IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL No. 37 OF 2020

(*Originated from the Court of Resident Magistrate for Arusha at Arusha, Matrimonial Cause No. 29 of 2019*)

BETWEEN

HERRY ABDALLAH KAGONJI ..... APPELLANT

AND

HAWA HASSAN MSANGI .....RESPONDENT

JUDGMENT

06th July & 15th August 2022.

TIGANGA, J

The appellant herein being aggrieved by the decision of the court of Resident Magistrate of Arusha in Civil Case No. 29 of 2019, he appealed before this court on the following four grounds as follows:

i. That, the Resident Magistrate Court erred in law and in fact by her findings that the marriage has broken down irreparably and issuance of the decree dissolving the marriage whilst the respondent has failed to prove and meet the test of essential grounds for nullifying the said marriage.

ii. That, the Resident Magistrate Court erred in law and in fact by her order of division of matrimonial assets being 50/50 sharing after the valuation authorised by the government valuer without taking into

account the existence of the appellant's three issues who existed before the marriage and who rely and reside on the said assets.

iii. That, the Resident Magistrates Court erred in law and in fact by making procedural error ordering the division of house hold items and furniture to the respondent prior to the completion and fully determination of the case to its finality.

iv. That, the Resident Magistrates Court erred in law and in fact by giving biased decision on her findings that the appellant is not entitled to proceeds and share on the catering business whilst the evidence adduced suggested he fully participated on its growth as he was the one who fully managed it while the respondent was busy with her banking employment.

Wherefore: he prayed this Court to:

a) Overrule the judgment of the trial court and declare that the marriage has not been broken down irreparably and nullify the decree of divorce

b) Nullify all the orders thereon including that of the division of matrimonial properties and maintenance of children.

c) Declaration that, the appellant is entitled to shares and proceeds of the catering business

d) Cost of the appeal be borne by the respondent

e) Any other relief this Honourable Court will deem fit and just to grant.

The appeal was opposed by the respondent who filed the reply to the memorandum of appeal in which she disputed all the grounds of appeal. He averred that, the marriage was broken down irreparably therefore, the decree for divorce was properly granted by the court. He also averred that, the custody of the children considered the best interest of the children. Lastly, that the court correctly found that, the catering business was solely belonging to the respondent.

To understand what brought up this matter, the background of the case albeit briefly is important. Parties to this appeal were husband and wife respectively having contracted Islamic marriage on 08th November 2008 as evidenced by the marriage certificate issued to them. In that marriage they were blessed with two issues namely Abdallah Herry Abdallah and Hans Herry Abdallah. But at the time of contracting marriage, the respondent found the appellant with three children namely; Hawa Herry, Furaha Herry and Abdul Herry. Among these three, only Abdul Henry was taken good care by the appellant as he was at secondary school level, while others are living their own lives.

According to the plaint, during the marriage, parties through their joint efforts and contribution acquired a number of properties enumerated in paragraph 7 from item (i) to (ix) inclusive. The grounds for divorce are pointed out in paragraph 15(i) to (v) (a) and (b), as well as paragraph 16 (a) (b) and (c) inclusive.

In the end, the respondent asked for the following orders:

i. A declaration that the marriage between the parties has been broken down irreparably.
ii. A decree dissolving the said marriage
iii. An order for the division of matrimonial properties
iv. An order for maintenance of the petitioner and the children
v. An order that the custody of the child Abdillah Henry Abdallah and Hans Herry Aballah be to the petitioner.
vi. Costs of the petition,
vii. Any other relief this Hon. Court may deem fit and just to grant.

The trial court found the marriage to have been broken down irreparably and granted the decree of divorce. It also ordered the custody of the two children to be on the respondent while the appellant remained with the maintenance role of the two issues including their education and

medical health insurance. The appellant was allowed visitation to the children during holidays, weekends and during emergencies like sickness.

The court also declared the catering and food supply business to be solely owned by the petitioner who is currently the respondent and the Motor vehicle make Toyota Pick up T292 CXB and Toyota Land Cruiser VX with registration No. T134 AWZ are solemnly owned by the respondent now the appellant and Toyota Hilux Vigo (Pick up with registration No. T589 DGR) is solemnly owned by the petitioner.

The court also ordered the matrimonial assets acquired by the parties to be distributed on 50/50 sharing after valuation made and authorised by the government valuer. Last, the trial court ordered that, the respondent who was the petitioner takes all her personal effects and each party was ordered to bear own cost.

