IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 129 OF 2021

HAMIS SHOMARI ..... APPELLANT

VERSUS

SALAMA LIMBILE ..... RESPONDENT

(Arising from the decision of the District Court of Ilala (Hon. C.N. Laizer-RM) in Matrimonial Appeal No. 22 of 2020)

JUDGMENT

4th and 26th July, 2022

KISANYA, J.:

The parties herein were husband and wife. Their marriage was celebrated under Islamic rites in 1990. After a long period under one roof, the marriage became acrid. The appellant could not stand it. He petitioned for divorce in Matrimonial Cause No. 6 of 2020 before the Ukonga Primary Court (the trial court).

Upon being satisfied that the parties were married in Islamic form, the Muslim Council of Tanzania (henceforth "BAKWATA") had certified to have failed to reconcile the parties, and that subsequent to the said certificate, the marriage was dissolved under Islamic law, the trial court made a finding that the marriage had irreparably broken under section 107(2) and (3) of the Law

of Marriage Act, Cap. 29, R.E. 2019. The trial court was further convinced the parties jointly acquired a house located at Kipunguni, Dar es Salaam. It then ordered that the said house be evaluated and shared by the appellant and respondent at the ratio of 80% and 20%, respectively.

The said decision triggered the respondent to appeal to the District Court of Ilala at Ilala (first appellate court). She raised three grounds of appeal which can be merged into two as follows: *One,* that the trial court failed to evaluate the evidence before it as such arrived to a wrong judgment; and *two,* that the trial court failed to consider that the respondent had contributed to the acquisition of the matrimonial properties.

In its judgment, the first appellate court arrived at a finding that the respondent contribution to the acquisition of the house at Gongo la Mboto was quite substantial. It went on to order that the respondent be given 40% of the market value of the said house.

Undaunted, the appellant chose to take up the matter to this Court. He filed the present appeal raising four grounds of appeal which can be merged into three complaints as follows:

1. That the trial Magistrate erred in law and facts by holding that the marriage was ended by the appellant and not the respondent.

2. That the court erred in holding that the house was jointly owned by the appellant and respondent.
3. That the court erred by failing to consider that the respondent did not contribute towards the acquisition of the matrimonial asset.

When the matter was placed before me for hearing, both parties appeared in person and unrepresented.

In his brief submission in support of the appeal, the appellant conceded that the respondent was his wife and that she had a right to the matrimonial assets. However, he contended that the respondent did not adduce evidence to prove her contribution towards acquisition of the matrimonial assets. His submission was based on the contention that the respondent had admitted before BAKWATA that she did not contribute to acquisition of the matrimonial property.

It was also the appellant's argument that the lower courts erred by holding that the marriage had broken down irreparably. His argument was premised on the reason that the marriage had not lasted for more than two years. He also contended that their former marriage was dissolved in 2014 and that they remarried in 2016 before being separated in 2018. When probed by the Court on whether the said former marriage was dissolved by the court, the

appellant's response was not in affirmative. He went on submitting that he was forced to petition for divorce because the Conciliation Board failed to resolve the duo. In conclusion, he prayed that the appeal be allowed by quashing the judgment of the first appellate and reduce the ratio of division of matrimonial properties.

When invited to submit in reply, the respondent adopted her reply to the petition of appeal as her submission. She had nothing to add.

Rejoining, the appellant re-iterated that the respondent did not contribute to acquisition of the matrimonial properties.

I have dispassionately considered the submissions and examined the record. The issue for my determination is whether the appeal is meritorious.

I prefer to start with the complaint that the trial court erred in holding that the marriage was ended by him (the appellant) and not respondent. This being a second appeal, the mandate of the Court is to hear appeal from or revise proceedings of the District Court. Therefore, this court cannot make a decision on an issue which was not decided by the District Court. I am fortified by the decision of the Court of Appeal in the case of **Jafari Mohamed vs R.**, Criminal Appeal No. 112 of 2006 (unreported). The law is however, settled law

that an issue which was not raised during the first appeal can only be raised in the second appeal if the same involves a point of law.

In the instant appeal, the appellant did not appeal against the decision of the trial court. Furthermore, the first appellate court did not hold that the marriage was ended by the appellant. Considering further that the appellant's complaint is based on facts and not law, I hold that it lacks merits.

Next for consideration is the appellant's complaint that the marriage was not broken down irreparably. It is on record that this ground was not stated in the memorandum of appeal. As that was not enough, the appellant did not seek leave before fronting the same as one of his complaints. That being the case, this Court is enjoined to disregard it. Even if I was to consider the same, that issue was not decided upon by the first appellate court. As that was not enough, the appellant did not demonstrate how the trial court erred in holding that the marriage had broken down irreparably. He contended that the marriage had not lasted for two years as required by the law. It is my considered view that such contention is based on facts which was resolved by the trial court that the parties contracted their marriage in 1990. From the foregoing reasons, the applicant's complaint cannot be determined at this stage.

