IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC MATRIMONIAL APPEAL NO.23 OF 2021

(Arising from the District Court of Lindi at Lindi in Matrimonial Appeal No.3 of 2021, originating from Mingoyo Primary Court in Matrimonial Cause No.2 of 2021)

MASUDI HAMISI MKANGWA..... APPELLANT

VERSUS

SALMA SALUMU MALYELYE.....RESPONDENT

JUDGMENT

10/5/2022 & 26/7/2022

LALTAIKA, J.:

This appeal originates from Mingoyo Primary Court in Matrimonial Cause No.2 of 2021. In that case, the respondent herein, **SALMA SALUMU MALYELYE** petitioned for a decree of divorce, division of matrimonial properties/assets and maintenance of children against the appellant, **MASUDI HAMISI MKANGWA** after BAKWATA failed to reconcile them.

To better appreciate the nature of the matter, it is pertinent to have a factual background of the same. The parties got married in July 2001 via Islamic rites. During the lifetime of their marriage, they were blessed

with three issues and jointly acquired assets including cashew farms, two houses, household items such as one TV set, three tables, two sewing machines and two cashew sprayer machines.

On 15th of November 2019 the appellant divorced the respondent in accordance with Islamic. He allegedly proceeded to divide the jointly acquired properties by giving some to the respondent. The respondent demanded that she received a compensation of TZS 370,000/= for a business pavilion situated at Mdenga retained by the appellant. The appellant refused to provide such compensation, so the respondent took up the matter to Mingoyo Primary Court. In addition to the business pavilion, the respondent also claimed maintenance of two issues whom she claimed were living with her.

Both parties testified and called witnesses to prove or disapprove the facts being contested. The appellant on his part, did not dispute the petition on divorce but merely raised an allegation that they had already made a peaceful division of matrimonial assets.

After a full trial, the trial court was satisfied that the marriage had broken down irreparably hence issued a decree of divorce under section 107(3)(a)(b) and (c) of the Law of Marriage Act, [Cap. 29 R.E. 2019]. It also ordered division of jointly acquired matrimonial assets as per section 114(1) of the Law of Marriage Act. In addition, the trial court ordered the

spouses to proceed providing the needs to their children as it had been before. Moreover, the trial court ordered the appellant to pay the respondent a total of TZS 380,000/= a debt arising from the farm situated at Mnazimmoja.

Dissatisfied, the respondent appealed to the District Court of Lindi vide Matrimonial Appeal No.3 of 2021. After hearing the parties, the first appellate court allowed the appeal and set aside the order for division of matrimonial properties made by the trial court. Moreover, the first appellate court ordered equal division of matrimonial properties on a 50 by 50 percentage mode. Indeed, the District Court did not touch any issue concerning maintenance of children of the parties due to the fact that it was not part of the grounds of appeal lodged before it. Dissatisfied with the decision of the District Court of Lindi the appellant lodged his appeal to this court vide a petition of appeal comprising of two grounds namely:

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1. *That the learned Resident Magistrate erred in law and fact to order equal division of all matrimonial assets without considering the contribution made by each party towards acquisition of these properties.*
2. *That the learned Resident Magistrate erred in law and fact when failed to observe the greater contribution made by the appellant in the acquisition of the said matrimonial assets and that the respondent found the appellant with two farms at Nachingwea.*

When this appeal was called on for hearing the parties appeared in person and unrepresented. The appellant started off by submitting that

the respondent was selling his farm and that was, in his part, a major concern. Elaborating, the appellant argued that in 2019 they divorced according to Islamic rites and he, out of his good intentions divided their properties. The appellant insisted that the respondent was apportioned a substantive part of their jointly acquired matrimonial property as she was also left with some of the children.

It is the appellant's submission further that although the respondent had initially conceded with the division of property in the traditional way, she later went to court and the court decided redivision of the property. The appellant insisted that he was appealing against the decision of the District Court of Lindi which ordered the division of matrimonial properties in 50 by 50 percentage arrangement. It is the respondent's submission further that not only was the decision of the court unfair given his (allegedly) greater contribution in the acquisition of the matrimonial property, but also quit disturbing that even before execution of the decree in appeal the respondent had started to take control of the properties such as land.

The appellant prayed that this court allows his appeal because he had fairly shared the jointly acquired property with his former wife and that in principle, there was no complain serve for compensation that he later agreed that he would pay.

In response, the respondent submitted by giving a brief account on how their matrimonial life commenced and what were their daily activities. She indicated that as a couple, both of them had income generating activities from which they jointly acquired assets.