It is this decree which aggrieved the appellant, who filed this appeal. In this appeal, parties were represented by the Advocates. The appellant was represented by Ibrahim Koisenge, learned Advocate and the respondent was represented by one Edwin Silayo learned counsel. The appeal was by the leave of the Court argued through written submissions which were filed by the counsel timely.

In the submission in chief, the counsel for the appellant abandoned the first ground of appeal. He therefore, remained and argued the 2nd, 3rd and 4th grounds of appeal. Regarding the second ground of appeal he submitted that, the issue of division of matrimonial assets after divorce is regulated by section 114 of the Law of Marriage Act, [Cap 29 R.E 2019] which requires the court to take into account the contribution and the extent of contribution in acquisition of the said property.

He submitted that, apart from the motor vehicle which were registered in the name of the parties, there is no any other evidence to prove the joint ownership of the matrimonial home. It was his further submission that, there is no title deed or any other evidence to prove the alleged joint ownership. And that, the court was wrong to peg the division on equal basis notwithstanding lack of evidence on the role of contribution and the role played by each party in the acquisition of the asset. He cited a number of cases to support his proposition.

Regarding the third ground of appeal, he submitted that it was against the procedure when the court ordered the division of house hold items and furniture's to the respondent prior to the completion and fully determination of the case to its finality. He submitted that the items were taken by the respondent on 18/02/2020 and the report to that effect was

presented in court in the presence of the parties, their Advocates and the local government leaders.

However, in the judgment the trial court attempted to rectify the errors in the judgment but what the trial magistrate did was premature. In so doing it goes without saying that, the trial court contravened the mandatory provision of section 114 (1) of the Law of Marriage Act (supra).

In the fourth ground of appeal which raises the complaint that, the Resident Magistrate Court erred in law and in fact by giving biased decision on her findings that, the appellant is not entitled to proceeds and share on the catering business whilst the evidence adduced suggested that, he fully participated on its growth as he was the one who fully managed it at the time when the respondent was busy with her banking employment. In his view, it was not correct for the Court to deny the appellant the proceeds of the catering business while in fact there was overwhelming evidence of his participation and the role played to make the business prosper.

He submitted further that, although there is evidence that the business started in 2007, the same was substantively improved by the role played by the appellant after their marriage in 2008 by injecting funds Tshs 5,000,000/= (five million) for the business to grow. He submitted that,

the appellant played the role as the supervisor of the business until when it expanded and acquired the amount in dispute.

He submitted further that in its decision the trial court failed to observe the strict provision of Section 114 (3) of the Law of Marriage Act (supra) which gives right to spouse for playing vital role in the improvement of the assets and for this matter the catering business.

In his view, that principle applies to the matrimonial home which was built by the appellant way back in 1998 before he contracted marriage with the respondent. In support of that argument, he cited the case of Christian John **Msigwa Vs. Neserian Justine Lukumay,** Civil Appeal No. 178/2017 (unreported) in which it was held inter alia that:

> *"In cases of separation, divorce or annulment of marriage, a woman or a man shall have equitable right of sharing of the joint property derived from marriage."*

Further to that, cementing on the same position, he cited the case of **Anna Kanugha Vs. Andrea Kanugha** (19960) TLR 195, where it was held inter alia that

> *"Personal property is liable for distribution in terms of Section 114 (3) of the Law of Marriage Act when such property has been substantially improved during the marriage by the joint effort of the spouse."*

Basing on the two authorities, the counsel submitted that, the trial court is at fault for its failure to appreciate the role played by the appellant in the supervision and administration of the business while the respondent was busy attending her banking employment. In his view the court could have considered the contribution made by the appellant and award him a significant share from the business. In the end he prayed for appeal to be allowed with costs.

In reply submission made and filed by Mr. Edwin Silayo, Advocate for the respondent, he submitted in respect of the first ground that, the court was correct to order a 50/50 division of the matrimonial assets between the appellant and respondent after valuation by the government valuer. In his view, the court based on the evidence adduced by both parties on important areas like the best interest of the children, as reflected at page 16 paragraph 4 of the trial court judgment as well as the extent of contribution made by each party as required by section 114 of the Law of Marriage Act.

Regarding the house at Sombetini which the appellant claim to acquire in 2000 before he contracted the marriage with the respondent, and calling to the court to consider the interest of three issues who are not begotten with the respondent, he submitted that,

although the house was built long before marriage, but it was substantively improved by both parties during their marriage as reflected at page 37 of the proceedings.

