IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

PC CIVIL APPEAL NO 53 OF 2021

[Arising from Matrimonial Appeal No 43 of 2020, of the District Court of Ilala at Kinyerezi. Original Matrimonial Cause No.20 of 2020 of Ukonga Primary Court]

BETWEEN

SALUM RAMADHANI.....APPELLANT

VERSUS

AMINA RAMADHANI.....RESPONDENT

JUDGMENT

MRUMA J

The Appellant Salum Ramadhani met the Respondent Amina Ramadhani sometime in the year 2010 wherein after they began dating. In 2014, the Appellant moved a step ahead and they began cohabiting at the Respondent's house in Nyebulu area in Chanika Dar Es Salaam. In 2015 they underwent an Islamic traditional marriage ceremony and continued to live together at the Respondent's house. At the time they began dating, the Respondent was expecting to get a child with the

Appellant but that however didn't happen. Their relationship henceforth started to suffer a number of set-backs.

At the trial the Appellant stated that the Appellant started to change when she realized that his mother was about to come and live with them. He contends that it was when he confronted her with that fact that a quarrel broke out between them whereupon he gave her a talak.

The Respondent has a different version of the troubles that befell their marriage. On her part, she stated that their marriage became troubled due to the fact that the Respondent wanted a child from it which didn't come. She said that the Appellant started a habit of sleeping outside their matrimonial home and consequently he gave her a talak.

Following the 'talak' the Respondent instituted formal divorce proceedings in the Primary Court of Ukonga. In that cause she also prayed for division of what she considered to be Matrimonial property.

The trial primary court endorsed the "talak" but dismissed her claims for division of matrimonial property on the ground that on the

evidence adduced she didn't contributed to the acquisition of the property she had listed as matrimonial property.

Aggrieved with the decision of the trial court the Respondent successfully appealed to the District Court of Ilala in Matrimonial Appeal No 43 of 2020. In its decision the District court found that there was evidence to the effect that the parties started to live together in 2010 and that in 2011 they bought two plots of land at Zingiziwa and in 2012 they bought another Plot at Nyebulu, Chanika in Dar Es Salaam. Citing the decision of the Court of Appeal in the case of **Moona Kasare Versus Apolina Manoo Kasare [2003] TLR 423** where it was held that a period of 25 years of wifely services to husband would entitle her to a share in the property. The District Court then went on to hold that even though the Respondent herein could have been a mere house wife she still could have been entitled to equal division of matrimonial property. Consequently it quashed and set aside the decision and orders of the trial court and ordered the matrimonial property to be divided equally.

The Appellant was aggrieved and he has appealed to this court on four grounds which can be summarized into one ground that the

Respondent didn't contribute to the acquisition of the property which were ordered to be divided equally.

At the hearing of this appeal the Appellant was represented by Ms Glory Venance, learned advocate while the Respondent got legal aid from TAWLA. The appeal was argued by way of written submissions. I am thankful to the parties' counsel for the brilliant submissions on the matter.

As the record would depict both parties consented to the marriage being dissolve thus, dissolution of marriage is not an issue in this appeal.What is hotly contested is the acquisition and division of matrimonial assets. The Respondent wants equal share of the property acquired during the subsistence of the marriage. The Appellant is not willing to let the Respondent have any share of the property, most of which he contends is his personal property acquired before the marriage.

I have carefully perused the records of both the trial court and the District Appellate court and as I have just intimated the issues for determination in this appeal in my view is whether the Respondent is entitled to any share in the property she listed as being matrimonial

property or property jointly acquired during the subsistence of their marriage.

According to the Appellant, the Respondent was not employed or earning any income during the period of their cohabitation before the Islamic marriage and the period of cohabitation after that marriage. She did therefore never made any financial contribution towards the acquisition of any of the property, save the provision of consortium.

The Respondent on her part stated that she did all chores herself including doing some small businesses of selling burns, samosas etc. She at times helped the Appellant in the construction of the house which subsequently became their matrimonial home.

