss the appeal in its entirety. The learned Advocate submits that the house which the trial court ordered division was a matrimonial property because the parties and issues of marriage have been staying which the Respondent was found to have made greater contribution to its acquisition and hence a higher share in the division irrespective of what she prayed for in her petition. The learned Advocate reinforces her submission on section 114 (2) of the Act on the trial court's power to order division of matrimonial properties acquired by their joint efforts having regard to the contribution of each party to the marriage. It is the learned Advocate's submission that there was evidence before the trial court that the Respondent contributed more to the good welfare of the children through her employment income compared to the Appellant who was irresponsible and so the trial court was right in making a higher rate of division to the Respondent than the Appellant.

In relation to ground two, the learned Advocate submits that the argument about acquisition of the house before marriage was not before the trial court and so that court cannot be faulted on an issue which did not form the basis of its decision now appealed against. The learned Advocate submits further that all what the Appellant is trying to do in this appeal is nothing less than simply leveling allegations which if founded could have been raised before the trial court and determined there and not in this appeal. Based on the foregoing submission the learned Advocate distinguished **Samweli Moyo V. Cassian Kayombo** [1999] TLR 197 as unhelpful to the instant appeal because it relates to division of assets if the same are proved to be material which is what the trial court did in the instant appeal. On the whole, the learned Advocate urges the Court to dismiss the appeal for lack of merits.

In rejoinder the learned Advocate for the Appellant reiterates his submissions in chief and submits further that there was no sufficient evidence to prove that the Respondent made greater contribution to the acquisition of the house justifying a higher percentage than the Appellant. Further, the learned Advocate argues that the trial court did not have any regard to the custody and maintenance of children as a factor in apportioning a higher rate of division in favour of the Respondent and in any case it is not one of the factors to be taken into account under section 114(2) of the Act. Rejoining the submissions in reply on the second ground of appeal, the Appellant's Advocate submits that the issue relating to acquisition of the house was raised before the trial court but that court made no determination and instead it concluded that it was a matrimonial property in the absence of sufficient evidence in support of it.

Having examined the submission for and against the appeal, I propose to discuss the second ground of appeal before I revert to the first one because it is my view that the acquisition of the house in dispute before the marriage is central to the determination of the appeal and so it has to be determined first. Before I do so, I wish to dispose one argument which surfaced in the submissions by the Respondent contending that the acquisition of the house before the marriage was a new issue which was not determined by the trial Court and so it should not be entertained in this appeal. It is settled law that an appellate court can only consider what was decided by the trial court on the authority of **Elisa Mosses Msaki V. Yesaya Ngateu Matee** [1990] TLR 90. It is evident from the reply to the petition (para 15) the Appellant denied that the house which the Respondent included in the list of matrimonial assets was acquired before the marriage. The trial court framed issue number 3 as follows:-

> *"Whether the petitioner and the Respondent have acquired joint matrimonial assets during the subsistence of marriage subject to division"*

That being so, it follows that the acquisition of the house as part of the matrimonial assets was a subject of the trial court's determination and not a new issue as contended by the learned Advocate for the Respondent. I would thus reject that submission for being baseless. Having so held, the next issue for my determination is whether there was sufficient evidence to prove that the house at Tabata Segerea was acquired before the marriage. Put it differently, did the Appellant discharge his burden of proof that the house was so acquired by his sole efforts before the marriage with the Respondent? The trial court believed the Respondent that the matrimonial house at Tabata Segerea was built during the subsistence of the marriage between the parties which qualified to be a matrimonial asset acquired jointly and thus it became subject of division following grant of a decree of divorce.

The learned Advocate for the Appellant criticizes the trial court for jumping into the conclusion that the house was a matrimonial asset without making a finding based on evidence that the said house was acquired during the subsistence of the marriage. I respectfully endorse that submission primarily because the trial court's judgment is conspicuously silent. It does not address the issue it framed by making a valuation of evidence adduced for and against that issue and why it believed the one version of that evidence against the other. Indeed the trial court's decision on issue number three which was central to the order for division was an unreasoned one which offended the mandatory requirement stipulated under Order XX rule 4 of the Civil Procedure Code, Cap 33 [R.E 2002] which commands a trial court to give reasons for its decision. Contrary to the submissions by the learned Advocate for the Respondent there is nothing in the trial court's decision that the learned Resident Magistrate directed his mind to the evidence for and against the issue before making a finding that the house was a matrimonial assets which was subject of division. Having so held it follows that that finding had no basis in law. However, since this court sits as a first appellate court it is entitled to look at the evidence

before the trial court and make own findings on the authority of **Martha Wejja Versus A.G. and** Another [1982] 35 at page 4. This Court applied the principle in **Mbeya Wood & Joinery Works Ltd vs Tanzania Electric Supply Co. Ltd**, DC Civil appeal No. 35 of 1996, HC, Mbeya Registry) (unreported). I will do alike in this appeal by reappraising the evidence and making my own findings relevant to the issue under consideration. upon examination of the evidence adduced before the trial court it is obvious that the Respondent led evidence to prove that the plot on which the house was constructed was built by joint effort in that the Respondent contributed Tshs. 50,000/= and the Appellant 30,000/= towards acquisition of the plot. The Appellant did not controvert that evidence. On the other hand answering questions in cross-examination, the Appellant admitted that he and the Respondent bought the plot together and built the house thereon. With that evidence there can be no doubt that the house which the trial court ordered to be divided was a matrimonial asset acquired during the subsistence of the marriage by their joint effort within the meaning of section 114(2) of the Act. Having so found, I see no merit in ground two of appeal which is dismissed accordingly. I would now revert to ground one.

From the evidence which stands uncontroverted, the Appellant and the Respondent contributed towards the purchase of the plot and the development of their joint efforts. In recognition of that fact the Respondent prayed for an equal division of the matrimonial assets including the house at Tabata Segerea. However, the trial court deemed it fit to make a division of 40% to the Appellant and 60% to the Respondent. The Appellant faults that formula contending that the trial court did not have regard to the consideration set out under section 114 (2) of the Act particularly the extent of the contribution the Respondent made towards its acquisition. I have already held that the house was jointly acquired by the joint efforts of the parties and as acknowledged by the Appellant himself answering questions during cross-examination.

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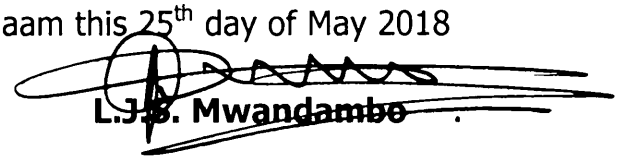
Having regard to the evidence and the Respondent's prayer for an equal division in the light of section 114 (2) (a) (b) of the Act, this was a fit case for an equal division. It was thus an error for the trial court to have made a division beyond what the Respondent had asked for as well as the evidence before it. The Appellant has asked for 70% division to himself but the evidence speaks louder against that and so, I would as I do set aside the trial court's formula of division and substitute it with an equal division.

In the event and for the foregoing reasons the appeal succeeds in ground one and fails in ground two. The trial court's order of division is hereby quashed and substituted with one for equal division of the matrimonial house at Tabata Segerea. Each party shall bear his/her own costs. Order accordingly.

Dated at Dar es Salaam this 25th day of May 2018



L.J.S. Mwandambo

JUDGE

25/05/2018