IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM REGISTRY

(AT DAR ES SALAAM)

PC CIVIL APPEAL NO. 22 OF 2021

(Arising from the judgment of the District Court of Ilala in Civil Appeal No. 39 of 2020 and Originating from the decision of the Primary Court of Ukonga in Matrimonial Cause No. 188 of 2018)

MBEGU MOHAMED...APPELLANT

VERSUS

MARIAM RAMADHAN..RESPONDENT

JUDGMENT

Date of last order: 19/08/2021
Date of judgment: 22/11/2021

LALTAIKA, J.

This is an appeal by **MBEGU MOHAMED** who is dissatisfied with the decision of the Ilala District Court in Civil Appeal No. 39 of 2020, originating from the Matrimonial Cause No.188 of 2018, at Ukonga Primary Court.

The brief historical background of this appeal is that, the parties herein contracted an Islamic marriage in 2013. The dispute between them stirred

up in 2019, when the appellant started complaining that the respondent was unfaithful following economic hardships encountered by the appellant. Later on, the appellant issued an Islamic talak when the reconciliation between the parties proved futile.

The appellant then took the matter to court, seeking for divorce. Accordingly, the trial court granted divorce to the appellant. It also ordered division of matrimonial property. Dissatisfied with the decision of the trial court, the respondent appealed to the District Court of Ilala, faulting the trial court in the division of matrimonial property. The District Court varied the percentage of division of matrimonial property granted by the trial court from the ratio of 60% for the appellant and 40% for the respondent to the ratio of 80% for the respondent and 20% for the appellant.

Dissatisfied with the first appellate court's decision the appellant lodged this appeal with three grounds as shown below:

1. That the District Court erred in fact and law for entertaining the matrimonial appeal from primary court without jurisdiction contrary to section 80 (1) of the Law of Marriage Act, Cap 29 R.E.2019.

2. That the District Court erred in fact and law for ordering the respondent to have a distribution share of 80% of the matrimonial house without considering the fact that the property was jointly acquired by both the appellant and the respondent and it has been jointly developed.

3. That the District Court erred in fact and law by introducing new facts that were never provided in the ward tribunal and the primary court.

The parties agreed to argue this appeal by way of written submissions. The appellant enjoyed the legal services of Ms. Judith Soka whereas the respondent appeared in person, unrepresented.

In her submission on the first ground, Ms. Soka made reference to section 80(1) of the Law of Marriage Act. From the wording of this section, Ms. Soka is of the view that the District Court of Ilala lacked jurisdiction to entertain the first appeal between the parties.

Submitting on the second ground of appeal relating to the division of matrimonial property, Ms. Soka is certain that the matrimonial property should be divided equally between the husband and wife. In that regard, she faulted the District Court for unfair and unjust division by giving the respondent 80% and 20% percent to the husband. To amplify her argument, Ms. Soka cited the case of **Daniel George Bwanali vs Okuly Eliufoo Muro, Civil Appeal No.138 of 2020.**

And finally on the last ground of appeal on introduction of new facts Ms. Soka briefly faulted the district court for introducing new facts on the appeal while it was in the knowledge of the trial magistrate that the facts introduced were not in the trial court.

Opposing the appeal, on the first ground, the respondent did not have substantive arguments to contest.

On the second ground, the respondent submitted that the appellant failed to provide sufficient evidence to prove on his contribution to the matrimonial asset. She also submitted that the provisions of section 114 of the Law of Marriage Act require the division of matrimonial property to be to the extent of contribution towards acquiring of the assets. To this end, she opines that she does not find any fault on the decision of the District Court.

On her final contest on the issue of the new facts as alleged by the appellant, the respondent argued that this ground has no merit since the appellant failed to prove the same.

In her brief rejoinder Ms. Soka maintained on what she submitted in her submission in chief.

Having considered the grounds of appeal and the submissions supporting and opposing the appeal I will start off my discussion on the issue of jurisdiction. The appellant faulted the trial court for entertaining the appeal without jurisdiction. On this, Ms. Soka referred this court to the provisions of section 80 (1) of the Law of Marriage Act. The said provision captured below provides that:

> *Any person aggrieved by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal therefore to the High Court.*

From the above provision of the law, I am of a firm view that the learned counsel misconceived the interpretation of the said provision. The

relevant provision has given an option to the aggrieved party to either appeal from Primary Court to the district court or from the Primary Court to the High Court. For avoidance of doubt on what I have pointed out above, I find it necessary to underscore the meaning of the phrase "*may*" in accordance with section 53(1) of the Interpretation of Laws Act which provides that:

> *Where in a written law the word "may" is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion.*

Similarly, section 20(1)(b) of the Magistrates' Court Act confers jurisdiction to the District Court to hear and determine appeals in suits originating from primary courts. The said relevant provision provides:

> *In any other proceedings, any party, if aggrieved by an order or decision of the primary court, may appeal there from to the district court of the district for which the primary court is established.*

In the instant matter the respondent herein, having been aggrieved by the decision of the primary court, chose to appeal to the District Court of Ilala within which the Ukonga Primary Court falls. It therefore suffices to hold that the District Court had jurisdiction to entertain the first appeal. To this end, in that regard, I find the first ground of appeal with no merit.

