IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC CIVIL APPEAL NO. 03 OF 2023

(Arising from the District Court of Mpanda at Mpanda in Civil Appeal No. 28 of 2022

which originated from Shanwe Primary Court in Matrimonial Cause No. 9 of 2022)

HAPPINESS D/O DENIS CHIWAMBWA.....APPELLANT

VERSUS

HENRY S/O ADRIAN MSANGAMA.....RESPONDENT

JUDGMENT

22nd June, 2023 & 18th July, 2023

MRISHA, J.

This is a second appeal in which **Happiness Denis Chiwambwa**, the appellant herein, is seeking a judgment in her favour after losing before the District Court of Mpanda at Mpanda (the first appellate court) which after hearing submissions from both parties, decided in favour of the respondent one **Henry Adrian Msangama**.

As per the appellant's petition of appeal, there are three grounds of appeal which she has raised in order to challenge the decision of the first appellate court. These are: -

1. *That the District Court erred in law and fact to conclude that the parties had no any marriage during the period under desertion while there is certificate of marriage between the parties.*
2. *That the District Court erred in law and fact to conclude that the appellant had no any contribution to matrimonial properties while the same were acquired during the existence of marriage.*
3. *That the District Court erred in law to order that the parties should file a separate civil case while the matter is a matrimonial per se.*

It is due to the abovementioned grounds that the appellant has asked this court to grant the following reliefs: -

i. *That this court be pleased to quash the judgment and orders of the first appellate court and uphold the decision of Shanwe Primary Court (the trial court),*
ii. *That this court be pleased to hold that the properties acquired during existence of marriage be declared as the matrimonial properties,*
iii. *That this court be pleased to order Costs of the appeal*

iv. *That this court be pleased to order any other relief as it will deem just.*

In order to have a better understanding of this matter, it is important to trace the historical background of the controversy between the parties, though briefly, before venturing into the merit or otherwise of the present appeal.

Sometime in 1991 at Kintinku in Singida Region the appellant, a peasant, and the respondent who is currently a retired Medical Doctor, tied their knots before a Registrar of marriages who issued them with a Certificate of Marriage.

Thereafter, the said spouses began their marriage life and were blessed with four issues. It would appear that the said couple managed to handle their blessed and happiest union despite the tears and wears up until April,2014 when they shifted to Mpanda District in Katavi Region and their relationship turned sour due to some matrimonial disputes.

It is on record that the big reason as to why the two separated was the complaint by the respondent that the appellant threatened to kill him by using a knife when he asked her why she changed behaviour by returning home late hours.

Due to such situation the respondent was forced to get out of their matrimonial house and went to another place where he rented a room for sometime. Then as life went on, he began to acquire some properties including a motor cycle, two vehicles to wit Toyota Rav 4 and Toyota Land Cruiser. He also purchased two houses.

It took almost eight years of separation between the two spouses until on 19.04.2022 when the appellant filed a Matrimonial Cause No. 09 of 2022 alleging to have been deserted by the respondent and that the respondent was not maintaining her and the children.

After listening to the evidence from the parties before it the trial court dissolved their marriage and proceed to grant orders of maintenance in respect of one of the four legal issues, and for division of matrimonial assets including those acquired during the period of separation.

Being amused by the said decision, the respondent successfully appealed to the first appellate court which after hearing oral submissions from both parties in relation to the grounds of appeal, declared the appellant and the respondent as no longer husband and wife, nullified and set aside all orders of the trial court in relation to division of matrimonial properties vide a Matrimonial Cause No. 9 of 2022.

It also ordered the respondent (who was then the appellant) to maintain a child called Baraka s/o Adrian Msangama and finally directed that any party with other claims has a right to institute a civil case in a court of competent jurisdiction.

The appellant was not happy at all with the above first appellate court's decision, save for the order of maintenance. Hence the present appeal. As it was the case before the first appellate court, none of the parties to this appeal had the legal services of a lawyer when this matter was called on for hearing.

