IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC CIVIL APPEAL NO.15 OF 2020

DORICE KATOLE..... APPELLANT

VERSUS

ABDALLAH CHUMA.....RESPONDENT

(Appeal from the judgment of the of the District Court of Maswa)

(Lukuna SRM)

Dated the 6th Day of June, 2018

In

Matrimonial Appeal No.4 of 2018

.....

JUDGMENT

18th May& 2nd July,2021

MDEMU,J.:

This is a second appeal. In matrimonial petition No. 56 of 2017 in the trial Primary Court of Nyalikungu, the Appellant Doris Katole filed a matrimonial petition for divorce and division of matrimonial assets against the Respondent husband one Abdallah Chuma. According to the record in 1990, the two contracted a customary marriage after paying bride price of Tshs. 50,000/=. It appears somewhere things never took the expected line leading to desertion of the Appellant by the Respondent in the year 2000.

They then separated. On 1st of March, 2018, the trial Primary Court made the following decision:

> *AMRI: Mahakama inaamuru talaka itolewe kwa mdai C/F110 (1)(a) Sheria ya Ndoa [Sura 29 R.E 2002]. Katika mgawanyo wa mali ya ndoa,mdai apewe milango mine toka chumba Na.1 mpaka Na.4 kwa mujibu wa kiambatanishi "B" kama kinavyoonekana katika kielelezo "DW-1". Hakuna amri yoyote ya matunzo au malezi ya watoto inayotolewa kwa kuwa watoto wote wa ndoa wameshafikia umri wa utu uzima.*

The Respondent wasn't happy with that decision hence appealed to the District Court of Maswa in Matrimonial Appeal No.4 of 2018. The appeal was determined and on 6th of June, 2018 it was ordered that:

> *In the final analysis, since the extent of contribution was not properly proved by both parties, it is better the same to be determined so that to know who contributed what and to what extent. Thus the other grounds of appeal have been taken by event, but it is ordered that, the same to be determined* ***denovo*** *to establish the extent of contribution.*

This decision aggrieved the Appellant thus approached this court by way of appeal on the following two grounds of appeal:

1. *That the 1st appellate court erred in law and fact in holding that the parties did not prove the extent of contribution in acquisition of matrimonial properties.*
2. *That the 1st appellate court erred in law and fact for ordering the case be tried* ***denovo.***

Parties appeared in person before me arguing the appeal on 18th of May, 2021. Along with her prayer to have her grounds of appeal adopted to form part of her submissions, the Appellant submitted that the court erred in dividing four (4) rooms to her out twelve (12) rooms ignoring the fact that she is taking care of children. She further submitted that the court did not take into account the extent of contribution resulting from taking care of the family as a house wife and that at times she was engaged in agricultural activities with the Respondent husband. Under the premises he thought the appeal has merits and prayed the same be allowed.

In reply, the Respondent submitted briefly that the Appellant stayed for almost twenty years while separated before filing the instant

matrimonial proceedings in the trial primary court. He added to have constructed one house at Kasulu where the Appellant is currently living. Regarding the house in Maswa, his submission was that the house was constructed by him and it is the one he is residing in. he faulted the trial court's position that the house has twelve (12) rooms. His position is that had the trial court visited the locus in quo, would have relialized that the alleged house has eleven (11) rooms.

Regarding number of children, his view was that they are two and not three. on those premises, the Respondent could not see any problem with the decision of the 1st Appellate Court thus asked me to dismiss the appeal for want of merits. The Appellant rejoined briefly that, there is no any house constructed at Kasulu and that the two were blessed with three issues and not two as submitted by the Respondent. He thus summed up that order of the 1st appellate court to have the matter retried is without substance.

I have gone through the entire record and duly considered submissions of the Appellant and the Respondent herein. It is not disputed that in 1990, the Appellant and the Respondent entered into a customary marriage and that the two separated for quite sometimes before the

Appellant petitioned for divorce and a share in the matrimonial assets. Essentially, parties are not contesting on divorce order. The question for their hours in court is with regard to division of matrimonial assets. Is there no evidence as to contribution of couples on acquisition of the matrimonial assets compelling the 1st appellate court to order retrial for ascertaining the same? It is trite law that in the division of matrimonial assets, the court has to consider contribution of each part in the acquisition of the said properties . (See **Bibie Maurid vs Mohamed Ibrahim (1989) TLR 162**) and that, such contribution may include what was stated in **Bi Hawa Mohamed vs Ally Sefu (1983) TLR 32** that:

> *(i) Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets.*
>
> *(ii) the "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;*

On contribution on acquisition of matrimonial assets, the trial primary court made the following observation at page 12 and 13 of the judgment:

