

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

PC. CIVIL APPEAL NO.28 OF 2021

(Arising from Masasi District Court in Matrimonial Appeal No.3 of 2021 and Originating from Chikundi Primary Court in Matrimonial Case No.5 of 2021)

MFAUME FADHILI MAKWANGU.....APPELLANT

VERSUS

RIDHIKI FUMAO MOHAMEDI.....RESPONDENT

JUDGEMENT

24/2/2023 & 30/5/2023

LALTAIKA, J.

This appeal originates from the Primary Court of Masasi at Chikundi in Matrimonial Cause No.5 of 2021. In that case, the appellant herein, **MFAUME FADHILI MAKWANGU** petitioned for a decree of divorce and division of matrimonial assets after the Matrimonial Board of BAKWATA CHIKUNDI had failed to reconcile them.

To better appreciation of the nature of the matter, it is pertinent to have a factual background of the same. The parties got married on 29.06.2013 via Islamic rites and a marriage Certificate with registration No.0586248 was issued by the registrar of marriages to the parties. During the lifetime of their

marriage, they were blessed two issues and jointly acquired assets including one house, households and half an acre farm.

In 2014 the matrimonial dispute ensued soon after the respondent went to Dar es Salaam for a training of Forever Living. The matrimonial lifestyle of the parties was characterized by chaos from 2014 to 2019. However, in most times either the parties themselves or by their relative or local government leaders or leaders from the school of the appellant were involved in settling the matrimonial disputes amicably and that is why the parties had managed to live together up to 2019.

More so, on 28/9/2019 the appellant divorced the respondent in accordance with Islamic law. In addition, the appellant went at the trial court in order to obtain the official decree of divorce due to disturbances he suffered from the respondent. During trial the appellant testified on how he compensated the respondent on the jointly acquired matrimonial assets. However, the evidence of the respondent disputed the appellant's assertion and instead she testified that the appellant's money was paid in order to persuade the respondent to resume to her marriage.

After a full trial, the trial court was satisfied that the marriage of the parties had been broken down irreparably. To that effect, it issued a decree of divorce under section 107(3) of the Law of Marriage Act [Cap. 29 R.E. 2019]. The trial court went further to divide the matrimonial assets to the parties. The trial court also dealt with the order of custody and maintenance of children though was not among the prayers of the appellant.

Dissatisfied, the respondent appealed to the District Court of Masasi vides Matrimonial Appeal No.3 of 2021. After hearing the appeal, the first appellate court allowed the appeal and set aside the order for division of matrimonial assets made by the trial court. Dissatisfied and aggrieved with the decision of the District Court of Masasi the appellant lodged this appeal vides a Petition of Appeal featuring three ground namely:-

- 1. That, the appellate trial(sic) Magistrate erred in law and fact by ordering the payment of Tsh.3,645,000/= to the Respondent was by way of love and affection while in fact the money paid was for an agreement of the respondent to return back home. And there is no evidence that the Respondent is entitled to such amount of compensation.*
- 2. That, the appellate trial (sic) Magistrate grossly erred in law and in fact by ordering equal distribution of matrimonial properties without considering the joint efforts contributed by the parties.*
- 3. That, the appellate trial Magistrate grossly erred in law and in fact by ordering the payment of debts obtain by the respondent after separation to be paid jointly with the appellant who did even enjoy the money.*

When this appeal was called on for hearing only the appellant appeared in person and unrepresented. In addition, the appeal was heard *ex parte* and the appellant made an oral submission on his three grounds of appeal.

Submitting on the first ground, the appellant contended that he never gave the respondent money out of love and affection because they had divorced. The appellant went on and submitted that the family meeting after divorce was the one that decided he should give the respondent the money. The appellant insisted that the respondent's father told the trial court clearly that the five (5) million was to be given to the respondent after separation. Furthermore, the appellant submitted further that the respondent is the one who told the court that he gave her money as an enticement "kumuhonga"

to return her home. The appellant contended that the appellant was also asked whether she indeed came back home and she replied to the negative. In addition, the appellant submitted that the appellant never mentioned the reasons for her refusal. To this end, the appellant prayed this court to consider the money he had paid the respondent to be full division of property and not merely money given out of love and affection. He stressed further that he also need a decree of divorce in order to avoid future disturbance especially at work.

Regarding the second ground, the appellant submitted that the respondent found him well established since he had built his house. The appellant insisted that the only thing that they built together was '*banda*' for chicken. The appellant submitted further that even the respondent herself is not interested in pursuing the court order because she was told by her peers that it was true, she found him with the house. The appellant stressed that both parents consented with five million because they knew that the house belonged to him. On top of that, the appellant submitted that learned magistrate decided that way because the respondent told him that "*sijachukua kitu chochote na tumezalisha mali*". He went on and argued that this is what made the magistrate think that they jointly built the house something which is not true.

Again, the appellant submitted for the third ground of appeal which is centred on the debts. The appellant submitted that there was a note on his house that it was going to be sold by **VICOBA and ASALELE** (merry-go-round type of self -help).The appellant contended that he felt embarrassed so he decided to pay that money in court. The appellant insisted that when

the respondent had appealed at the district court, she did not know that he had already paid the money. To this end, the appellant prayed this court to recognize that the debt he had paid and that a husband is not responsible for paying debts of a wife that has irresponsibly led to family loss including threat to sell a house.

Having dispassionately considered the submission of the appellant and the records of the lower courts, I am inclined to determine the merits or otherwise of the appeal. It should be noted at the very outset that parties herein are not contesting neither on divorce nor custody and maintenance of children. Indeed, the complaints are **one**, the status of money which the appellant had paid the respondent after he had divorced her. **Two**, division of matrimonial assets on equal share which did not consider the extent each party contributed towards acquisition of the same. **Three**, an order of payment of debts which occurred after separation of the parties.

