IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

PC CIVIL APPEAL NO. 12 OF 2021

(From Kinondoni District Court Matrimonial Appeal No. 21 of 2020)

JOYCE NYANTORI.....APPELANT

VERSUS

IBRAHIM YEREMIAH MWAYELA.....RESPONDENT

JUDGMENT

8/11/2021 & 6/01/2022

N.R. MWASEBA, J.

This matter originated from Magomeni Primary Court at Kinondoni in Matrimonial Cause No. 45 of 2019. In that case, the respondent, petitioned to the trial court for divorce.

Basically, after the Primary Court had heard the petition, it granted the divorce, custody of two children was vested to the appellant herein mentioned and the respondent was ordered to pay a monthly maintenance of Tshs. 200,000/=for both children. Further, among the three vehicles they jointly acquired the trial court ordered that the Nadia

make vehicle will be for the appellant, the Harrier make vehicle will be for the respondent and the Rav 4 make vehicle will be given to the respondent's parents and the appellant will be compensated her share. Actually, this order was in harmony with the two parties' prior agreement. The two jointly acquired matrimonial houses were not divided but rather, it was ordered that: the house located at Ubungo should be spared for leasing and the rent would be divided equally between the parties; the appellant herein was allowed to stay with their children in the house located in Mbweni but under the condition that in case she gets married she would be supposed to vacate the said house.

The appellant appealed to the district court which partly allowed the appeal by upholding the decision with regard to maintenance order, division of vehicles and further varied the distribution of matrimonial houses whereby the appellant was given the house in Mbweni and the respondent was given the house in Ubungo. Again, this decision did not please the appellant, hence this second appeal with the following grounds:

1. *That the appellate court erred in law and fact by ordering the distribution of matrimonial properties not proportional to what the appellant contributed.*
2. *That the appellate court erred in law and fact by giving the respondent a house situated in Ubungo without any justifiable evidence for his contribution.*
3. *That the appellate court erred in law and fact for ordering the house situated in Ubungo to be given to the respondent without considering that the said house is a convenient environment for their issues and appellant compared to that of Mbweni.*

At the hearing of this appeal the appellant enjoyed the services of Ms Utti Mwangámba and Jane Kapufi both learned counsels while the respondent had the services of Mr Michael Kasungu learned counsel. The appeal was disposed of by way of written submission.

In her submission, the appellant argued on the first ground of appeal that the trial court erred in law by ordering the distribution of matrimonial assets which is not equivalent to what the appellant

contributed. She avers that at the trial court she tendered documentary evidence to show how she contributed to the acquisition of the matrimonial houses and vehicles in which she said she is working with TANESCO and she secured a loan from SACCOS then contributed to the construction of the houses and buying of vehicles. So, she argues that she is entitled to equal distribution of the matrimonial assets.

She referred this court to the case of **Bibie Maulid Versus Mohamed Ibrahim, (1989) TLR 162** which insisted on the division of matrimonial assets by considering the contribution of a party to earning them. **Section 114 (2) (b) of the Law of Marriage Act,** CAP. 29 R.E 2019 which was referred in the case of **Mariam Tumbo versus Harold Tumbo**, (1983) TLR 293 (HC) in which it was insisted that in exercising its power of division of assets, the court ought to regard the extent of contributions made by the spouses in terms of money, property or work to acquisition of the property. See also **Yesse Mrisho Versus Sania Abdu**, Civil Appeal No 147 of 2016 (unreported).

She says she proved with evidence at the trial court with no mere assertion on her contribution to the acquisition of matrimonial properties as required by **Section 110 (1) of Evidence Act,** CAP 6, and R.E 2019.

In her second ground of appeal, she stated that the appellate court erred in law for giving the respondent the house situated in Ubungo without any justifiable evidence of his contribution. She referred this court to the case of **Gabriel Nimrod Kurwijila versus Theresia Hassan Malongo**, Civil Appeal No 102 of 2018 in which the Court of Appeal insisted that the extent of contribution is of utmost importance in determining the division of matrimonial assets.

In her third ground of appeal, she contended that the appellate court erred in law and fact by giving the appellant the house situated in Ubungo without considering that the said house is a convenient environment for their issues and the appellant compared to of the house in Mbweni. She argues that, this house is close to children's school whose school is located in Kimara and it is close to appellant's work place which is TANESCO- Ubungo.

In his reply, the respondent submitted on the first ground by referring this court to **Section 60 (a) of the Law of Marriage Act** (supra) that it is a presumption of the law that properties acquired in the name of either the husband or wife belongs absolutely to that person. He says that he testified at the trial court that the house in Mbweni was acquired before their marriage.

With regard to the house located in Ubungo, he submitted that they jointly acquired it. Further, he says that the documentary evidence alleged to be tendered by the appellant at the trial court was rejected, so she cannot say she satisfied the court as per **Section 110 of Evidence Act** (supra). He cited the case of **Magreth Wisdom vs. Wilfred Selemani** (1976) TLR, 48 when the court said it could determine issues pertaining to the division of matrimonial property after sufficient evidence had been adduced to show the contribution of each spouse. He asserts that **Section 114 (2) (d) of the Law of Marriage Act** (Supra) clarifies that the court can consider the interest of children when dealing with the distribution of matrimonial assets.

