IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. MATRIMONIAL APPEAL NO. 19 OF 2019

(Arising from Ruangwa District Court at Ruangwa in Matrimonial Appeal No. 2 of 2019. Original Matrimonial Cause No.2 of 2019 from Ruangwa Primary Court.)

SELEMANI ABDALLAH..... APPELLANT

VERSUS

MWANAAFA RAISI.....RESPONDENT

JUDGMENT

26 Nov. & 22 Dec., 2020

DYANSOBERA, J.:

This is a second appeal by Selemani Abdallah (appellant) against Mwanaafa Raisi (respondent) arising from a matrimonial dispute which culminated into a decree of divorce and an order on division of matrimonial assets before Ruangwa Primary Court at Ruangwa. After the decision of the trial Primary Court, the appellant challenged the division of the matrimonial properties, that is, one house and one cashew nut farm at the District Court at Ruangwa. However, the appellant's appeal was dismissed and the decision of the trial court upheld hence this appeal.

The facts giving rise to this instant appeal are as follows. Selemani Abdallah and Mwanaafa Raisi were husband and wife having celebrated their marriage under Islamic rites in 2006.During the life time of their marriage, the parties were blessed with only one issue. Before the respondent petitioned for her divorce and division of matrimonial assets she lodged her matrimonial dispute before the Marriage Conciliatory Board with the National Muslim Council at Chienjere Ward. Before the Board, the appellant defaulted appearance and this necessitated the matrimonial dispute to be submitted to the trial court.

The respondent's thrust for knocking at the door of the trial court was cruelty by the appellant whereby it was alleged that the respondent was always being beaten by the appellant even during her time of pregnancy of the appellant's child. The continuous beatings perpetrated by the appellant forced her to file a matrimonial cause before the trial court. The respondent's claim on cruelty of the appellant was supported by the evidence adduced by Darus Nasoro (PW2) and Hassan Musa (PW3).

The appellant, in his defence, admitted to some extent to have beaten the respondent and was supported in this by DW4 (Samweli Pauli). DW4 told the trial court that he received complaints from the respondent on the cruelty of the appellant to the extent that he gave the respondent a refuge.

On the basis of that evidence the trial court was satisfied that the marriage of the parties to this appeal was broken down irreparably thus, it dissolved it under section 107(3) of the Marriage Act, Cap 29 R.E. 2002

and proceeded to grant a decree of divorce to the parties. Furthermore, the trial court ordered the division of the matrimonial assets which the respondent had outlined in her petition and which was revealed in evidence. The trial court considered the evidence adduced on the matrimonial assets and eventually divided the assets to the parties on the percentage basis. With respect to the house, the trial court ordered the respondent to be given thirty percent (30%) of the value of the house while the remaining seventy percent (70%) was given to the appellant. On the cashew nut farm the respondent was given forty percent (40%) whereas, the appellant was given sixty percent (60%), on the 'boriti' and cashew nut sprayers were equally divided to the parties. Lastly, the trial court divided a piece of land to the respondent while the appellant was given a motorcycle.

As said before, the appellant was aggrieved by the decision of the trial court and lodged his appeal in the District Court of Ruangwa at Ruangwa on five grounds of appeal. The appeal was registered as Matrimonial Appeal No.2 of 2019. Upon hearing the parties, the first appellate court dismissed the appeal and upheld the decision of the trial court on the division of the matrimonial assets.

Still aggrieved, the appellant has come to this court on a second bite. He is armed with the following grounds of appeal:-

(1) *That, the trial Magistrate erred both in law and in fact by the failure to consider evidence adduced by the appellant on how the house was which is subject to matrimonial division and the*

time the appellant acquire that property was not married to the Respondent.

(2) *That, the trial Magistrate erred both in law and in fact by failure to consider the appellant contribution in acquisition of the house and shamba which he acquired before his marriage to the Respondent.*

(3) *That, the trial Magistrate erred in both in law and in fact by deciding and dividing 30% on the Matrimonial house and 40% on shamba to the Respondent while the Appellant acquired all the said property before his marriage to the respondent*

(4) *That, the trial Magistrate erred in law and fact by stating that the shamba which was subject to division and 40% be given to the Respondent was Matrimonial property acquired by joint efforts while in reality it was not.*

During the hearing on 26.11.2020 the parties appeared in person and unrepresented. The appellant submitted that he filed four grounds of appeal and that the respondent found him with a farm and house. He further submitted that in their matrimonial life they managed to jointly acquire the rest of the properties.

