IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

MATRIMONIAL APPEAL NO. 04 OF 2021

(Originating from Matrimonial Cause No. 07 of 2020 of the District Court of Dodoma)

ACKSA MASIMA .....APPELLANT

VERSUS

PETER MASIMA .....RESPONDENT

JUDGMENT

Acksa Masima ("the appellant") and Peter Masima ("the respondent") have just had their marriage set asunder by a decree of divorce granted by the District Court of Dodoma ("the trial Court") on 9/10/2022 and none of them seems to bother about the breakdown.

The appellant has filed this appeal, not for any other reason, but to lament his discontent with the division of matrimonial assets. The only ground of appeal is;

> *"That, the Honorable Trial Magistrate erred in law and fact by determining the matter against the weight of evidence on record adduced by the appellant in the division of matrimonial assets by disregarding the contribution made by the appellant towards acquisition of the same".*

Based on the above ground, the appellant called upon this Court to set aside that part of the decision of the trial Court on division of the

matrimonial assets by awarding her an appropriate share of the jointly acquired matrimonial assets according to her contribution towards acquisition of the same.

Briefly, the parties started living together under one roof in one room since 1984 and later in 2001 they celebrated their marriage under Christian rites. They were blessed with five issues of marriage, two of whom were dependent on their parents by the time the appellant petitioned for divorce. The parties managed to acquire matrimonial properties listed thus: 3 houses located at Hombolo, 4½ acres of Zabibu, Motor Vehicle (NOAH) Valued at Tshs 12 million, one bicycle valued at Tshs 120,000/=, one TV, table, cupboard, one gas cooker, 14 acres of *shamba* and two unsurveyed plots. The appellant told the trial Court that all those properties were jointly acquired by the parties.

The trial Court, among other things, ordered the appellant to be given three (3) out of nine (9) acres of shamba and the rest of the acres were to be taken by the respondent. The trial Court also gave one bicycle and house furniture to the appellant. As intimated earlier, the appellant was not happy with this division of matrimonial assets, hence this appeal.

Ms. Godliver Joseph, learned advocate represented the appellant during hearing of the appeal, while Maria Ntui, learned advocate appeared for the respondent. Both parties were also present during hearing.

Ms. Godliver Joseph submitted that the division of properties done by the trial Court did not include other matrimonial properties, particularly

the grape farm, hence the division defied the principle of equal distribution of properties by parties' contribution as per the decision in the case of **Bi. Hawa Mohamed V. Ally Seif** [1983] TLR 32. The learned advocate clarified that both parties were farmers and had started business together since 1984 whereby they acquired all the properties together. Hence, equal distribution of matrimonial properties was the way to go. She prayed the appeal be allowed with costs.

Ms. Maria Ntui, for the respondent supported the division of matrimonial properties done by the trial Court. She clarified that some of the properties mentioned by the appellant and which were listed in the typed judgment of the trial Court, didn't exist. She mentioned such properties as the seven-acre farm and the house located at Hombolo Police Station. She said that, the latter was sold in 2019 to raise school fees for the parties' daughter. She added that the appellant, who was not staying at home during the said sale did challenge the sale in court but lost her case and never appealed. Ms. Ntui argued that the appellant's act of not appealing signified the end of her claim over that house.

Ms. Ntui mentioned other properties, which were listed by the appellant but were no longer existing, as the five-acre and a two-acre farms. She argued that when the respondent was testifying about those properties during trial, the appellant didn't object. Hence, the trial Court believed that those properties did not exist. She argued further that since the appellant didn't adduce any proof to show that all the assets which she had listed were truly their matrimonial properties, the trial Court had

to eventually divide only those properties with such a proof, adding that as per record, the respondent agreed to the said division.

Ms. Ntui further told the Court that of the ten (10) business rooms ("frames") built in front of the parties' matrimonial house, the trial Court distributed eight (8) to the respondent and two (2) to the appellant. However, the respondent has willingly added three (3) more frames, from his share, to the appellant to make a total of five (5) rooms apiece. It was Ms. Ntui's submission that the trial Court duly considered the provision of section 114(1) (2) (a) (b) of the Law of Marriage Act [cap 29 RE 2019].

To demonstrate that the appellant didn't deserve more share of properties than what she was already given, Ms. Ntui submitted that, during trial, the respondent proved that the appellant had a habit of dodging work and thus retarded the respondent's development endeavor. That, the appellant was absenting herself from matrimonial home without informing her husband, a wrong she confessed even to the church leaders. The learned advocate, further argued that while the appellant could not prove the extent of her contribution to the acquisition of matrimonial assets, the respondent proved to be the one who was working, the evidence that was not contradicted by the appellant.

