IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 93 OF 2021

(Arising from the judgment and decree of the District Court of Kinondoni at Kinondoni in Matrimonial Appeal No.01 of 2021 before Hon. Lyamuya A.M , PRM, dated 29th of April, 2021, Original Matrimonial Cause No. 177 of 2020 before the Primary Court of Kimara)

SALUM MOHAMED.....APPELLANT

VERSUS

ZIADA HUSSEIN ISSA..... RESPONDENT

JUDGMENT

Date of last order: 06th July, 2022

Date of judgment: 19th August, 2022

E.E. KAKOLAKI, J.

This matter originates from the Primary Court of Kimara at Kinondoni (the trial court) in Matrimonial Cause No. 117 of 2020. In the trial court the respondent herein successfully petitioned against the appellant for divorce decree, division of matrimonial properties and maintenance of the issues of marriage, as the trial court declared the marriage broken down hence dissolved the marriage while two houses in plots No.170 and 171 found to be jointly acquired by the parties divided into shares of 55% to 45% to the appellant and respondent respectively. Aggrieved the appellant unsuccessfully appealed to the District Court of Kinondoni vide Matrimonial Appeal No. 1 of 2021 as the trial Court's decision was confirmed. In

dismissing the appeal the appellate court dealt with three grounds filed by the appellant. These are **one,** that the trial magistrate erred in law and facts in delivering a judgment in disregard of the appellant's evidence, **two;** the trial magistrate erred in fact and law when distributed matrimonial assets without considering the mode under which the parties had contracted their marriage and **three,** the trial magistrate erred in fact and law in distribution of matrimonial assets in total disregard of the contribution made by each party in their acquisition.

Discontented the appellant has forwarded his complaints before this court challenging the first appellate court's decision. This time he is armed with two grounds all of them challenging the division of matrimonial properties, going thus:

1. That, the Appellate Magistrate erred in fact and law in distribution of matrimonial assets in total disregard of the contribution of each party in acquisition of the said matrimonial properties.
2. That, the Appellate Magistrate erred in fact and law in distribution of matrimonial assets without considering the mode under which the parties contracted marriage.

Hearing of the appeal proceeded by way of written submissions and both parties filed them timely in accordance with the Court's orders. The appellant proceeded unrepresented while the respondent traded under legal aid of Tanzania Women Lawyers Association (TAWLA) who prepared her submission. Submitting in support of the first ground, the appellant lamented that, the appellate court was in error to confirm distribution of the two houses amongst the parties as matrimonial assets in total disregard of the fact that, the same were self-acquired before the two had contracted their marriage in 1998, hence contravened the provision of section 114(1) and (2)(a) and (b) of the Law of Marriage Act,[Cap 29 R.E 2019]. He said, while aware of the principle of non-monetary effort as stressed in various decision including the case of **Bi Hawa Mohamed Vs. Ally Seif** [1983] TLR 32, the same is inapplicable in the circumstances of this case as no proof of any efforts was made by the respondent regarding acquisition of the properties. He thus invited the court to allow the appeal on those grounds.

In rebuttal submission, the respondent resisted the appellant's submission when contended that, it is not true the properties were acquired prior to their marriage as they contracted their marriage under the Islamic rites in 1998 and one of the said two piece of land at Kimara was bought in 2000

when they constructed the house and moved in the year 2002. She submitted that, while living at Kimara they bought another piece of land close to their matrimonial home and built the second house. She therefore insisted that, the two properties were acquired during existence of their marriage hence the same were correctly and properly distributed to them as the trial Court was satisfied with her contribution in their acquisition.

Having keenly examined both parties' rival submissions as well as both lower court's records and the concurrent findings on the issue of distribution of matrimonial assets, the issue before this Court for determination is whether the distribution of the said two houses were made in disregard of contribution of each party as asserted by the appellant. Gathering from appellant's submission, he is challenging division of the two houses in plots No. 170 and 171 situated at Kimara on the ground that, he acquired them before marriage contrary to the concurrent findings of both lower courts. In investigating this fact, I will be guided with the settled principle in both this Court as well as the Court of Appeal that, the appellate court will not interference with concurrent findings of facts, unless on face of it they are unreasonable or leading to miscarriage of justice or there is misapprehension of evidence or violation of some principle of law by the lower courts. See the

cases of **Japan International Cooperation Agency (JICA) Vs. Khaki Complex Ltd**, Civil Appeal No. 107 of 2004 (CAT-unreported) and **Raymond Mwinuka Vs. R,** (Criminal Appeal No.366 of 2017) [TZCA 315 (29 August 2019); www.tanzlii.org. In Raymond Mwinuka (supra) the Court of Appeal quoted with approval the decision made in the case of **Jafari Mohamed Vs. R**, Criminal Appeal No. 112 of 2006 (unreported) where it was held that:

> *"An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse" leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance,* ***Peters V. Sunday Post Ltd****. [1958] E.A. 424:* ***Daniel Nguru and Four Others V.R****. Criminal Appeal No. 178 of 2004, (unreported); Richard Mgaya (supra), etc".*

Guidance will be also drawn from the guidelines on what should be considered by the court in reaching just and fair decision when considering division of the matrimonial assets as provided by the law under section 114(2) of LMA which says:

> *(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; and

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

Now upon perusal of the documents relied on by the appellant, it is not in dispute as soundly found by both lower courts that, he was an employee with salary and other sources of income and that, he was the one who purchased the said two plots. What is contrary to his submission is the fact that, the two plots were purchased before the two had contracted their marriage in 1998. It was unchallenged evidence which was also appreciated by both lower courts that, the first plot was acquired (purchased) during existence of marriage in 2000. The appellate court on this fact at page 5 of its judgment had this to say the findings which I embrace and quote:

> *"I have followed the testimonies of both parties during trial, I agree with the trial court that the portion of land at Kimara-DSM was acquired in the year 2000 when parties lived in Keko –Dar ee salaam."*

Apart from that, there is uncontroverted evidence of the respondent that, the second plot was acquired after she had given birth to their second child in 2002 when they had shifted in their house at Kimara built in the first plot, the evidence which proves that the same also was acquired during existence of their marriage.