I have keenly considered the three areas of controversy as gleaned from the grounds of appeal and I have noted that the same centres on the how the lower courts divided the matrimonial assets to the parties. In the line of that observation, it is crucial at this juncture to understand the meaning of the phrase matrimonial asset or property. I am aware that our statute (the Law of Marriage Act [Cap. 29 R.E. 2019]) has not defined the term matrimonial asset. However, the Apex Court of country (the Court of Appeal of Tanzania) has made tremendous efforts to define that phrase even by borrowing a leaf of wisdom from other jurisdictions. For instance, in the case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo**, Civil Appeal No.102 of 2018 the Court borrowed a definition from Indian Matrimonial

Property Act, Chapter 275 of the Revised Statute, 1998 and also took what it decided in the case of **Bi Hawa Mohamed vs Ally Sefu** [1983] TLR 32. To that end, I reproduce what the Court imported into our jurisdiction:-

"In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouse before or during their marriage, with the exceptions of

- (a) gifts inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;*
- (b) an award or settlement of damages in court in favour of one spouse;*
- (c) money paid or payable to one spouse under an insurance policy;*
- (d) reasonable personal effects of one spouse;*
- (e) business assets;*
- (f) property exempted under a marriage contract or separation agreement;*
- (g) real and personal property acquired after separation unless the spouses resume cohabitation.*

The definition is not far from what this Court stated in the famous case of **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R. 32 when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. The Court stated:-

"The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view, the term "matrimonial assets" means the same thing as what is otherwise described as "family assets". Under paragraph 1064 of Lord Hailsham's HALBURY'S LAW OF ENGLAND, 4th Edition, p.491, it is stated,

"The phrase "family assets" has been described as a convenient way of expressing an important concept refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and furniture in it (2) those which are of a revenue nature-producing nature such as the earning power of husband and wife."

Based on the above definition, I have no doubt that what the trial court outlined, evaluated and founded to be the matrimonial assets of the parties is unquestionable. However, I am aware that the major determinant factors of a whether an asset is a matrimonial asset or not lies on the ability of a party or parties to mention them and provide plausible evidence as to the extent contributed on its acquisition. Furthermore, the parties are required to provide adequate evidence as to how their matrimonial assets were acquired and how each one contributed to its acquisition. In addition, the issue of equality division as provided by section 114(2) of the Law of Marriage Act will not arise. The Court of Appeal of Tanzania clearly stated in the case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo** (supra) 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 our view, the issue of equality of division as envisaged under section 114(2) of LMA cannot arise where there is no evidence to prove extent of contribution."

As far as the record of the first appellate court is concerned, it divided the matrimonial assets into equal share to the parties. The divided matrimonial assets include the house and the debts. Indeed, what the first appellate court decided did not consider the evidence of the parties on how each one contributed towards its acquisition and also how and when the debts ensued. I expected the learned appellate magistrate could have analyzed the evidence adduced by the parties specifically on the contribution made by each one towards the acquisition of the same. Furthermore, the

first appellate court could have objectively evaluated on how and when the debts came into being and also find out if it follows within the ambit of section 114(2)(c) of the Law of Marriage Act.

Strictly speaking the learned appellate magistrate exempted himself from exercising his duty of re-evaluating the evidence gathered by the trial court. Being the first appellate court was duty bound to re-evaluate the evidence of the trial court, put it to a critical analysis and where possible arrive to a different decision. See, **Future Century Ltd vs TANESCO**, Civil Appeal No.5 of 2009 and **Leopold Mutembei v. Principal Assistant Registrar of Lands, Housing and Urban Development & Another**, Civil Appeal No.57 of 2017 (both unreported).

More importantly, the reasoning of the first appellate court of excluding TZS.3,645,000/= paid by the appellant being part of the agreement made between them before their parents as compensation after they had religiously divorced each other is unjustifiable and unfair on the part of the appellant. I am aware that the court has been vested with power of dividing the matrimonial assets to the parties of any matrimonial cause as per section 114 of the Law of Marriage Act. In the matter at hand, the trial court exercised such power although it considered the money paid by the appellant to the respondent as part of her share on the matrimonial assets as agreed between them. Indeed, the evaluation made by the trial court was objective as to the circumstances of the parties.

To this end, I agree with the reasoning of the trial court as envisaged at page 4 and 5 of the typed judgment. For instance, the reasoning of equal

share on the house, 'banda la kuku' (chicken coop), a foundation of the business pavilion and its plot and half an acre farm of cashews was arrived due to the fact that the parties never testified on the extent of their contribution towards acquisition of the same.

Regarding households the trial court considered the unchallenged evidence of the appellant that after their informal separation the respondent took the households. Based on that unchallenged evidence and also on the spirit of equal division of matrimonial assets, the trial court ordered the appellant to take a bicycle, 3000 bricks, two trips of sand soil, pebbles and eight woods while the respondent remained with the households she took before. I am also fortified with the division order of the trial court on maize, cement and how parties should settle the debts.

In the light of what I have endeavored to discuss, I find the appeal has merit. Consequently, I quash and set aside the judgment and decree in appeal of the first appellate court. Furthermore, the trial court's judgment and orders are restored and decree of divorce should be issued to the parties with immediate effect. Since this is a matrimonial matter, I make no order as to costs.

It so ordered.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the printed name and title.

JUDGE

30.05.2023

Court:

Judgement delivered this 30th day of May 2023 in the presence of neither party.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the printed name.

JUDGE

30.05.2023