**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 90 OF 2019**

(Originating from the Judgement of Temeke District Court In Matrimonial Cause No. 34 of 2018)

**SOFIA HAMAD TABIADA.....APPELLANT**

**SAID ALLY MCHANAMA.....RESPONDENT**

## JUDGEMENT

**MASABO, J.L.:-**

The parties herein contracted an Islamic Marriage in 1996. In 2019, they had their marriage dissolved by the District Court for Temeke in Matrimonial cause No. 34 of 2018. Subsequent to resolution of marriage, the trial court made subsequent orders on division of matrimonial properties where by it declared that, the two houses (one at Newala in Mtwara region and another at Mgabala Kilungule in Dar es Salaam) were not matrimonial assets and vested the ownership of the same in the respondent herein. The Appellant is aggrieved and has appealed to this court. Her ground of appeal is that the trial court erred in law and in fact for declaring that a house located at Mbagala Kilungule area in Temeke District in Dar es salaam is not a matrimonial property and consequently failing to distribute it between the parties herein.

The Appeal was argued in writing. In a submission prepared on gratis on her behalf by the Women Legal Aid Clinic (WLAC) the Appellant argued that the

trial court erred grossly in failing to consider that the house in question was acquired during the subsistence of marriage and that the Appellant contributed to its acquisition of the disputed house financially and through and through work, including among others, taking care of household chores and by extending natural love and affection to the Respondent. She coted the case of **Bi. Hawa Mohamed v Ally Sefu** [1983] TLR 32[CA]; and the case of **Eliester Philemon Lipangahela v Daud Makuhana** Civil Appeal No. 139 of 2002 HC at DSM.

In response the Respondent did not dispute that the house was acquired during the subsistence of marriage. He stated however that, the Appellant does not deserve any share as she had no contribution to the acquisition of the house. He reasoned that, at the time the house was being constructed she did not contribute any money and her contribution to taking care of the husband was negligible because she had no children to take care of as their marriage was not blessed with any issue. He further argued that the appellant failed entirely to adduce any evidence during trial to show that indeed she contributed to the acquisition of the house at Mbagala Kilungule area. He argued that, the Appellant had a duty to prove her contribution to the house and since she failed to discharge this duty, she should not be given anything out of sympathy that she is a woman. He cited a case of **Lawrence Mtefu v Germana Mtefu,** Civil Appeal No. 214 of 2014 (HC) unreported. In her rejoinder, the appellant reiterated that she deserves a share because the house was acquired during the subsistence of marriage and that she contributed financially to some of the construction costs.

I have accorded due consideration to the submission by the parties. The issue waiting my determination is only one, namely whether the house at Kuimara Kilungule is a matrimonial house and if so, whether the trial court's refusal to award division of this house was just. Section 114 of the Law of Marriage Act, Cap 29 R.E 2002 from which the court derives its powers on division of matrimonial assets provides the following principle with the regard to the exercise of jurisdiction in division of matrimonial assets:

> 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 of any assets acquired by **them during the marriage 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.

Subsection (2) of this provision provides further that

> In exercising the power conferred by subsection (1), the court shall have regard:
> (a) .....
> (b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

This provision is a common subject in our courts. There now exist a plethora of authorities in the interpretation of this provision, the landmark one being the case of **Bi. Hawa Mohamed v Ali Seif** (Supra) where the court had this say:

> "It is apparent from the citation to and the wording of section 114 that the assets envisaged thereat must firstly be matrimonial assets; and secondly, they must have

been acquired by them during the marriage by their joint efforts."

With regard to the interpretation of sub section 2(b) the Court held that:

"...the words "their joint efforts" and "work towards the acquiring of the assets" have to be construed as embracing the domestic "efforts" or "work" of husband and wife."

Guided by the principles above, the task of this court will be confined to determine whether, (i) the house was acquired during the subsistence of the marriage (ii) whether it was acquired by the joint efforts of the spouses.

