IN THE HIGH COURT OF TANZANIA
AT MBEYA
(PC.) MATRIMONIAL APPEAL No. 1 OF 2019.
(Arising from Matrimonial Appeal No. 9 of 2018, in the District Court of Mbeya District, at Mbeya, Original Matrimonial Cause No. 3 of 2018, in the Primary Court of Mbeya District, at Iyunga).

PAULINA D/O NERESON..... APPELLANT

VERSUS

ZAWADI S/O TIMOTH..... RESPONDENT

JUDGMENT

27/02 & 22/05/2020.
UTAMWA, J.

This is a second appeal. The appellant PAULINA D/O NERESON is challenging the judgment dated 17th July, 2018 (impugned judgment) of the District Court of Mbeya District, at Mbeya (the District Court) in Matrimonial Appeal No. 9 of 2018. The matter arose in Matrimonial Cause No. 3 of 2018, in the Primary Court of Mbeya District, at Iyunga (trial court). The respondent ZAWADI S/O TIMOTH resisted the appeal.

The brief background of this matter, according to the record is that, the appellant (Paulina) and the respondent (Zawadi) were wife and husband respectively. The appellant filed a matrimonial matter before the trial court claiming for divorce and division of matrimonial assets. In her claim, she listed such assets as two houses, one at Iyunga-Mbeya and another at Inyala-Mbeya. Domestic utensils were also in the list though not specified. The respondent did not dispute the claim for divorce. However, he denied the fact that he owned the two house, let alone the joint ownership of the two houses with the appellant. Upon hearing the parties, the trial court granted the divorce. It then divided the two houses. The appellant was awarded the Inyala-house while the respondent was granted the Iyunga-house. The trial court further granted the appellant the custody of the two issues of the marriage, to

wit: Enea d/o Zawadi (12 years) and Linda d/o Zawadi (6 years). It also ordered the respondent to pay maintenance of the issues at the tune of Tanzanian Shillings 20, 000/= per month.

The respondent (Zawadi) was aggrieved by the distribution of the assets and the order for maintenance made by the trial court. He appealed to the District Court. In turn, the District Court partially allowed his appeal and partly dismissed it. It essentially set aside the division of the houses. Nonetheless, it dismissed the appeal against the order for maintenance. It is against this decision of the District Court that the appellant is now appealing to this court. Her memorandum of appeal envelopes three grounds of appeal. However, the grounds revolved around a single ground of appeal that, the District Court erred in law and fact in setting aside or reversing the trial court's order the division of one house to the appellant in spite of sufficient evidence proving her contribution to the two houses. The respondent resisted the appeal by filing what he termed "REPLY TO THE MEMORANDUM OF APPEAL." The appellant did not cross-appeal against the partial dismissal of his appeal regarding the order for maintenance.

When the appeal was called upon for hearing, the appellant had nothing to add to her memorandum of appeal. The respondent did not also wish to add to his reply, hence this appeal.

I have considered the improvised single ground of appeal, the record and the law. From all these aspects, it is clear that, in this appeal the parties do not dispute about the divorce and the order for maintenance. Their squabble is centred on the division of the two houses. The major issue here is thus, *whether or not the District Court erred in law and fact in reversing the trial court's order on division of the two houses*.

In my concerted view, the evidence on record do not attract answering the major issue posed above affirmatively for the following reasons: in making its impugned decision, the District Court relied upon the evidence adduced before the trial court. It (the District Court) found that, there was no any sufficient evidence demonstrating that the appellant (Paulina) had contributed to the acquiring of the two houses. The law guides that, the division of matrimonial assets depends on the contribution of the divorced-spouses to the jointly acquired property.

The contribution may be in monetary, labour or material form and there must be evidential proof to that fact. The District Court fortified its stance by a decision of this court in **Mwanaisha Omary v. Athuman Bakari, PC- Matrimonial Appeal No. 6 of 2014, High Court of Tanzania (HCT), at Mbeya** (unreported).

The District Court further held that, what the appellant testified before the trial court was only that the parties built the two houses jointly when their marriage was subsisting. The respondent denied to have built any house. He maintained that, the Iyunga-house referred to by the appellant belonged to his (appellant) father, one Timoth. The District Court further found that, the sale agreement tendered by the appellant to support here evidence (as exhibit P. 1) was a mere photocopy and not original. It thus, offended the provisions of Regulation 11 (1) (a) of The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN. No. 22 of 1964 (hereinafter called the GN). It consequently expunged it from the record.