It was further submitted that, the said property was renovated by the respondent, after she found the appellant living in servant quarter, and acquired the title deed bearing the names of both parties as reflected at page 15 last paragraph and page 17 line 7 – 8. In his view, the fact that the property was registered in the names of both parties is an assurance that, the appellant consented the said house to be owned by both parties, they became the co-owners.

Although it is true that, marriage does not change ownership of properties privately owned before marriage to make them matrimonial, however, where there is express agreement between husband and wife in terms of section 58 of the Law of Marriage Act [Cap 20 R.E 2019] as interpreted by the High Court in the case of, **Stamili Selemani Kibinga vs TTB Development Bank and 3 others**, Land Case No. 275 of 2017, HC – unreported at pg. 8 in which the court referred to the authority in **Mariam Tumbo vs. Harold Tumbo** [1983] T.L.R 393 in which it was held that it may be possible

for spouses to enter into agreement for joint ownership of the property separately acquired.

In his strong view, immediately after the appellant had surrendered his private property to be jointly owned, he surrendered 50% in that property, to the co owner, he cannot be heard at the moment asking for the interest of his three children out of the share of the co- owned. Further to that, he also submitted that, the house at Sombetini was substantially improved by the respondent as proved by evidence.

He submitted that, the argument by the counsel for the appellant that since the respondent was a Bank Manager therefore did not contribute, is an afterthought because it does not constitute his evidence before the trial court. To the contrary, the available evidence is of the appellant acknowledgement that, the respondent has contributed to the acquisition of the property.

He reminded the court that, the issue of extent of contribution is a matter of evidence and cited the case of **Gabriel Nimrodi Kurwijira Vs. Theresia Hassan Malengo,** Civil Appeal No. 102/2018 – CAT (unreported) to support that legal position.

After looking to the submissions of both Advocates, I know turn to the main issue for determination which I consider proper for disposing this appeal. The issue is whether, this appeal is meritorious.

As said above, the appellant fronted in this court four grounds of appeal. However, he dropped the first ground only to remain with three arguable grounds of appeal, in disposing these grounds, I will follow the pattern adopted by the counsel and start with the second ground of appeal. In this ground, Mr. Koisenge, among other things, argued that, in division of matrimonial property the court should have regard to the extent of contributions made by each party in money, property or work towards the acquisition of the assets. To buttress his argument, he cited section 114(2)(b) of the Law of Marriage Act, [Cap. 29 R.E 2019] also the cases of **Bibie Maurid vs Mohamed Ibrahim** [1989] T.L.R 162 and **Mariam Tumbo vs Horold Tumbo** [1983] TLR 293 that, in order to understand that joint acquisition there must be evidence of the said contribution. Mr. Koisenge argued that, the contribution was not amounting to 50% for each as the contribution of the appellant was higher than that of the respondent and also that, the evidence proves that the appellant had personal property before marrying the respondent. Mr. Koisenge further added that, the appellant has three children begotten

with another woman before he married the respondent, and that the children are residing in the house which was distributed to parties. That the trial court did not consider the best interests of the children who are living therein and the extent of contribution. On that base, the division is contrary to the evidence on record. He submitted.

On his part, Mr. Silayo submitted that, the property was no longer private property to the appellant but rather the property jointly owned by the parties. He supported his such argument by the evidence as reflected at pages 34, and 37 of the proceedings. He also said, the evidence is clear that, when the parties got married, they were living in a servant quarter house and that the main house was substantively renovated during the marriage. Also, that, the title of the said house bears both names of the parties to justifiably prove that the house was owned by joint efforts of both parties. Mr. Silayo intimated this court to pages 15 and 17 of the trial court proceedings to see itself the strength of the evidence to support his arguments.

In further support of his argument, Mr. Silayo went on citing section 114(3) of the Law of Marriage Act which provides that, joint properties include the property previously acquired by one party but substantially improved by another party. It is his conviction therefore that, the evidence

apparently shows that, the respondent substantially improved the said properties. In his view, the allegation by the appellant that the respondent being a bank manager did not contribute in the acquisition of the matrimonial property is an afterthought because the appellant in the trial court testified by acknowledging the contribution made by the respondent in the acquisition of the said properties. As earlier on pointed out that he referred this court to the case of **Gabriel Nimrod Kurwijira vs Theresia Hassan Malongo**, (supra) regarding the need of the court to scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets.

