IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CIVIL APPEAL NO. 09 OF 2022

(Originating from Songea District Court in Matrimonial Cause No. 04 of 2021)

DALIA NJAKO ..... APPELLANT

VERSUS

DOMINIC HYERA ..... RESPONDENT

JUDGEMENT

11.10.2022 & 24.11.2022

U.E Madeha, J.

This is the first appeal that arises from the decision made by Songea District Court. Dominic Hyera legally married the Respondent. They lived together for forty (40) years and they were blessed with six (06) children. Unfortunately, there was trouble in paradise that is problems arose in their marriage as a result the Respondent petitioned for divorce and hence the division of their matrimonial properties.

It is worth considering that, the trial Court distributed the matrimonial assets whereby the Respondent was entitled to 80%. In that regard, he was given nine (09) acres shamba, the domestic utensils will be

equally divided. Moreover, the Respondent was required to take one bed and one set of coaches located at Songea. Principally, the parties were decreed to be divorced whereby Dalia Njako was dissatisfied with the decision made by the District Court and hence preferred this appeal. The Appellant filed three (03) grounds of appeal which are elaborated hereunder:-

1. *That, the trial Court erred in law and divided the jointly acquired properties without considering evidence brought before it, in respect of the extent of the contribution made by each party in acquiring the property.*
2. *That, the trial Court erred in law and fact to deliver judgment without assigning reasons for reaching that before it.*
3. *That, the trial court erred in law and facts for failure to determine the property of the matter before it.*

It is important to note that, the grounds of appeal raise the following issues: **Firstly;** whether the Appellant and the respondent contributed to the acquisition of matrimonial properties. **Secondly**; whether the parties are entitled to the distribution of matrimonial properties and to what extent. **Thirdly**; whether divorce was granted with sufficient reasons.

The facts of this case as derived from the trial Court's records are as follows. The Appellant got married to the Respondent and they are actually blessed with six (06) children. According to the Appellant, they lived peacefully however the Respondent's behavior changed with time for the reason that he had another woman. To add to it, the matter was sent to the Marriage Conciliatory Board but unfortunately it yields nothing as the Appellant denied settling the matter peacefully.

Additionally, in their joint life they had built their house whereby the Appellant contributed to the house with the domestic chores and raising children. On the contrary, PW1 that is Dominic Antony Hyera, the Respondent stated that he retired as a Social Welfare Officer on 29th October, 2018 and currently he is living alone at Mjimwema, Songea. Also, the Respondent averred that the Appellant was his legally married wife and they contracted a Christian marriage ceremony on 22nd October, 1981 at Litembo Roman Catholic Church. Additionally, the marriage certificate was admitted and marked as exhibit P1.

Moreover, on 27th January, 2019 the Appellant attacked him using abusive language that he had married another wife. Similarly, the Appellant's brothers and elders appeared to resolve the matter.

Unfortunately, the conflict between them was not resolved. It is important to note that on the following day his children come at their house whereby they had to beat the Respondent to the extent that some good Samaritans/people appeared to resolve the matter. In that regard, from that time the Appellant went to live at Kigonsera whereby she is living in one of their houses. In fact, they decided to send the matter to Mjimwema Marriage Conciliatory Board whereby the board failed to resolve the matter amicably. To crown it all, the Marriage Conciliation Board Certificate was admitted and marked as exhibit P2.

It is worth considering that, the matrimonial properties which was acquired during the existence of the marriage are none other than; the house located at Songea Mjimwema situated on Plot No. 1622 block QQ, one (01) house at Mkoroshoni Kigonsera - Mbinga at Mtaa wa Lami, two (02) farms of six and a half hectares located at Kigonsera, one (01) cow, two (02) bicycles and other domestic properties.

