IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL APPEAL NO. 2 OF 2019

(Arising from Civil Case No. 131 of 2017 at Bukoba Urban Primary Court and Civil Appeal No. 44 of 2017 at the District Court of Bukoba)

STIVIN JUMA MUNIGANKIKO.....APPELLANT

VERSUS

THERESIA ANDREA.....RESPONDENT

JUDGMENT

12/08/2022 & 21/10/2022
E. L. NGIGWANA, J.

The parties to this appeal were a married couple for 26 years having contracted their marriage in 1980. Their marriage came to an end by decree of divorce granted by the Primary Court of Bukoba Urban. However, the instant appeal does not arise from the decree of divorce perse rather, from subsequent proceedings for division of assets considered to have been acquired jointly during the subsistence of the marriage, hence matrimonial properties.

The material background and essential facts of the matter as obtained from the lower court records indicate that; initially, the petitioner now respondent had petitioned for divorce and division of matrimonial property vide Civil Case No. 15 of 2006 at the Primary Court of Bukoba Urban. Upon hearing the parties, the decree of divorce was granted on 16/06/2006.

As regards the issue of division of matrimonial properties, she was left at liberty to institute fresh proceedings on division of matrimonial properties whereas, in 2017, the respondent approached the same court vide Civil Case No. 131 of 2017 for division of matrimonial properties. After hearing the parties, the court was satisfied that during subsistence their marriage the parties managed to construct one house in plot No. 91-EE within Karagwe District in Kagera Region, but the same which was sold by appellant in 2009 at the price of **Tshs. 20,000,000/=** without the consent of the respondent who was also not given her share. The trial court ruled that the respondent was entitled to get 40% of **Tshs 20,000,000/=** to wit; **Tshs. 9,000,000/= (**Nine Million) only.

Aggrieved by the decision of the trial court, the appellant registered Appeal No. 44 of 2017 in the District Court of Bukoba to challenge the same on the following grounds;

1. *That, the trial court erred in law and fact for having entertained the suit which was time barred*
2. *That, the trial court erred in law and fact for holding that the respondent's efforts in acquiring the house built in Plot 91 EE at Kayanga was 40% while there was no any proof tendered before the trial court from which the trial court would have based its reasoning in arriving at such calculation of 40%*
3. *That, the trial court erred in fact and law for not taking into consideration the fact that the appellant had already compensated the respondent's efforts in the acquisition of the matrimonial*

property by building for her a house of two rooms and establishing for her a small shop commonly known as kiosk

4. *That, the trial court erred in law and fact for relying on the mere words of the respondent in respect of the availability of the matrimonial properties without tendering any proof in such of allegations.*

After hearing the appeal, the 1st appellate court was satisfied that the appeal had no merit. Consequently, the appeal was dismissed with costs on 16/08/2018. Aggrieved by the decision of the District court, the Appellant has now knocked the doors of this court clothed with four (4) grounds of appeal which were crafted as follows:-

1. *That, the District Court erred law for failure to take into consideration, the legal fact that the trial primary court entertained the suit which was time barred.*
2. *That, the District court erred in law for failure to take into account the legal fact that, the respondent's claims for the distribution of matrimonial properties ought to have been filed in the trial court, within the period, before the decree of divorce took effect.*
3. *That, the District court erred in law for failure to take into consideration the legal fact that by the time the appellant sold a house at Plot No. 91 EE at Kayanga in 2009, the respondent had by then failed to prove the existence of the jointly acquired properties including the said house.*
4. *That, the District Court erred in law for failure to take into consideration the legal fact that, the claims for the distribution of the*

matrimonial assets is to be entertained by the same magistrate and same assessors who sat, heard, and determined the petition for divorce.

Wherefore, the appellant is praying that this appeal be allowed with costs by quashing that decision of Bukoba Urban Primary Court in Civil Case No. 131 of 2017 and the judgment of the District Court of Bukoba in Civil Case No. 44 of 2017.

At the hearing of this appeal, the appellant had the legal services of Mr. Dastan Mutagahywa, learned advocate while the respondent was represented Ms. Theresia Bujiku, learned advocate. The appeal was argued by way of written submissions.