During the trial, the Respondent simply told the court that she wanted division of property jointly acquired during the existence of their marriage. She neither did adduce oral nor documentary evidence to prove not only that she contributed in the acquisition of any of the properties mentioned by the parties in their pleadings and testimonies, but that they do exist. Her witness Fatuma Juma (SM2) told the court that the Respondent informed her that her husband (i.e. the Appellant)

was looking for a plot to buy. She took them to a vendor who sold a plot to the Appellant at Nyebulu.

In his evidence during the trial the Appellant refuted the Appellant's claim that the property was acquired jointly during the subsistence of their marriage, he said rather that all of the properties were acquired by him before the marriage.

Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband or wife may hold in trust for the clan or family. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to. They may also include property of the parties generated during the marriage otherwise than by external donation. In other words it is the matrimonial home plus property acquired during the marriage otherwise than by gift or inheritance. However, not every property acquired by either spouse during the subsistence of the marriage constitutes matrimonial property. Section 60 (a) and (b) of the Law of Marriage Act [Cap 29 R.E. 2019] provides for

presumption of sole ownership of a property acquired in the name of a couple. Thus, in absence of statutory provision, there can be no suggestion that the status of marriage per se results in any common ownership or co-ownership of property.

So, while I agree that Article 12 (1) of the 1977 Constitution of the United Republic of Tanzania guarantees equality of human beings and Article 13(1) which guarantees equality before the law in treatment of either the wife or husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases be shared equally upon divorce. In my view Article 24 (1) of the same 1977 Constitution and other statutory law as, while recognizing the right to equality of men and women in marriage and its dissolution, also reserved the right of individuals, be they married or not to own property either individually or in association with others. This means that even in the context of marriage the right to own property individually is preserved by our constitution as is the right of an individual to own property in association with others who may include a spouse, children, siblings or even business partners.

If indeed the framers of our laws had wanted to take away the right of married persons to own separate property in their individual names, they would have explicitly said so. Thus as the Parliament didn't intend that, then courts will continue to determine each case based on the Constitution and the applicable marriage and divorce law in force at the time in order to make determination whether the property in question is marital property or individual property acquired prior to or during the marriage and to determine whether such property should be divided either in equal shares or otherwise, as the facts of each case would dictate.

The principle of equal ownership of matrimonial property between husband and wife is a matter of policy and cannot be inferred by courts (see ***Pettitt v. Pettitt [1969] 2 WLR 966***) and also in the Kenyan case of ***Essa v. Essa, Kenya Court of Appeal Civil Appeal No. 101 of 1995*** (unreported), where it was held that there is no presumption that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties. It is therefore fully possible for the property rights of parties to the marriage to be kept entirely separate. Whether the spouses contributing to the purchase or acquisition of a property should be considered to be equal owners or in

some other proportions must depend on the circumstances of each case **(see *Rimmer v. Rimmer [1953] 1 QB 63*).**

The general practice of courts in presuming common ownership or equal ownership of property is in respect of such property as is registered in the names of both spouses or property registered in the names of one spouse but in respect of which there is evidence of the other spouse's contribution to the purchase or acquisition of the property. In such cases, the spouses will be considered to be equal owners or in some other proportions. This is illustrated **by *Pettitt v. Pettitt [1969] 2 WLR 966,*** [supra] **at page 991** paragraph H, where Lord Upjohn opined, thus:

> *"But where both spouses contributed to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners, that is so whether the purchase be in the joint names or in the name of one. This is a result of an application of resulting trust"*

A similar decision was reached in another Kenyan case of ***Kamore v. Kamore [2000] 1 EA 81*** where the Court of Appeal of Kenya

presumed equality in two properties registered in the name of the husband and wife jointly saying at page 85 paragraph d;

> *"Where property is acquired during the course of coverture and is registered in the joint names of both spouses the court in normal circumstances must take it that such property being a family asset is acquired in equal shares".*

That is of course a rebuttable presumption. This principle is embodied in section 60 of our Law of Marriage Act [Cap 29 R.E. 2019]. Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property..

