IN THE HIGH COURT OF TANZANIA

AT BUKOBA

MATRIMONIAL APPEAL NO.1 OF 2017

(Arising from Matrimonial Appeal No.6 of 2016 of Bukoba District Court and original Matrimonial Cause No. 88 of 2013 of Bukoba Urban Primary Court)

ANNA BENJAMIN MALONGO..... APPELLANT

VERSUS

YOHANA BALOLE ..... RESPONDENT

JUDGMENT

10.04 & 29.06.2018

BONGOLE, J.

This is the second appeal to this court where the appellant for the first time petitioned the primary court of Bukoba for divorce, distribution of matrimonial property and maintenance of issues. The trial court annulled the marriage and ordered for maintenance and distribution of matrimonial property whose details will be given shortly in this judgment.

The appellant was not satisfied with the distribution of the property so she appealed to the district court of Bukoba which partly upheld the trial court's decision.

Still dissatisfied, the appellant appealed to this court armed with four grounds coached thus:-

1.That, after having properly set aside the trial court's order of distribution of the private owned premises/property situated there at Kashai Matopeni, the Appellate court grossly erred in law by failing to order for the redistribution of the joint owned assets, thus prejudiced the rights of the Appellant.

2. That, the learned Magistrate also misconceived the principles of the law regarding the rights of the spouses in relation to the order made by the trial court over the premises erected there at Kibeta area.

That, by declaring the house at Igoma – Mwanza the property of the Elder wife of the Respondent both the trial court and the Appellate court grossly erred in law and fact to determine a case which was not before it.

4. That, the Resident Magistrate grossly erred in law and in fact by upholding the decision of the trial court which was contradictory in nature regarding the division of the matrimonial assets.

The respondent filed a reply to the petition of appeal refuting all the grounds.

Briefly, the facts giving rise to this appeal are not complex and they can be summarized as follows.

The couple who are said to have celebrated their marriage in 2005 used to reside in a single rental room at Hamgembe within Kagera Region. Before marriage the appellant resided at Kashai Matopeni in her own house. They later on shifted to another rental house at Nyakanyasi.

During the existence of their marriage the litigants are said to have acquired joint properties in Mwanza and Kagera Regions while others were there before their marriage. As their relationship became sour, the appellant petitioned the primary court of Bukoba urban for divorce.

The trial court annulled the marriage and ordered for payment of Tshs. 100,000/= monthly as maintenance, equal distribution of a house situate at Buswelu in Mwanza Region, equal distribution of the households in the house situate at Kibeta within Bukoba Municipality while the house remained the property of the respondent and his other 7 children from the other wife. The other house which the appellant is said to have acquired alone

but later on during the existence of the marriage the respondent participated to renovate it was given to the appellant while the other house situate at Igoma in Mwanza Region was ordered to be the property of the other first wife. Similarly, 18 cows and one motor vehicle were equally divided between the litigants.

It is this distribution that the appellant seeks to challenge before this court.

At the hearing before this court the appellant was represented by Ms. Aneth learned counsel while the respondent was represented by Mr.Mugisha learned counsel. By leave of this court the appeal was argued by way of written submission.

On the first ground of appeal, Ms. Aneth submitted that division of matrimonial assets by the trial court included the house situated at Kashai Matopeni which was the personal property of the appellant but the same was given to her as a matrimonial share. He submitted that the District Court upheld this decision by including the same among the matrimonial assets. She argued that this is wrong because having treated the said property as personal property the learned appellate Magistrate ought to have ordered re-distribution of matrimonial assets to enable the appellant to get her share.

It was her submission on the second ground that according to the evidence on record, both parties confirmed that the house located at Kibeta comprised of 10 rooms was a matrimonial asset. She argued that after finding the said house to be matrimonial the trial court erred in law for failure to redistribute the same to the parties instead of distributing the same to the respondent alone. She was of the view that this was contrary to the principles governing distribution of matrimonial assets as provided for under **section 114 of the Law of Marriage Act Cap.29 R.E.2002].**

She submitted that it was wrong for the trial court to hold that the only matrimonial motor vehicle was Saloon Mark II and not forester Subaru. She questioned that if there was no evidence to prove existence of both motor vehicles, how the trial court concluded that only one motor vehicle was in existence.

Lastly, Ms. Aneth challenged the distribution of matrimonial property on the basis that the respondent had seven issues so he was entitled to reside in the house situate at Kibeta with other 5 issues of the other wife. According to her the record shows that the only issues in existence were two namely Paul and Magoke. She challenged both courts on where the said issues came from. She invited this court to set aside the division of the property made by both courts and order for re-distribution.

In reply, the respondent tasked the appellant to prove that it is mandatory for the District court to re-distribute matrimonial property in the law. In his view the trial court had mandate to order distribution of the matrimonial assets according to the evidence and how it deem fit and just to do. He maintained that the distribution by both courts was fair and just.

On grounds two and three, he briefly submitted that the appellant failed to establish existence of other assets complained of and that whatever was distributed was done by the courts according to the facts and evidence which were available. He argued that to order for redistribution of the assets which are not proved to exist will result into injustice. He invited this court to dismiss the appeal.

In brief rejoinder, the appellant was emphatic that the children alleged to reside with the respondent were not proved to exist adding that the redistribution should be made in respect of the Subaru ADU be given to the appellant and the respondent remain with Mark II. In respect of the order for maintenance, she complained that the amount of Tshs. 100,000/= monthly is not yet paid by the respondent to date. She thus prayed the respondent be compelled to pay the said money for 19 months.