The germane sub-issue here is thus, *Whether or not the parties acquired the two houses jointly at the time of their marriage*. In fact, as observed by the District Court, the appellant merely averred before the trial court that they had built the two houses. She did not specify when and how. She merely tendered a photocopy written sale agreement dated 20/7/2011 to support her averment. However, the document is pregnant of various weaknesses. In the first place, it only relates to a sale of a trees-farm at Inyala area of Iyunga Ward. It did not relate to any house. Furthermore, though the document is a photocopy, it conspicuously indicates, through naked eyes, that the name of the respondent "Zawadi Timoti" was inserted at the space of the purchaser by a different handwriting from the rest of the hand-written text in the document.

Moreover, the document was improperly tendered and admitted by the trial court in evidence as rightly found by the District Court. When the appellant tendered it in court, the respondent resisted it. However, the trial court admitted it as exhibit P. 1. As hinted earlier, the document was a mere uncertified photocopy. The conditions for admitting a copy of a documentary evidence before a primary court are set under Rule 11

(1) (a) of the GN (supra). These provisions read thus, and I quote them verbatim for a readymade reference:

> **"(1)** The original document must always be produced.
>
> *Exceptions* :
>
> **(a)** A copy of the original document may be proved if the original has been lost or destroyed or if it is in the hands of the opposing party and he will not produce it, but (unless paragraph (b) of this exception applies) oral evidence must be given that it is a true copy of the original."

From the above quoted provisions of the law, it is lucid that, only original documents have to be tendered in evidence before primary courts. In case a party wishes to tender a copy thereof, he/she has a duty to demonstrate that the listed conditions under Rule 11 (1) (a) of the GN are met. As hinted earlier, in the matter at hand, the record of the trial court does not indicate that the appellant had demonstrated that the document met the conditions before it was admitted by the trial court. On its party, the trial court blindly admitted the document in evidence though the respondent had objected it and though the conditions had not been met.

Owing to the reasons shown above, it cannot be said that there was proof that the parties acquired the two houses at the time of their marriage, let alone that they jointly acquired the same. Moreover, even if it is presumed (without deciding) that the parties acquired the two houses at the time of their marriage, it would still be difficult to find that the houses were acquired by joint efforts of the parties. It will not thus, be fair to hold that the said two houses were matrimonial assets subject to be divided between the parties. This view is based on the following reasons: the appellant and her one witness only testified before the trial court that, the parties had built the house. The appellant did not give any evidence of her contribution to the assets. In law, a trial court granting divorce is obliged to consider the extent of contribution of each spouse in dividing the jointly acquired property; see a decision by the Court of Appeal of Tanzania (CAT) in the case of **Yesse Mrisho v. Sania Abdul, Civil Appeal No. 147 of 2016, CAT at Mwanza** (unreported). In my further view, according to the envisaging under

section 114 (2) (b) of the LMA, evidence is needed for proving the extent of the contributions made by each party in the form of money, property or work towards the acquiring of the matrimonial assets which are subject to division upon a divorce being granted. This follows the stance of the law that, he who alleges a fact must prove it by evidence. However, the appellant did not adduce such evidence.

I am also aware of the legal position that, performance of domestic activities by a divorced spouse is one way of contributing to the jointly acquired assets; see the famous **Bi Hawa Mohamed v. Ally Seif [1983] TLR. 32** that was also cited with approval in the **Yesse Mrisho case** (supra). In the case at hand however, the appellant did not make even a mention before the trial court that she used to perform domestic activities. It did not suffice for the appellant to only prove that she was married to the respondent. The CAT in the **Yesse Mrisho case** also underlined that, proof of marriage alone does not suffice for purposes of division of matrimonial assets.

Having observed as above, I find the sub-issue posed above negatively that, the parties did not acquired the two houses either jointly or otherwise, at the time of their marriage. It follows thus, that, before the eyes of the law, the two houses were not matrimonial assets subject to division between the patties. The major issue is thus, also determined negatively that, the District Court did not err in reversing the trial court's order on division of the two houses. The improvised single ground of appeal is thus, overruled. The appeal is consequently dismissed in its entirety. Each party shall bear his own costs. This is because, the trial court also contributed in necessitating the appeal to the District Court and to this court for admitting the exhibit P. 1 in evidence erroneously.

J.H.K. Utamwa
Judge
22/05/2020.

22/05/2020.
CORAM; Hon. JHK. Utamwa, J.
Appellant: present in person.
Respondent; present in person.
BC; Mr. Patric Nundwe, RMA.

Court: Judgment delivered in the presence of the parties, in court, this 22nd May, 2020.

JHK. UTAMWA.
JUDGE

22/05/2020.