In the instant case, on basis of the available evidence, there is evidence of acquisition before the Appellant's marriage to the Respondent. According to the testimonies of Fatuma Juma (SM 2), the two plots located at Zingiziwa and one plot at Nyebulu where the house they were living was constructed were purchased by the Appellant in 2011 and 2012 respectively. According to Omari Juma (SM3) the parties

got married in 2015 and divorced five years later in 2020. Thus, these properties cannot be categorised as jointly owned property since there is no evidence of joint acquisition during or even after the subsistence of the marriage.

There is no evidence of any property which was acquired after the parties underwent the Islamic marriage ceremony which took place in 2015. The only evidence available is that after their marriage they lived in the house which was constructed in 2014. Accordingly none of these properties were acquired in the joint efforts of both parties. For the Respondent to lay claims of equal division of any of these properties as being matrimonial property or jointly acquired property, she had to adduce evidence of joint contribution to the purchase or acquisition since there is no general presumption that any or all property acquired during the subsistence of a marriage is to be treated as being jointly owned by the parties.

This burden of proof was explained and followed in ***Kimani v. Kimani (1997) LLR 553*** which was cited with approval in ***Kamore v. Kamore [2000] 1 EA 80*** that;

> *"It was for the Appellant to prove on a balance of probabilities that she directly or*

indirectly contributed towards acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was invariably to be considered in its own special circumstances"

Where the disputed property is not registered in the joint names of the spouses and there is no evidence that it was so acquired the beneficial share of each spouse would ultimately depend on their proven respective proportion of financial contribution or otherwise either direct or indirect towards the acquisition of the property and where the contribution is not ascertainable but substantial it may be equitable to apply the maxim "equality is equity". The Respondent in the instant case had failed to prove to have made any direct contribution to the purchase or acquisition of any of these plots, but rather an indirect contribution. As to the kind of indirect contribution which will create a joint interest in the property acquired in the name of only one of the spouses, there have been attempts by courts in our jurisdiction to reckon a wife's non-monetary contributions as indirect contribution to the acquisition of matrimonial property. This for example is seen in the case of **Lawrence Mtefu v. Germana Mtefu, Civil Appeal No. 214 of 2000**

(HC), which considered some of the properties including the house at Tandika and the sewing machines, in respect of which counsel had submitted that the Respondent was an unemployed house wife who earned no income and could not contribute anything in terms of money or property towards the construction of the house. That the only contribution made is "house-keeping" which amounts to a purely conjugal obligation which does not entitle the applicant to the division of the house in Tandika. As for the sewing machines, the submission was that they were acquired before the marriage and therefore the Respondent never contributed towards their acquisition, it was held by Kimaro, J;

> *"The submission by Mr. Mbuya, to say the least, is a clear reflection of the violence and discrimination which a woman has lived within the society for years. Services by women which require recognition and compensation are termed conjugal obligations on the part of the woman. This is so even where they are not reciprocated and the woman ends up in being exploited and a looser"*

In this case the Respondent did testify of being sent to Moshi to take care of the Appellant's grandmother who was old. She stayed with her until her death. She also used to take care of the Appellants "kihamba's and cows" and the income was used for the development of the houses in Moshi. Definitely the Respondent made contributions towards acquisition of the properties. The case of **Bi Hawa Mohamed** [supra], recognizes housekeeping as services requiring compensation. As was observed by the Court of Appeal, the rendering of such services make the other spouse stable and enhances the ability to concentrate on development of properties.

