

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

CIVIL APPEAL NO. 31 OF 2022

(Originating from Arusha District Court Civil Appeal Case 7/2021, original Arusha Primary Court Matrimonial 107/2020)

JUMANNE MAULID SILAYO.....APPELLANT


VERSUS

YVES BOKOLO MMBANDO.....RESPONDENT

JUDGEMENT

26th Sept & 06th October 2022

KOMBA, J

Parties were formerly husband and wife until 2020 when the Arusha Primary court through Matrimonial No. 107/2020 pronounce divorce as usual followed by distribution of matrimonial property. Primary Court decide the matter in favour of the Appellant, Jumanne Maulid Silayo. Being dissatisfied on how the primary Court distribute matrimonial properties, respondent appeal to District Court, Civil Appeal Case 7/2021 which overturned the Primary Court decision by provide different portions of selected purported to be matrimonial properties decision which was uncompromising on the side of appellant hence lodged this appeal with eight (8) grounds. 

During hearing of this appeal, the applicant was represented by Mr. Salehe learned counsel while Mr. Richard Manyota learned counsel appeared for the respondent.

Arguing for the appeal, while adopting affidavit Mr. Salehe on the first and second ground on prematurity of the case at the primary court, he said respondent failed to tender Form No. 3 from Marriage Conciliation Board (MCB) as an exhibit during hearing of the case at primary court saying that is contrary to S. 101 and S. 104(5) of the Law of Marriage Act [CAP 29 R.E. 2019] (CAP 29) he said failure to tender form signify that the same was not fulfilled the requirement of law hence jurisdiction of the primary court in this case was in question as petitioners did not pass to MCB. He cited the case of **Fanuel Mantiri Ngunda Vs Herman Mantiti Ngunda** (1995) TLR 159 to the effect that the issue of jurisdiction is fundamental and creature of statute and pray for this court to nullify primary court proceedings for lack of jurisdiction. In response Mr. Manyota said there is no provision of law requiring tendering of Form No. 3 as exhibit during hearing of matrimonial cause. He further said S.106(2) of CAP 29 requires petition for divorce to be accompanied by certificate from MCB. It was his submission that there is no

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doubt that parties attended to conciliation board and there was a conciliation case No. 97/2020 where both parties appeared.

In ground no. 3 Mr. Salehe was of the opinion that the appellant court erred by deciding that the house located at Olorien (the house) in Arusha Region to be sold and Respondent to get 30% of proceed after sale or otherwise while the appellant during the trial proved that he acquired the said house prior to the marriage and justify his assertion by tendering exhibit D3 and D4. The respondent never objected the said exhibit; he said it was very improper for the respondent to challenge the said exhibit at the appellate court and demand proof of the opposite. He prays for declaration that applicant is the owner of the said house.

Mr. Salehe in ground No. 4 was of the opinion that the lower court erred by ordering the vehicle NISSAN X-trail with unknown Registration Number (the vehicle) to be the property of the respondent. He was of the opinion that since the lower court supplied the same without consideration of the appellant who got nothing it was unfair since the record speaks itself the respondent is one who vacated the matrimonial house, as a wrong doer deserves nothing.

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Further ground No. 5, he said judgment of the appellate court should not be left to stand because it is originated from wrong evaluation of the evidence done by appellate court particularly on matrimonial properties, as the respondent adduce contradictory and inconsistent evidence regarding how she contributed in the acquisition of the house in dispute. He said it is in page 3 of proceedings where the respondent said "*kuhusu mali nilimkuta mdaiwa na nyumba ambayo ipo maeneo ya Olorien Arusha pamoja na duka la nguo lipo stendi kubwa Arusha*".

Mr. Salehe while arguing ground No. 6 refers Section 68 and 114 of LMA (CAP 29) which according to him was wrongly interpreted, the Section provides for presumption of separate property and 114 provides for contribution towards the acquisition of matrimonial property. He said extent of contribution of each party is important. The respondent failed to show how she contributed in acquisition of the house, that being the case he prays this court to be guided by the decision of **Salumu Juma Kivara V Mwanaidi Mkwizu Jumanne Mkwizu** PC Civil Appeal No. 11 and No. 12 of 2019 and proceed to quash the division of matrimonial property ordered by appellate court.

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He submitted ground No. 7 and 8 jointly by claiming respondent failed to prove at the standard set in Section 110 and 111 of the Evidence Act. We are of the opinion that respondent failed as she tendered nothing towards allegation and responded nothing to legal excuse for failure to tender the exhibit to justify her claims opposing to appellant who tender exhibit to prove how he acquire the property.

He finalized his argument by maintenance issue is it is in ground nine. He said the appellate court erred by failure to make critical analysis as to the income of the appellant against the amount of money decreed as maintenance. The amount is high and unjustifiable amount to appellant.

In contesting this appeal, Counsel for respondent joined ground 3, 4, 5, 6 and 7 and said they are of the same character aiming the same conclusion about contribution and division of matrimonial properties to the respondent.

Mr. Manyota said these people were husband and wife who blessed with one child and they spent more than 10 years together. He said in all these time it was the respondent who was taking care of the house as featured at page 3 of the trial court proceedings ;-

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"mali ambayo tumechuma pamoja ni gari X- trail na mchango wangu katika nyumba ni finishing ya ndani, ukuta wa fence, gate, grill, tiles za nyumba nzima, nilipiga rangi nyumba nzima, vyoo vya kisassa na mabomba mawili ya kuogea pia niliingiza maji na umeme kwenye hiyo nyumba.

He vehemently submitted that this being a matrimonial cause, there is no requirement of proving each and everything done for the benefit of the family as if one is proving the ownership of piece of land and that requiring the respondent to prove her contribution towards the development of matrimonial house by using a receipt or anything of such kind is equal to as to require the appellant to prove he was maintaining the family by buying a bread.