SM1 katika ushahidi wake alidai kuwa walipata nyumba iliyoko maeneo ya Biafra "A" Maswa pamoja na kiwanja ambacho alidai kuwa walikipata 1994 lakini mwaka 1998 alikuta tayari mdaiwa ameshakiuza. Lakini pia SM1 alidai kuwa walikuwa na shamba ambalo alikuwa analima na alipofukuzwa aliacha hilo shamba alilotaja kuwa analilima na alipofukuzwa aliliacha hilo shamba alilolitaja kuwa lilikuwa maeneo ya mnadani Maswa. SM3 yeye alidai kuwa mdai na mdaiwa walikuwa na nyumba moja waliyokuwa wanaishi na nyumba hiyo SM3 alidai kuwa mdai na mdaiwa waliipata baada ya kuuziwa na ndugu Msafiri s/o Omary Sadala ambaye SM3 alidai kuwa alikuwa ni mume wake. SM4 naye katika ushahidi wake anadai kuwa mali ya wazazi wake(mdai na mdaiwa) anayoitambua yeye ni nyumba moja. Hata hivyo, kwa upande wake SU1 yeye alidai kuwa hakuna mali yoyote waliyopata yeye na mdai. Isipokuwa kati yam waka 1994 na 1995 kaka yake aitwaye Salum Chuma alimnunulia nyumba hapa Maswa maeneo ya Biafra "A"

.....SM1, SM3 na SM4 wote wmethibitisha kwamba mdai na mdaiwa walikuwa/wana nyumba moja ambayo ndiyo walikuwa wanaishi kabla hawajatengana na nyumba hiyo waliipata walipokuwa wanaishi pamoja. Kwa upande mwingine, SU1 naye alidai kuwa ni kweli walikuwa na nyumba waliyokuwa wanaishi kabla ya kutengana ingawa SU1 alidai kuwa nyumba hiyo alinunuliwa na Kaka yake.....

Kwa msingi wa K.114 (2)(b) cha Sheria ya Ndoa, Sura RE 2002, Mahakama imejiridhisha na kuona kwamba nyumba iliyotajwa na SM1 na kuungwa mkono na SM3 pamoja na SM4 iliyoko Biafra "A" Maswa, Mahakama imeona nyumba hiyo ni mali ya pamoja ya ndoa

This was not the case on appeal in the District Court as it was observed at page 7 through 8 of the judgment that:

In deciding what the parties should get, the court normally looks at the evidence adduced by both side. Each party is expected to give evidence on what was his/ her contribution and not mentioning what was acquired. The Respondent is saying that they had one house and the Appellant is alleging

that they had a two roomed house which had one door frame for business purposes.

On this analysis, the appellate learned Senior Resident Magistrate had an observation that there is no evidence in the trial court's record indicating extent of contribution of parties in acquisition of the matrimonial house. In other words, was the house acquired during subsistence of the marriage and what role parties prayed in such acquisition?

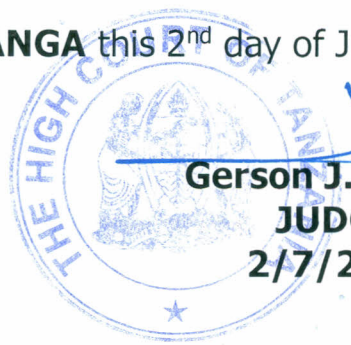
In the evidence in the trial primary court on spouse's contribution in acquisition of the matrimonial house it is not disputed according to SU1 that the said house was acquired during existence of the marriage. SM1 the Appellant just mentioned its existence. SM2 was informed by SM1 that they purchased the house so was SM3 who was informed by her late husband on purchase of the house by the couples.SM4 his was short regarding the house that *Mimi naomba yule mke wake wa pili wa mzee aweze kutupisha*. With this version, together with the evidence of the Respondent that his brother purchased the house for her, there must be evidence from that brother if at all he purchased the house for the Respondent or for the couples. This evidence is relevant as in it will be established that neither the Appellant nor the Respondent contributed

towards acquisition of the said house. Whether or not the house is a matrimonial one, it will all depend on the evidence that it was purchased for the couples or the Respondent alone.

It is upon those premises, I am in all fours with the learned appellate Senior Resident Magistrate that, as the evidence regarding contribution of parties in acquisition of the matrimonial house is wanting, the best option is to return this matter to the trial primary as I hereby do,court to determine that aspect. In view thereof, the decision of the trial court on the aspect of division of matrimonial assets is accordingly quashed. The appeal is thus allowed to the extent just stated above. Each part to bear own costs. It is so ordered.

Gerson J.Mdemu
JUDGE
2/7/2021

DATED at **SHINYANGA** this 2nd day of July, 2021



Gerson J.Mdemu
JUDGE
2/7/2021