Moving to the rephrased second ground of complaint, the appellant claims that the house located at Gongo la Mboto was not jointly acquired by the appellant and the respondent. The issue that arises is whether the house in question is a matrimonial asset. The phrase "matrimonial assets" has been defined by case law. In the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malanga,** Civil Appeal No. 102 of 2018 (unreported), the Court of Appeal cited with approval its decision in **Bi Hawa Mohamed vs Ally Sefu** [1983] TLR 32 where the phrase "matrimonial assets" was discussed as follows:-

> *"The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view, the term "matrimonial assets" means the same thing as what is otherwise described as "family assets": Under paragraph 1064 of Lord Hailshams HALBURY'S LAWS OF ENGLAND, fourth Edition, p. 491, it is stated,*
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> > *"The phrase "family assets" has been described as a convenient way of expressing an important concept: it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives and used for the benefit of the family as a whole.*

The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife.

In view of the above position, the Court of Appeal went on to underline as follows on the meaning of matrimonial assets:

"They refer to 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."

As indicated earlier, the appellant does not dispute that the respondent was his wife and that she is entitled to the matrimonial properties. In order to determine whether the house at Gongo la Mboto is a matrimonial property or asset, I was inclined to go through the evidence on record. In his evidence in chief, the appellant told the trial court they acquired a house located at Gongo la Mboto. His evidence went as follows:

"Tulibahatika kupata nyumba iliyoko Gongolamboto...

Kwa sasa ninachoomba ni talaka na mgao wa mali..."

As it can be glanced from the above extract, the appellant admitted that the house at Gongo la Mboto is a matrimonial property. Without further ado, I

find no merit on the appellant's complaint that the said house was not jointly owned by the appellant and respondent.

With regard to the last ground of complaint, the appellant grieves that his contribution towards division of matrimonial property was not considered. It is trite law that before embarking into dividing the matrimonial property, the court must consider the extent of each party's contribution by examining the evidence adduced before it. See the case of **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (unreported) which was cited with approval in **Gabriel Nimrod Kurwijila** (supra) where the Court of Appeal held that:-

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

The above position was restated in the case of **Gabriel Nimrod Kurwijila** (supra) when the Court of Appeal observed that:-

> *"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets. It is clear therefore that extent of contribution by a party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not*

considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise also where there is no evidence to prove extent of contribution."

Having examined the evidence adduced by the parties before the trial court, I find that neither the appellant nor the respondent produced evidence on the extent of contribution to the house in question. In that regard, it is not known as to how the trial court made a finding that the appellant and respondent's share in the said house is 80% and 20% respectively.

When the matter reached the first appellate court, the rate was changed to 60% and 40% in favour of the appellant and respondent, respectively. The factors considered by the first appellate court are reflected at page 3 of the judgment as quoted hereunder:-

"The appellant was both a house wife and a business woman. Her contribution as a housewife embraces both her domestic efforts and work. Her contribution as businesswoman was both in terms of money and work. According to her testimony she contributed cash during the construction of the house, under those circumstances there is no doubt that the Appellants own contribution to the acquisition of the House at Gongo la Mboto was also quite substantial."

As stated earlier, the respondent did not give evidence on the extent of her contribution toward acquisition of the house in question. It was during her oral submission in support of the appeal when the respondent averred that she contributed cash money earned from her business. In terms of the law, submission by the counsel or parties to the case is not part of evidence. In that regard, submissions cannot form the basis of decision of the court. [See the case of **The Registered Trustees of the Archi Diocese of Dar es Salaam vs The Chairman Bunju Village Government and 11 Others,** Civil Appeal No. 147 of 2006 (unreported)]. In view of the said position, the first appellate court erred in considering the respondent's submission as her testimony.

Considering that neither the appellant nor the respondent gave evidence on the extent of contribution to acquisition of the house located at Gongo la Mboto or other matrimonial property, decisions and orders made by the trial court and first appellate court in respect of division of said property cannot stand. This is so when it is considered further that nothing to suggest that the Gongo la Mboto's house referred to in the judgment of the first appellate court and Kipunguni's house featured in the judgment of trial court is one and the same house.

In the final analysis, the appeal is allowed on the ground as to division of matrimonial properties and dismissed on other grounds of appeal. In the circumstances, I exercise the revisionary powers of this Court, as hereby do, quash and set aside the decisions and orders made by the lower courts in relation to division of the matrimonial properties. Either party is at liberty to file a matrimonial proceeding on division of matrimonial properties before the trial court. Otherwise, the decree of divorce issued by the trial court stands. Given the nature of this case, each party is ordered to bear its own costs.

Ordered accordingly.

DATED at DAR ES SALAAM this 26th day July, 2022.

S.E. Kisanya
JUDGE

COURT: Judgment delivered this 26th day of July, 2022 in the presence of the appellant and respondent. C/C Zawadi-RMA present.

Right of appeal explained.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

S.E. Kisanya
JUDGE
26/07/2022