I have read the record of this appeal and listened to the submission and in the process of resolving this appeal; the issue remains to be whether this court should order for re-distribution of the matrimonial assets. In doing so I will be dealing with every ground of appeal and reply there to.

It was the submission of Ms. Aneth on the first ground that the trial court erred to include the house of the appellant situate at Kashai Matopeni in the division of matrimonial assets. She argued that the said house was a private property as it was solely acquired by the appellant before marriage. Though I do not completely buy the argument by the learned counsel that a privately owned property by one spouse cannot be included in the matrimonial assets, I still note on the record that the property complained of was not divided between the litigants but given to the appellant alone. Let me first explain a bit on how a privately owned property by one spouse before marriage can later on be matrimonial. This happens when such a spouse later on involves his or her spouse and their new joint efforts are used to develop or upkeep the former property. In my view, this scenario is what is envisaged under **section 114 (1) (2)(3) of the Law of Marriage Act [Cap.29 R.E.2002]** which provides thus:-

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.[Emphasis supplied]

Su –section 3 above which does not in my view exclude the either spouse, explicitly requires that when a property was solely acquired before marriage by either of the couples but involves the contribution of another later during the existence of their marriage for substantial improvement of the same then, such property is matrimonial. Thus, in the appeal at hand if the appellant had involved or taken contribution of the respondent in improving the Kashai Matopeni house; she could not validly argue that it was wrongly treated as matrimonial. However, the District court categorically resolved this issue by clarifying what the trial court had contradicted itself at page 14 of the typed judgment in trying to term it as matrimonial. It was therefore subsequently held by the District court that the respondent had not proved any contribution he used in improving the same so, the house

remained to be the property of the appellant and it was so declared. The only misdirection here by the District court is to include the said house in the division of matrimonial property after it had found that the same was privately owned. With due respect the learned District court Magistrate, erred in law and fact to hold that the Kashai Matopeni house should be awarded to the appellant while it was not part of the matrimonial properties jointly acquired.

On the second ground, Ms. Aneth's contention was that the appellant was deprived of a share in the house situate at Kibeta as the same was given to the respondent alone and the issues said to be borne of another wife. She further challenged the existence of the other said issues as well as another wife. Much as I respect this argument, but the record is apparent at page 5 of the trial court typed proceedings first paragraph that, before the marriage of the litigants the respondent had another wife and children from Mwanza. This fact which was not disputed implies that the appellant was fully aware of that fact that the respondent had other children as she personally informed the trial court on the same. At page 5 of the proceedings the appellant is recorded thus:-

"SU1 alinza (sic) tabia ya kwenda wa kienyeji kwa (sic) kienyeji pamoja na watoto wa yule mke wa awali wa kwanza (sic)."

During the trial this issue was not contested and it is the same that guided the trial court to allow the respondent to reside in the Kibeta house and these other children but ordered the Buswelu house, 18 cows and the mark II car to be apportioned between the litigants. In addition the appellant was left with Tshs.100, 000/= monthly as maintenance.

Taking into account that the litigants acquired two houses one at Kibeta Bukoba and the 2nd at Buswelu Mwanza; the subordinate counts ought to have divided the houses in equal shares. A fact that the Respondent is or was residing in the Kibeta House with his children it was prudent and correct as I so find to be awarded the said house.

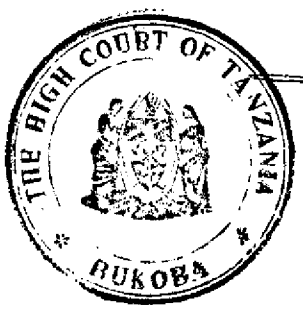
The appellant ought to have been awarded the Buswelu house as her share and I so find and award.

With regard to the two motor vehicles, they were also required to be divided each part to get one. I so find and divide that the Mark II car be awarded to the Appellant and the Forester car to the Respondent.

The division of the cows and the order of maintenance I find the same to be fair and need no intervention by this court save that the Respondent should comply with the order of paying Tshs. 100,000/= monthly as maintenance.

In the upshort, this appeal is allowed to the extent explained herein above.

From the fact that the litigants were husband and wife and more so father and mother I will wisely award no order as to costs.



S.B. Bongole

Judge

29/6/2018

Date: 29/6/2018

Coram: Hon. S.B. Bongole, J.

Appellant: Ms. Aneth Lwiza

Respondent: Absent

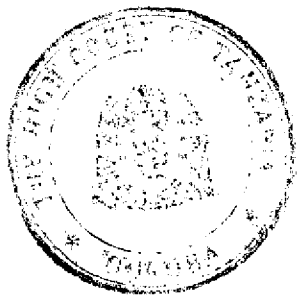
B/C: A. Kithama

Ms. Lwiza:

My Lord, the appeal comes for judgment and I am ready.

Court:

Judgment delivered.

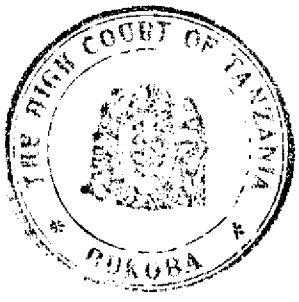


S.B. Bongole

Judge

29/6/2018

Right of Appeal explained.



S.B. Bongole

Judge

29/6/2018