IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO.9 OF 2022

(Arising from Matrimonial Appeal No.12 of 2021 and originating from Mtwara Primary Court at Mtwara in Matrimonial Cause No.31 2021)

HASSANI FIKIRI.....APPELLANT

VERSUS

FATUMA FIKIRI MPONERA.....RESPONDENT

JUDGMENT

20/10/2022 & 19/12/2022

LALTAIKA, J:

This appeal originates from Mtwara Primary Court at Mtwara in Matrimonial Cause No.31 of 2021. In that case, the respondent, **FATUMA FIKIRI MPONERA**, petitioned for a decree of divorce and division of matrimonial assets against the appellant, **HASSANI FIKIRI** after the Raha Leo Ward Tribunal had failed to reconcile them.

The brief background of the matter is as follows: The parties got married on 09/04/1989. They celebrated their marriage under Islamic rites at Magomeni area within Mtwara Mikindani Municipality before Sheikh Mbelenje and witnessed by Omari Said and Rashid. Pursuant to The Law of Marriage

Act of 1971, the parties were issued with a valid Certificate of Marriage. During their happy and joint matrimonial union, they were blessed with four issues: Farida Hassani (32), Nasra Hassani (30), Abulrazizi Hassani (24) and Ratifa Hassani (17). The parties had also managed to acquire several joint matrimonial assets as will be apparent in this judgment.

The trial court, having been convinced that the marriage of the parties was broken down irreparably as per section 107(3)(1)(a)(b) and (c) of the Law of Marriage Act, granted the decree of divorce under section 110(1)(a) of the Law of Marriage Act. It further ordered the division of matrimonial assets to the parties.

Dissatisfied, the respondent appealed to the District Court of Mtwara vide Matrimonial Appeal No.12 of 2021. After concluding the hearing of the appeal, the first appellate court allowed the appeal by ordering that the house situated at Mitengo area was given to the respondent while the appellant was given the house situated at Ligula B and the plot situated at Mtambaswala. The court also ordered equal division of the house utensils.

Dissatisfied, the appellant has lodged this appeal which has only one ground of appeal as follows: -

1. *That, the trial magistrate erred in law and fact by not taking into consideration the extent of contribution of the petitioner to the acquisition of matrimonial asset hence arrived at favoritism and unfair distribution of the matrimonial asset.*

When this appeal came for hearing on 26/7/2022 by consensus the parties agreed to conduct hearing by written submission in lieu of viva-voce hearing. Indeed, the parties complied with order and thus on 20/10/2022

the matter was scheduled for judgment. On the part of the appellant, he enjoyed the services of Mr. Kassian Mkali, learned counsel from Facility Attorneys while the respondent appeared in person and unrepresented.

Mr. Mkali submitted that the appellant married two wives as proved in paragraph one of page six of the judgment of the trial court. The learned counsel stressed that each wife had built a house with the appellant. He went further and argued that the appellant built the house situated at Ligula B with the respondent. On top of that, the learned counsel submitted that the second wife built jointly with the appellant the house situated at Mitengo in 2017 after the wedlock in 2015.To this end, he insisted that the decision of the trial court is the right position which decided that the house situated at Ligula B was jointly acquired by the parties to this matter.

Mr. Mkali stressed further that the first appellate court misdirected itself when it divided the house situated at Mitengo which the appellant built the same with his second wife and not the respondent. The learned counsel argued that the matrimonial assets which were subject to division were those which were acquired during the existence of marriage and through joint efforts and not otherwise. To substantiate his argument, the learned counsel cited section **114 (1) of the Law of Marriage Act Cap.29 of 1971.**

In addition, the learned advocate submitted that the respondent did not prove her contribution and joint effort at the trial court. He further argued that there had to be sufficient evidence showing that the assets sought to be divided after separation or divorce were acquired by joint efforts during the subsistence of the marriage. The learned counsel further submitted that

there had to be a link between the accumulation of wealth and the responsibility of the couple during such accumulation. See, the case **Mariamu Sulaiman vs Sulaiman Ahmed**, Civil Appeal No.27 of 2010 High Court of Tanzania at Dar es Salaam and **Cleophas M. Matabaro vs Sophia Washusa**, Civil Application No.13 of 2011 CAT.

