

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

PC MATRIMONIAL APPEAL NO. 4 OF 2021

(Arising from Matrimonial Appeal No. 6/2020, Originating from Matrimonial Cause No. 25/2020 80 of 2020 primary court of Tarime district at Tarime Urban)

CHARLES OLOO ARILAAPPELLANT

VERSUS

HILDA DIDA OMOLO.....RESPONDENT

JUDGMENT

3rd August & 29th September, 2021

Kahyoza, J.:

This is a second appeal filed by Charles Oloo Arila against the decision of the District Court in favour Hilda Dida Omolo. The District Court upheld the decision of Primary Court granting divorce and distributing the matrimonial properties. Charles contended that District Court divided property which does not exist or not acquired by joint efforts, and the house situated at Ngasaro Street should not be sold and proceeds shared.

Charles raised two grounds of appeal which raised two issues as follows:

1. Were the assets divided all matrimonial assets and do they exist?
2. Is the house at Ngasaro subject of division?

The background of this matter is that Hilda Dida Omolo (Hilda) petitioned in primary court for divorce and division of matrimonial property against Charles. It is undisputed that Hilda and Charles contracted a customary marriage in 1986 and they were blessed with 5 issues. They acquired several assets, the list which is disputed. Hilda was a house wife and Charles was employed as a teacher. Hilda contended that they lived peacefully until Charles married another wife Charles denied Hilda conjugal rights.

Charles contended that he did not deny Hilda conjugal right at his will but he is diabetic so unable to perform sexual activities. There was evidence that the marriage between Hilda and Charles was from 2016 entangled with disputes.

Both courts found that the marriage was broken beyond repair. No party appealed against this finding. The primary court found and the District Court upheld that Hilda and Charles acquired several matrimonial assets. It is the division of the assets by the primary court which were uphold by the District Court which aggrieved the Charles.

Parties appeared submitted orally in support and against the appeal. I will refer to the parties' submissions while answering the issue raised.

Were the assets divided all matrimonial assets and do the exist?

Charles submitted that Hilda being a house wife did not contribute to the acquisition of the assets. He added that assets divided were acquired before he married Hilda. Charles contended further, that he married Hilda

after he was employed as teacher and acquired some of the property construed as matrimonial asset.

Charles submitted that the Hilda did not prove the existence of some of the assets divided to her.

Hilda replied that she lived with Charles for 36 years, hence, she knew all the assets acquired during the subsistence of their marriage. She stated that they acquired two milling machines. She contributed to the acquisition of the second machine. They acquired two plots at Shirati. She refused knowing a third plot at Shirati. They also built two houses one for her and another one for the second wife. They have five frameworks for shops. Hilda added that Charles took her frame for a shop and leased it. She contended that they own a plot at Songe-Musoma, which they bought at Tzs. 600,000/=. She contended that she was given two rooms in the house of 14 rooms. She is living a begging life after staying and cooking for Charles for 33 years.

In his rejoinder, Charles submitted they do not have a plot of land at Songe-Musoma.

After hearing the rival submissions, one of the thorns in the parties' fresh is which assets qualify as matrimonial assets. The Court of Appeal in **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, www.tanzlii.org [2020] TCA 31 after taking inspiration from the Indian position as to what is the family assets, it described matrimonial assets as *those property acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives*. Thus, in the present case,

all assets acquired jointly or separately before or after Charles married Hilda provided they were acquired with the intention that there should be continuing provision for them and their children during their joint lives are matrimonial assets.

It is undisputed that according Section 114 (4) of the **Law of Marriage Act**, [Cap. 29 R.E. 2019] (the **LMA**) assets acquired by joint efforts include assets acquired before the marriage by one party and which has been substantially improved by their joint efforts during the marriage. It stipulates that.

114(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Charles submitted that he had never owned 86 herd of cattle as listed by Hilda. He contended that he owned only 36 herds of cattle. Hilda replied that she knew all the assets. She contended that her father-in law gave her one herd of cow, which reproduced 10 cattle. She contended that the primary court was required to subtract 10 herds of cattle before diving them.

