

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

AT DAR ES SALAAM

CIVIL REVISION NO 13 OF 2019

(Arising from Matrimonial Cause No. 32 of 2016 at District Court of Temeke)

HIDAYA KONDO.....APPLICANT

VERSUS

MOHAMED SHABANI MUMBI.....1ST RESPONDENT

LEAH BEDA KABUNGIRA.....2ND RESPONDENT

RULING

MASABO, J.:

The Applicant, Hidaya Kondo has moved this court through a chamber summons praying that this court be pleased call and revise the records of the District Court of Temeke in Matrimonial Cause No. 32 of 2016. The Application is supported by an affidavit sworn by the Applicant which was sternly contested by two counter affidavits, filed by the first and the second respondent. The background of the application as deciphered from the record are that the Applicant in this case married one Mohamed Shabani Mumbi, the 1st respondent here in 1977 and were blessed with seven issues. During the subsistence of their marriage sometimes in 2004 the 1st respondent married Leah Beda Kabungira who is the 2nd Respondent herein with whom they were blessed with one issue.

The marriage between the Respondents lasted to 2016 when the 1st respondent successfully petitioned to divorce the 2nd Respondent. Having dissolved the marriage, the trial court, the District Court of Temeke, proceeded to order division of matrimonial assets. The 2nd Respondent was given a house located at Buza area which according to the Applicant was acquired before the respondent's marriage. Aggrieved by this decision, the applicant has filed for Revision under section 79(1) and (2) of the Civil Procedure Code [Cap 33 R.E 2019] seeking the court to grant the following orders;

1. That this Honorable Court may be pleased to call for the records of District Court of Temeke and examine whether it has properly exercised its jurisdiction so vested or it has illegally exercised its jurisdiction vested and nullify the order of distribution of the matrimonial properties made to respondents without considering the applicant.
2. That the costs of this application to follow the main event, and
3. For any other order (s) as this Honorable Court may deem fit and just to grant.

The hearing proceeded in writing. The Applicant was represented by Mr. Yudathadei Paul, learned Counsel, the 1st respondent appeared in person and the 2nd respondent enjoyed the services of Tanzania Women Lawyers association (TAWLA). Arguing in support of the Application Mr. Paul argued that the trial court misdirected itself by proceeding to divide the assets between the parties while ignoring that the 1st respondent was first married to the Applicant for about

39 years and that before the 2nd Respondent came into their lives, they had acquired several assets including the house at Buza, a plot at Buza and a motor vehicle. On his part, the first respondent submitted that indeed the decision of the trial court was erroneous because it favoured the 2nd Respondent. He submitted that, he married the Applicant in 1977 and that soon thereafter, he started an extra marital relationship with the 2nd Respondent and in 2004 they contracted a civil marriage. With regard to the division, he argued that in reality neither the applicant nor the 2nd respondent deserves any share in the matrimonial because all the assets were acquired through pension to which none of the two wives contributed.

On her party, the 2nd respondent submitted that her relation with the 1st Respondent started in 1977. From this year up to 2004 they cohabited a under one roof. In 2004 they contracted a civil marriage whereby the 1st Respondent declared that he was single having divorced his first wife who is the applicant herein. Therefore, the applicant cannot be considered a legal wife of the 1st respondent. She further submitted that, division of matrimonial assets involves the parties to marriage pursuant to section 114(3) of the Law of Marriage Act, 1971. Thus, the Applicant being a stranger to the marriage has no right over the assets. She cited the case of **Maryam Mbaraka Salehe v Abood Salahe Abood**, Civil Application No. 1 of 1992, Court of Appeal of Tanzania (unreported) where the court dismissed an application by a core wife. She then proceeded to argue that, the 1st

Respondent had divorced the 2nd Respondence thus she is not a co-wife and has no right whatsoever.

I have considered the submission by both parties. There is only one issue for determination, namely whether 2nd Respondent was wrongly awarded assets that belong to the Applicant.

The law regulating division of matrimonial assets states that, only assets jointly acquired by the spouses during the subsistence of marriage and assets acquired by one of the spouses prior to the marriage but substantially improved during the subsistence of marriage are responsible for distribution.

Section 114 (1) and (3) specifically states as follows:

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 matrimonial by their joint efforts or to order the sale of any such asset and the assets division between the parties of the proceeds of sale

(3) For the purposes of this section, references to assets acquired during a 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.

Therefore, for an asset to be regarded as a matrimonial asset, the party making the assertion has to prove that the respect asset was acquired or substantially improved subsistence of marriage and through joint efforts.

Upon scrutiny of the court records, I have observed that the trial court correctly directed itself to the point of law and facts. Guided by the above provision and the authority in **Bi Hawa Mohamed v Ally Sefu**, Civil Appeal No. 9 of 1983, CA, the trial magistrate divided the assets which were proved to have been acquired during the subsistence of marriage. In my settled view the objection made by the Applicant are devoid of any merit because the welfare of the co-wife has no room in the application of section 114. There are several other factors that are to be taken into account by court when exercising its powers under section 114; the welfare of a co-wife is none of them. According to section 114(2) the factors to be considered by the court include, the extent of the contributions made by each party towards the acquisition of the assets; debts owing by either party which were contracted for their joint benefit; and to the needs of the infant children, if any, of the marriage. Therefore, as correctly submitted by the 2nd Respondent the Applicant has no rightful claim over the assets.

Even if it was to be assumed that the applicant has any claim, her claim would obviously fail because if the assets belonged to the former marriage, it was upon the 1st Respondent to provide proof to

that effect during trial but he never did. Records reveal that, he confirmed that the assets listed were acquired during the subsistence of the marriage between him and the 2nd respondent. In fact, a further scrutiny of the record would reveal that the applicant's claims are inconstant with the testimony she rendered in court in support of the 1st Respondents case. According to the proceedings, on 25th May 2016, the Applicant testified as follows:

“in our marriage we were blessed with seven issues, one house at Kipunguni, a shamba at Ifakara.”

At no place in her testimony did she mention the house and plot at Buza to which she is now contesting. It is also interesting to note that, even the 1st is not in support of her claim. As stated earlier, in his submission he stated that neither the Applicant nor the 2nd respondent deserved a share in the assets which confirms further that the applicant's claims are baseless.

Under the premise, the application is found to be devoid of merit and is subsequently dismissed. The parties are to bear their respective costs.

DATED at DAR ES SALAAM this 16th day of July 2020.