On the second ground, it is trite law that subsequent to the grant of divorce the trial court is duty bound to order division of matrimonial assets acquired during the marriage. In exercising such powers, the court is guided by provisions of section 114 of the Law of Marriage Act. The section provides as quoted bellow:

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.

(2) In exercising the power conferred by subsection (1), the court shall have regard to –

(a) the customs of the community to which the parties belong.

(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets.

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

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

To catch up from the above provisions, the gleaned record of the District Court found that the appellant did not have evidence to support his claims that he actually deserves a share to the extent of his contribution in acquiring the said property in accordance with the provisions of section 114 as quoted above other than Tshs.70,000/= as claimed by the respondent's relative who testified that she was told by the respondent that the appellant gave her Tshs. 70,000/= for the purchase of the said plot.

On the other hand, the record of the trial court exhibits that the parties work for gain. However, the amount of gain from such work was not

established by the parties. The appellant, on his part, testified in the absence of any solid proof that he took a loan from his office for the construction of the house. There was no document to indicate that he took the said loan. The respondent, on her part, testified that she bought and constructed the said house from her own *'vicoba'* savings and with the assistance from her father.

The vendor of the said plot testified in favour of the respondent to the effect that the respondent purchased the said plot in two instalments at a total sum of TZS 3,500,000/=. Moreover, the sale agreement tendered before the trial court shows that the respondent is the one who signed as the purchaser of the said plot. At this juncture, I would like to add to what I have just stated referring specifically to section 60 of the Law of Marriage Act. The section provides:

> *Where during the subsistence of a marriage, any property is acquired-*
>
> *(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;*
>
> *(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.*

In embracing the above provision in the testimony presented during the trial, it is noteworthy to state that it is trite law under section 110 of the Evidence Act that, whoever alleges the existence of any facts must prove. See the case of **Faraja Msemwa vs Alex Mbilinyi, PC Matrimonial**

Appeal No.4 of 2020, [2020] TZHC 4135 (6 November 2020), www.Tanzlii.org.

In the instant matter the appellant did not tender any evidence to rebut the assumption that the property purchased in the name of the respondent was not meant to belong exclusively to the respondent but jointly as a matrimonial property acquired by their joint efforts during the subsistence of their marriage. The mere assertion that the respondent forged the sale agreement which had their names jointly as owners is not enough to place the said property onto joint ownership. Suffices to state that from the wording of section 114 of the Law of Marriage Act, a property subject to division must pass these three tests: one it must be a matrimonial property, two it must have been acquired by the joint efforts of the parties and three the extent of contribution.

In the instant matter, the appellant's evidence to qualify the said house to division as matrimonial property is implausible. There is balance of probability that that his contribution to the acquisition of the said property in terms of work was not disputed by the respondent that the appellant also worked for gain as a chef. In the case of **Shomari Matambo vs Shamilla Ally (Civil Appel No.149 of 2019 [2020] TZHC 2523 (18 August 2020)**, www.Tanzlii.org the court had this to say:

> "*For an asset to be regarded as a matrimonial asset, the party making the assertion has to prove that the respect asset was acquired or substantially improved subsistence (sic) of marriage and through joint efforts. Also, according to section 11(sic)(2)(b) the court is required*

while exercising its power in division of matrimonial assets to consider "the extent of the contributions made by each party in money, property or work towards the acquiring of the assets."

From the above cited case I am of the considered view that the respondent's contribution towards the said house is greater compared to that of the respondent. It should be noted that division of matrimonial property is not a matter of equal share as claimed by the appellant's learned counsel but entirely on the extent of contribution in terms of work, money and property. The same must be properly assessed and determined. See the case of **Bibie Maulid vs Mohamed Ibrahim (1989) TLR 162**.

Likewise in the case of **Yesse Mrisho vs Sania Abdul, Civil Appeal No.147 of 2016,** the court, with reference to the celebrated case of **Bi.Hawa Mohamed vs. Ally Seif (1983) TLR 32,** had this to say;

"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage.

The contribution granted should not necessarily lead to 50% share each, since it is dependent on a party's contribution which is the determining factor of what share one should receive and each case has to be considered on its own circumstances".

Thus, applying the above finding of the court in the instant case I find no fault in the first appellate court finding in re-evaluating the issue of extent of contribution proper in reaching to its decision in accordance with section 114 (2) (b) of the Law of Marriage Act.

Finally, on the third ground of appeal regarding introduction of new facts by the District Court, I have taken liberty to go through the judgment of the court whereupon I have scrutinized the grounds of appeal for determination. They are in two parts: part one is on evidence and part two on division of matrimonial property. The appellant neither stated the alleged new fact introduced by the District Court nor established how the alleged new facts, if at all present, prejudiced his rights. I therefore find this ground of appeal with no merit.

From the foregoing reasoning, I uphold the decision of the District Court. I further order that the said property undergo valuation prior to finalization of distribution. Each party is assumed first priority to compensate the other if deemed necessary. This being a matrimonial matter, I make no orders as to costs. Each party to bear its own costs.

E. I. LALTAIKA

JUDGE

22/11/2021

Court: Judgement delivered in the Court Chambers in the presence of both the Appellant and Counsel for the Respondent

E. I. LALTAIKA

JUDGE

22/11/2021