I went through the evidence and found that Charles deposed that before he married Hilda he owned 30 herds of cattle, which reproduced up to 84 herds of cattle. For that reason, Hilda did not contribute to the acquisition of the herds of cattle. Charles testified that-

"...kabla sijamuoia mdai tayari nilikuwa mwalimu hivyo mali zote zilitoka nan a msharaha wabgu na ng'ombe alizosema 84 ni kati ya 30 nilizoachiwa na urithi na baba yangu marehemu..."

Charles' evidence implied that he owned 84 herds of cattle which were produced by 30 herds of cattle he inherited from his father. It meant also that Hilda had no contribution to the acquisition of the herds of cattle. He also accepted during cross-examination that Hilda's father in law gave her one cow. The primary court set aside 30 herds of cattle, which is the number of cattle Charles inherited and divided the remaining 56 or say 54 as Charles admitted in his evidence that he owned 84 and not 86 herds of cattle. The primary court gave 18 herds of cattle to Hilda.

Given the position of the law that if one party owned private asset, which is substantially improved after marriage, that asset becomes matrimonial asset. That asset is therefore subject of division. I am therefore, in total agreement with the decision of the two courts below that Hilda was entitled to have a share out the 84 herds of cattle. The herds of cattle Charles inherited have been substantially improved by joint efforts. They are family assets. I also found it proved that Charles owns 84 cows of cattle. He admitted in his testimony before the primary court.

Before, I approve the division of the matrimonial asset or otherwise, I wish to state at the outset that it is settled that a party seeking an order for division of matrimonial property must plead in his or her I petition to that effect and must prove in court by adducing evidence to show that he or she contributed to the acquisition of such property. See **Fatuma Mohamed V Saidi Chikamba** [1988] TLR 129 Further, the principle

underlying division of matrimonial property is one of compensation, it does not make any difference whether what is being compensated is direct monetary contribution or domestic services. Thus, the legal principle on which division of matrimonial assets is based is one of giving recognition to the contribution of the spouse towards the acquisition or **enhancement of value of the particular property**". See the case of **Pulcheria Pundugu V Samwel Huma Pundugu** [1985] TLR 7.

A house wife like, Hilda in the present case, contributed to the acquisition of matrimonial asset through her provision of domestic services. She is entitled to be compensated for her contribution after the marriage was declared to be broken beyond repair or the presumed marriage came to an end. The primary court determined Hilda's contribution towards the acquisition of the family asset as being 25%. Domestic services of a house wife amount to contribution in acquisition of matrimonial assets. See **Bi Hawa Mohamed V Ally Sefu** [1983] TLR 32. Hilda did not appeal against that finding. The primary court made the finding, that Hilda was entitled to 25% of value of the matrimonial asset (the house) which, the district court approved. I believe that Hilda's contribution to the acquisition of the matrimonial assets in general. This being the second appellate court, I will not interfere with the concurrent findings of facts by the two courts.

It is trite law that *where there are concurrent findings of facts by two courts, the second appeal court should not disturb them unless it is clearly shown that there has been a misapprehension of evidencing or a miscarriage of justice or violation of some principle of law or procedure*. See the case of **Amratlal Damodar Maltaser and Another t/a**

Zanzibar Silk Stores Vs. A.H Jariwalla tla Zanzibar Hotel [1980]

T.L.R 31. I will uphold the finding that Hilda, a house wife contributed 25% to the acquisition of the matrimonial assets.

The primary court award 18 herds of cattle out of 86 to Hilda. The district court reduced them to 13 herds of cattle out of 86 to Hilda. The district court did no adduce sufficient reason or any reason for the reduction. I am unable to support the deduction. I quash the district court's decision and that of the primary court. I find that Hilda is entitled to 21 herds of cattle, which is 25% of 84 herds of catted. The primary court determined that Hilda's contribution to the acquisition of the matrimonial asset was 25%. I resolved to interfere because there were no current findings by the two courts below, as the primary court awarded 18 herds of cattle, and the district court reduced the award to 13 herd of cattle. Further still, the division occasioned *a miscarriage of justice*. Hilda had the right to be compensated to the extent of her contribution to the acquisition of the matrimonial assets.