In his submission on the first ground of appeal, Mr. Mutagahywa submitted that there is no provision of law in the law of Marriage Act Cap. 29 R.E 2019 which allows a party to a marriage contract to institute a separate claim of matrimonial assets without any matrimonial cause for either separation or divorce that is why the said law has not set time limit for the institution of proceedings for division of matrimonial assets. He added that, the position of law is that, an order for the division of matrimonial property is ancillary to the decree of divorce or an order for separation, and therefore, it cannot be claimed in form of a separate suit.

The learned counsel went on submitting that, should one assume that the Law of Marriage Act Cap. 29 R.E 2019 has not forbidden the practice of instituting a separate suit for division of matrimonial properties, then one has also to believe that the principles governing the institution of such suits has to guide such a separate suit. He added that, in the instant appeal, it is

evidently clear that the cause of action as between the parties to this appeal, rose from the fact that they had contracted a marriage which was irreparably broken and a decree of divorce was issued in Civil Case No. 15 of 2006 at Bukoba Urban Primary Court but the respondent instituted a separate suit for division of matrimonial properties in 2017, almost eleven (11) years, then one has also to believe that the principles governing the institution of such suit has to guide such a separate suit for the claim of matrimonial assets.

The learned counsel argued that since, the Law of Marriage Act Cap. 89 R.E 2019 does not set the limitation of time in instituting such a suit, then the provisions of section 3, 43 (f) and 46 of the Law of Limitation Act Cap. 29 R.E 2019 should guide in answering the issue as to whether the suit in the trial court was filed in time or out of time. He added that, since the cause of action arose in 2006, the respondent's right to sue accrued from that time when the contract of marriage was dissolved.

He added that, according to paragraph 7 of the Schedule to the Law of Limitation Act Cap. 89 R.E 2019, the institution of any suit founded on contract, is six years therefore; this suit ought to have been filed not later than 2012 owing to the reason that it is based on contract of marriage. The learned counsel also made reference to paragraph 24 of the Schedule to the Law of Limitation Act, [Cap. 89 R. E 2019] which provides that; suit not otherwise provided for, period of limitation is six years.

He ended his submission in respect of the first ground that the instant suit was filed out of time in the trial court and for that matter the trial court

had no jurisdiction to entertain the suit which was time barred; it ought to have been dismissed.

Submitting on the 2nd, 3rd, and 4th grounds of appeal which are interrelated, Mr. Mutagahyawa submitted that, a claim for division matrimonial assets cannot be brought separately as a suit, but they must be part of the divorce proceedings. He referred this court to section 106 (f) of the Law of Marriage Act Cap. 29 R.E 29 which provides that;

"*The petition for a decree of divorce has to contain the statement of petitioner's proposal on the division of matrimonial assets acquired through the joint effort*". He also referred me to section 108 (b) of the Law of Marriage Act Cap. 29 R.E 2019 which provides that;

"*It shall be the duty of a court hearing a petition for decree of separation or divorce to inquire into the arrangement made or proposed as regard's maintenance and the division of the matrimonial property and to satisfy itself that such arrangements are reasonable*".

The learned counsel also referred the court to the case of **Mahega Zengo versus Holo Kadaso** [1982] TLR 94 where it was held that; the court hearing a petition for divorce or separation has the duty to inquire into the issue of matrimonial property. He also made reference to the case **Robert Arajo versus Zena Mwijuma** [1984] TLR 7 where it was held that; the court has power when granting a decree of divorce or separation, to make an order for division of matrimonial assets acquired during marriage by the joint efforts of the parties.

He further submitted that the trial court in Matrimonial Cause No. 15 of 2006 did inquire into the issue of matrimonial property and held that there was no proof to justify the said properties. The learned counsel added that in that respect, the Primary Court was *fanctus officio* in respect of this matter. Therefore, the available remedy was to appeal.

Notwithstanding his argument that the court was functus officio, Mr. Mutagahywa further submitted that, from the herein above authorities and the position of the law, the court which had jurisdiction to decide on the issue of matrimonial property was the court which was composed of the magistrate and assessors who determined Matrimonial Cause No. 15 of 2006 at Bukoba Primary Court, therefore any court with a different magistrate and another set of assessors had no jurisdiction to entertain such issue.

