IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO.14 OF 2020

(Originating from District Court of Kilombero at Ifakara in Civil Case No. 32/2019 and originating from Mkamba Primary Court in Matrimonial Cause No.11 of 2019)

JONAS EMILIAN KOMBA ---------- APPELLANT

VERSUS

MARY MATEI KIGALAMA ----------RESPONDENT

Date of Last Order: *08/03/2021*

Date of Judgment: *09/04/2021*

JUDGMENT

L. M. MLACHA J.

The appellant, Jonas Eliamani Komba was the respondent in Matrimonial Cause No.11 of 2019 of the district court of Kilombero district at Mkamba. The respondent, Mary Matei Kigalama was the petioner. It was a case for divorce and division of matrimonial assets. There was no claim for custody of children apparently because the children (4) are no longer infants given the age of the marriage as we shall see later. The primary court granted the petition. The appellant was dissatisfied by the judgment of the primary

court and appealed to the district court of Kilombero at Ifakara in Civil Appeal No. 32/2019 without success. He has now come to this court by way of appeal.

Before going to examine the grounds of appeal, a bit of the background of the dispute may be useful. The records reveal that the respondent found some difficulty in her marriage and moved to the primary court to file the case which was dully drawn to the attention of the appellant. Both parties appeared at the primary court with their witnesses and were given the right to be heard. The respondent (born 1965) gave a lengthy testimony at the primary court saying that they celebrated a Christian Marriage in 1987 but they had started to live as friends in 1980 or 1981. They managed to get 4 children. Difficulties developed after the appellant had picked another woman. There were serious quarrels which lead her to walk out of the matrimonial house on 23/03/2019. She shifted to the other house of the family where she stays to date. The appellant (born 1957) gave evidence and accepted that their marriage was celebrated in 1987. It was a Christian Marriage. He said that his wife developed a habit of being a drunkard. She was out of control and they were not in good terms. She was one day brought home while necked.

Difficulties developed which lead her to vacate from the matrimonial home.

Both parties say that reconciliation was attempted at home and at church levels without success. The primary court found that the marriage had broken down beyond repair and granted divorce. It then proceeded to divide matrimonial assets which was the area of complaint in the district court. It is also the basis of the appeal before this court.

The primary court gave the respondent one house (nyumba ya Chikago aliyohamia), one farm (defined as shamba la Kitete) and matrimonial assets currently in Chikago house. The appellant was given the matrimonial house (defined as nyumba ya Mkamba) and the rest of the farms (shamba la Msindazi na shamba la Sanje). The appellant did not see justice in the divisions and appealed to the district court without success. He then came armed with two grounds of appeal which may be put as follows: -

1. That the district court failed to examine the facts thereby leading to a wrong finding and decision.
2. That the district court erred in falling to note that the assets which were ordered to be divided were not matrimonial assets.

The parties being laymen could not address the grounds of appeal specifically. They made general submissions. The appellant submitted that the house which was given to the respondent was in existence before the marriage. He proceeded to say that the land which was given to her was part of his terminal benefits after being terminated from his job and should not have been given to her.

Submitting in reply, the respondent said that they got the properties after the marriage. Giving details, she said that the appellant had two plots which had no house. The houses were built during the subsistence of the marriage and therefore subject to division. Speaking of the farms, she said that the appellant has more than 5 acres while she was given just one. Further that, the garage and motor vehicles were left to him. She added that the appellant has another land, 3 acres, which has sugar cane.

I had time to peruse the records of the lower court closely. Much as I have the view that the appeal had no merit but I am not happy with the style of the magistrate. With respect, I see a serious negligence on his side. He dismissed the appeal saying "I hereby dismiss the appeal for lack of disclosure of error of law" and proceeded to say "I hereby struck out the appeal". That was wrong and very unusual.

An appeal which has been dismissed cannot be struck out by the same magistrate in the same ruling. The reasons are obvious, something which has been dismissed goes out, it does not exist anymore so as to be struck out. It was therefore wrong to proceed to struck it out after it had been dismissed. This shows that the magistrate worked without the sense of duty. He was negligent so to say. He is once again reminded to be careful in future.

That said, what is the merit of the appeal before me? The appeal suggests that the parties have no problem with divorce. They are satisfied that the game is over though when I referred them to principles of Christianity on forgiveness (kusamehe saba mara sabini) they appeared to be shaking. The husband appeared to be more concerned but asked me to consider that the division was unfair. He favoured a new division. He could not see the possibilities of living with the respondent again.

The issue before me now is whether the division made by the primary court was fair and just regard being taken to the requirements of section 114 of the Law of Marriage Act. Apparently, the decision of the district court did not discuss the issue so I cannot make any discussion on it. I will start by reference to the law.

Section 114 reads:

"*(1) The court shall have power* ***when granting or subsequent of the decree of separation or divorce****, to* ***order the division between the parties*** *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.*

(2) In the exercise of the power conferred by subsection (1), the court shall have regard-

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

(b) ***the extent of the contribution made by each party in money, property or work towards the acquisition of the assets;***

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

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

The position of the Law is that, division of matrimonial assets follow the decree of separation or divorce. In other words, there cannot be a division of matrimonial assets in the absence of a decree of separation or divorce.

The law has set out some conditions or principles to be followed; One, the court must have regard to the customs of the community. Two, the court must be guided by the contribution made by each of the parties in the acquisition of the assets. Three, the court must address its mind to the debts of the family, if any. Four, the court must take into account the needs of infant children, if any. And finally, the court shall incline towards equality of division. There is nowhere written that the division must be made on 50% basis as is sometimes confused to be the case. The case of **Bi Hawa Mohamed v. Ally Self (1983) T.L.R 32** did not say that people should be given 50% without proving contribution. All what it said is that domestic services of a woman rendered to the family have to be taken in to account as part of her contribution in the final assessment of division of matrimonial assets. And in my view, even on this area, one has to show what he did for the family because in some cases, domestic activities are performed by domestic servants (house girls, house boys, cooks etc).

The issue now is whether there was evidence showing that the respondent made a contribution giving her a right to be given the house, domestic assets and the land, one acre.

The evidence reveal that the appellant had 2 plots at the time of marriage. One plot had a mud house which was later demolished to make a modern house. They also built a house on the other plot. The appellant worked at the garage while the respondent remained at home taking care the family and the children. They then acquired the farms which formed the main source of income for the family. There is evidence that the two worked together on the farms. They cultivated sugar cane and other crops.

Taking into account the life style of the two parties and the duration of the marriage which was 32 years (1987 to 2019), I think the division made by the primary court was fair. Each got a house where he/she can live for the rest of his/her life and got a piece of land for farming activities. The appellant got a bigger piece of land because his contribution was bigger and I agree. He was also left with the garage. I think that was correct. I see no base disturbing the division for it was fair.

That said, the appeal is dismissed. No order for costs.

L. M. MLACHA

JUDGE

08/04/2021

Court: Judgment delivered in presence of both parties. Right of appeal explained.

L. M. MLACHA

JUDGE

09/04/2021