Charles contended that Hilda did not establish that they acquired the plot at Songe-Musoma. Hilda stated that they own the plot at Songe-Musoma.

The primary court awarded 2 shop frameworks to Hilda and 3 three shop frameworks to Charles. It also bestowed all houses and five acres' farm at Buturi to Charles. It only gave Hilda the plot at Songe-Musoma. if there is Plot at Songe-Musoma is not existing, it is Hilda who should have been mournful for being given a plot they never owned. I therefore, dismiss the complaint that Hilda was given a non-existing plot. Like the

district court I uphold the division of the Plot of land at Songe- Musoma to Hilda I also upheld the decision all houses and 5 acres' farm at Buturi to Charles.

Charles submitted that it was wrong for the primary court to give one of the milling machines to Hilda. He contended that there was one machine with two components. Hilda contended that at the time of her marriage there was one machine. She contributed and they procured a second one. It is settled that if the property acquired before marriage by one party is substantially improved by the other then that property is a matrimonial asset. Given the nature of the division of the matrimonial assets between the parties, I find that to give one machine will lead to 25% of all assets and not more. Hilda was not given any farm. She is a human being she needs to feed herself. I find no reason to interfere with the division. It is on record that apart from the assets divided as shown above, the primary court gave Charles one motor cycle and one milling machine.

I uphold the primary court's division of matrimonial assets except the division of herds of cattle, which I increase to 21 from 18 herds of cattle.

Is the house of Ngasaro subject of division as matrimonial asset?

Charles complained that the magistrate erred in law and fact to order that the matrimonial house which is situated at Ngasaro Street in Shirati be sold. He contended that the magistrate did not consider the fact that the parties depend on the house for their survival and for survival of the issues of their marriage and for paying their school fees.

Hilda, the respondent, replied that she was also aggrieved by the decision of the district court, which gave her **two** rooms and 14 rooms to Charles.

I wish to state as already stated that after the marriage is broken beyond repair, parties to the marriage have a right to be compensated to extent of their contribution to the acquisition of the matrimonial asset. There is no doubt that the house at Ngasaro is one of the matrimonial assets. Once it is established that a given property is a matrimonial asset, that property is subject of division. For that reasons, the house situated at Ngasaro street is also subject of division. Section 114(1) of the **LMA**, speaks louder, it stipulates that-

*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.***

The primary court was right to order the house to be sold and the proceeds distributed between Charles and Hilda. It was not ease to divide the house between the parties. Although, none of the parties requested, I find it proper that instead of selling the house, the house may be valued and then one of the parties who can buy out the other party by paying the value of the other party's share. The party may retain the house after paying the value the other party's share. The house must be valued by the

government valuer or any independent valuer appointed by the primary court.

In case of dispute as to who should buy out the other, I direct Charles, who owns 75% of the value of the house, to be given preference to buy off Hilda.


In the end, I find the appeal without merit and uphold the decision of the district court and the primary court with the following alterations: -

- 1) Hilda is entitled 21 herds of cattle; and
- 2) Instead of selling the house at Ngassara street Shirati, the house may be valued and the party capable of paying the value may buy out the other party. Charles, who owns 75% of the value of the house is given preference to buy out Hilda. If, he fails to pay the value within two months from date of establishing the value of the house, Hilda may buy out Charles. As a last resort, if there will be no party able to buy out the other, the house shall be sold and the proceeds divided as order by the primary court.

Hilda, the respondent is awarded costs of this appeal. It is ordered accordingly.

Given under my hand this 29th day of September, 2021.




J. R. Kahyoza
JUDGE
29/9/2021

Court: Judgment delivered virtually through the resident magistrate in charge of the district court of Tarime at Shirati. B/C Millinga.



J. R. Kahyoza

JUDGE

29/9/2021

Court: Copies sent to the Parties through the resident magistrate in charge of the district court of Tarime at Shirati.



J. R. Kahyoza

JUDGE

29/9/2021