THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 149 OF 2019

Originating from Matrimonial CauseNo.61 of 2017 at the District Court of Ilala before Hon. Haule F.E)

SHOMARI MATAMBO.....APPELLANT

VERSUS

SHAMILA ALLY.....RESPONDENT

JUDGMENT

MASABO. J.,

This is a first appeal emanating from the decision of Ilala District Court in Matrimonial Cause No. 61 of 2017 in which Shamila Ally, the Respondent herein petitioned for divorce. Her marriage to the appellant which subsisted since the year 2011 was dissolved on the 7th May 2019. Further to dissolution of marriage, the court vested the custody of the two issues of marriage, Abas Shomari and Shamsa Shomari into the custody of the respondent. Matrimonial assets acquired by the couple during the subsistence of marriage were also distributed whereby the respondent was awarded 40 % of the matrimonial house while the appellant got 60%. The Appellant was also ordered to provide a sum of Tsh 100,000/= as monthly maintenance for the issues. The Appellant was not amused. He is now before this court armed with following four grounds: **First;** the trial resident magistrate erred for failure to consider that the houses distributed are not matrimonial properties; **Second,** the trial court failed to consider the issue of fairness on division of matrimonial properties as some of the properties were not acquired jointly

by the efforts of the parties. **Third;** the trial court failed to analyse, evaluate and assess the dispute/ evidences adduced before and henceforth came up with wrong conclusion rendering a failure of justice; and **Forth**, the trial court erred in not considering that the appellant was not cruel/ brutal to the respondent but she was the one who abandoned him.

The appeal was heard in writing. Mr. Hassan Mawazo, Advocate appeared for the Appellant. The respondent enjoyed *probono* legal service provided by Tanzania Women Lawyers Association (TAWLA). The appellant prefaced his submission with the provision of Section Section 114 (1) of the Law of Marriage Act [Cap. 29 RE 2019] and the case of Bi **Hawa Mohamed V Ally Seif, (1983) TLR 32**. He then proceeded to submit that he married the appellant in 2011 and the houses identified as the matrimonial assets which are located at Pugu Kwaraisi was built in 2009 by the Appellant's father (deceased) under the supervision of the Appellant. Therefore, the District Court erred in law and fact in holding that these two houses were matrimonial properties. He also appended a sale agreement showing that the plot was purchased by his father one, Hussein Shomari Matambo.

In regard to the 2nd ground of appeal, he submitted that the provision of section of 114(1) of LMA (supra) is limited to assets jointly acquired through the domestic efforts of a husband and wife. Therefore, the court was duty bound to devide only the assets that were acquired during the substistence of marriage, which was contracted in 2011. Regarding the 3rd ground of appeal it was argued that the trial magistrate failed to analyse, evaluate and

assess the dispute/evidences adduced before by the parties and especially the evidence adduced by DW1 and DW2 regarding ownership of the house henceforth it came up with wrong conclusion rendering a failure of justice. On the fourth ground, he submitted that the trial court erred in ignoring his evidence that he was not cruel to his wife but the wife is the one who deserted the matrimonial home. He, stated that he still loves his wife and he still want her back.

In reply, the Respondent vehemently resisted the 1st ground of appeal arguing that the trial magistrate correctly ordered the division of matrimonial assets because, although it is not in dispute that the plot was acquired by the Appellant prior his marriage to respondent, but the same was developed during the subsistence of marriage through joint efforts. She submitted that, at the time of marriage she found the appellant with a one-bedroom house on the said plot and later they manage to develop four bedrooms, sitting room, kitchen and toilets. They also managed to build a second house to which she also contributed the monies she earned from her second clothes business. Therefore, the findings of the trail court was within the confines of section **114(3) of the Law of Marriage Act (Supra)**. She also argued that she made household duties hence the decision of the court was in line with the case of **Bi Hawa Mohamed V ally Sefu [1983] TLR 32 (CA)** and there is nothing to fault it. The respondent's argued this court not to consider the new evidence appended to the appellant submission as it contravenes the principle laid down by the Court of Appeal in the case of

Galus Kitaya v Republic, CAT , Mbeya, Criminal Appeal No 196 of 2015 (unreported) .