Arguing on the second ground of appeal the respondent stated that it is undisputed that both parties contributed to the acquisition of the assets in dispute (2 houses). This fact has never been controverted by the appellant herein and has been consistently upheld by the two prior subordinate courts. He referred this court to page 1-2 of the trial court judgment the fact which was not controverted by the appellant and both properties appear in the name of the respondent. He clarifies that whereas he did not give documentary evidence to prove his contribution

the appellant did not tender the documents as they were rejected. Thus, both parties were equally faulty for not assisting the court in its process of division of matrimonial assets. (See **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** (supra).

In the third ground he replied that as a matter of principle, matrimonial assets are not divided according to personal preferences but rather according to the law, most specifically Section 114 of the Law of Marriage Act. He went on to submit that the appellant does not want to live in the house located in Mbweni because the house is not a convenient environment for the appellant and their children and also the children's schools are far from there. Unfortunately, this is not among the factors the court considers during the division of matrimonial assets. He insisted that the division of matrimonial assets is governed by **Section 114 of the Law of Marriage Act.**

He therefore prays that the appeal be dismissed with costs for being non-meritorious.

Rejoining to the reply, the appellant claims that the respondent misconstrued and misinterpreted the provision of **Section 60 (a) of**

the Law of Marriage Act. She says it is a rebuttable presumption which one can prove against upon persuading the judge that the presumption is not true. She says the appellant stated at the primary court that they started to build the house in Mbweni in 2005. Thus, it was acquired during the subsistence of their marriage.

After having the submissions by both sides, I find only two issues for determination. **One** is whether the matrimonial assets were well ascertained and **two** is whether the matrimonial assets were fairly distributed.

Starting with the first issue as to whether the matrimonial assets were well ascertained, the respondent in his submission before this court claimed that the house in Mbweni was acquired by him before their marriage so it is not a matrimonial asset. I have gone through the Primary Court's record and found that when the respondent was adducing his evidence on 17/7/2019 he mentioned the properties which they acquired together being two houses one in Mbweni and another one in Makoka- Ubungo area. The parties were not at issue as to the acquired properties that is why they agreed on the distribution of vehicles of which the court settled according to their wishes and so the

dispute remained on the distribution of the two matrimonial houses. Regarding the fact that the house at Mbweni is not a matrimonial asset it cannot be raised by the respondent at this juncture. Therefore, this court declares that the two houses are matrimonial assets.

Coming to the second issue as to whether the matrimonial assets were fairly divided. The first appellate court gave the house in Ubungo to the respondent and the house in Mbweni to the appellant. I do not think the appellate magistrate considered carefully the proportion of the distribution of those two houses. From the record, it was not disputed that each party contributed to the acquisition of the said properties. This fact was also observed by the appellate magistrate as it appears at page 9 of the typed judgment that:

> *"As I have stated above, I find no dispute on contribution of each party thus distribution has to be effected."*

However, the magistrate did not state the ratio of the distribution to be effected but ended up dividing the two houses to the parties. **Section 114 (2) (b) of the Law of Marriage Act** (Supra) states that:

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

> *(b)* ***to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*** *(Emphasis is mine)*

This provision was also clarified in the case of **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (CA) (unreported) in which the Court of Appeal stated that:

> *"There is no doubt that a court, when determining such contribution* ***must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."*** *(Emphasis is mine)*

From the record, there is no dispute as to the contribution among the parties to the acquisition of the said houses. However, it is difficult to know to what extent each party specifically contributed in order to ascertain the ratio of distribution. This drives me to buy the idea of my learned sister Shangali, J. (as she then was) in the case of **Victoria Sigala v. Nolasco Kilasi** PC Matrimonial Appeal No. 1 of 2012 HC Iringa (Unreported) cited with approval in the case of **Anna Aloyce V. Zakaria Zebedayo Mgeta,** PC Matrimonial Appeal No 1 of 2020 HC Mwanza District Registry (Unreported) 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 or 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."

It is evident that when the parties were acquiring these properties it was their happy days coupled with love and harmony. Therefore, the matrimonial houses are to be distributed in equal terms.

Through the evidence the parties agreed on the distribution of vehicles and the trial court decided accordingly and the district court upheld the decision as I similarly do. Before me the parties are at issue on the distribution of the two houses. Both of them seem to be especially interested in the house located in Ubungo for several reasons.

The position in this case is that the marriage between the parties was already dissolved and the divorce was granted. There is no way the parties can still own their properties jointly. The appellant magistrate

divided the two houses unfairly. So long as the values of the two houses are different, and the distribution ought to be done in equal terms, then the distribution will be effected in accordance with **Section 114 (1) of the Law of Marriage Act** (Supra) which stipulates that:

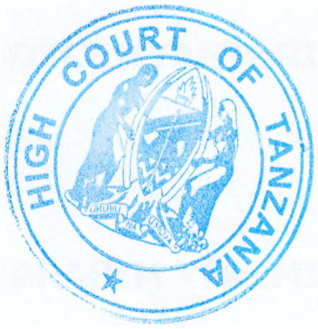
> *"The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts* ***or to order the sale of any such asset and the division between the parties of the proceeds of sale****. (Emphasis added)*

As I have emphasized on the above provision, and being guided by the said provision I hereby order that the two houses be evaluated by a qualified valuer, then the same be sold and the proceeds for sale be equally divided among the parties. The parties are at liberty to be the buyer and compensate the other party.

Having so said, the appeal is allowed. Due to the nature of this case each party will bare own costs.

It is so ordered.

DATED at **DAR ES SALAAM** this day of 6th day of January, 2022.



N.R. MWASEBA

JUDGE

6/01/2022