In another Kenyan case of ***Kivuitu v. Kivuitu, [1990-1994] E.A. 27,*** where the parties were a husband and wife who, in the process of obtaining a divorce, contested the division of the family home registered in the names of both spouses. The matrimonial property in dispute was bought and registered in the joint names of the husband and wife without specifying the share of each. After the dissolution of the marriage the wife filed an originating seeking an order that the matrimonial property be sold and the proceeds be shared equally. The lower court awarded the husband a three-

quarter share and the wife a one-quarter share, concluding that the husband had made mortgage payments and the wife had contributed to family income and assets by being employed intermittently and by running various business ventures on behalf of the family. On appeal, the Court of Appeal reversed this decision and held that the value of the home should be split evenly between the spouses. It ruled that, in addition to making direct financial contributions to the family income, the wife had made indirect contributions by paying for household expenses, preparing food and clothing for the children, organizing their schooling, and generally enhancing the welfare of the family. One judge commented as follows:

> "*The time when an African woman was presumed to own nothing at all and all [that] she owned belonged to her husband and was regarded as a chattel to her husband has long gone. Women are now honourably employed and occupy high positions equal to men in the Government and in the private sector ... The situation has changed and so have customs.*"

Another Judge stated thus:-

> *"And, even where only the husband is in the income earning sector the wife is not relegated to total dependence on him without an ability to make some reasonable contribution towards the economic management of their family. It is no longer right to assume, as was done under customary law that the wife was totally dependent on the husband and not capable of contributing at all or substantially to the development of the household and increase in the family wealth"*

In the present case I have no slightest doubt that the Respondent contributed to the maintenance of property even though that contribution cannot be quantified in monetary terms. In the case of the urban housewife, if she were not there to assist in the running of the house, the husband would be compelled to employ someone to do the

house chores for him; the wife accordingly saves him that kind of expense. In the case of the wife left in the rural home, she makes even bigger contribution to the family welfare by tilling the family land and producing either cash or food crops. Both of them however, make a contribution to the family welfare and assets. Court can determine her interest in the property, and in that case, the court would have to assess the value to be put on the wife's non-monetary contribution.

A non-office going or business wife's contribution, will more often than not take the form of back-up service on the domestic front rather than a direct financial contribution. It is incumbent, therefore, upon a trial magistrate to take into account this form of contribution in determining the wife's interest in the assets under consideration.

Thus, even if I had been of the view that the Respondent had contributed no money at all towards the construction of the house where she was living with the Appellant , I will go on to asses her non-monetary contribution as a wife and put a value upon that. It would be extremely cruel to the wife and to the other women in her position that they can only have a share in property acquired during marriage if they can prove financial contribution. Similarly it would be cruelty of the highest order to a non-office going or small businessman or hawker

husband that her or his solely owned property is equally shared with her or his ex who had no tangible contribution towards its acquisition. A wife who makes other important non-financial contributions such as staying in the house, keeping it clean, bringing up the children etc. is not without a remedy [See **Bi Hawa Mohammed's Versus Ally Sefu (1983) TLR 32**

Taking all that into consideration, I allow the Appellant's appeal. I quash and set aside the Judgment and orders of the District Court of Ilala in Matrimonial Appeal No 43 of 2020. Taking into account the fact that the Appellant and Respondent did stay in the house at Nyebulu in Chanika Dar Es Salaam as husband and wife for about five years from 2015, I take it that she contributed in maintaining that house by cleaning it and cook for and provide other matrimonial services to her husband. This is indirect contribution towards maintenance (not acquisition) and therefore existence of the house. She is entitled to be compensated for that and given a short period of subsistence of their marriage I assess her contribution and entitlement at 25% of the value of the property.

Accordingly, I order that the house should be evaluated by qualified government valour and the Appellant shall compensate the

Respondent 25% of the value of the house and keep it and in the event he fails the Respondent shall compensate the Appellant 75% of the value of the property and acquire it. If both options will not work, the property should be sold in a public auction and the proceeds of sale be divided in the proportion of 75% to the Appellant and 25% to the Respondent after deducting costs of evaluation or court brokers fees as the case may be. Each party shall bear own costs in respect of the appeal.

Order accordingly,

A.**R. Mruma,**

Judge

Dated at Dar Es Salaam this 12 day of May, 2022.

R.A. Explained.