Before I proceed further let me once again pose here and state that, for purposes of appreciating the judgment of the trial court and the reasoning thereto, the appellate court has jurisdiction to review the evidence rendered during trial so as to determine whether the conclusion of the trial judge should stand or not (**Peters V. Sunday Post Ltd.** (1958) E.A. 424). Based on this principle, this being the first appeal court, I will take liberty to review the evidence rendered the course of trial, the detailed part of which was ably reproduced in the trial court judgement.

As it could be vividly seen in the Respondent's submission which coincides very well with the evidence rendered in court, there is no any dispute on the first element as regards whether or not the house was acquires during the subsistence of marriage. The Appellant who was PW1 and the Respondent (DW1) were all in agreement that the asset was acquired during the subsistence of marriage. The consensus on this element leaves me with only

one element for determination, i.e whether or not the Appellant contributed to the acquisition of the house and whether her contribution if any entitles her to a share. Having scanned through the records, I have found that, it is not under dispute that at the time the said house was being constructed the appellant was a house wife, a fact which is not disputed in the Respondents submission.

The nature of the contribution made by each part towards the acquisition of the matrimonial assets which included: a house at Mbagala Kilungule (the disputed house); a house at Newala, a plot situated at Vikindu area, Mkuranga district, a plot at Mbagala Kongowe area in Temeke and house utensils, was not clearly stated in the testimonies, possibly because both parties are lay and none of them was represented. On the plaintiff's side, PW1 just mentioned the assets acquired during the subsistence of marriage while on the other hand, DW1 just stated that the disputed house was acquired during the subsistence of marriage at the time when the Appellant was a house wife but she latter started petty business and having said this he prayed that the court be pleased to distribute matrimonial assets in accordance with the law.

The nature and extent of contribution made by each of the parties were thus left grey and having traversed in this wilderness the trial court made the following orders with regard to the division of matrimonial assets:

ii. The house situated at Mbagala Kilungule, Temeke District Dar es Salaam and Newala, Mtwara are not

subject to distribution and the remains under the ownership of the Respondent

iii. Two plots at Vikindu Area, Mkuranga District and Another at Mbagala Kongowe in Dar es Salaam are granted to the petitioner

iv. The household utensils be divided to the parties equally

v. One refrigerator, one bed and its mattress and one radio subwoofer are granted to the petitioner

vi. One sofa set, bicycle, two sheets and one gas cooker are granted to the Respondent

When the Principle in **Mwanahawa Mohamed v Ali Seif** (supra) is applied to the facts of this case, it is obvious that the trial court erred in its conclusion, more so because no reason was adduced as to why the assets in (ii) above were insulated from distribution. In the absence of concrete evidence to show that the contribution of one of the parties outweighed the contribution of the other party, this court is of the considered view that it is fair and just that the assets be distributed equally between the parties.

I take note of the fact that PW2 mentioned that both the Appellant and the Respondent were doing business. However, considering that he was not party to the marriage and, presumably, not privy to the manner in which the parties herein used to conduct their family affairs including matters pertaining to contribution towards acquisition of assets, I will not accord weight to this piece of evidence. I have also noted the Appellant's submission that the appellant's contribution in terms of work, if any or valuable, was minimal because she had no children to take care of, and that her caring role was only to the husband. With due respect, this kind of

argument is not only devoid of merit but is also inconsistent with the provisions of the Law of Marriage Act, 1971 which, commendably, treats matters pertaining to matrimonial assets and matters pertaining to issues of marriage as separate entities. In other words, the existence of issues of marriage is not antecedent to entitlement on matrimonial assets. Under the law a spouse will be entitled to his/her share to matrimonial assets regardless of whether or not the marriage was blessed with issues.

Based on what I have stated with regard to the error inhibited in the trial court orders, I allow the appeal. Further, I invoke the revisional powers vested in this Court by Section 44 (1) of the Magistrate Courts Act, quash and set aside the orders of the trial court and order that: All the matrimonial assets listed in item (b) to (f) of the trial court's decree be valued and divided to the parties on equal halves.

This being a matrimonial appeal, I will make no orders as to costs.

DATED at DAR ES SALAAM this 4th day of March 2020.

**J.L. MASABO**

**JUDGE**