

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 144 OF 2019

(Arising from the Judgment Ilala District Court in Civil Appeal No. 2 of 2019 dated 03rd July, 2019 before Hon. A. A Mwingira, RM – Original Matrimonial Cause No. 28 of 2018 – Manzese/Sinza Primary Court)

HUSSEIN MOHAMED SHELA APPELLANT

VERSUS

NEEMA ALLY UGOMBA RESPONDENT

JUDGMENT

28th May & 26th June, 2020.

E. E. KAKOLAKI J

This is a second appeal in respect of the decision of Kinondoni District Court in Civil Appeal No. 2 of 2019 which was entered in favour of the respondent by dismissing the appellant's appeal. Discontented the appellant knocked doors of this court by way of appeal canvassed with two grounds of appeal as registered hereunder:

1. That the Honourable Magistrate erred in law by dividing the matrimonial assets without fully taking into consideration the extent of contribution towards acquisition of the same.
2. That, the Honourable magistrate erred in law by giving the respondent property with more value while the Appellant had more contribution towards acquisition of the same.

Briefly the story behind this appeal may be narrated as follows. The parties contracted marriage under Islamic rites in 2007 and blessed with no issue. Their sweet marriage lasted for (5) five years as from 2012 fracas between them started that led into separation and every one lead his or her own life despite several attempts of reconciliation by religious leaders. The appellant on 07/08/2018 opted to petition for divorce decree and division of matrimonial assets in Matrimonial Cause No. 28 of 2018 at Sinza/Manzese Primary Court. After full trial a divorce decree was issued by the trial court on 27/11/2018 and division of matrimonial assets order entered. The appellant was awarded a house situated at Tanga whereas the house located at Mabibo Dar es salaam was awarded to the respondent. It was further ordered that the rest of the assets that included a farm at Tanga, plots at Mbezi, Mbagala – Kongowe and Kigamboni were to be sold and distributed equally amongst the parties. Disgruntled appellant unsuccessful appealed to the District Court of Kinondoni in Civil Appeal No. 2 of 2018 whose decision was pronounced on 03/07/2019 upholding the trial court's decision save for the division of the house of Tanga that was awarded to the appellant which was excluded from the matrimonial assets allegedly acquired jointly. The appellate court divided the assets in the following order. The appellant was awarded the farm located at Tanga and plot located at Mbezi whereas the respondent retained the house of Mabibo. The plots of Mbagala Kongowe and Kigamboni were to be sold and divided amongst the parties equally. Aggrieved with the decision of being denied with the division of the Mabibo house he is now before this court by way of appeal registering her dissatisfaction in two grounds above cited which equally have the same complaint.

Both parties appeared unrepresented when the matter was called for hearing on 2/04/2020 and agreed to dispose the appeal by way of written submission in which the filling schedule order was issued. Submissions were filed save for rejoinder submission which the appellant opted not to do.

The appellant's major complaint in this appeal is that the appellate court erred when failed to consider his large extent of contribution towards acquisition of the matrimonial assets before their division. He was of the submission that in exercising its powers of division of matrimonial assets the court under section 114(1)(b) of the Law of Marriage Act, [Cap. 29 R.E 2002] must consider the extent of contribution made by each party in monetary, property or work towards acquisition of the assets. While appreciating domestic chores as part of contribution made by the respondent to the acquired assets, he was of the view that as stated in the case of **Bibie Mauridi Vs. Mohamed Ibrahim** (1989) TLR 162, performance of domestic duties does not necessarily amount to 50% contribution in acquisition of matrimonial property. He had it that there is nowhere in the trial court records it is stated that the respondent had direct monetary contribution apart from supervisory role towards acquisition of matrimonial assets. On his side he said being employed as chief storekeeper at Magomeni and later elevated to Chief godown/storekeeper he had direct monetary contribution towards acquisition of the assets. He argued that court's decision of awarding the Mabibo house and equal shares of the Mbagala Kongowe and Kigamboni plots to the respondent was unequal distribution compared to what was awarded to him which is the Mbezi plot and a farm of Tanga which he alleged was already excluded by the appellate court from matrimonial assets. He said was supposed to have large share corresponding his

contribution. He placed reliance on the case of **Amon Benedictor Buchwa Vs. Aisha Shabani Hamis**, PC Matrimonial Appeal No. 11 of 2019 (HC-Unreported) where the party with monetary contribution was awarded 70% and the one with indirect contribution 30% of the assets and not equal distribution. He therefore called this court to allow the appeal with costs by reversing the judgment and decree of the appellate court.

