THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

PC. CIVIL APPEAL NO 11 OF 2019

(Arising from Matrimonial Appeal NO.14 of 2018 of Masasi District Court; Originating from Lisekese Primary Court in Matrimonial Case NO.27 of 2018)

BAKARI HASSANI SAIDI .....APPELANT

VERSUS

ASINA SELEMANI .....RESPONDENT

JUDGMENT

Hearing date on: 13/2/2020

Date of judgment: 27/2/2020

NGWEMBE, J.

This is an appeal against the decision of the District Court of Masasi, which in effect set aside the decision of Lisekese Primary Court on the issue of division of matrimonial properties obtained during cohabitation of the parties. It was established during trial that the two parties had cohabitation from 2011 until when fuds and tensions arose between them, which ended to Lisekese primary court for divorce. The trial magistrate considered if at all there was any marriage known by law, the court concluded that there

was no formal marriage but presumption of marriage, which parties did not dispute. The parties did not venture to court for divorce, rather were on division of what found together during their cohabitation. According to the record from the trial court, the dispute which hold the parties to loggerheads is division of farms. One farm has 22 cashew nutstrees, the second has ten (10) cashew nuts trees and the last one has eight (8) cashew nuts trees, forming a total of three farms. The trial court divided those farms among them, that the respondent was given two farms, the one with ten (10) and eight (8) cashew nuts tree, while the appellant was given a farm with twenty-two (22) cashew nuts trees. But the respondent was dissatisfied, hence appalled to the District court where the first appellate cour,t nullified the judgement of the trial court and ordered no division of the said land to the appellant. That is all farms belong to the respondent/appellant, which decision aggrieved the appellant, hence this appeal armed with two grounds namely;

1. That the trial court erred in law and in facts by not considering the time limit in appeals originating from primary court, despite the fact being brought to the attention of the court thus, arriving to erroneous judgment.

2. That the trial magistrate erred in law and in facts by arriving his decision based on argument that I was compensated for a farm that we jointly acquired.

On the hearing date, the appellant appeared alone, when he was asked as to where about the respondent, the answer was that, she refused to

accept neither summons nor documents from the appellant or this court and refused to appear in court. Being curious to know more on the truth of that assertion, the appellant referred this court to the letter written by the Village Executive Officer of Ngalole Village written on 13/9/2019. Part of the contents of the letter is quoted hereunder:-

> *"Asina Selemani ni makazi wa kijiji cha Ngalole kata ya Namajani Wilaya ya Masasi, ambaye amehitajika katika mahakama hiyo mtwara. Lakini baada ya kumfikishia taarifa hizo za kuhitajika alikataa kuzipokea pia alikataa kuweka sahihi yake"*

In brief, the respondent refused to accept summons to appear for hearing of this appeal. In the circumstances, this court ordered the appellant to proceed arguing his appeal uncontested.

In turn, the appellant in his brief submission, stated that, this appeal is against the decision of Masasi District Court, which decided in favour of the respondent. He pointed out that the dispute is related to ownership of three cashew nut farms. The District Court ordered all the three farms to be owned by the respondent, leaving him with no any farm. He rested his submission by praying this court to make fair distribution of the said farms.

The trial magistrate was firm to distribute the said farms according to the evidence adduced in court. At page 3 of the judgement (Hukumu) had this to say:-

"Mahakama hii kwa mamlaka iliyo nayo kwa mujibu wa kifungu cha 114 cha sheria ya Ndoa ya 1971 inazigawa mali hizo ambazo hazikugawiwa katika mashamba matatu mdai atapata shamba la mikorosho kumi na lile la mikorosho nane na mdaiwa

The question now is, whether the disputants acquired such properties jointly? In his submission the appellant submitted that, the District Court ordered all the three cashew nuts farms be owned by the respondent, leaving the appellant with no farm at all. The evidence on record indicates that, parties acquired three cashew nuts farms among other properties. The only holding the parties in loggerhead is division of those farms. It is a legal position of law that division of matrimonial property or properties founded on cohabitation of parties should be divided according to each party's contribution. **Section 114(2) of the law of marriage Act** provides that:-

"In exercising the power conferred by section (1), the court shall have regard

(a) To the customs of the community to which the parties belongs;

(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 the 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".

Likewise, it is a settled principle of law that issues which entirely based on credibility and reliability of witnesses should properly be dealt with by the trial court as opposed to the appellate court. In the case of **Augustino Peter Mmasi Vs Tausi Selemani, Civil Appeal No. 56 of 2014, (CAT)**, at Dar es Salaam (unreported) had similar guidance on this issue.

The evidence testified by the appellant during trial had this to say:

"Kwenye ndoa yetu tumebahatika kupata mashamba matatu".
In cross examination the appellant testified that *"Mashamba nimepata nikiwa na wewe na walio tuuzia wapo. Mashamba tulinunua wote mimi na wewe. Mashamba tulinunua kwa pesa ya kilimo. Tulikuwa tunalima katika shamba la ndugu yake mdaiwa"*

Based on that piece of evidences the trial court divided the three farms accordingly. It is evident that disputants during the existence of their cohabitation were engaged in agriculture and the proceeds of that farming enabled them to purchase those farms. Thus, the farms were jointly acquired. In the case of **Robert Aranjo Vs Zena Mwijuma [1984] TLR 7,** the court held:-

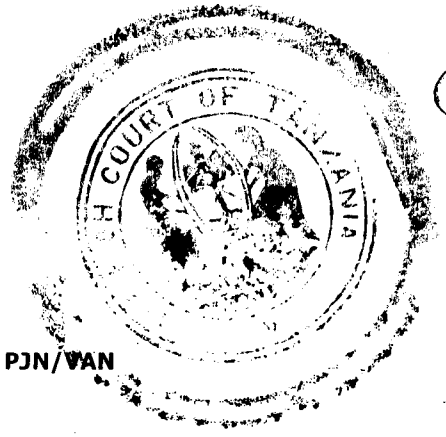
"The court has power, when granting a decree of divorce or separation, to make an order for division of matrimonial assets acquired during the marriage by the joint efforts of the parties".

The same position was repeated in the case of **Mahega Zengo Vs Holo Kadaso [1982] T.L.R. 94,** held:-

> *"The court hearing a petition for a decree of divorce or separation has the duty to enquire into the issue of matrimonial property".*

In totality and according to the evidence on record, I find justice demand each party should benefit from his sweat be it from agriculture or business or employment, so long each party participated in acquisition of the disputed property. Therefore, I find merit to this appeal and no cogent reason to disturb the well-reasoned judgement of the trial court. Accordingly, I hereby quash the judgement of the District Court and exceedingly, restore the judgement and orders arrived by the trial court. Each party to bear his/her own costs. **I accordingly Order.**

DATED at Mtwara in chambers this 27th day of February,2020.



P.J. NGWEMBE

JUDGE

27/02/2020

PJN/VAN