In response the respondent submitted nothing in reply whereas, the appellant had nothing to rejoin.

I have closely perused the lower courts' records and I have taken into consideration the petition of appeal and the rival submissions by the parties. It is apparent that the grounds of appeal are typically centred on

the division of two matrimonial assets as was ordered by the trial court and upheld by the first appellate court. In endeavour to settle the dispute between the parties on the two assets being protested in this court thus, I have framed two issues which will guide this court to reach settlement. The first issue is whether the disputed properties/assets are matrimonial assets as prescribed under section 114(1) of the Law of Marriage Act, Cap 29 R.E.2002. Second, if the answer is affirmative, whether the percentages apportioned to each party to this appeal considered the contribution of each party towards the acquisition of the disputed assets. Admittedly, the power of the court(s) to divide matrimonial assets is derived from section 114 (1) of the Law of Marriage Act which states:

"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."

It is apparent from the wording of section 114 (1) of the Act that the assets envisaged thereat must firstly be matrimonial properties and secondly, they must have been acquired by them during the marriage by their joint efforts. The Court of Appeal of Tanzania in the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R 34 had

defined what constitutes matrimonial assets to mean the same thing as what is otherwise described as 'family assets' as for the purposes of section 114 of the Act.

From the wording of section 114(1) of the Act for the Court to exercise its power to divide the matrimonial assets, the trial court must make sure that three conditions are met. These conditions include, first, when the Court has granted or is granting a decree of divorce or separation. Second, there must be matrimonial assets which were jointly acquired by the parties during the marriage and three; the extent of contribution of each party to the acquisition of such assets. Being aware of how the Court exercises its power under section 114(1) now I should find out if the learned trial Magistrate observed those conditions when he divided the assets to the parties. Upon my perusal of the trial court untyped judgment I am very confident to say that the learned trial Magistrate firstly, was satisfied that the marriage of the parties was broken down irreparably and continued to grant a decree of divorce to the parties.Secondly, according to his findings he was satisfied that the assets were acquired during their marriage.Three, he was satisfied that the acquisition of the house and farm was through joint efforts of the parties. Since this the second appellate court which has been invited by the parties to find out if the assets are matrimonial assets as ascribed to section 114(1).

It is a settled law that the second appeal court will not interfere on the concurrent findings of the first appellate court and the trial

court unless it is shown that there has been a misapprehension of evidence, a miscarriage of justice or a violation of a principle of law or practice. See **Amratlal D.M. t/a 10 Zanzibar, Silk Stores v. A.H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31.In light of that established cardinal principle I will try to abide to it and where necessary I will depart from the findings of the lower courts in case the lower courts did any violation of the hereinabove stated factors.

To answer appellant's contention brought by the appellant this court will use the gathered evidence, the law of Marriage Act and the legal precedents available in our jurisdiction to arrive at the settlement of the disputed assets. To begin the evidence gathered by the trial court reveals that the respondent was involved in the purchase of the plot of land which finally they constructed the contested house. Also, the respondent's evidence shows that she participated on the development of the cashew nut farm. In the light of that piece of evidence it important to reproduce part of the evidence of the respondent which she testified in the trial court as follows:

> "Mali ambazo tumeunda pamoja ni shamba la mikorosho heka
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> 3. Shamba hili lina heka 6 ila mimi na SU1 pamoja na tulifanyia kazi shamba lote hili,ninaomba nippate fidia kwenye heka 3 tu ambazo zina mikorosho ambayo tumekuwa tukiokota.Mwaka 2006 nilimkuta SU1 akiwa na mke ambaye muda mchache tu

alifariki.Tulilima mashamba na kuvuna mahindi ambayo tuliuza na kuanzisha biashara,Kutokana na biashara hiyo tuliweza kununua kiwanja na kuanza ujenzi.Nilishiriki katika kutafuta baadhi ya mafundi na kuwapikia mafundi hadi nyumba ilipokamilika.Mali zingine za pamoja ni pikipiki 1, kiwanja kimoja kipo Nachingwea,Redio 1 ya subwufa,pamoja na boriti 100."