On her side the respondent resisted the appeal on the ground that the appellate court rightly decided the appeal after considering the contribution made by the respondent towards acquisition of the matrimonial assets. She stated that the appellate court and trial court took into consideration the provisions of section 114(1) of the Law of Marriage Act and the case of **Bi Hawa Mohamed Vs. Ally Seif** (1983) TLR 32 (CA) and further that joints efforts and works embraced domestic efforts and works of the husband and wife. She also cited two other unreported cases which she did not attach to the submission, I will therefore not consider them. She added that, she managed to prove her case on the balance of probabilities as provided under section 111 and 112 of the Evidence Act, [Cap. 6 R.E 2002] unlike the appellant who failed to do so. The respondent insisted that the trial court was correct in its decision when ordered equal division of matrimonial assets by 50% each. She therefore invited the court to uphold the appellate court decision and hold that the respondent is entitled to equal distribution of the matrimonial assets.

I have carefully considered both parties' submission which basically are on one issue equal or unequal distribution of matrimonial assets jointly acquired by the parties. There is no dispute that parties had legal marriage during which its existence some assets were jointly acquired. What is in

dispute is the extent of each part's contribution which the appellant claims to have contributed more and directly than the respondent who contributed indirectly through domestic chores. And that the appellate court did not consider his direct contribution as a result awarded the respondent large share of the assets despite of the fact that she had no monetary contribution towards their acquisition.

The appellant is also complaining that the appellate court apart from excluding the farm of Tanga from matrimonial assets wrongly proceeded to include it again in the division made. I think this complaint has no merit. As per the judgment of the appellate court what was exempted from matrimonial property was the house allegedly built in Tanga, included into matrimonial assets and awarded to the appellant by the trial court the decision which I find to be sound and uphold it. With regard to the farm the same was not excluded since the appellant was claiming to have sold it to his mother. However, no evidence was tendered in court to prove the alleged sale by tendering the sale agreement. Thus it was correct to treat it as a matrimonial property.

Now as to the extent of contribution as asserted by the appellant I agree with him that the appellate court did not consider this factor properly especially when awarded the house of Mabibo solely to the respondent without considering appellant's direct and monetary contribution. Where there is evidence of substantial contribution by a party towards acquisition of the matrimonial asset then justice demands equal distribution. This was the position in the case of **Salum Buzu Vs. Mariam Kibwana**, Civil Appeal No. 29 of 1992 (CAT-Unreported) where the Court said:

"where the evidence properly adduced that each party made substantial contribution towards the acquisition of matrimonial

assets justice requires equal division of matrimonial assets in question."

It was the appellant's submission that being employed he was earning salary thus making direct monetary contribution towards acquisition of matrimonial assets unlike the respondent who was a house wife and her contribution is counted through domestic efforts and works and or supervision during construction of Mabibo house. This fact of appellant working was not disputed by the respondent during the trial, thus a proof that the appellant contributed directly in the construction of the said house. Equally there is no dispute that the respondent contributed towards acquisition of the said house through domestic chores. As to what extent, I would answer to a small extent as compared to that of the appellant. I am therefore satisfied and hold that the appellant has proved direct contribution to the acquisition of the said house and deserves a large share in the said asset as there is no any other matrimonial house to be awarded to him. I therefore find the two grounds of appeal to have merits.

In the circumstances and for the foregoing reasons, I would allow the appeal on both grounds as I hereby do. The decision of appellate court awarding the house of Mabibo to the respondent is varied. I order that the appellant is entitled and hereby awarded 60% of the market value of the Mabibo house and the respondent 40%. With regard to the rest of the decision of the appellate court the same remains undisturbed. This being a matrimonial cause I order no costs.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of June, 2020.



E. E. KAKOLAKI

JUDGE

26/06/2020

Delivered at Dar es Salaam this 26th day of June, 2020 in the presence of Mr. **Salim Salim** learned advocate for appellant, the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

26/06/2020