Ms. Ntui further clarified that what was alleged to be the business owned by the parties was none other than the business frames and farms. She said that it was from the same properties the school fees were raised. Having submitted as above, Ms. Ntui urged this Court to uphold the

division of properties done by the trial Court, save for the three (3) additional frames generously offered by the respondent to the appellant. She finally prayed the Court to dismiss the appeal with costs.

In her rejoinder, Ms. Godliver Joseph partially conceded that there was no evidence on existence of properties mentioned before this Court. However, she insisted that all the matrimonial properties listed by the appellant during trial, the evidence of their existence was adduced.

Regarding three (3) additional rooms/frames from the respondent to the appellant, Ms. Joseph rejoined that the said generosity was not supported by any evidence, and so was the argument that the appellant was dodging work and the payment of school fees after selling of the grape farm. She added that, as per records, the respondent had once escorted the appellant to hospital where she was diagnosed with Blood Pressure problem.

On the argument that the appellant didn't prove her contribution in the acquisition of the matrimonial properties, Ms. Joseph rejoined that according to the decision in **Bi Hawa Mohamed** (supra), spouse' contribution is considered even if it was indirect. She added that such an indirect contribution should entitle the appellant to an equal share of matrimonial property, even if she was sometimes sick. Finally, she prayed the Court to allow the appeal with costs.

Having heard the submissions by both learned advocates and after perusing the proceedings and judgment of the trial Court, there is one

issue for determination, which is, whether the trial Court duly considered the contribution of each party in the division of their matrimonial properties.

The division of matrimonial assets is a matter placed under the powers of the Court under section 114(1) of the Law of Marriage Act [Cap 29 R.E 2019] (Henceforth "the LMA") but exercise of such power is guided by section 114(2) of the LMA which provides:

> *"(2) In exercising the power conferred by subsection (1), the court shall have regard to –*
> *(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****".* **[Emphasis added]**

According to the typed judgment of the trial Court, particularly from page 8 to 9, the trial Magistrate firstly determined the properties which he considered matrimonial and later identified those which were proved to exist and went ahead to divide the same. While he acknowledged that he would divide matrimonial properties "jointly acquired", which he mentioned them as 3 houses located at Hombolo, 4½ acres of Zabibu (grapes), motor vehicle Noah valued Tshs. 12 million, one (1) bicycle

valued Tshs 120,000/=, one TV, one table, cupboard, one gas cooker and 14 acres of shamba, and 2 unsurveyed plots, he considered the testimony of the respondent that there were only two (2) houses at Hombolo, as one was sold to pay school fees. He also considered that while the appellant listed a seven-acre land, the respondent said it was not existing.

The trial Magistrate appeared to require the respondent to prove the negative. He stated that the respondent did not produce exhibit to prove the non-existence of the seven -acre land. I think the appellant was the one who had to prove that the seven-acre land was firstly a matrimonial property and secondly, it was existing. The law requires that he who alleges has to prove. Section 111 of the Evidence Act, [Cap 6 R.E 2022], provides:

> *"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side".*

Likewise, the motor vehicle was neither proved to be a matrimonial property nor to exist. It is for this reason I agree with the trial Magistrate that the appellant herein, was required to prove that the mentioned properties existed. For not providing such necessary proof at all, her claims must fail.

In the light of the foregoing, I think the decision in **Bi Hawa Mohamed** (supra), could only be invoked after the appellant had discharged her part by proving, firstly; the existence of the matrimonial

property and secondly; her contribution in money, property or work towards the acquiring of the identified assets, even if she was a mere house wife.

Before this Court, there is no further evidence to rely on as proof of the existence of the three-acre grape farm or any other land as part of the matrimonial properties. The status of the matrimonial assets remains the same as it was ascertained by the trial Court. Under such circumstances, I find no new ground for ordering re-distribution of the properties. The same were already duly divided by the trial Court. I have noticed however, that the respondent is willing to add three (3) rooms/ frames to the share of the appellant. I think this is a good gesture, which needs to be enforced for the appellant to realize the same. Accordingly, the three (3) business rooms or frames given by the trial Court to the respondent shall henceforth be part of the properties of the appellant.

Save for the order made immediately above, this appeal has no merit and is dismissed accordingly. Respecting that the parties were husband and wife, I make no order as to costs.

Dated at **Dodoma** this 04th day of July, 2022.

ABDI S. KAGOMBA
JUDGE