The respondent agrees with the appellant that they parted ways in 2019 when their disagreements intensified. The respondent stressed that their divorce was acceptable in accordance with Islamic rites since the appellant had issued her a talak in the presence of her relatives. Thereafter, the respondent averred, the appellant divided their jointly acquired property. She submitted further that on her part, she was given one house and one farm located at Mnazimmoja. She argued that the appellant took two farms and one house at Nachunyu. The respondent further submitted that she owed the appellant Tshs.370,000/= and in 2019 they registered the debt at the office of the Village Chairman and appellant promised to pay the debt in 2020 but he never honoured his promise.

It is the respondent's submission that, as the appellant refused to pay the debt the matter went to Mingoyo Primary Court. However, the respondent laments, the trial court entertained a completely different matter. It started by asking them to go back to BAKWATA and later ordered a fresh division of the matrimonial properties while they had peacefully done it in 2011.

The respondent complained that as a result of the order of the primary court, her properties situated at Mnazimmoja that she had initially been given by the appellant were given back to him. Dissatisfied, she appealed to the District Court of Lindi.

The respondent submitted rather emphatically that they were blessed with three children but after divorce the appellant took two children and she remained with one child, a girl. She stressed further that although the appellant initially refused to take care of his daughter then

studying at Mtwara Technical College, he later changed his mind and now they are taking care of the child together.

The respondent concluded her submission by an earnest prayer that this court upholds the decision of the district court so that each party continues to own his/her properties as originally divided. She dismissed the claim that she was selling the farm as fiercely complained by the appellant. She stressed that she only went there with her relatives to visit and see the farm.

In a very short rejoinder, the appellant argued that when the respondent went to the trial court she told the court that she wanted a decree of divorce, child maintenance and division of matrimonial properties. He insisted that the trial magistrate did not simply entertain the matter out of nowhere but rather responded on the complaints tabled before her. However, the appellant strongly refused any liability on debts as alleged by the respondent. He conceded that during their marital life they both earned money from their income generating activities emphasizing however that the respondent was merely a tailor "fundi cherahani" while he was engaged in farming and selling of cashewnuts and other cash crops.

Having dispassionately considered the detailed submissions of the parties, I am inclined to determine the merits or otherwise of the appeal.

It should be noted on the very outset that parties herein are contesting neither the decree of divorce nor the custody and maintenance of children. In fact, they were even content with the arrangement for division of matrimonial property save for the alleged unpaid debt on the part of the appellant. To this end, I will limit my analysis on the contested

division of matrimonial property. Before I embark on tackling the issues, it is imperative to understand the meaning of the phrase matrimonial asset or property. I am aware that our statute (the Law of Marriage Act, Cap.29 R.E. 2019) has not defined the term matrimonial asset. However, by the aid of what the Court of Appeal elaborated vide the case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo**, Civil Appeal No.102 of 2018. In fact, the Court borrowed a definition from India Matrimonial Property Act, Chapter 275 of the Revised Statutes,1989 and also took what it decided in the case of **Bi Hawa Mohamed vs Ally Sefu** [1983] TLR 32. Thus, the Court of Appeal imported that definition as seen at page 7,8 and 9 of the case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo** (supra). To that effect I reproduce what the Court imported into our jurisdiction: -

> *"In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exceptions of*
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> *(a) gifts inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;*
> *(b) an award or settlement of damages in court in favour of one spouse;*
> *(c) money paid or payable to one spouse under an insurance policy;*
> *(d) reasonable personal effects of one spouse;*
> *(e) business assets;*
> *(f) property exempted under a marriage contract or separation agreement;*
> *(g) real and personal property acquired after separation unless the spouses resume cohabitation.*

The definition is not far from what this Court stated in the famous case of ***Bi Hawa Mohamed v. Ally Sefu*** *[1983] TLR 32 when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. The Court stated: -*

The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 144.In our considered view, the term "matrimonial assets "means the same thing as what is otherwise described as "family assets "Under paragraph 1064 of Lord Hailsham's HALBURY'S LAWS OF ENGLAND,4th Edition, p.491, it is stated,"

"The phrase "family assets" has been described as a convenient way of expressing an important concept refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and furniture in it (2) those which are of a revenue nature-producing nature such as the earning power of husband and wife."

Basing on the above definition I have no doubt that what the first appellant court divided to the parties were matrimonial assets. Now, as to the first issue, I am fully satisfied that the first appellate court properly considered the evidence testified by the parties and their witnesses at the trial court as to how each spouse played his part towards the acquisition of the of the contested matrimonial assets. Upon evaluation of the

evidence adduced at the trial court, the first appellate court was satisfied that those properties were jointly acquired and that is why it divided to them on fifty-by-fifty percentage basis. In that regard, I am of the same settled view because the evidence of the respondent as seen at page 6 of the typed proceedings of the trial court when appellant cross examined the respondent stated: -

