

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

PC CIVIL APPEAL No. 90 OF 2020

TUMPE THOMSON MWAKYONDE.....APPELLANT

VERSUS

JOSIA ABDUL KULWA.....RESPONDENT

(Appeal from the decision of Temeke District Court)

(Ndelwa- Esq, RM.)

dated 28th February, 2020

in

Matrimonial Appeal No. 06 of 2020

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JUDGEMENT

5th October & 3rd December 2020

ACK. Rwizile, J

Parties to this appeal lived together in customary marriage for about 16 years. Their marriage was blessed with two children. Before they parted ways, it is alleged, they had acquired some properties by their joint efforts. The appellant after some time of separation, decided to file a matrimonial dispute before Temeke Primary Court.

After, hearing of the same, it was decided that the house at Buza is a matrimonial asset subject of division and custody was placed on the respondent. Her appeal to the District Court was not successful to her satisfaction, even though it was found that she was entitled to 30% of the house at Buza, a farm at Kibaha and one motor vehicle a Toyota stout. She has therefore preferred this second appeal challenging both decisions of the courts below. The appellant has advanced four grounds of appeal namely;

- i. That the District Court erred in law and in fact for ordering the appellant to get only 30% of her share of the matrimonial assets; a house at Buza, two farms at Kibaha and Boko and a Toyota stout*
- ii. That the District Court erred in law and in fact for failing to declare, that a farm at Mdaula, a Plot at Miembesaba, 6 incubators machines and a motor vehicle muso to be matrimonial properties jointly acquired during their marriage*
- iii. That the district court erred in law and in fact for failing to order equal division of matrimonial assets in grounds 1 and 2*
- iv. That the trial court erred in law and in fact for ordering that the time to appeal is 30 days without considering that time to appeal in matrimonial cases from the District Court to the High Court is 45 days.*

Parties had no legal representation; their case was however argued by way of written submissions. This allowed the appellant to enjoy services of drafting of submissions by Women's Legal Aid Centre. The appellant argued her appeal jointly on grounds 1, 2 and 3, the 4th ground was separately argued.

According to her submission, she was entitled to 50% of the total assets jointly acquired. She was of the submission further that the trial court did not record her important evidence proving her contribution towards acquisition of those assets. But according to her she contributed to have shops, and made physical contribution in terms money, work and supervision in building the house. She therefore referred this court to her contribution as counting under section 114 of Law of Marriage Act.

To support her asset, she said, they sold fish at Kilwa Kivinje, and took a loan from Akiba Commercial bank. This was done for purposes of developing the family assets. Apart from section 114 of LMA, she referred to the case of **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32. By citing the case of **Bi Hawa**, the appellant was inviting this court to accept her contribution made not only by work but also other forms of contributions. She further referred this court to the case of **Eliester Philemon Lipangahela vs Daud Makuhuna**, Civil Appeal No. 139 of 2002 CAT (unreported). She said, she was providing money to the respondent when he had nothing, for the purpose of furthering family projects.

It was insisted that both parties contributed in terms of money and so was entitled to half of the share on the assets jointly acquired. To her dismay, she exclaimed, the trial court did not accord due weight to her contribution leading to 30% ration. In law, the appellant submitted, it was her duty to prove her contribution, which she successfully did as under sections 111 and 112 of the Evidence Act. It was further submitted that the both courts below did not consider her evidence correctly, they arrived at a wrong judgement.

Furthermore, it was stated the District Court did not consider some of unlisted properties as family assets. These, according to her, included a farm at Mdula, a plot of land at Miembesaba, 6 incubator machines, a Muso motor vehicle. It was her serious allegation that her evidence was not recorded as she testified before the trial court in respect of these properties. This means, her contribution did not match the same. In her view, her contribution in terms of effort money and work was not valued. She referred this court to the case of **Lawrence Mtefu vs Germana Mtefu**, Civil Appeal No. 214 of 2014 (HC) (Unreported) where article 13(1) of the Constitution of United Republic of Tanzania prevents discrimination of all kinds and article 9(f) as well as article 15 of the convention on elimination of all forms of discrimination against women direct state policies and programs to ensure human dignity and require state parties to accord equality of men and women and to make sure women are not discriminated. She concluded by saying she deserved a bigger share because of her contribution.

Submitting on the last ground of appeal. She was clear that the District was wrong in giving 30 days to the parties to appeal. It was submitted that appeals in matrimonial proceeding is 45 days as it is governed by section 80(1)(2) of the LMA.

The respondent dealt with 1st and 2nd grounds together while he did not contest ground four which was considered to have been an error. Section 80 of the Law of Marriage Act, was cited to support this point. Submitting on the first and second grounds, it was stated that the trial court recorded evidence, assessed the same fairly leading to a fair judgement.

It was further stated that the appellant failed to prove that properties, a farm at Mdaula, Plot at Boko, six incubator machines and two motor cars were matrimonial assets. According to the respondent's submission, her evidence was only hearsay. He asked this court therefore to dismiss the two grounds for not being merited.

Turning to the third ground of appeal, the respondent was of the view that after dissolution of marriage, the next step was division of the assets jointly acquired. It was submitted that it is guided by section 114 of the Law of Marriage Act. It was further submitted that the appellant was the source of this dispute, she cannot claim a bigger share of the assets. It was submitted that the case of **Bi Hawa Mohamed** was relied upon by the trial court in considering the contribution of each spouse. According to the trial court finding division of the assets was also considering the infant children, it was submitted for the respondent. The court was therefore asked to dismiss this appeal for lack of merits.