The learned counsel ended his submission that claims for distribution of matrimonial properties ought to have been filed in the duly constituted court which heard the petition for divorce. And the fact that the said duly constituted court had an opportunity to inquire into the presence of the matrimonial assets, then its decision that there was not proof of matrimonial properties ought not to have been disturbed by the same court unless appealed against.

In reply to Mr. Theresia Bujiku, learned advocate for the respondent commenced her submission by admitting that the Law of Marriage Act does not provide for the time limit to lodge an application for division of matrimonial assets among the divorced couple. She added that, since this matter originated from the Primary Court, the Law of Limitation Act Cap.

89 R.E 2019 does not apply. The learned counsel for the respondent further submitted that, the law applicable here is the Magistrates Courts (Limitation of proceedings under customary law) Rules, 1964 especially Rule 5.

She added that, in the Primary Court the respondent successfully presented warrantable reasons of her delay therefore; the trial court was guided by Rule 3 (4) of the Magistrates' Courts (Limitation of Proceedings under Customary Laws) Rules, 1964.

Submitting the 2nd , 3rd and 4th grounds, she stated that the argument by the learned advocate for the appellant that it was not proper for Civil Case No. 131 of 2017 to be filed separately from Civil Case No. 15 of 2006, is baseless because section 114 (1) of the Law of Marriage Act Cap. 29 R.E 2019 allows the filing of a separate suit in the same court and can be heard by a different magistrate because criteria for determining divorce cases and division of matrimonial assets differs. The learned counsel for the respondent also agrees on the dictates of section 106 (f) and 108 (b) of the Law of Marriage Act Cap. 29 R.E 2019, but added that, reading the provision of the law, the court has the duty to properly advice the parties accordingly before arriving on the order of division of matrimonial assets, whereas in Civil Case No. 15 of 2006, the trial court advised the respondent to lodge a separate suit. She further submitted that; since there was no order for division of matrimonial property issued by the court in Civil Case No.15 of 2006, it cannot be said the court was *functus officio*. In other words, the issue of division of matrimonial property was not determined on merit in Civil Case No. 15 of 2006.

She further submitted that; since it is not disputed that the Appellant sold the house situated at plot 91 Block EE, Kayanga and did not give the respondent her share, the appellant should feel free to release such share for the interest of justice.

I have passionately considered the grounds of appeal and submissions by the learned counsel for both parties; therefore, I am now in a good position to determine this appeal as I hereby do.

The appellant's complaint as per first ground of appeal is that, civil case No. 31 of 2017 was filed out of time. It is trite that statutes of limitation of actions are not by mistake but they are designed to stop or avoid situations where a party can commence action at any time he/ she feels like doing so. In other words, by the statutes of limitation, a party has no freedom of the air to sleep or slumber and woke up on its own his/her own time to commence an action against another.

However, in the instant matter, both advocates are well aware that the Law of Marriage Act, Cap 29 which is a specific law governing matters of divorce and division of Matrimonial Properties does not provide for time limitation for institution of a suit for division matrimonial properties.

According to the appellant's advocate, under such a situation, the law to be resorted to is the Law of Limitation Act Cap 89 R.E 2019. Section 46 of the Law of Limitation Act, Cap 89 R: 2019 provides

"Where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written

law, and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act."

Section 43 the Law of Limitation Act Provides;

***"43-**This Act shall not apply to-*

(f) any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46"

As submitted by Mr. Mutagahywa, it is very clear that according to paragraph 7 of the Schedule to the Law of Limitation Act Cap. 89 R.E 2019, the institution of any suit founded on contract, is six years, and according to paragraph 24 of the Schedule to the Law of Limitation Act, [Cap. 89 R. E 2019, suit not otherwise provided for, period of limitation is six years. That is the position of the law, however in my view, considering the fact that the matter originated from primary court, the learned counsel for the appellant ought to have read the trial court record to satisfy himself as to whether there was any justification for the trial court to admit and hear Civil Case No. 131 of 2017. Page 3 – of the primary court judgment read;

"Ni wazi kuwa madai haya yameletwa baada ya miaka 12 kupita toka talaka itolewe kwa wadaawa tarehe 16/06/2006.Kanuni za sheria ya kienyeji (Kikomo cha Muda wa madai) 1963 hazitoi ukomo wa muda wa kuleta madai ya mgawanyo wa mali ya ndoa. Isipokuwa Mahakama imepewa mamlaka ya kukataa madai yeyote ambayo hayakuelezwa muda wa kikomo katika kanuni tajwa endapo mahakama itajiridhisha kuwa hapakuwa na sababu za msingi ya kukawiza madai hayo au kama