> *"i. Shamba la hekari moja na nusu la Nachunyu, shamba hilo tuliunda kwa Pamoja kwa kuwa yeye alikuwa analima msitu, mimi nalima fundu.*
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> *ii. Shamba la hekari saba (7) la mikorosho tulinunua kwa laki moja (100,000) shamba la Hekari moja na nusu tulilima mihogo na tulivuna yeye mdaiwa akawa anakaanga mihogo mimi napeleka kuni na maji.*
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> *iii. Shamba la mikorosho la Mnazi mmoja tumenunua kwa laki nane (800,000. Ila shamba hili lina deni laki moja na elfu themanini (180,000) shamba hili limepatikana kutokana na mashamba mawili ya Nachunyu."*

Also, the appellant when was cross examined by the court assessors as seen at page 12-13, he stated that: -

> *-Mdai hajui hekari saba,ametia chumvi tu shamba la Nachunyu.*
>
> *-Shamba la hekari moja na nusu lina mikorosho hamsini (50) na hekari hizo hazikai hamsini ila ni ekari mbili.*
>
> *-Shamba hekari moja na nusu(2),nilimwambia Mdai achukue hekari za Mnazi mmoja alikataa,leo hii siwezi kumpa kwa kuwa nimepata mikorosho mipya sitini (60) nilipanda themanini.*

-Mengine yanaungua moto

-Shamba la Nachunyu hekari Nne (4) mbili linakorosho mbili halina mikorosho,pori tu.

-Shamba la mnazi mmoja ni hekari tano (5) na alilochukua Mdaiwa ni hekari mbili (2).

-Mdai alijigawia mwenyewe shamba.

-Mdai anavyodai shamba amesikiliza watu.

-Shamba la Mkuja/Mnazi mmoja ni la kwangu sijamlazimisha kulipa deni.

Also, the appellant's witness (Mohamedi Mfaume Namanje) testified at page 14 and 15 of the typed proceedings testified as follows:

"Wadaawa walikuwa wanandoa na walitengana na waliunda vitu katika Maisha yao vitu ivyo sivifahamu kuna mashamba ya mikorosho,nyumba mbili cherehani mbili na mashine za kupulizia mikorosho mbili,wavyoachana walilazimika kugawana,mdaiwa alichukua nyumba ya miti Nachunyu, na shamba la korosho mnazi mmoja na mashine za kupulizia mbili(2),cherehani mbili na shamba la mikorosho Nachunyu,Nyumba ya mnazi mmoja alipewa mdai."

Looking at the reproduced excerpts herein above, it is quite clear that the evidence of the appellant did not reduce the value of what the respondent testified as to how they jointly acquired their matrimonial assets. In fact, the evidence of the appellant clarifies the size of the farms and number of cashews being planted. I expected that such evidence would have explained how the appellant acquired each matrimonial asset which is subject to division viz vis the respondent's contribution. The

evidence of the appellant is lacking such quality and is being watered down by the evidence of his witness who testified that the former spouses have their jointly acquired matrimonial assets and he went further to mention them without specifying their locality and size. Surely, with this evaluation, I am of the settled view that the appellant did not provide plausible evidence which would convince the first appellate court to order a great percentage of share in each jointly acquired matrimonial asset. That is why, initially I hold that the first appellate court correctly ordered the division of the matrimonial assets to the parties as per evidence gathered by the trial court and also as per the dictates of section 114(1) and (2)(b) of the Law of Marriage Act. Besides, the first appellate court paid a look on the domestic activities of the respondent as part of her contribution as a wife of the appellant. This is very true since as to the customs of our societies it is obvious that the wife is subject to domestic works which is also counted in the division of matrimonial assets as a kind of her contribution towards its acquisition by the spouses. However, in the present matter, the respondent testified as to how she participated on the acquisition of their jointly acquired matrimonial assets which were subject to the division. In addition, nowhere the appellant testified that he had properties situated at Nachingwea which he acquired before the subsistence of their marriage.

I am also guided by the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo** (supra)where the Court stated: -

> *"It is clear therefore that extent of contribution by a party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the*

appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114(2) of LMA cannot arise where there is no evidence to prove extent of contribution."

Being guided by the above observation of the Court, in the present case equal division of the matrimonial assets to the parties was ordered by the first appellate court when it evaluated the evidence testified by the parties and their witnesses during trial.

In the light of the above observation, I find the appeal to be unmerited and consequently dismiss it. Also, the decision and orders of the first appellate court are upheld. In addition, the trial court is ordered to immediate execute the orders of this court and District Court without tempering and delay. Since this is a matrimonial matter, I make no order as to costs.

It is so ordered.

E.I. LALTAIKA

JUDGE
26.7.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 26th day of July 2022 in the presence of both parties.

E.I. LALTAIKA

JUDGE
26.7.2022

COURT

The right to Appeal to Court of Appeal is explained.

E.I. LALTAIKA

JUDGE
26.7.2022