I am entirely in agreement with both counsels on the stand of the law that; matters of division of matrimonial properties are governed by section 114 of the Law of Marriage Act. (supra) and the governing principle are provided under section 114(2) which for easy reference it is hereby reproduced:

> *"(2) In exercising the power conferred by subsection (1), the court shall have regard–*
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> *(a) to the customs of the community to which the parties belong;*

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

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

(d) to the needs of the infant children, if any, of the marriage,

and subject to those considerations, shall incline towards equality of division."

This means, in terms of subsection 2 the general rule is that, before considering the factors above, then the right of the parties to the properties proved to have been acquired by the joint effort, is equal division. It means, parties are entitled to more or less depending to the extent of contribution and other factors as provided herein above in the provision of the law. See the case of **Bibie Maurid versus Mohamed Ibrahim** (supra).

In this case, although there is no analytical proof on how much each party contributed in terms of money or effort, but the record proves that both party had legitimate source of income which enabled them to contribute in acquisition of matrimonial assets. While the respondent was a banker, the appellant was a businessman.

Every one had been capable of contributing in the acquisition of the properties in monetary form. It is also not disputed that; the title of the disputed property is in the names of both parties.

In law, section 60(1) of the Law of Marriage Act (supra) provides for a presumption of equal interest in the property registered in both names of the spouse as hereunder provided.

> *"s. 60. Where during the subsistence of a marriage, any property is acquired-*
>
> > *(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal".*

Despite the fact that, this section provides for beneficial interests but it might be of significance to the circumstances of this case. I say so because, the section reorganizes on the properties jointly acquired to be equally divided its beneficial interests. If that is the case, even the property which have been jointly reacquired bears the same status.

It was the duty of the appellant to rebut the presumption that even though the property is registered in the name of both parties, it belongs to himself alone in exclusion of the respondent, the fact which he has failed to negate. Failure to prove that fact or that the respondent

contributed minimally, the reality remains the same that the property was jointly acquired and the extent was equally made.

There is another argument here by the counsel for the appellant that, the court failed to consider the best interests of the three children who are not issues of the respondent and who are living in the said house.

It has been severally said by Courts of record that, children are not part to the matrimonial properties and therefore they cannot be counted when dividing the said matrimonial properties. Further to that, even where the law, section 114(2)(d) provides for regarding the interest of children in division of the property, the children referred are the infant children, and they should be of that particular marriage

In this case the children whose interest are complained to have not been regarded by the trial court are not of the marriage between the parties, there is no proof of their age to ascertain as to whether they are infant or not. Thus, for the foregoing reasons, this ground of appeal lacks merit. It is hereby dismissed.

Ground three of the petition of appeal in my view need not detain me much. I say so because I have gone through the records of the trial court, nowhere the trial magistrate divided the household utensils to the respondent before dissolving marriage. Therefore, with this I join hands

with Mr. Silayo that Mr. Koisenge might have misconstrued the record. What is vivid is that the respondent was actually allowed to take her personal effect from the house and that is what the record vindicate. In my view, person effect does not mean house hold equipment. Therefore, the ground is also dismissed for want of merits.

The last ground that is ground four of the appeal, the appellant is complaining that, the trial court was biased after holding that, the appellant did not contribute to the acquisition of catering business and therefore he has no shares thereto. It is obvious that, exhibit P1 which is of the establishment of the Catering business was issued on 15th July, 2007. The parties were married in 2008. In the absence of any other evidence evidencing differently the proof of ownership of shares in the company by the appellant remain redundant, unproved.

Also, there is no dispute that all the payments were made in the bank account belonging to the respondent. Scanning all evidence on record there is no proof by the appellant of any monetary contribution in acquisition of the catering business within the meaning of section 114(1) of the LMA, which provide 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".

Even if there is no evidence of monetary contribution, there is evidence that on a number of occasions, the appellant has been supervising the business in the absence of the respondent. It has not been said by the respondent that, he was so supervising as an employee of the company or a volunteer. He must have been doing so as either the family business or helping his spouse.

Although the business was acquired before Marriage, the appellant had contribution in improving it. In terms of section 114 (3) of the Law of Marriage Act, that business becomes matrimonial. Looking at the nature of contribution of the appellant, I find him to be entitled to only 30% of the business.

In the light of the above exposition, I find the second and third grounds to have been failed, while the fourth ground has been partly allowed to the extent explained above. That said and done, the appellant has failed to prove his second and third grounds of appeal, they are hereby dismissed, while the fourth ground is partly allowed as explained above.

It is accordingly ordered.

DATED at **ARUSHA** on 16th day of August 2022.

J.C. TIGANGA

JUDGE.