The appellant being the first to address this court on the abovementioned grounds of appeal, submitted that she was a wife even at the time she was deserted by the respondent for seven years plus. She added that during that time she was maintaining her family which was left by the respondent.

Finally, she requested this court to adopt her grounds of appeal as her submission in chief and proceeded to pray for several reliefs as indicated above. On the other hand, the respondent submitted on the first and second grounds altogether by contending that the first appellate court was right to declare that the parties had no marriage during the period of separation.

He added that the first appellate court rightly analysed the properties which were acquired during subsistence of marriage and those acquired during the period of separation. Submitting in relation to the third ground of appeal, the respondent stated that he did not leave the appellant, but they separated willingly after the appellant threatened him with a knife.

In rejoinder, the appellant submitted that she did not agree to separate with the respondent, but it was the respondent who decided to abandon his family and they were not divorced. The appellant insisted that the respondent abandoned his family.

On my part, I have carefully gone through the rival submissions by the parties as well as the records of the lower courts. Having done so, I am of the view that this appeal can only be disposed of by one issue which as will be raised shortly, relates to the second ground of appeal. It is whether the assets acquired during a period of separation falls under the category of matrimonial assets subject to division.

It is on record that the fact that by the time the appellant knocked the door of the trial court and petitioned for a decree of divorce and an order for division of matrimonial assets the subject of this appeal, the parties in this case were already separated for about eight years past.

It is also an undisputed fact between the two parties, that the assets which are **Motor cycle DT** with registration No. MC 685 AQY, Motor Vehicle make **Toyota Rav 4** No. T 523 AEG, **House located at Kilimahewa**, Mpanda in Plot No. 680 in Block EE(HD), a **House located at Nsemulwa**, Mpanda District in Plot No. 568, Block "B", a Motor vehicle make **Toyota Land Cruiser** No. T 624 AJF, were acquired by the respondent during the period of separation, save for the **House in Plot No.519**, Block T(HD) located at Mikocheni, Mpanda which was acquired before the said parties separated.

However, it is the position of the appellant that even those properties which were acquired by the respondent during the period of separation amount to matrimonial properties because her marriage with the respondent was still subsisting. The above assertion was strongly disputed by the respondent who seems to support the holding of the first appellate court.

At this juncture it is important to have in mind the proper definition of the term *"Matrimonial Assets"* because it is such definition which can help to determine whether the assets acquired during a period of separation falls under the category of matrimonial assets.

When faced with a similar situation the Court of Appeal in **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018, CAT at Tanga(unreported) while noting that the LMA does not specifically provide for a definition of the term *"Matrimonial assets"*, was inspired by the definition of the same as provided under section 4(1) of the Matrimonial Property Act, Chapter 275 of the Revised Statutes, 1989 which is among the Principal Legislations of India, as hereunder: -

> *"In this Act. "Matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage,* ***with the exceptions of***
>
> *(a) N/A;*
>
> *(b) N/A;*
>
> *(c) N/A;*
>
> *(d) N/A;*
>
> *(e)N/A;*
>
> *(f)N/A;*

(g) ***real and personal property acquired after separation unless the spouses resume cohabitation.***" [Emphasis added].

The apex court also noted that definition given in the above Indian Statute is not far from what it stated in the landmark case of **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32 when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. It stated as follows: -

"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 Hailshams ***HALBURY'S LAWS 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: it refers to those things which are acquired by one or other or both of the parties,* ***with the intention that there should be continuing provisions 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 the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife*".

Having seen a proper definition of what amounts to *"matrimonial assets"* as provided above through the aid of the decision of the Court of Appeal, I am now in a good position to answer the crucial question that I have posed earlier.

Just as I have indicated above there is no dispute between the appellant and the respondent that the assets I have described above, were acquired by the respondent during the period of separation which lasted for eight years until when a Matrimonial Case No. 09 of 2022 was filed in the trial court, and it appears that the said parties have not resumed cohabitation since then.

