IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. CIVIL APPEAL NO.15 OF 2019

(Arising from Tandahimba District Court at Tandahimba in Matrimonial Appeal No.5 of 2019. Original Tandahimba Urban Primary Court Matrimonial Cause No.7 of 2019)

BETWEEN

FADINA MUSSA MPONDA.....APPELLANT

VERSUS

SHAIBU ALLY MTEPA..... RESPONDENT

JUDGMENT

26 Nov. & 17 Dec. 2020

DYANSOBERA, J.:

The appellant, Fadina Mussa Mponda is taking exception to the decision of the District Court at Tandahimba which reversed the decision of the trial court of Tandahimba Urban, particularly on division of matrimonial assets.

A brief background of the matter on hand is as follows. The appellant and respondent were wife and husband who had contracted Islamic marriage on 25.5.2014. They were, however, blessed with no issue but led a happy life. During their matrimonial life, they managed to acquire some matrimonial properties including two houses: one located at Malopokelo village and the other located at Malopokelo Nasuvi. There was also a cashewnut farm at Milongodi. On 9th day of November, 2018 their marriage

became intolerable and in 2018 it was broken down. The appellant unsuccessfully sought reconciliation before the National Muslim Council of Tanzania and, ultimately, the matrimonial dispute landed in the Primary Court at Tandahimba Urban whereby Matrimonial Cause No. 7of 2019 was instituted in which the appellant was petitioning for dissolution of marriage and division of matrimonial assets. The trial court dissolved the marriage and ordered a division of the matrimonial properties in the following manner. First, the farm which the respondent inherited from his father was given to him. Nevertheless, he was ordered to pay to the appellant a sum of Tshs. 1,500,000/= being compensation of the services

she allegedly rendered in said farm for four years. Second, the house with four rooms situated Malopokelo Nasuvi was given to the respondent while the two-roomed house also situated at Malopokelo village was given to the appellant. The appellant was also awarded three mango trees and three orange trees while the respondent was given two mango trees and four orange trees. A bicycle was given to the appellant and the two sinks were given to the appellant and respondent each.

The respondent was aggrieved by the decision of the trial court and appealed to the District Court of Tandahimba in Matrimonial Appeal No. 5 of 2019 on three grounds of appeal. The first ground was on the award of Tshs. 1,500,000/= to the appellant and the complaint was that the appellant had never gone to the said farm to inject any effort. In the second ground, the respondent faulted the trial court for awarding a two-roomed house to the appellant without considering that the house was built by him before the marriage. In the last ground of appeal, the

respondent asserted that the matter was decided in the appellant's favour without considering that the respondent used most efforts to acquire the properties awarded to the appellant. In his judgment, the learned Resident Magistrate at the first appellate court reversed the decision of the Primary court. It found that the farm and the house were not matrimonial properties subject to division. With respect to the mango trees, orange trees and the bicycle, the District Court came to the finding that they were not pleaded and proved. With regard to the house at Makolopelo Nasuva, the appellant was awarded one third of its value as her share while the respondent was given two thirds. The house was ordered to be valued by the government valuer or any certified valuer and the appellant was to be given one third of the value as the share so as to retain the property. It was directed that upon failure by either party to pay the other party, the house was to be sold by public auction and the proceeds of the sale had to be divided to the parties in accordance with the shares of two thirds to the respondent and one third to the appellant.

The appellant was aggrieved by the decision of the first appellate court hence the present appeal. According to the petition of appeal filed by the appellant on 19th November, 2019 the following are the grounds of appeal, that is:-

1. The district court of Tandahimba error in law and fact for ordering that 1/3 of the value of house given to appellant without considering that both parties fully involved in availability of that house.

2. The district court of Tandahimba erred in law and fact for awarding respondent the house allocated in Malopokelo village without considering that the said house in the matrimonial property which was to be subject to equally distributed between the disputants.
3. The district court of Tandahimba err (sic) in law and fact for failure to consider that respondent has the right to be give(sic) other properties which were obtained during the lifetime of their marriage.
4. The District court of Tandahimba failed to consider that the appellant had the right to be given a share in the second house located at Malopokelo Nasuvi where she used her effort to develop the said house during the existence of their marriage.
5. The appellate court erred in law and fact for failure to consider that respondent failed to justify his appeal before the District court of Tandahimba.

During the hearing of this appeal, both parties appeared in person and were unrepresented. The appellant through her oral submission told the court that she filed five grounds of appeal to impugn the judgment of the Tandahimba District Court. She complained that she has no residence and lacks necessities of her life. She prayed this court to look into the impugned judgment so as to do justice.

In response, the respondent submitted that the appellant found him with the farm and she did not assist him to develop it. It was his further

submission that the appellant found him with the house with corrugated iron sheets and she did not incur any costs.

The appellant had nothing to re-join save that her case rested on the evidence she had adduced at the trial.