As much as the contribution to the properties acquired is concerned, PW1 stated that the house situated at Mjimwema Plot No, 1622, Block QQ, one house at Mkoroshoni and other matrimonial assets were bought by the Respondent who was working as the Social Welfare Officer. To add to it,

the Appellant contributed in the prosperity of their family by doing domestic chores and taking care their children. The Respondent bought all materials properties and the domestic utensils and PW2, PW3 and PW4 stated that the Respondent built the house.

This appeal was canvassed by written submissions. The Appellant was represented by the learned advocate Mr. Zuberi Maulidi and on the other hand the Respondent enjoyed the services of none other than the learned advocate Mr. Dickson Ndunguru.

Mr. Zuberi Maulidi the Appellant's learned advocate submitted on the first (1st) ground of appeal, the law has clearly stated under section 114 (2) (b) of the Law of Marriage Act (Cap 29, R.E. 2019) that in exercising the power conferred by the law on the division of the matrimonial properties, the Court shall take into regard the extent of the contributions made by each party in money, property or works towards the acquisition of the properties. To cement his arguments, he made reference to the case of **Bi. Hawa Mohamed v. Ally Seif** (1983) TLR 32. He further submitted that the Appellant gave testimony that she contracted a Christian marriage with the Respondent on 22nd October 1981 and they lived a happy life for forty years as husband and wife. He further demonstrated that during their

married life the Appellant has been performing domestic duties as wife and husband.

Moreover, Mr. Zuberi Maulid stated that the Appellant was an entrepreneur who also engaged in agricultural activities of which contributed to the acquisition of matrimonial properties such as in the construction of the house in question Plot No. 165 Block QQ Mjimwema. To crown it all, the evidence was supported by DW2 and in fact the Respondent failed to cross examine the evidence on such important matter whereby it is said to have accepted the evidence.

Furthermore, he contended that the couple lived together for forty (40) years and was blessed with six issues. Notably, all the matrimonial assets the Appellant used her efforts to protect and care the Respondent and their children's future, love and affection believing that whatever they are doing was for the future welfare of the entire family. Likewise, he argued that the Appellant being a housewife she was engaged in other activities to generate their income used to acquire their properties hence this entitles her huge share or equal distribution. For more emphasis, he cited the case of **Victoria Sigala v. Nalasco Kilasi,** PC. Matrimonial Appeal No. 1 of 2012 (unreported), where it was observed; indeed, there is

no fast and hard rule in deciding on the amount of contribution and division of the matrimonial assets, where the material assets were acquired during the happy days of subsistence of marriage and in the joint efforts of the spouses. On the same note, he contended that Tanzania has ratified the *United Nations Convention on Elimination of all Forms of Discrimination Against Women (CEDAW)* and the *Protocol to the African Charter on Human and Peoples Rights*, which provides clearly that in case of separation or annulment of marriage, women and men shall have the right to an equitable share of the joint property deriving from their marriage. Basically, he further contended that the Respondent alleged that he actually contributed 100% percent on the acquisition of those properties through his salaries and loans, however; in his evidence he adduced nothing to prove his scale of salary to prove the amount of money that he had contributed to the matrimonial properties. To put it in a nutshell, he cited with approval *section 112 of the Evidence Act (Cap 6, R.E. 2022)* which clearly provides that the one who alleges the existence of particular facts the burden of proof is on him.

On the third (3rd) ground of appeal he argued that the first appellate Court gave judgment that contains no genuine reasons for its decision. The

learned counsel cited with approval *Order XX Rule 4 and 5 of the Civil Procedure Code (Cap 33, R.E. 2019)* which governs the contents of judgment and determination of issues raised in writing of it which reads as follows:-

> *'A judgment shall contain a concise of the case, the points for determination, the decision thereon, and the reasons for the decision'.*

Additionally, reference was made with approval to the case of **Philipo Joseph Lukonde v. Faraji Ally Said,** Civil Appeal No. 74 of 2019 Court of Appeal of Tanzania at Dodoma (unreported) in which it was held that;-

