IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 349 OF 2021

(Arising from the decision of the District Court of Mkuranga at Mkuranga, in Matrimonial Cause No. 1 of 2021, by Hon. Mwailolo-RM dated 9th day of September, 2021)

SAID MOHAMED SALUM ..... APPELLANT

VERSUS

MARIAM MAURID WAZIRI ..... RESPONDENT

JUDGMENT

21st April, & 23rd May, 2022

ISMAIL, J.

The tussle in this appeal involves erstwhile couple and bed fellows who have since estranged one another. The blossoming intimacy fledged and bad blood between them flew in. Squabbles began and grew into irreconcilable differences which were referred to BAKWATA Conciliation Board but none of the parties was able to swallow their pride and move on.

The District Court of Mkuranga District at Mkuranga, before which the matter was placed, took the view that the marriage between the parties was unstitchably torn apart. It granted a decree of divorce. What followed

thereafter was the thorny issue of distribution of matrimonial assets. The trial court ordered distribution of assets after satisfying itself that the same were acquired in the subsistence of the marriage and through joint contribution of the parties. These included a four-acre farm which was distributed at the proportion of 75% to 25% for the appellant and respondents, respectively; and a house at Dundani village which was shared on a 50-50 basis. The decision on Dundani house was preceded by annulment of what was claimed by the respondent as a deed of transfer which offered the said house as a gift. The view taken by the trial court is that the deed did not pass the test of a valid deed. A parity of distribution was also ordered with respect to a two-room business premise (frames).

This decision was met with serious outrage by the appellant. Feeling hard done, he has chosen to take a ladder up, through the instant appeal which has four grounds of appeal. The grounds are paraphrased as follows:

1. *That the trial Magistrate erred in law and in fact by delivering contradictory judgment by deciding that the respondent be given one acre which includes ½ acre given at Bakwata;*

2. *That the trial Magistrate erred in law and in fact by not considering TZS. 80,000,000/- given to the respondent at*

Bakwata as her contribution towards acquisition of the property;

3. *That the trial Magistrate erred in law and in fact by misdirecting by dividing business stall/frames, which were rented; and*

4. *That the trial magistrate erred in law and in fact by dividing house of Dundani at 50% each, ignoring the evidence adduced by the appellant that he built the house by using his salary.*

Disposal of the appeal took the form of written submissions the filing of which duly conformed to the filing schedule. Ms. Aisha Bwasheikh, learned counsel for the appellant, kicked the first ball.

Submitting with respect to grounds one and two of the appeal, Ms. Bwasheikh argued that BAKWATA assumed powers it did not have with respect to distribution of matrimonial assets. She contended that the trial court found itself sailing in the same boat when it included and/or ratified the distribution done by BAKWATA. Ms. Bwasheikh singled out the order for payment of TZS. 8,000,000/-, referred to as Mutah and distribution of ½ of a farm in the respondent's favour was contrary to the dictates of section 114 (1) of the Law of Marriage Act, Cap. 29 R.E. 2019. This provision bestows powers of distribution of matrimonial assets on the court. To bolster her

contention, she cited the decision of the Court in ***Hadija Rashid Sandari v. Issa Juma Kaimika***, HC-(PC) Matrimonial Appeal No. 11 of 2019 (unreported). She argued that BAKWATA's mandate, as enshrined in section 104 (5) of Cap. 29 was fully discharged when it certified that it was unable to resolve the parties' matrimonial dispute.

With regards to ground three, learned counsel's argument is that assets which do not constitute the matrimonial assets were included in the distribution. Her reference point was two frames one of which she contended that is inbuilt with the house and cannot be separated, while the other is rented. What isn't clear is whether the same has been rented out to a tenant or the appellant has rented the said frame from a third party.

Submitting on ground four, Ms. Bwasheikh's contention is that distribution of the Dundani house on 50-50 basis was flawed and did not consider that the testimony adduced by PW1, DW2 and DW3 was to the effect that the building of it was financed by the appellant's own salary from his employment. She urged the Court to be persuaded by the decision in ***Fatuma Bakari Mtingala v. Rajabu A. Kautipe***, HC-(PC) Civil Appeal No. 15 of 2020; and ***Eliestre Philemon Lipangahela v. Daud Makuhuna***, HC-Civil Appeal No. 139 of 2002 (both unreported), wherein it was

emphasized that the provisions of section 114 (2) of Cap. 29 must be conformed to when the court is ordering distribution of matrimonial assets.

Learned counsel took the view that the respondent failed to prove her case consistent with section 110 of the Evidence Act, Cap. 6 R.E. 2019.

Mr. Omega Juael, learned advocate whose services were enlisted by the respondent chose to combine grounds one, three and four. He began by giving some detailed explanation of what guides division of the matrimonial assets within the import distilled from the case of ***Bi Hawa Mohamed v. Ally Seif*** [1983] TLR 32. Learned counsel argued that the trial court was guided by the principle which is to the effect that division of matrimonial assets was premised on the assets which were acquired in the subsistence of the marriage, and that there was a joint effort in their acquisition. Mr. Juael found nothing blemished in the trial court's decision to order division in the manner it did.

Regarding division of the frames, the contention by the respondent's counsel is that renting them out would not be the basis for not ordering distribution between the parties.

With regards to ground two of the appeal, the argument is that the sum given as Mut'ah was meant to accommodate the respondent pending

final determination of the dispute. He took the view that such payment would not be considered in the final distribution of the assets.

