IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 14 OF 2021

(Arising from the decision of District Court of Kigamboni at Kigamboni in Matrimonial Appeal No. 4 of 2021 delivered by Hon. A.L Mchome, RM on 17th August, 2021 originating from Matrimonial cause no. 124 of 2020 before Hon. Luguru R.M)

ANGELINA MWAMGUNDA..... APPELLANT

VERSUS

HARUNA MWAKAPISO..... RESPONDENT

JUDGMENT

Date of last order: - 21/2/2022
Date of judgment: - 17/03/2022

OPIYO, J.

The above-named appellant being aggrieved by the whole decision of the District Court of Kigamboni delivered on 17th August 2021 before Honourable A.L Mchome, RM appeals to this court on the ground that the appellant court Magistrate erred in law and fact by failure to consider the appellant's contribution in the division of matrimonial property.

Wherefore, the appellants prayed for the appeal to be allowed, the judgment of the District Court be quashed and set aside and order of equal division of the matrimonial properties.

On 4th January, 2022 the parties in consensus agreed to dispose of the appeal by way of written submission of which they were filed timely and there was no rejoinder submissions.

The appellant submitted that they were married under the Christian rites on 18th October, 2015, and had one child who passed away. They managed to build one house at Morogoro and a farm annexed to it, a house at Kigamboni, a plot, and a hardware store. Before that, the parties cohabited since 2004 at Morogoro and later moved to Dar es Salaam. When they were at Dar es Salaam, they bought a plot at Kihonda and a farm at Mafuru and started construction of two rooms, and in 2015 after the marriage ceremony, they continued building the same house and bought another plot nearby.

In the acquisition of the matrimonial properties, the appellant stated that she was a shopkeeper at the hardware store and the earnings were used in maintaining the family and helping in building the house. She stated her participated in supervision during the building process, fetching water, buying sand and aggregate stones and other building materials that were used in building the house to mark her contribution. that the also contributed both as a wife in taking care of the family. She referred to section 114(2) (b) and (d) and cited the case of Bi Hawa Mohamed v Ally Sefu, Civil Appeal No. 9 of 1983 to substantiate her argument on how her participation in the way she did constitutes valuable contribution for the purpose of division of matrimonial properties. However, in their case trial court did not consider such contribution in the distribution of the matrimonial assets, thus it ended up distributing assets in numbers rather

that in value as the assets distributed to each have huge difference in value. Hence, the appellant prays for this appeal to be allowed.

Resisting the application, the respondent stated that, they enjoyed matrimonial rights since October, 2015 and during the subsistence of marriage they acquired a house at Kihonda, a farm at Mafuru Morogoro, and built a house at Kisiwani area Kigamboni at Dar es Salaam. That after a successful petition for divorce the assets were divided by the trial court based on the extent of their contribution whereas the appellant was given a house located at Morogoro Kihonda and a farm at Mafuru in Morogoro, respondent was given Kiswani- Kigamboni house. He further submitted no place in records that shows the appellant was selling at the hardware and her earnings were used in building the houses, her contribution was not stated anywhere but the trial court considered a domestic contribution and awarded the said house and a farm. He argued that the basis of the division was founded under section 114(1) of the Law of Marriage Act, Cap 29 R.E 2019 and for the wording of such section, the magistrate does not have to address the reason for ordering such division but as the matter of experience one has to show how he reached to the conclusion. He referred to page 7 of the Primary court decision and stated that magistrate had shown well how he reached the conclusion.

Lastly, the respondent submitted that there is no hard rule on valuation and quantifying the matrimonial assets. The trial Magistrate ascertained the number of assets which were acquired by joint efforts and were all subjected to division as witnessed in the trial court and thus he prayed for the court to uphold the decision and dismiss the appeal.

I have gone through the ground of appeal and the submissions of both parties. Having done so, the central issue for determination by this court is whether the trial court failed to consider the extent of appellants contribution when ordering the distribution of the matrimonial assets. From the records, the appellant listed the assets to be a house at Kihonda, Morogoro, a farm at Mafuru, Morogoro, a house and a plot at Kisiwani, Kigamboni- Dar es Salaam. She further stated that her contribution was both domestic and financial, however, this assertion of her contribution was heavily resisted by the respondent but not on the properties mentioned. Both agreed on the jointly acquired properties.

At the trial court, that is Primary court, the appellant stated that they both shifted to Dar es Salaam as husband and wife whereby they managed to buy a plot at kisiwani and build three rooms, and she used to cook for the masons in 2014 and in 2017 they bought another plot at the same place at Kisiwani Kigamboni and also build 2 rooms at Kihonda and bought a farm at Mafuru. That, at some point she got sick and undergon a surgical operation that it is when their marriage got sour. She stated that before all that she used to work at the shop selling motorcycle spare parts but she was prohibited by the respondent. During cross-examination with court assessor the appellant stated that she used to be a shopkeeper and she bought aggregates and sand for the construction.

