IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 59 OF 2019

MWANAHAWA IDDY MTILI.....APPELLANT

VERSUS

OMARY RAJABU MUAMBO.....RESPONDENT

(Arising from Civil Appeal No. 12 of 2018 Morogoro District Court)

JUDGMENT

Date of last order: 20/4/2020

Date of Judgement: 30/7/2019

S.M. KULITA, J.

This is the second appeal by **MWANAHAWA IDDY MTILI** who is dissatisfied with the decision of the Morogoro District Court in Civil Appeal no. 12 of 2018, originating from the Matrimonial Cause no. 9 of 2018 Chamwino Primary Court in Morogoro District.

A brief background of this matter is that the appellant **MWANAHAWA IDDY MTILI** and the respondent **OMARY RAJABU MUAMBO** contracted an Islamic marriage in 1994 at Handeni in Tanga Region. During subsistence of their union the parties herein were blessed with three issues, the first born is aged 20 years, second born is aged 18 while the last born is 13 years old. In 2012 they were separated following the departure of respondent from the matrimonial home. The respondent issued ***Talaq as per the Islamic rituals*** in 2018, the appellant decided to take the issue to BAKWATA for reconciliation but the respondent alleged that the appellant is no longer his wife.

The appellant took the matter to court where she petitioned for divorce at Chamwino Primary Court in Morogoro District. Apart from divorce she sought for division of matrimonial properties and maintenance of the third issue who is under the age of majority. The decision was for the respondent.

Dissatisfied with the judgment of the District Court the appellant lodged this appeal with eleven grounds of appeal. However, during the submission she opted to abandon grounds no. 7 and 8. She also consolidated grounds 1,4,5,6 and 9 of the appeal and

remained with five grounds which can be paraphrased into three grounds of appeal as follows;

1. That the District Court was wrong to bless the decision of the Primary Court in deciding that the matrimonial house located on Plot No. 511 Kihonda is not subject to distribution for the reason that it was given to Uhuru Muslim School as ***waqf*** *(endowment)* while there was no proof of consent from the appellant.
2. That the District Court erred in law in ordering maintenance of the third issue to the insufficient tune of Tanzanian Shillings 50,000/= only per month from Tsh. 20,000/= granted by the Primary Court.
3. That the District Court erred in law by deleting/quashing the Primary Court order of awarding the Appellant a total sum of Tanzanian Shillings 1,000,000/= as her contribution in matrimonial assets without making any substitution thereof while the matrimonial assets are valued at more than Tanzanian Shillings 100,000,000/=

During the hearing of this appeal the parties preferred to argue by the way of written submissions. Both parties were not represented.

With regard to ground one of appeal the appellant submitted that there was no evidence adduced at the trial court to prove that the matrimonial asset, a house located at Kihonda was given to the Muslim School of Uhuru. She also submitted that the respondent did not dispute that the said house is a matrimonial asset in which the appellant is still living. She said that the respondent did not seek the appellant's consent when he decided to give the said house to the school as ***waqf.***

With regard to the motor vehicle and the motor cycle the appellant submitted that the said properties were not sold as scraper as alleged by the respondent where the motor cycle was used for gain. Furthermore, the respondent did not seek for her consent prior to the sale of the said assets.

Arguing on ground two of appeal the appellant submitted that the amount of Tanzanian 50,000/= granted by the District Court for maintenance of the child as a substitute of the Tsh. 20,000/= which was granted by the Primary Court still is not sufficient to cover the expenses of maintaining the child.

Arguing on the last ground of appeal the appellant submitted that she was a house wife with the duties of taking care of the family. Her contribution towards the acquisition of the matrimonial assets

should be considered by making evaluation and equal division thereafter.

The appellant went on to submit that the amount of Tanzanian Shillings 1,000,000/= ordered by the trial court as his share was unfair. Worse enough the District Court rejected even that small sum for the reason that it has no basis and never awarded any sum of money as part of her contribution in acquisition of the matrimonial assets. The appellant cited the case of **BI. HAWA MOHAMED V. ALLY SEFU (1983) TLR 32** to support her argument in respect of this ground of appeal.

Replying on the 1st ground of ground of appeal the respondent submitted that the appellant consented that part of bare land located at Kihonda kwa Mkomola be given to the mosque for the purposes of building the madrasa (Uhuru Muslim School) and the document handling over the said piece of land was signed by the parties on 22/02/2000.

With regard to motor vehicle and the motorcycle he said that they were sold as a scrapper as they were not in good condition and the appellant knows that.

Replying on ground two of appeal the respondent submitted that the trial court ordered him to pay Tanzanian Shillings of 50,000 for maintance of a child upon due consideration of his income. To support his argument the respondent cited the case of **JEROME CHILUMBA V. AMINA ADAMU [1989] TLR 117.**

As for the last ground of appeal the respondent submitted that the appellant did not identify the matrimonial assets. It was therefore difficult for the court to grant the appellant the share that she claims from the matrimonial properties.