When given a chance to rejoin, the appellant apart from maintaining what was submitted in chief, she reiterated the prayers made and asked this court to allow this appeal.

After having gone through the record of appeal and pondered the submissions of the parties. I have to state that the first ground of appeal bears a complaint on 30% share given to the appellant on a house at Buza, two farms at Kibaha and Boko and a Toyota stout. The respondent was not in dispute on the decision of the District Court on this aspect.

There is no doubt therefore that the properties named here are matrimonial properties. It is now settled that what determines a share in the matrimonial property is the amount of contribution. The case of **Bi Hawa Mohamed** (supra) is good to that effect. It was held when interpreting section 114 of the LMA that domestic duties done by a spouse have to be counted when dividing the family assets. In order that to be done, the appellant had in this case to prove her contribution. It is presumed in law that the properties acquired during marriage belong to the parties and were acquired by their joint efforts.

In this appeal, it was the view of the District Court that evidence shows the properties named here were acquired jointly. The evidence to prove so did not come from the appellant. It was from the respondent who admitted that he bought the same by his own money. When giving evidence the respondent tendered exhibits to prove so. It is therefore clear to me as it was to the District Court although the appellant contributed, there is no evidence proving she deserves an amount more than as was given. She has complained that her evidence was not recorded by the trial.

There is doubt, the appellant is trying to invite evidence at the appellate stage. First, she did not advance that a ground of appeal here or at the District Court, second, she did not at least refer to any incidence before the trial court that would lead the trial court fail to record her evidence. It is now settled that court document is a serious document which cannot be impeached by words from the submissions of the parties. Evidence must be led to prove such allegation. I have to hold that since the appellant did not raise it at the first appellate court, it an afterthought to have it raised now.

It is clear to me that her evidence on proving her contribution was not good enough to entitle her more than what she got. The first ground of appeal has no merit. It is dismissed.

Taking on the second ground of appeal, it has been stated that the properties named as a farm at Mdaula, a Plot at Miembesaba, 6 incubators machines and a motor vehicle muso are matrimonial assets. As hinted before, it was the duty of the appellant to procure some evidence to that effect. The evidence brought to prove the same were merely mentioning without further proof. The respondent on his part tendered exhibits D, 2, 3, 4 to D6 showing the same are not his properties. This evidence was held so by the trial court as well held by the district court. There is therefore a concurrent finding of this fact by the two courts below on this issue. In my considered, I see there is no evidence proving that the same properties were family properties subject of division. I therefore dismiss this second ground for being baseless.

The third ground of appeal is in my view simple to deal with. It depended on the answers of the preceding two grounds. I have in shot answered them against the appellant. The reason I have given show there is no supporting evidence in the first place showing that the same deserves an equal share in the properties mentioned in the first ground of appeal. In the second-place properties mentioned in the second ground of appeal have been held not matrimonial. This means therefore the 3rd ground of appeal has no merit. It is therefore dismissed too.

The last ground of appeal deals with a technical issue. It is about the time to appeal in matrimonial proceeding. This ground is not contested.

When it comes to appeal there are as far as I can recollect different law governing time to appeal. For case originating from the primary court time to appeal is governed by section 25 of the Magistrate Court Act (MCA). It states as follows;

25.-(1) Save as hereinafter provided-

(a) in proceedings of a criminal nature, any person convicted of an offence or, in any case where a district court confirms the acquittal of any person by a primary court or substitutes an acquittal for a conviction, the complainant or the Director of Public Prosecutions; or

(b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal there from to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired...

It is clear that 30 days to appeal to the High Court provided in the MCA, caters for cases of criminal nature or any proceeding which originate from the primary court. This provision applies therefore in such terms. In other proceedings where specific law has given time of limitation to appeal, the MCA does not apply even when proceedings may originate from the Primary Court. Matrimonial proceedings are governed by the Law of Marriage Act. Since it provides for time limit, then the MCA does not apply in such proceedings as far as limitation of time to appeal to the High Court is concerned. Section 80 of the same provides follows;

80.-(1) Any person aggrieved by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal therefrom to the High Court.

(2) An appeal to the High Court shall be filed in the magistrate's court within forty-five days of the decision or order against which the appeal is brought.

(3) Save to the extent provided in any rules made under this Act, the provisions of the Civil Procedure Code relating to appeals shall not apply to appeals under this Act.

(4) Any person aggrieved by a decision or order of the High Court in its appellate jurisdiction may appeal therefrom to the Court of Appeal on any ground of law or mixed law and fact.

(5) Any person aggrieved by a decision or order of the High Court in its original jurisdiction may appeal therefrom to the Court of Appeal.

(6) Notwithstanding the provisions of this section or any other written law, an appeal against a declaratory decree granted under paragraph (e) of subsection (2) of section 94, may be filed within ninety days of such decree.

It was not therefore proper to give 30 days of appeal while the law provides 45 days. But all in all, this appeal was in time. This ground has merit. Having said what, I have said. I therefore dismiss this appeal with no order as to costs.

**ACK Rwizile
JUDGE
3.12.2020**