As regard to the contribution toward acquisition of matrimonial assets, section 114 (2)(b) of LMA provides that, due regard shall be paid to *the extent of the contributions made by each party in money, property or work towards the acquisition of the said assets*. In this case as said earlier on, the appellant testified that, he was working as teacher and later on obtained his retirement benefits which he spent into acquisition of the said properties without any contribution of the respondent. Relying on the case of **Bi. Hawa Mohamed** (supra), which appreciates the contribution of woman through domestic chores, he insisted the respondent failed to provide any proof of her contribution towards acquisition of the said properties. In the contrary the respondent testified that, she had contribution towards acquisition of the said properties. The case of **Bi Hawa Mohamed** (supra) is one of the landmark cases that appreciated and embraced the domestic work, or efforts of the spouse be it wife or husband to be one of the factor contributing to

joint efforts towards acquisition of joint properties or assets. In so speaking the Court held that:

> *"(i) Since the welfare of 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; and*
>
> *(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"*

Also the Court of Appeal in the case of **Bibie Maulidi Vs. Mohamed Ibrahim** (1989) TLR 162, precisely on how domestic duties contributes towards acquisition of jointly acquired properties though not to extent of 50%, the Court said that:

> *"Performance of domestic duties amounts to contribution towards acquisition but not necessarily 50%."*

From the above understanding, it is now clear to me that it is not only monetary contribution which amounts to joint efforts, domestic duties also forms part of it. In this appeal parties lived together from 1998 up to 2015 when the appellant issued a **talak** (divorce) to the respondent. It is not a

story worthy believing that, for all 17 years of their marriage the respondent was just an idle woman house wife who did not do anything towards improvement of the welfare of her family. Apart from giving the appellant five children which is a not an easy labour experience to go through, the respondent was also responsible to take care and raise them while the appellant engaged in performing employer's duties with peaceful mind. In his evidence before trial court the appellant never complained that, the respondent was an irresponsible mother/wife to the extent letting him go to his work with dirty clothes or come back home and find their children not taken care of by the respondent.

It is an outdated vision for sound minded man to think that, it is an employed spouse only who can contribute towards the development or improvement of his/her family or solely contribute in acquisition of properties. Domestic activities though not easily appreciated are the most challenging activities of which if assessed and appreciated its reward could be giant than what some of the employees are getting. The appellant stated about being paid salaries, selling other plot and also being assisted financial by her sister but these assertions are not a proof that all those money were spent in acquiring the said disputed properties. Likewise, the same does not mean that he was the

only person who acquired the disputed properties hence sole contribution. During her cross examination by the appellant, the respondent stated that she was also involved in mama lishe activities (small catering services) something which indicates that, apart from being wife/mother she was also involved in small business hence contributed to the family as well as construction of the said houses. With such uncontroverted evidence, this Court finds no reason to interfere with the findings of the two lower courts on acquisition and division of the said matrimonial assets. Hence this ground fails.

Turning to the second ground of appeal, it is the appellant's complaint that, the distribution of assets was made without considering the mode in which parties had contracted their marriage. Arguing this ground he said, as per section 114(2)(a) of the LMA, the court was mandatorily required to consider the Islamic customs which the parties belong to before division of the said assets. In response the respondent submitted that, customs referred under the said section are not religious customs rather tribal or community customs and further that, Islamic is not a custom but rather a religion hence not a fact to be considered during distribution of matrimonial assets. She therefore prayed this Court to dismiss the ground and the entire appeal.

It is true and I agree with the respondent that, the customs of the community to which parties belong to as referred in section 114(2)(a) of LMA do not refer to the religious beliefs of the parties. The term custom is defined by **Blacks Law Dictionary**, 8th Ed (2004) by Bryan A. Garner at page 1164 to mean:

> *"A practice that by its common adoption and long, unvarying habit has come to have the force of law."*

With that definition I would conclude that, customs of the community meant to be considered during the division of matrimonial assets are the long practice of the community in which the parties belong to particularly in the division of matrimonial properties and not religious rules or laws which in most of religions such as Islamic are codified. It follows therefore that appellant misconstrued the provision of section 114(2)(a) of LMA, believing the same to be applicable to the religion rites while in fact is not. The second ground is also wanting in substance and I dismiss it.

That said and done, this court finds that the appellant has failed to advance sufficient materials to convince it interfere with the concurrent findings of the two lower courts. The appeal therefore has no merit henceforth is hereby dismissed. Being a matrimonial matter I make no order as to costs.

DATED at DAR ES SALAAM this 19th August, 2022.

E. E. KAKOLAKI

JUDGE

19/08/2022.

The Judgment has been delivered at Dar es Salaam today 19th day of August, 2022 in the presence of both appellant and respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
19/08/2022.