> *'This being the first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusion'.*

On the Contrary Mr. Dickson Ndunguru, submitted that it is clear from the record of the trial Court that the Court considered the extent of contribution made by each party in the acquisition of the jointly acquired properties. Principally, he argued that according to the evidence on record the Respondent contributed to the acquisition of the said property by monentary and material and the Court did not ignore the Appellant's

evidence as stated in the case of **Bi. Hawa** (supra). Notably, he further averred that the case held that the domestic activities were a joint effort towards the acquisition of the properties but unfortunately, it was held that the same was not to amount equal distribution. On top of that her other contribution was only cooking for masons and filling debris only and not more than that. Basically, he emphasized that it is not in dispute that all properties and money were contributed by the Respondent hence making the contribution higher on the part of the Respondent more than the Appellant.

Subsequently, concerning the second (2nd) ground of appeal, the learned advocate for the Respondent averred that in the division of 80% to the Respondent was due to the fact that he contributed more than the Appellant. Above all, the award of 20% is actually more than what the Appellant deserved. Since, she did not contribute much therefore, she only deserved 05% percent of the matrimonial assets.

Besides, considering whether the Appellant and the Respondent contributed to the acquisition of matrimonial properties. In fact, there was an argument that the Appellant being a housewife contributed to the acquisition of the properties by cooking for the household, taking care of

children and taking care of the Respondent by giving him peace of mind. It is worth considering that, the Respondent was involved in various activities and sought all the properties.

As a matter of fact, the division shall be conducted in relation to the amount of contribution towards the acquisition of the said property. It is the submission of the Appellant that the Respondent failed to prove his contribution towards the acquisition of the properties as the Appellant acquired them individually without the Respondent. Exclusively, the appellant cited the famous case of **Bi. Hawa Mohamed v. Ally Seif** (1983) TLR 32. It is important to note that, the Respondent further contended that the first Appellate District Court was right by dividing the property acquired jointly since the Respondent had lived together with the Appellant for a period of forty (40) years. Reference was made to the case of **Hemed S. Tamim v. Renata Mashayo** (1994) TLR 199 where the Court held that;-

> *"Even if the presumption is rebutted as per section 160(1) of the Law of Marriage Act, Cap 29 still the Court can go further and divide the properties if there is a proof that the parties lived together for more than two (02) years".*

With regard to the second (2nd) issue, which is on the issue of the distribution of matrimonial property, the power of the Court to divide the matrimonial assets is derived from *sections 114 (1) and (2) of the Law of Marriage Act (Cap. 29, R. E 2019)* which provides as hereunder: -

(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 the said sale.*

(2) *In exercising the power conferred by subsection (1) the court shall have regard:*

(a) *To customs of the community to which the parties belong.*

(b) *To extend 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 contributed for their joint benefit; and*

(d) *To the needs of the infant children, if any, in the marriage".*

On the same note, in the case of **Cleophas M. Matibaro v. Sophia Washusa**, Civil Application No. 13 of 2011 (Court of Appeal of Tanzania) it was made clear that there must be a link between the accumulation of wealth and the responsibility of the couple during such accumulation. So, the matrimonial assets for distribution should be assets acquired in the course of the marriage by both parties. Thus, the power of the Court to divide the matrimonial assets under section 114 (1) of the Law of Marriage Act (Cap. 29, R. E 2019) can only be invoked when the following conditions exist;-

(i) "When the court has granted or is granted a decree of divorce or separation, and

(ii) When there are matrimonial or family assets which were acquired by the parties during the marriage and

(iii) When the acquisition of such assets was brought about by the joint efforts of the parties".

As a result, in the case of **Bi. Hawa Mohamed v. Ally Sefu** (supra), the concept of separate ownership of properties by spouses was discussed in relation to the Law of Marriage Act (supra). According to this case, the concept is recognized under sections 58 and 60 of the Law of Marriage Act

(Cap. 29, R. E 2019). In **Bi. Hawa Mohamed v. Ally Seif** (supra) it was held that;-

(i) "Since the welfare of the family is an essential component of economic activities, it is proper to consider the contribution of a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets".