I have carefully considered the grounds of appeal, the submissions of the parties and have perused the lower courts' records. I have been called to determine whether the division of the matrimonial assets made by the first appellate court on the two houses and one farm took into account the evidence and established legal principles as well as the provisions of section 114(1) and (2) of the Law of Marriage Act, [Cap 29 R.E. 2002].

Admittedly, the trial court and first appellate court derived their powers to divide the matrimonial properties/assets to the parties by virtue of section 114(1) of the Law of Marriage Act which provides:

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

Though in exercising that power the court(s) were guided by the following factors which are enshrined in subsection 2 of section 114 of the Law of Marriage Act and which provides that:

"(2) In exercising the power conferred by subsection (1), the court shall have regard–

(a) to the customs of the community to which the parties belong;

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

(c) to any debts owing by either party which were contracted for their joint benefit; and

(d)to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division."

Being aware of the provision of law governing the division of the matrimonial properties in our jurisdiction it is now imperative to revisit the evidence gathered by the trial court in respect of the matrimonial assets of the parties to this appeal particularly where the decisions of the two lower courts have taken different dimensions. The revisiting and re-evaluation of the collected evidence by the trial court will enable this court to endeavour to quench the thirst of the parties who have travelled a long way of seeing that justice on either side is done and being seen to be done.

In her first, second, fourth and fifth grounds of appeal, the appellant is faulting the first appellate court for the award of one third of the value of the house without considering that both parties fully involved themselves in acquiring the said property and further that the award to the respondent of the house located at Malopokelo village did not take into account it was to be equally distributed to the parties. Likewise, the first appellate court is

being faulted for failure to consider that the appellant had also a share in the second house and that the respondent had failed to justify his grounds of appeal he had raised before the first appellate District Court.

In order to appreciate the substance or otherwise of the appellant's complaint in these first two grounds of appeal, a revisit of the evidence is axiomatic. The appellant, according to the trial court's proceedings at pages 2 and 3, is recorded to have said:

> "...nilimkuta mme wangu hana biashara yeyote,alikuwa na nyumba malopokero,kiwanja kimoja.Malopokelo alikuwa na tofali 1205 tofali za brock,lakini aliniambia kati ya hizo 500 ni za mke wake aliyeachana naye,nilimkuta ana shamba 1 la urithi wa baba yake. Baada ya kufika na kuona mazingira sio mazuri,nikamwambia mimi ni mjasiliamali naomba rizaa yako niendeleze shughuli zangu,akakubali,nikaenda nyumbani kwetu,niligawana na mtalaka mwenzangu,nikafukua viazi vikuu ambavyo niliuza na kupata sh. Elfu 9(9,000) nilindunduliza nikapata hela na kutunza,nilipata hela ya pamoja na kununua dawa ya kupulizia mikorosho,vipande vyote,tulichopata tuliweka kwa pamoja tukachota kiasi tukauza.Hela nikanunua ngano na kuendeleza biashara ndogondogo za mitaani na kukusanya mikorosho shambani,shamba la mdaiwa hatukupata chochote shamba langu nilipata kilo 800 za korosho baada ya kumaliza msimu,kwa pamoja tulikubaliana kusafirisha tofali kwenda kwenye sehemu ya ujenzi,tuliendeleza ujenzi mpaka tukafikia msingi.Mwaka wa pili 2016 tukaendeleza ujenzi na biashara

tulikuwa tunaendeleza kwa pamoja.Tulisimamisha ujenzi wa nyumba,tukaenda kubomoa nyumba niliyofikia mimi,tukajenga ya ukumbi na vyumba 2 tukashirikiana na mtoto wa mme wangu. Baada ya kumaliza hiyi nyumba,tulirudi kumalizia nyumba yet una kumaliza boma lote,ndio hapo mgogoro wa maisha ya ndoa ulipoanza."

The evidence of the appellant was, in material particular, supported by that of of PW2 (Samuli Nanchoti) who, at page 6 of the typed proceedings of the trial court, is recorded to have said on the disputed properties as follows:-

"Baada ya kuoana mdai na mdaiwa walikuwa na tofali 1205, vipo ndani ya uzao wa mke aliyeachika,baada ya kumuoa mdai walikaa miezi 2/3 akaanza mradi,mdai kutoka shambani kwake,akachimba viazi,na kuuza hela iliyopatikana alizungusha biashara,baadaye mtaji ulikuwa ukafikia mahali akanunua sulpher mifuko 2 moja ilipelekwa shamba la mdai na linguine mdaiwa,baada ya mavuno nilikuta mzigo wa kilo 800 za korosho.

Kilichoendelea mdaiwa hakupata chochote,walichukua kilo 100 za korosho,hela iliyopatikana mdaiwa alikuwa na kiwanja walinunua mifuko 13 kukomboa mifuko na kulipa kwa mtalaka wa mdaiwa.Baada ya hapo walihamisha tofali kupeleka katika uwanja mwingine na kujenga,walikuwa wanaleta vitu na kujenga nyumba na nyumba ilisimama na choo kijengwa."