In the case at hand, the issue in controversy is the extent of contribution and division of the said properties. It is not disputed that the parties herein started cohabiting back in 2004 and married in 2015. The appellant was there when both properties were acquired, and she was already married as the properties were acquired mostly in 2017.

The case of **BI HAWA MOHAMED v ALLY SEFU 1983 TLR 32,** came out with two major factors to consider on what makes a matrimonial property, it was held that;

> *"(i) Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider a contribution by a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets;*
>
> *(ii) the "joint efforts" and 'work towards the acquiring of the assets have to be construed as embracing the domestic "efforts' or "work" of husband and wife"*

Thus, from that angle of domestic efforts or work of the husband or wife has to be considered which in the case at hand the appellant claimed to be taking care of the family and doing other works, like cooking for the masons even buying building materials. These factors have been considered when ordering distribution.

The position of the law is very clear that, in granting the order of division between the parties the court shall consider the extent of the contribution made by each party in money, property, or work towards the acquisition of the assets. In the case at hand, the appellants proved all these as stated above.

I am alive to the holding in the case of **Victoria Sigala v Nolasco Kilasi, PC Matrimonial Appeal No. 1 of 2012, HC Iringa,**

(unreported) cited with approval the case of **Anna Aloyce v. Zakaria Zebedayo Mgeta, PC Matrimonial Appeal No. 1 of 2020, HC Mwanza (unreported**) advocating for equal division. In this case it was held that:-

> *"Indeed, there is no fast and hard rule in deciding on the amount of contribution and division of matrimonial assets. Where the matrimonial assets were acquired during the happy days of subsistence of marriage and in the joint efforts of the spouses there is no need of requiring one spouse to give evidence to show the extent of her/his contribution. The distribution of such assets should automatically proceed in equal terms"*

With that spirit stated in **Anna Aloyce's case**(*supra*) as both parties agrees on the contribution of each other with respondents weighing more in monetary terms, I hesitate to consider equal distribution in obviously unequal contribution. In this respondent seems to have contributed more in monetary terms that the appellant. In my view, consideration of one's contribution is still paramount irrespective of the difficulties in determining actual extent of one's contribution. With that in mind, does it mean I bless the division by the lower courts? obviously no. the reason for a different consideration is that the trial court and first appellate court decided the way they did with assumption that respective assets distributed have equal values as they divided them to the parties in numbers. The appellant was was given a farm and house (2 rooms as stated in trial court hearing) at Morogoro while the respondent a house and plot at Kigamboni without even having a consideration on their value. In my considered view, this was an erroneous approach by the lower

courts as it is prospective to cause more chaos as each asset is likely to differ in value from the other. Value of properties is determined based on different factors as it is also affected by many factors. In landed properties location and size plays a major role. By the fact that the properties are in different localities, regions for this matter, division by numbers was irregular as the value is likely to be different from one region to another. To reach a fair and just distribution to the parties based on their contribution the trial magistrate should have divided the alleged matrimonial landed asserts in a ratio of percentages on each party (see the case of **Antony Maziku v Elizabeth Maziku, Civil Appeal No. 49 of 2019, High Court of Tanzania, at Dar es Salaam, (unreported)**)

Therefore, based on the reasons which I have expounded, this appeal is allowed. Since the division of matrimonial assets was irregular, this court hereby faults and varies the order in respect of the division of the listed matrimonial assets save for the spare parts shop. The following issue for determination is on what ratio each party is entitled to. This is calculated based on the contribution made by each party, which as noted above, respondent seems to have contributed more in acquisition of the same. The appellant proved her contribution through housework and the like but not monetary. That in my view does not attract equal division, but one with more contribution deserves bigger share. Therefore, I hereby order those matrimonial landed properties should be evaluated and be distributed in terms of 30% for the appellant and 70% for the respondent.

The issue of spare parts shop is to be treated differently. It is my observation that this shop has been in place soled as a result of the respondent's efforts not joint efforts of the two as the appellant was

undisputedly given 1million as starting capital for her separate business which she misused or did not account for during the distribution of assets. So, the same has to be retained by the respondent alone.

In the course of determining this appeal the parties asked the court to amicably dived household appliances. The distribution was agreed as follows. Respondent is to take refrigerator, Capet, TV set, one mattress and small gas cooker. The remaining items goes to the appellant including big gas cooker, wardrobe, cupboard, 1 bed and 1 mattress, sofa set, dressing table, plastic table and 3 plastic chairs, and kitchen utensils etc.

Taking into account the nature of this matter being a matrimonial issue, I make no order as to costs.

HIGH COURT OF TANZANIA

M. P. OPIYO,

JUDGE

17/3/2022