Mr. Juael concluded by urging this Court to hold that distribution of the matrimonial assets conformed to the law. He prayed that the appeal be dismissed with costs.

From the rival submission by the parties, the broad question for resolution is whether the appeal is meritorious. I will follow the sequential flow of the grounds of appeal in their disposal.

With regards to ground one, the contention by the appellant's counsel is that there is a contradiction arising from the trial court's order that the distribution should include ½ an acre, awarded by BAKWATA, on top of what was ordered by the court. I find nothing contradictory in the order as the respondent's entitlement remained to be 25% of the size of the farm which works out to 1 acre. What the trial court did was merely to clarify that the 25% will not be on top of what BAKWATA ordered. Instead, this was the aggregate of the respondent's entitlement. The only disquieting point is that pre-divorce distribution was done before a pronouncement that the marriage had irreparably broken down. This was a flawed decision which was rectified

by the decision to order re-distribution as the trial court did. I find nothing concerning in this ground and I dismiss it.

Ground two of the appeal has taken exception to the decision to condone or cast a blind eye on BAKWATA's decision to order that the respondent be given TZS. 8,000,000/- as part of the distribution of the matrimonial assets. As both counsel held, the decision to order payment of this sum, along with distribution of the farm, was done when the parties referred their dispute for conciliation by BAKWATA.

It is noteworthy, that the parties' dispute was referred to BAKWATA as part of the condition precedent set under section 101 of the Law of Marriage Act, Cap. 29 R.E. 2019, which makes such reference mandatory. The Conciliation Boards, BAKWATA inclusive, are established under section 102 (1) of Cap. 29, and their sole mandate is that of trying to resolve the matrimonial dispute between the disputants. Where reconciliation is impossible, as was the case in this matter, the role of the Board is to act consistent with what section 104 (5) states. It provides as follows:

> "*Where the Board is unable to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties, it shall issue a certificate setting out its findings.*"

It follows that the order for payment of TZS. 8,000,000/- or any form of distribution ordered upon certification that the dispute has not been resolved was nothing but a ceaseless exercise of powers that BAKWATA and all other conciliation boards do not possess. The net effect of all this is to render decisions arising out of this infraction untenable. Consequently, I am in full agreement that the trial court erred when it left the cash award made by BAKWATA unscathed. I allow this ground of appeal.

Ground three of the appeal has taken an exception to the trial magistrate's decision to include what the appellant considers to be a rented property which isn't a matrimonial asset. I have gone through the trial proceedings. Nothing, in the testimony of the appellant, then featuring as DW1, supports the contention raised in the written submission that the said outlets (frames) were rented. None of the other witnesses came forward and testified to that effect. In the absence of any semblance of testimony that would lend credence to this contention, I find nothing convincing in the appellant's argument that the outlets were not part of the assets jointly acquired in the subsistence of the marriage. It is in view of the foregoing, that I consider this ground hollow and destitute of fruits. I dismiss it.

Ground four of the appeal queries the legality of the trial court to order equal distribution of the Dundani house while the evidence adduced proved that its construction was financed by the appellant's salary. It is a settled position that division of matrimonial assets is dependent, not only on the spouse's contribution towards acquisition of the particular asset, but also on the spouse's ability to prove the extent of his or her contribution in the acquisition. This is provided by section 114 (1) of Cap. 29 which states as hereunder:

> *"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."*

The reading of this provision has to be done together with section 114 (2) (b) which provides as follows:

> *"In exercising the power conferred by subsection (1), the court shall have regard-*
>
> *(a) N/A*

(b) To the extent of the contributions made by each party in money, property or work towards the acquiring of the assets.'

The cited provision brings the import that the proportion of division of the matrimonial assets must be preceded and determined by the extent to which a party contributed in the acquisition of the asset set for distribution. The court's determination on the extent of contribution must be based on adequate evidence. This was underscored in ***Hidaya Ally v. Amiri Mlugu*** [2015] TLR 329 at page 333. It was held by the Court of Appeal of Tanzania, as follows:

> *"However, whether or not to order distribution of matrimonial property the court must take into account the question of contribution by the parties as contemplated by section 114 (2) (b) of the LMA….. The above section underscores that there must be adequate evidence showing the extent of contribution; it can be in terms of money, or any other form of input in relation to the being and/or existence of the property which is the subject of distribution."*

The trial court's decision to order even distribution of the Dundani house was informed by two factors. ***One***, that the house was built in the subsistence of the marriage and have lived in that house for 20 years. ***Two***,

that the estranged spouses were of advanced age and are dependent on the same house. These reasons are, in my considered view, less significant and unable to justify the even the distribution of the property. They do not prove the extent of the respondent's contribution in the acquisition of the property.

In the circumstances, I find that equal distribution of the Dundani house was predicated on wrong consideration and, as long as extent of contribution by the respondent is not evidenced, the justified conclusion is that the respondent's contribution remains to be that which is known to be offered by a housewife. In view thereof, I review the proportion to 30% of the market value of the Dundani house, in respondent's favour. This ground of appeal partly succeeds to that extent.

In the whole, this appeal partly succeeds to the extent stated herein. Each party shall every bear their own costs.

It is so ordered.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 23rd day of May, 2022.

M.K. ISMAIL

JUDGE

23.05.2022