Mahakama itajiridhisha kwamba uwamuzi wa haki wa madai hayo waweza kuleta udhalimu kwa ajili ya kukawia kwake. Mdai alithibitisha kwamba tangu talaka itolewe mwaka 2006 alikua anamuuguza mama yake ambaye alifariki mwaka 2008.Na kwamba hata yeye mdai alianza kuumwa tangu mama yake akiwa anaumwa na hali yake ilikua mbaya tangu 2011, nakwamba baada ya kufanyiwa vipimo aligundulika ana HIV mwaka 2015. Lakini pia mtoto wake wa kiume aliumwa ugonjwa wa akili tangu 2008. Mahakama iliamini ushahidi wa mdai ambao uliungwa mkono na mashahidi wake kuwa hakuweza kuleta madai yake ndani ya muda mfupi kutokana na matatizo tajwa hapo juu na mahakama kuamua kuwa mdai alikua na sababu za msingi za kuchelewa kuleta madai haya na siyo busara kuyakataa. Lakini pia mahakama imejiridhisha kuwa uwamuzi wa haki wa madai haya huwezi kuleta udhalimu kwa ajili ya kukawia kwake."

Rule 5 the Magistrates' Courts (Limitation of Proceedings under Customary Laws) Rules, 1964 provides that;

"Where any proceeding is brought for the enforcement of a claim under customary law for which no period of Limitation is prescribed by these Rules, the court may reject the claim if it is of the opinion that there has been unwarrantable delay in bringing the proceeding and that the just determination of the claim may have been prejudiced by that delay."

Rule 3 (4) of the Magistrates' Courts (Limitation of Proceedings under Customary Laws) Rules, 1964 which provides that;

"The court may, ***in its discretion, admit any proceedings after the expiration of the period of limitation if is satisfied that the person***

bringing such proceedings was unable, for sufficient cause to bring the proceedings earlier"

Indeed, the trial Magistrate had exercised his discretion judiciously for the interest of justice. It should be noted that it is mundane law that each case must be decided in accordance with its own circumstance. In the instant matter, since application of the Magistrates' Courts (Limitation of Proceedings under Customary Laws) Rules, 1964 was neither disputed in the trial court nor in the first appellate court, as far as the instant matter is concerned, the first ground of appeal herein is devoid of merit therefore, it is hereby dismissed.

Reading the 2nd, 3rd, and 4th grounds of appeal, the major issue which need to be resolved is whether a claim for division matrimonial assets be brought separately as a suit after dissolution of the marriage?

Reading carefully section 106, 108 and 114 (1) of the Law of Marriage Act, Cap 29 R.E 2019, it is very easy to realize that a party seeking for an order for division of matrimonial property has to plead in his/her petition to that effect and must lead the evidence at the same time and in the same proceedings regarding divorce or separation to show that he/she contributed to the acquisition of such property. Where the two orders are sought, the court should first decide whether the marriage has broken down irretrievably and should it so hold, the court must proceed to consider and decide whether the property was a matrimonial, and where it is satisfied that the property is a matrimonial property, it should order division between the parties according to law. Where the issue of property is not pleaded and proved under section 106 (f) and 108 of the LMA, the

court has no power to inquire into the issue of division and cannot make an order to that effect.

Section 114 (1) of the LMA provides for a second procedure where a party may first seek a decree of divorce without at the same time seeking for an order for division of property acquired through joint efforts of the parties. In other words, subsequent to the grant of a decree of divorce, a party to the proceedings may institute a fresh proceedings claiming division of matrimonial property in the same court which granted the decree of divorce or separation and not any other court, but the Magistrate should not necessarily be the same. See the case of **Fatuma Mohamed versus Said Chikamba** [1988] TLR 129.

In the instant case, as stated earlier, the record of the trial court shows that the petitioner now respondent had petitioned for divorce and at the same time, she asked for an order for division of matrimonial property vide Civil case No. 15 of 2006. Upon hearing the parties, the decree of divorce was granted on 16/06/2006. As regards the issue of division of matrimonial properties, the petitioner now respondent was left at liberty to institute fresh proceedings on division of matrimonial properties, hence Civil Case No. 131 of 2017.