Regarding the 2nd ground of appeal the respondent submitted that the issue of fairness in division of matrimonial assets was dully considered by the trial court. The proportion awarded to each of the parties considered the extent of contribution made by each party as per section 114(2) (b) of Law of Marriage Act. With respect to the 3rd ground of appeal, the respondent submitted that it is devoid of merits as the trial court considered and evaluated evidence of both parties and none of them proved ownership. On the last ground, she argued that the trial court did not err in holding that the appellant was cruel and brutal to the respondent as there was evidence to that effect.

In rejoinder, the appellant argued this court not to consider the submission made by the respondent because it was made out of the time scheduled by the court hence it should be disregarded. He also distinguished the case of **Galuis Kitalya** v R (supra) arguing that what has been submitted by the appellant is not evidence.

Having accorded due consideration to the submission of the parties, let me first address the issue of late filing of reply submission. As correctly submitted by the appellant, the schedule for filing of submission as orderd on 5th May 2020 was as follows: The appellant was to file his written submission by 19th May 2020; the Respondent was to file he reply submitting by 3rd June 2020 and rejoinder if any was to be filed by 9th June 2020.

According to the record and as correctly submitted by the appellant, the respondent's reply submission was filed on 3rd June 2020, which implies it was late by one day. In my view, since the issue raised borders on the respondent's right to be heard and since the delay was only for one day which is by no means inordinate, it is in the broad interest of justice that her submission be considered so that, the court can have the benefit of hearing the arguments from both parties.

There is also a contention from the Respondent that the appellant has appended new evidence to the submission contrary to the law. The position of law as stated in **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd v. Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited** [2005] TLR 41, is that, annextures are not to be appended to the submission save where the said annexture is an extract of a judicial decision or text book. If the annexture appended to the submission is other than an extract of a judicial decision or text book, it should be expunged from the submission and totally disregarded. I have had time to look at the annextures appended to the appellants submission. They constitute a sale agreement of the plot and copies of document showing payment of property tax which are all in the name of the appellant's father one Hussein Shomari Matambo. Undeniably, these documents were meant to contradict the finding by the trial magistrate that no evidence were rendered to show that indeed the two houses were owned by the said Hussein Shomari Matambi who testified as DW2. This practice is unacceptable as it directly contravenes the position

above. I therefore, expunge the annexures from the record and I ignore them.

On the merit of appeal, I will concurrently deal with the 1st and 2nd ground of appeal as they are all on the issue of division of matrimonial assets. The major complaint is that the trial magistrate erred in law and fact for failure to consider that the houses divided are not part of matrimonial assets and that the trial magistrate did not consider the issue of fairness in dividing the same. The issue to be determined here is whether the two houses at Pugu Kwaraisi are matrimonial assets. And, whether the answer is in affirmative, was the decision of the court to divide the same correct?

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 ammenable 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. Also, according to section 11(2)(b) the court is required while exercising its power in division of matrimonial assets to consider "the extent of the contributions made by each party in money, property or work towards the acquiring of the assets"

According to the trial court record the parties were in dispute concerning ownership of the two houses situated on the same plot. The appellant contended that the two houses are not matrimonial assets but rather they belonged to his father as he was only supervising the construction. On the other hand, the respondent contended that they form part of matrimonial assets because, while it is true that she found the appellant with the plot which he acquired from his father, there was only one room in which the appellant domiciled at the time of marriage and that, after their marriage they jointly developed the same and built another two bed room house in the same plot. She also submitted that she contributed in the construction using money earned from her business and her other form of contribution was through family chores.

Upon perusal of the record, 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,** (supra), the trial magistrate divided the assets to the parties in proportions commensurate with their respective contribution, which in respect of the respondent comprised of monies earn from business and family work. Thea argument that the houses belonged to DW2, are without merit. As held by the trial magistrate, they were supported with no evidence other than empty words. I therefore find no merit in the 1st and 2nd ground of appeal.

In regard to 3rd ground of appeal that the trial court failed to analyse, evaluate and assess the evidences adduced by the parties and henceforth came up with wrong conclusion rendering a failure of justice; I have found it to be baseless. The evidence rendered by both parties were dully considered and the finding was made out of the evidence so rendered. The last ground as to the issue of the appellants cruelty to the respondent, I find no reason to fault the trail court's findings as the evidence of PW1 and PW2 were uncontroverted. In this regard, I reject both the 3rd and 4th ground of appeal for being devoid of merit.

In the final event, I dismiss this appeal. This being a matrimonial dispute, I will order no costs.

DATED at DAR ES SALAAM this 18th day of August 2020

THE HIGH COURT TANZANIA

J.L. MASABO

JUDGE