He further said there is no doubt that both were taking care of the shop located at Arusha bus stand and they borrowed a loan together which at the end they managed to secure the same towards joint effort. About the Motor Vehicle X- trail, he submitted that there is no doubt that the said was sold by both appellant and respondent so as to pay for school fees and other amount were used as a capital. Despite the fact that there is no proof of existence of the said motor vehicle, he said the same was still awarded to

respondent who remain with her secrecy that was sold for betterment of their child. At this juncture, this court with to make record clear that the judgment of the 1st appellate court directed that if the vehicle was sold then Respondent in this appeal must refund the appellant here half of share of the proceed of sale of the vehicle. He additionally said there is no any contradictory evidence by respondent as she explained how she contributed towards development of their matrimonial property and it was fair for the first appellate court to decide on what it has decided and that ground No. 3, 4, 5, 6 and 7 be found meritless and dismissed.

I have considered the grounds of appeal, the records and submissions of both parties. There are two issues for determination here the **first is** whether the Primary court had jurisdiction to entertain the petition and **second is** whether the division of matrimonial assets made by the District Court was fair and just.

The Law, CAP 29 confer jurisdiction to all courts via section 76 that-

'Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court.'

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Procedures to be abide so that one can file petition to any court as mentioned above is also proved for under section 101 of CAP 29 thus-

S. 101. No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties: Provided that, this requirement shall(No applicable.)

S. 104 (5) Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings, and

S. 106 (2) Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition in accordance with subsection (5) of section 104.

Counsel for Applicant submitted that the certificate for MCB must be tendered as exhibit, wit due respect I differ with that position, what is required is that, certificate be appended to the petition which from the court

record the certificate was appended. In the **case of Patrick William Magumbo** (supra) which Mr. Salehe cited the certificate was not attached to the petition contrary to this appeal at hand where the certificate was attached. Thus, the petition was correctly filed in primary court and same had jurisdiction.

For this analysis, the 1st issue is answered in affirmative.

In dealing with the second issue regard being taken to the requirement of Section 114 of CAP 29 which reads: -

114 (1) The Court shall have power when granting or subsequent to the grant of a decree of separation or divorce to the division between the parties of matrimonial 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 sub section (1), the Court shall have regard to-

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

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(b) the extent of the contribution made by each party in money, property or work towards the acquisition of the assets;

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

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

The law sets the position that, division of matrimonial assets must follow the decree of separation or divorce, in this case, is divorce. This has been done in the instant matrimonial dispute. In dividing joint acquired assets, the law has set out some conditions to be abided by the court that, it must be established that the said property is actually a matrimonial asset, the it must have regard to the customs of the community, it must be guided by the contribution made by each of the parties in the acquisition of matrimonial assets, must address debts of the family, if any and must take into account the needs of the infant children if any.

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When it comes to calculation of percentage in the distribution, the yardstick is on the extent of contribution in acquisition of such matrimonial assets. The Court of Appeal once said that-

*"From the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. 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." **Yesse Mrisho vs. Sania Abdul**, Civil Appeal No. 147 of 2016, (unreported).*

Benchmark case in division of matrimonial property is one of **Bi. Hawa Mohamed v. Ally Seif** [1983] T.L.R. 32. The principle imbedded in this case is that domestic services of a woman rendered to the family have to be taken into account as part of her contribution in the final assessment of division of matrimonial assets.

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My analysis will therefore base in this fact, effort of each party' contribution, especially the respondent, on the properties acquired assets during subsistence of their marriage. In the appeal at hand, there is a house which applicant claim to have been acquired before marriage. Crosswise, respondent did not deny that fact, The Counsel informed the court that she found the applicant with the house and further elaborated her contribution in improving the same. Respondent further labor in providing services in the Shop which was acquired by the appellant before their marriage with respondent. Her being employed as shopkeeper as observed by first appellant court, she contributed in maintaining the shop by cumulation of money which was used to buy a jointly own vehicle. This, in my view, is evidence that the Respondent, apart from being a house wife, she was also engaged in some other businesses thus deserve the fruitage of her labour. **See Edward Mbele v. Magdalena Jackline Mbele** (PC. Matrimonial Appeal 11 of 2021) [2022] TZHC 10836. From the above, joined issue regarding contribution and division of assets is answered in affirmative, that they were correctly distributed by the first appellate court.


Best interest of the child, yes I have to say something before I put off my pen. Parties to this appeal have blessed with one issue to their marriage, at

the time the divorce was pronounced he was ten years of age and the custody was pressed to her mother. These are undisputed facts among the parties. What the applicant is grumpy of is the amount directed to pay for maintenance of his child, One hundred thousand (100,000/) shillings per month. Life of a normal Tanzanian require, at least, to have meal three times a day. Bearing in mind the standard of living of Tanzanian and the fact that applicant own the shop apart from other engagements, the amount pronounced by the first appellate court is manageable. I need not to interrupt it.

I am aware that this is the second appeal, the doctrine vested in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31 by the Court of Appeal is not applicable in the instance case because the two courts below had different findings. Nevertheless, I concur with findings of the first appellate court by not disturbing its findings that the respondent did contribute to acquisition and maintenance of properties as settled in the **Bi Hawa Mohamed** case taking into account the years parties have spent together.

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The appeal is hereby dismissed. The entire decision of District court is upheld. I order each party to bear its own costs.


M. L. KOMBA

JUDGE

06/10/2022

Judgment delivered this 06th day of October, 2022 in the presence of Counsel for both parties.




M. L. KOMBA

JUDGE

06/10/2022