The appellant's advocate had the view that the trial court was *functus officio.* However, since there was no order for division of matrimonial property issued by the court in Civil Case No. 15 of 2006, I agree with the respondent's advocate that under the circumstances of this case, it cannot be said the court was ***functus officio.*** The appellant was aware of this fact that is why the issue of ***fuctus officio*** was not raised as a preliminary

objection in the trial court or as a ground of appeal in the 1st appellate court. Let me register my concern that there are compelling circumstances which the trial court may opt to reserve one of the prayed orders like in our case the issue of division of matrimonial properties and opt for separate suit or claim. For instance in polygamous marriage where the interest of the matrimonial property is shared by more than one wives, determining the said issue of division of matrimonial properties between the divorcing parties only would/may occasion failure of justice to the remaining non divorcing wife/wives whose marriage is still subsisting

Basing on the evidence adduced before the trial court, the trial court was satisfied that one house in plot No. 91-EE within Karagwe District was acquired by the parties during the happy moment of their marriage life hence a matrimonial property. The trial court record further revealed that the appellant admitted that the house was built in 1997 and during its construction the respondent fetched water, supervised the construction and took care of the family.

It is common sense and principles of general human rights require that a woman who is married to a man, and performs various household chores for her partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner's catering needs as well as those of visitors, raising up of children in a congenial atmosphere and generally supervising the home such that the other partner, has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during marriage when the marriage is dissolved. **See Adje versus Adje [2021] GHASC5**

The Court of Appeal of Tanzania in the celebrated case of Bi **Hawa Mohamed versus Ali Seif** [1983] TLR 83 categorically stated, even domestic chores done by the house wife should be considered as contribution towards acquiring matrimonial property.

In the instant case, since the appellant had admitted before the trial court that he sold the said house in 2009 at the price of **Tshs. 20, 000,000**/= but the respondent was given no share, the trial court ended ordering the appellant to pay the respondent a sum of **Tshs. 9,000,000/=** being 40% of the proceeds of sale. The trial court decision was upheld by the 1st appellate court in Civil Appeal No. 44 of 2017. I agree that there was no way the respondent who lived with the appellant since 1980 to 2006 can be allowed by the court which is a temple of justice to go empty handed.

In the case of **Neli Manase Foya versus Damian Mlinga** [2005] T.L.R 167 the Court of Appeal had this to say:

"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court."

In another case to wit; **Fatuma Ally versus Ally Shabani,** Civil Appeal No.103 of 2009 CAT (Unreported) it was held that;

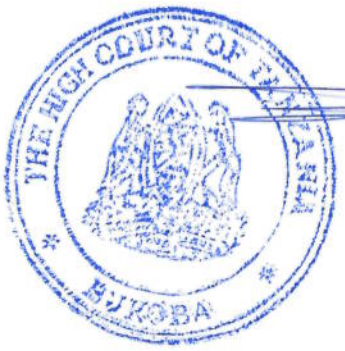
" Where there are concurrent findings of fact by two courts, the court of appeal, as wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a

miscarriage of justice or violation of some principles of law or procedure. In other words, concurrent findings of facts by lower courts should not be interfered with except under certain circumstances."

Basing on what I have endeavored to explain and being guided by the herein above court of Appeal decisions, I find no justification to fault the concurrent findings of the lower courts because I neither found misapprehension of evidence or miscarriage of justice nor do I see a violation of some mandatory principles of law or procedure.

In the event, this appeal is devoid of merit and I dismiss it accordingly. Given the nature of this appeal, I make no order as to costs.

Dated at Bukoba this 21st day of October, 2022.



E. L. NGIGWNA

JUDGE

21/10/2022

Judgment delivered this 21st day of October, 2022 in the presence of the Appellant and his Advocate Mr. Dastan Mutagahywa who is also holding brief for Ms. Theresia Bujiku, Advocate for the respondent, Hon. E.M. Kamaleki, Judge's Law Assistant and Ms.Tumaini Hamidu, B/C.

E. L. NGIGWNA

JUDGE

21/10/2022.