IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 248 OF 2018

(*Arising from Matrimonial Cause No. 1 of 2018 Kigamboni District Court)*

TIMOTHEO LUNALA.....APPELLANT

VERSUS

HYASINTA LUNALA .....RESPONDENT

JUDGMENT

Date of last order: 06/04/2020

Date of Judgement: 30/7/2020

S.M. KULITA, J.

This is an appeal arising from Matrimonial Cause No.1 of 2018, Kigamboni District Court filed by the appellant one **TIMOTHEO LUNALA** who is aggrieved with the decision of the District Court. A brief background of this matter is that, the appellant **TIMOTHEO LUNALA** and the respondent **HYASINTA LUNALA** contracted a Christian marriage on 22/09/1993. They lived happily until 2009 when the misunderstanding and domestic violence started which

led the respondent herein to leave her matrimonial home in 2015 following failure of the church leaders to reconcile the parties.

The respondent took the matter to the court where she petitioned for divorce at Kigamboni District Court. Apart from divorce she also sought for division of matrimonial properties and maintenance and arrears for maintenance allowance from July, 2011.

The court's decision was that the properties be equally divided to the parties and the children, all of them being over 18 years old to continue staying with their father, appellant.

Dissatisfied with the judgment of the District Court, the appellant lodged this appeal with three grounds of appeal as hereunder;

1. That the trial Magistrate erred in law and in fact for failure to give room to the respondent and his witness to express and give out their evidence consequently arriving to an erroneous decision.
2. That the trial Magistrate erred in law and fact for failure to appreciate the extent of contribution and joint effort made by each party towards the acquisition of matrimonial properties.

3. That the trial Magistrate erred in law and fact for failure to take into consideration pending debts incurred by the spouses during existence of their marriage.

The appeal was argued by the way of written submissions, both parties were not represented. The appellant withdrew the third ground of appeal and remained with the first two grounds.

With regard to ground one of appeal the appellant submitted that he informed the trial court that he had four witnesses but the court failed to give him the opportunity to call the two witnesses who were listed in the proceedings. He said that such failure prejudiced his right to be accorded with fair trial. The appellant cited a number of cases to support his argument listed as follows;

i. UNION OF INDIA V. TULSI RAM AIR (1985) S.C.1416.
ii. HOLLAND V.MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE. (1998) ILRC 78.
iii. DU PREEZ & ANOTHER V. TRUTH & RECONCILIATION COMMISISION. (1998) ILRC 86.
iv. DOODY V. SECRETARY OF STATE FOR THE HOME DEPARTMENT (1993) 3 LCR 428.

v. ABBAS SHERALLY & ANOTHER V. ABDUL SULTAN HAJI MOHAMED FAZALBOY, Civil Application No. 33 of 2002, CAT (unreported).

Arguing on ground two of appeal the appellant submitted that the trial court was unfair when it ordered the sale of matrimonial properties and the proceeds of sale be divided equally between the parties. He stated that he contributed by 99% of the matrimonial properties in which he invested Tsh. 4,000,000/= in building the house and a day care centre. He also stated that the respondent cannot claim equal division of matrimonial properties while she contributed nothing in acquiring them.

Furthermore, the appellant submitted that the respondent deserted her matrimonial home in 2015, such act is a misconduct and cannot entitle her equal division of the matrimonial properties.

The appellant concluded his submission by praying for the appeal to be allowed.

Replying on ground one of appeal the Respondent submitted that the burden of proof lies on the appellant as per sections 111 and 112 of the Evidence Act [Cap 6 R.E. 2002] in which the trial court considered the evidence of the two witnesses who appeared before the court. She submitted that the appellant was accorded with the

right to call his witness who some of them negligently did not appear to testify.

Replying on ground two of appeal the respondent submitted that the trial court took into consideration the joint effort of the parties in the acquisition of the matrimonial properties when reaching into that decision of equal division of the said properties as per the requirement of the Law of Marriage Act. To support her argument the respondent cited a number of cases as shown below;

i. BI. HAWA MOHAMED V. ALLY SEFU (1983) TLR 32.
ii. FELISTER PHILEMON LIPANGAHELA V. DAUD MAKUHUNA, Civil Appeal No. 139 of 2002, CAT (unreported)
iii. LAWRENCE MTEFU V. GERMANA MTEFU, Civil Appeal No. 214, HC (unreported)

The respondent concluded her submission by praying for the dismissal of the appeal as the appellant is applying it as a delay tactic for the execution of the respondent's rights.

Having carefully considered the submission by both parties here is my analysis; starting with the issue of division of matrimonial properties, section 114 of the Law of Marriage Act provides;

> *(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to the*

division between the parties of matrimonial 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) ..... Not Applicable .....

(b) To the extent of contributions made by each party in money, property or work towards the acquiring of the assets.

In the instant matter the appellant is aggrieved by the order of the trial court to sale the said properties and the proceeds of sale be divided equally between the parties for the following reasons;

One, that the respondent has not contributed anything in the acquisition of the said matrimonial assets namely a house and a nursery school. He submitted that he invested Tsh. 4,000,000/= to acquire the said assets. My comment on that is that the said argument by the respondent cannot be conclusive as he had not established on evidence the real costs that had been incurred in erecting the said house and the nursery school. Secondly, the appellant has not disputed that the said assets were acquired

during the subsistence of their marriage. Furthermore, the respondent was also working for gain to support her family, in that sense there is no doubt that she actually contributed to the acquisition of those matrimonial assets.

The other reasons pointed out by the appellant is that he termed the respondent's act of leaving the matrimonial home a misconduct which reduces her (respondent's) share when the matrimonial assets are divided. I find that argument baseless as the law puts it clearly that division of matrimonial assets is guided by the extent of contribution by joint efforts of the parties. In my view the trial court was right to consider the provisions of the section 114(1) and (2)(b) of the Law of Marriage Act [Cap 29 RE 2002] and the case of **BI. HAWA MOHAMED V. ALLY SEFU (1983) TLR 32** (supra) which recognized even the domestic activities as among the means of contribution in acquisition of the matrimonial assets. The fact that the properties were acquired during the subsistence of their marriage it suffices to declare that contribution of each party herein has been clearly established, hence the proceeds of sale of the matrimonial properties should be equally divided between the parties. However, the interested party who wishes to remain with the asset(s) can refund the other party to the extent of division of his/her share.

The appellant also raised the issues of unfair trial/hearing. It is the principle of law that the burden of proof lies on the party who alleges. The appellant was required to exercise such duty by ensuring that the witnesses he had intended to call to defend his case appeared before the trial court to testify for him. The trial court's duty is just to weigh the evidence presented by both parties in order to reach into a just decision. The records of the trial court show that the appellant summoned a total of three witnesses who actually testified before the court and there is nowhere in the records which shows that he prayed to call the other witnesses and the court denied. In addition to that the fact that the appellant has not established as to how his failure to summon those other two witnesses prejudiced him in the trial at the lower court I find this ground has no merit.

From the foregoing analysis I find this appeal with no merit hence dismissed. As the matter involves family issues I grant no order as to costs.

S.M. KULITA
JUDGE
30/07/2020