Further, on cross examination, the appellant is recorded to have said at page 4 that:

"Nakumbuka ulisema utanipa milioni mbili"

"Nilisema nataka milioni tano"

On his part, the respondent is recorded to have testified at page 10 of the typed proceedings of the trial court that:-

"Tarehe 01/12/2014 nilianda lindo,nilifanya miezi 4 nilikusanya laki nne na elfu 80 (480,000) baada ya hapo nilimshauri mdai nakusaidia kuhamisha tofali kutoka tunapoishi mpka site tunapojenga nilitumia (441,000) tofali 1205.Baada ya hapo nilisombesha mchanga ndoo 220 kwa sh 22,000/=.Baada nilisombesha mchanga ndoo 306 ambazo nililipa 36,000/= nikanunua saruji mifuko 20,nilifyatua tofali 980,tukachukua bati tuliendeleza kujenga kila mmija 16,500 kokoto karai 100 @ 1000, laki moja usafiri, 20 (120,000) tuliendeleza ujenzu=I nyumba ina chumba 4,korido 1.

Tulivunja nyumba ya mwanzo tulikuwa tunaishi tukajenga palepale chumba 2 ukumbi ndani kwa ndani.Nilijenga kwa lai 3, nikamlipa 2 ikabaki laki 1,tofali zilizobaki tuliandaa choo cha kudumu,ambacho hakijaisha,katika ujenzi wa choo tulikopa cement mifuko 9 haijalipwa.Tulitumia mifuko 7,ikabaki 2, tuliendeleza ujenzi.Tukasimamisha ujenzi.

Baada ya hapo 2017-2018 mdai alianza kuingia mikataba nje na mimi....."

The same respondent is recorded to have stated at page 11 of the typed proceedings thus:-

"Upande wa nyumba nilimwambia nimfidie shs. Milioni 2 alisema anataka milioni 5 na mimi nilikataa kwa sababu thamani ya nyumba haififi milioni 5".

Also at page 12, the respondent told the trial court that:

"ujenzi wa nyumba tulikuwa wote na mdai"

Likewise, it is on record that the same respondent at page 13 stated that:

"Mali anayodai ni nyumba. Nyumba zote nilijenga nikiwa na mdai. Niliamua tu mwenyewe kumpa milioni 2"

From the totality of evidence, it is clear that that both houses were matrimonial assets acquired by the joint efforts of the parties and therefore subject to division. The award of each house to the respective parties as ordered by the trial Primary Court was, in the circumstances of the case, justified. It is to be noted that there were some improvements made by the appellant on the disputed properties. I am fortified in this by the respondent's own version when, upon being cross examined by the first court assessor at page 13 of the typed proceedings, he did not mince words when he told the trial court that,"Nyumba zote nilijenga nikiwa na mdai." It cannot be gainsaid that the appellant contributed in the acquisition of the said two houses as admitted by the respondent himself. On that basis, the interference made by the first appellate court and the finding by the first appellate court that one house was not a matrimonial property subject to division was unfortunate as it was not supported by

evidence on record. The 1st, 2nd, 4th and 5th grounds of appeal have merit and are upheld.

As regards the 3rd ground of appeal, the trial court was satisfied that mango trees, orange trees and two sinks were matrimonial properties and subject to division and accordingly, divided them in the manner it did. The respondent, in his appeal to the District Court, did not complain at all. It was a misconception on part of the first appellate Resident Magistrate to quash the distribution of those items. The decision of the trial Primary Court is upheld.

However, the evidence on record does not establish that the cashewnut farm which was the respondent's inheritance was matrimonial asset subject to the division. The trial Primary Court was, therefore, wrong to order the respondent to compensate the appellant Tshs 1, 500, 000/= as there was no basis for that order of compensation. This is so particularly where it was clear that the farm, apart from not being a matrimonial property but an inheritance, was not substantially developed by the appellant so as to be a jointly acquired property.

Save for the said variation in the trial court's decision, the appeal is allowed, the decision of the District Court is quashed and set aside and the decision of the trial Primary Court restored and endorsed.

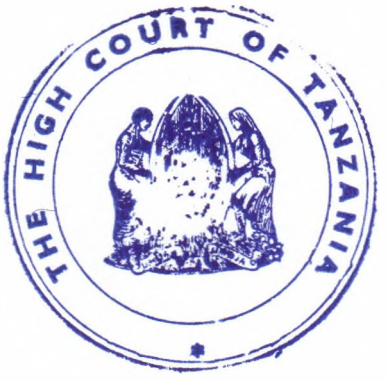
Each party to bear his/her own costs.

W.P. Dyansobera

Judge

17.12.2020

This judgment is delivered under my hand and the seal of this Court on this 17th day of December, 2020 in the presence of the appellant and the respondent.



W.P. Dyansobera

Judge