Mr. Mkali submitted that regarding the house situated at Mitengo no contribution or joint effort was made by the respondent in acquiring such property because the appellant built the same with his second wife in 2017.The learned counsel stressed that the appellant and his second wife resides in such house. To this end, the learned counsel submitted that the respondent's claim is baseless and argued this court to take a judicial notice that the appellant's wife has filed an application No.34 of 2022 against the appellant and respondent while claiming inclusion of the house at Mitengo while is not a matrimonial property.

At last, the learned counsel submitted that based on the authorities it was clear and no doubt that the house at Mitengo was not the matrimonial property of the parties. Thus, he prayed this court to allow the appeal and uphold the decision of the trial court.

In response, the respondent opposed the appeal and supported the decision of the first appellate court. The respondent contended that the issue was whether the house located at Mitengo B is part of the property jointly acquired by the parties. She went on to assert that there was no dispute that the said house was acquired during the subsistence of the marriage of the parties hence it formed a part and parcel of the matrimonial property. The

respondent contended that the amount which each party was entitled to depends on the evidence on the extent of contribution made by each party towards acquisition. To bolster her argument, she referred this court to the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo**, Civil Appeal No.102 of 2018 CAT at Tanga.

The respondent contended that from the record of both the trial court and even the first appellate court there was no evidence to suggest that the house at Mitengo was not jointly acquired by the parties. To support her claim, the respondent referred this court to page 4 and 5 of the typed judgment of the first appellate court whereby it reproduced what had transpired at the trial court. The respondent reproduced what the first appellate court had stated:

> *"...na kabla mdaiwa hajanioa hakuwa na chochote mali hizo tumechuma wote na mali zenyewe ni kama,nyumba mbili moja iko Ligula B na moja iko Mitengo,kiwanja kimoja kiko mtambaswala,makabati matatu nk. Na kuwa mimi nilishiriki kwenye upatikanaji kama ifuatavyo,a)nyumba nilichangia kwa pesa sijui shilingi ngapi lakini nilikuwa nafanya biashara ya kuuza unga,mandazi,mkaa na genge.B)Nyumba ya Mitengo-kodi ya nyumba ya Ligula ndio imejenga ya Mitengo.C)vitu vya ndani yeye alikuwa mfanyakazi mimi nafanya biashara tukipata pesa tunanunua vitu".The respondent went on and argued that the appellant told the appellate court that "na kuwa wakati tunaoana na mdai alikuta sina mali yeyote isipokuwa nilikuwa na kazi tu,fundi magari kwenye makampuni ya watu binafsi baadae nikaingia serikalini mwaka 1990.Hivyo tulifanikiwa kuchuma mali zifuatazo 1)nyumba mbili moja yenye vyumba sita iko Ligula B na nyingine Mitengo,2) kiwanja kimoja Mtambaswala 3) vitu vya ndani."*

The respondent submitted further that with the aid of section 114(2) of the Law of Marriage Act [Cap.29 R.E. 2019], the court went on to decide which properties were acquired jointly and to what extent of contribution by each party. The respondent contended that the learned counsel did not advise his client well since he knows the procedure on how to challenge issues at the second appellate court. She stressed that at the trial court there was no piece of evidence tendered suggesting that the house at Mitengo was built by the appellant and her second wife. On the contrary, the respondent contended, there was evidence that the income used to construct the house at Mitengo was generated from rent of the house of Ligula B.

Furthermore, the respondent submitted that in the trial court there was neither evidence nor testimony of the so called the second wife of the appellant. In addition, the respondent submitted that there was no evidence of her contribution over the acquisition of the house at Mitengo hence she could not possibly benefit from the sweat of others. The respondent insisted that the plot at Mitengo was acquired in 2001 by the parties. The respondent stressed further that both parties were aware that the property in dispute is a matrimonial asset acquired by them jointly. To this end, the respondent submitted that the first appellate court was correct in deciding in favour of her because of the evidence adduced.

Regarding the counsel's submission that this court takes judicial notice that his client's wife had lodged a Land Case No.34 of 2022 she argued that it was ridiculous to challenge the court's decision by filing another case while the learned counsel was aware of the jurisprudence which required him to

file a Revision or an Objection proceeding and not to institute a fresh case. To this end, the respondent prayed this court to dismiss this appeal with costs and confirm the decision of the first appellate court.