On part of the appellant he did not cross examine the respondent on the assets which she claimed to have acquired jointly with him.Also, when the appellant was adducing his evidence before the trial court he did not testify on assets which the respondent claimed to be the matrimonial assets acquired jointly during the subsistence of their marriage while he was aware of the issue of division of the matrimonial assets which were read before him when the matter was at its initial stage. To fortify this stance the appellant when was required to plea on the claim laid against him he replied as seen at the first page of untyped proceedings of the trial court that:

"...Mali zote alizotaja zipo sawa isipokuwa shamba hilo la mikorosho alilikuta na nyumba pia aliikuta,niliijenga na marehemu mke wangu"

In addition, during defence hearing the appellant did not at all testify on the assets claimed to be matrimonial assets by the

respondent until when he was cross examined by the learned trial Magistrate. Thus, the appellant told the trial court as follows:

> "Shamba la mikorosho heka 3 pamoja na nyumba ambayo SM1 anaongelea ni mali ambazo alizikuta,sikuchuma nae kabisa."

Bad enough no witness from either side who testified on the acquisition of the disputed matrimonial assets except the parties themselves. As the record of the trial court reveals there is no doubt that the appellant did not take efforts to justify his argument that the respondent found him with the house and the cashew nut farm. The mere statement that the respondent found him with the house which he constructed with his late wife. Also, the statement that the respondent found him with the cashew nut farm are not a concrete proof that the said properties are not matrimonial assets jointly acquired by the parties to this appeal during the subsistence of their marriage. On my part and upon my kin scrutiny of the reproduced evidence as it appears hereinabove, Iam of the settled view that the evidence of the respondent was water tight evidence than that of the appellant on how they acquired and developed the same.

In addition, the evidence of the respondent is very explanatory on how she played her part in creating the three acres of cashew nut farm though the gathered evidence shows that they own six acres of land. The evidence of the respondent did not end there but it further

shows that the respondent asked the trial court to be given compensation on the cashew nut farm which she developed jointly with the appellant during the subsistence of their marriage. Furthermore, on the evidence on how they constructed the house in dispute. The evidence of the respondent is very clear that they cultivated the maize and the outputs were transformed into joint business. From that business they purchased a plot of land and started construction. The respondent further stated that she was involved in finding the craftsmen who built their house and also she used to cook for them until when construction was completed.

From the gist of evidence of respondent I am of the settled view that she participated fully in creating the cashew nut farm and the house. It is very clear that the appellant admitted on the existence of that fact since he did not cross examine the respondent during hearing. I am supported in this by what was said in the case of **Martin Misara versus The Republic**, Criminal Appeal No.428 of 2016(unreported) the Court stated that:

> *"It is the law in this jurisdiction founded upon prudence that failure to cross examine on a vital point, ordinarily, implies acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter."*

In view of the above hold and the act of the appellant not cross examining the respondent it amounted to acceptance of the fact(s)

which were being testified by the respondent. Further that, it is apparent that the appellant was unwilling to adduce evidence on how he acquired those assets before he married the respondent. Why Iam saying the respondent was unwilling to testify on those two disputed assets? It is because his evidence in chief does not feature any of how he created the cashew nut farm and a house. But, until when he was asked by the learned trial Magistrate on the two assets where he simply told the trial court that was the three acres of cashew nut farm and house are properties which were obtained before his marriage with the respondent and the respondent was not involved anyhow in its acquisition. Surely, the appellant who now disputes the division of the matrimonial assets before this court was required to go further by bringing witnesses to prove the existence of the facts he asserted; failure of which, he is to blame.

In the light of that re-evaluation I am of the firm view that the disputed assets are matrimonial assets which were acquired by joint efforts of the parties and during the life time of their marriage. As evidence reveals there is no doubt that the contribution of the respondent was through physical work and financial support via cultivation of maize and cashew nut and carrying out a business. Other forms of the contribution made by the respondent in the acquisition of the house are finding the craftsmen who built their house and cooking for them till when construction was completed. Also, on the second issue I think it will not be wise to interfere with

the percentages apportioned by the trial court since the respondent did not complain anyhow.

In view of the above analysis, I find nothing warranting this court to interfere with the concurrent findings of the two lower courts. I find this appeal without merit and dismiss it.

Accordingly, I direct that, the valuation on the disputed properties to be conducted immediately by the Government Land Valuer or Certified Land Valuer and the Land Valuation Report be submitted to the trial court for implementation of the division order of matrimonial assets.

Each party to bear his/her own costs.

Order accordingly.

W.P. Dyansobera

Judge

22.12.2020

This judgment is delivered under my hand and the seal of this Court on this 22nd day of December, 2020 in the presence of the appellant and the respondent.

W.P. Dyansobera

Judge