Having carefully considered the submissions of both parties here is my analysis; starting with ground one of appeal which is concerned with the matrimonial house located on plot number 511 Kihonda in Morogoro. The said house is alleged to have been given as ***waqf*** to Uhuru Muslim School so that it could be used as a *madrassa* (Islamic Religious School). The records of the trial court particularly the evidence of the respondent, Omary Rajabu Muambo show that the said property was given to the said school for the purposes of erecting a madrassa the fact which the respondent alleges that the appellant consented and signed the document. However, the appellant denies that fact. Furthermore, there was no any document tendered to the trial court to that effect nor any other

testimonies adduced at the trial court to prove that issue other than a mere statement of the respondent himself.

Principle of law requires the one who alleges any fact to prove it. The fact that there was no proof of transfer of the said property to the 3rd party the Respondent's submission was not supposed to be regarded by the trial court instead it was required to deal with its basic duty of distributing the matrimonial properties to the parties. The said submission by the respondent might be a technique to taint the appellant's right. Had that been true he could have called the witnesses like the person/institution purported to have been endowed the said property. Not only that but also the fact that the appellant still lives in that house with her children it doesn't make sense that ownership of the house has been transferred and if that was done by the respondent it must have been done maliciously and without consent of the appellant. In his submissions the respondent tries to show that he was financially poor to the extent of seeking for loans to boost his business it doesn't make sense that the same person dedicates his property into ***waqf.*** It is therefore my finding that the respondent submitted the said issue of ***waqf*** for the said house used by the appellant as her residential premise as a tactic to taint the appellant's right to matrimonial share.

As for the other properties that have been mentioned the records show that they exist but they are under control of the Respondent. Those properties include;

1. A house at Mji Mpya (Kichangani) of which according to the records the respondent lives with the new wife.
2. A house at Mwembesongo of which the Respondent did mention that it exists but it is very small building with only two rooms.

Existence of these two properties depends on whether the Respondent has not disposed them. The fact that they were under his control as it was for the motor cycle, Motor vehicle and properties located in Tanga region (Handeni and Tanga) they might be existing under his control or not I find it inexpedient to allocate any of those properties to the Appellant for avoidance of inconvenience to her and the infant whom they live under the same roof in the house located on plot no. 511 Kihonda, Morogoro.

As for those properties whose existence are uncertain, if disposed the respondent ought to have involved the appellant before doing so as long as they were acquired during the subsistence of their marriage.

Turning to the issue of maintenance, the first appellate court ordered the amount of Tanzanian Shillings 50,000/= which the appellant claims that it is not sufficient to carter the needs of the child who is under her custody. Section 129 of the Law of Marriage Act places the duty to maintain the children to the man/father, but with regard to his means of life and station. I have given due consideration of the means of life of the respondent and the needs of the child where the respondent shall remain with the core duties of providing her with education, health, accommodation and clothing. Sincerely the amount of Tanzanian Shillings 50,000/= is not sufficient considering the current cost of life and the needs of the child. In that sense I hereby order the amount for maintenance to be TShs. 100,000/= per month.

As for the issue of division of matrimonial properties the respondent submitted that failure of the appellant to identify the matrimonial assets made it hard/difficult for the trial court and the first appellate court to grant her share as claimed. My comment is that identification of the matrimonial assets is a duty of both parties. The parties are the ones who are supposed to inform the court as to which properties they jointly own so that the court can distribute among them. I am of the view that the respondent has

misconceived the fact that the division of matrimonial assets solely depends on the extent of contribution by joint efforts of the parties and the contribution is not necessarily be made physically. Section 114 of the Law of Marriage Act [Cap 29 RE 2002] states;

> (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.*
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> *(2) In exercising the power conferred by subsection (1), the court shall have regard,*
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> *(a) ..... Not Applicable .....*
>
> ***(b) To the extent of contributions made by each party in money, property or work towards the acquiring of the assets.***

The appellant has not disputed that the appellant was a house wife and acknowledged her duties as a house wife which includes taking care of the family and home. Such contribution cannot be disregarded. The domestic activities are regarded as contributions

towards the acquisition of the matrimonial assets. The celebrated case of **BI. HAWA MOHAMED V. ALLY SEFU (1983) TLR 32** recognized the domestic activities as a contribution in the acquisition of the matrimonial assets. Records of the two lower courts show that the appellant did not receive any distribution for the houses located at Kihonda, Mji Mpya (Kichangani) and Mwembesongo; the sold motor vehicle and the sold motor cycle. The appellant's share is subject the extent of contribution in domestic activities during subsistence of their marriage.

Generally, I find it unfair for the appellant not to be granted any property as her share for the contribution in the acquisition of the matrimonial assets.

In upshot I partly allow the appeal to the following extent;

i. The house located on plot no. 511 Kihonda, Morogoro in which the appellant lives with the issue(s) is granted to the appellant, one Mwanahawa Iddi Mtili.

ii. As for the other properties it is ordered that they have to remain with the Respondent. This comprises the proceeds of sale of the motor vehicle and the motor cycle

following the sale by the respondent without consent of the appellant.

iii. The amount for maintenance of a child is increased to the tune of Tanzanian Shillings 100,000/= per month.

As the matter involves family issues I grant no orders as to costs.

S.M. KULITA
JUDGE
30/07/2020