Having dispassionately considered the rival submissions by both parties and having gone through the records of the lower courts, I am inclined to decide whether the appeal is meritorious. The contentious matter as expounded above, is centered on division of one matrimonial asset namely the house situated at Mitengo.

It is imperative at this juncture to point out that, in our jurisdiction Section 114 of the Law of Marriage Act has empowered only the courts to divide any assets acquired by parties during existence of their marriage by their joint efforts and order the sale of any such asset and divide between the parties the proceeds of the sale. This power is implemented by the courts when granting or after the grant of a decree of separation or divorce.

Whenever a court of law in our jurisdiction is called upon to exercise its power under section 114(1) of the Law of Marriage Act, it is obliged to observe the factors enshrined under subsection 2 of section 114 of the Act. These factors include **one**, the customs of the community to which the parties belong. **Two**, the extent of the contribution made by each party in money, property or work towards acquiring of the assets. **Three**, any debt owing by either party which were contracted for their joint benefit. **Four**, the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

The rationale for revisiting the above legal requirement is the claim by the parties that as per the the record of the trial court that the Kadhi had divided their matrimonial assets between them when they went there for reconciliation. This is reflected at page 6 and 13 of the typed proceedings of the trial court. Fortunately, the trial court had discussed this issue on its judgment. However, it is important to remind the reconciliation boards go by the book and refrain from usurping jurisdiction and exercise matter that they are not empowered to exercise.

Having read thorough the proceedings and judgment of the trial court plus the first appellate court, I am convinced that the evidence adduced by the respondent was heavier than that of the appellant. The respondent had testified as to how she found the appellant with no asset, the way they managed to erect the first house situated at Ligula B, purchase the plot of land at Mtambaswala, how they purchased the household items and finally the way they purchased the plot of land at Mitengo and how they built the house in dispute.

Even when the appellant cross examined her on how she contributed on the acquisition she clearly testified that she contributed by money, supervising the construction activities, cooking for technicians, taking care of the children, and comforting the appellant. Furthermore, the evidence of the respondent that the house in dispute was built by the rent (money) collected from the house of Ligula B was not disputed/ cross examined by the appellant. This gives an interpretation that the appellant had accepted that piece of evidence of the respondent and is estopped from asking this court to disbelieve what the respondent had testified.

This position has been stated by the Court of appeal on many occasions. See, the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 and the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** (supra) cited by the respondent, in which the Court of Appeal held that: -

> *"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 the instant matter, the evidence adduced by the respondent is watertight and has proven that the house in dispute is a matrimonial house. The same cannot escape division between the parties herein as ordered by the first appellate court.

I am also in agreement with the respondent that the learned counsel for the appellant has brought a new issue that the house in dispute is not a matrimonial asset as it was built by the appellant with the aid of his second wife in 2017. Indeed, this issue was raised neither at the trial nor first appellate court. Therefore, I find the arguments advanced by the learned counsel are, with due respect, baseless. I have no doubts that the Senior Counsel is very much aware that as the second appellate court I cannot decide on something not raised at the first appellate court. See **Samweli Sawe vs Republic**, Criminal Appeal No.135 of 2004 at page 3.

Furthermore, I also agree with the respondent that if the appellant's second wife had an interest over the disputed house, she could lodge an

objection proceeding and not filing a fresh suit at the District Land and Housing Tribunal. This gives the impression that the learned counsel for the appellant has not exercised his due diligence and competence in advising the appellant and his current wife.

In the upshot, I am convinced that this appeal is devoid of merit. Consequently, the same is hereby dismissed in its entirety. The decision of the District Court of Mtwara is upheld. Since this is a matrimonial matter, I make no order as to costs.

It is so ordered.

E.I. LALTAIKA

JUDGE
19/12/2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 19th day of December,2022 in the presence of Mr. Kassian Mkali, learned counsel for the appellant and the respondent who has appeared in person, unrepresented.

E.I. LALTAIKA

JUDGE
19/12/2022

Court:

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA

JUDGE
19/12/2022