In the circumstances, and given the fact that the appellant has not disputed that such assets were acquired by the respondent during the period of separation, nor did she object exhibits A-2, A-3, A-4, A-5 and A-6 which were tendered by the respondent and admitted by the trial court, it is my view that those were not matrimonial properties as they

fall under the exception to the general rule provided above through the aid of the definition of the term *"matrimonial assets"* under section 4(1) of the Matrimonial Property Act, Chapter 275 of the Revised Statutes, 1989, because the parties in this case have not resumed their cohabitation to date.

It is also my considered opinion, and for the sake of argument, that even if it could be that those assets were obtained during subsistence of marriage between the two, still the appellant could have no chance of benefiting from them.

I am fortified in that position because it is evident that those assets were acquired in the name of the respondent as it appears on exhibits A-2, A-3, A-4, A-5 and A-6, and the provision of section 60(a) of the LMA is to the effect that:

> *"Where during the subsistence of a marriage, any property is acquired—*
>
> *(a) in the name of the husband or of the wife,* ***there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse****" [Emphasis added]*

In my careful scrutiny on the typed records of a trial court particularly at pages 7 and 14, reveals that when testifying before the trial court the appellant did not lead any sufficient evidence to prove the extent of her contribution towards the acquisition of the assets obtained by the respondent during their separation, nor did she bring any witness corroborate her claim that as a domestic wife, she performed some domestic duties during the period of separation which contributed to the acquisition of the same.

The requirement of the law is that he who alleges must prove existence of a certain fact; see section 110 of the Evidence Act, Cap 6 R.E. 2019.

In our case, and as I have pointed above, the appellant had failed to pass the test of proving her extent of contribution towards the acquisition of the assets obtained during a period of separation compared to the respondent who apart from adducing evidence to show how he acquired the same, tendered some documents which were admitted by the trial court without being objected by the appellant.

In appreciating the above documents, the trial magistrate is quoted to have written the following in his judgment: -

> *"SUI aliieleza na kuifafanulia mahakama hii kwa kuwasilisha nyaraka za mali hizi kama kielelezo na*

mahakama ilipokea kama vielelezo kuthibitisha

chanzo na wakati gani mali hizi zilipatikana

kama ifuatavyo..." [Emphasis added]

The above excerpt clearly justifies that even the trial court appreciated the evidence which was adduced before it by the respondent. Hence, under such circumstances it is on a balance of probabilities that between the two, the evidence adduce by the respondent in relation to those assets outweighs that of the appellant.

The above suffices to dispose of this appeal. However, before signing out, I wish to point out that in the course of reading the judgment of the first appellate court, I noted that although he nullified and set aside the orders in respect of matrimonial assets, the Appellate Resident Magistrate did not specify which assets were to be affected by his order. That leaves a confusion because reading closely the order with roman No. 'ii.', one may think that the order of nullification combined both matrimonial and personal assets something which is not what the said order appears to provide.

In my view, that could add more confusion and/ or sparkle more flames on the dispute between the parties instead of resolving it. After sorting out which assets were matrimonial assets and which were personal as

he rightly did, the Appellate Resident Magistrate ought to nullify and set aside the order of division of matrimonial assets made by the trial court, step in the shoes of the trial court, make an order of division of matrimonial assets and finally declare the respondent to be the owner of those properties acquired during the period of separation to the exclusion of the appellant as it is required of him by the law.

Again, in my view there was no any need for the Appellate Resident Magistrate to order that any party can institute a civil case in a court with competent jurisdiction as that would not assist the parties to have their prolonged dispute come to an end, rather it could delay it unnecessarily. It is from the foregoing reasons, that I find the present appeal to have no merit; the same is supposed to be dismissed as I hereby do.

As for the way forward, I order that both case files of the lower courts be remitted back to the first appellate court for it to make the necessary orders pertaining to matrimonial assets as well as personal properties immediately subject to the relevant law. Given the nature of this case, I make no order as to costs.

It is so ordered.

A.A. MRISHA
JUDGE
18.07.2023

DATED at **SUMBAWANGA** this 18th Day of July, 2023.

A.A. MRISHA
JUDGE
18.07.2023