(ii) *The joint effort and work towards the acquiring of the assets have to construe as a joint effort for domestic effort to the work of husband and wife."*

For this reason and from the record of the trial Court it became crystal clear that the Appellant was a housewife and her job was to look after her children and do the household chores. In fact, the Respondent was involved in various activities and was the one who sought all the properties. Section 114 (2) of the Law of Marriage Act Cap 29 (R. E 2019), empowers the Court to have regard in the division of matrimonial property and it states as follows;-

(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'.

Nevertheless, this Court is not in doubt that the Appellant's contributed towards the acquisition of matrimonial assets in terms of her domestic chores which include; bearing and rearing children, and making the home comfortable for the Appellant and the issues. Moreover, even if the Appellant engaged himself in various activities, the Respondent would have still been entitled to the matrimonial property by virtue of her contribution made through domestic chores. Reference is made to the case of **Bibie Mauridi v. Mohammed Ibrahim** (1989) TLR 162, which provides further guidance on the issue of the distribution of matrimonial property. Basically, it was actually in this case where it was held with regard to the issue of contribution, that there must be evidence to show the extent of contribution before making an order for the distribution of matrimonial assets. In this respect, the performance of the domestic duties also amounts to the contribution towards such acquisition.

In this appeal, I am of the view that each of the spouses made a contribution towards the acquisition of the matrimonial property which need not be necessarily financial. To put it in a nut shell, in the case of **Kagga v. Kagga**, High Court Divorce Case No. 11 of 2005 (Uganda), Mgwangusya J. held that:-

> *'Our Courts have established a principle which recognizes each spouse's contribution to the acquisition of property and this contribution may be direct or monetary. When distributing the property of such divorced couple, it is immaterial that one of the spouses was not financially endowed as the others as this case clearly shows that while the first respondent was the financier behind all the wealth acquired. In this case, the contribution of the petitioner is not less important than that made by the respondent'.*

As a matter of fact, in this appeal, the trial Court ordered the Appellant to take 20% of the properties and the Respondent to take 80% of the matrimonial properties on the basis that the Appellant was only a mere house-wife whereby the Respondent was a Social Welfare Officer. The parties have lived together in their married life happily for forty (40) good years. It is a fact that since they have been living together, they are now very old to the extent that the Appellant cannot do any productive

activity. It is true that, there is no evidence that shows how much each person contributed and how they contributed to the acquisition of those assets by having receipt or exhibits to show how their matrimonial properties were acquired.

In fact, the Appellant has lived with the Respondent for 40 years, obviously she could not stay idle without work; the tasks of raising children, taking care of the Respondent, and farm work; these are tasks help to develop the family. I am of the view that the Appellant who was a house-wife for forty (40) years, cannot leave with nothing after the divorce. I think that with her youthful energy she has contributed to the acquisition of matrimonial properties, which are currently being contested. Considering her age, she is now old and she has lost the youthful strength that she had used together with the Respondent. It is important to note that, the Appellant needs to leave with something so as to start her old life. Based on the circumstances of the case I hereby quash and set aside the judgment and decree of the District Court. In the final result, I make the following orders;-

a) That the Respondent is to take the house located at Songea Mjimwema situated at Plot No. 1622 block QQ and the Appellant to

take a house located at Mkoroshoni Kigonsera - Mbinga at Mtaa wa Lami.

b) The farm and other properties should be divided 60% percent to the Respondent and 40% percent to the Appellant so that each party to the case can lead his life as they are of old age.

c) Conclusively, due to the circumstances of this case each party bears its own costs.

DATED and **DELIVERED** at Songea this 24th day of November, 2022.

U. E. MADEHA

JUDGE

24/11/2022