IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

MATRIMONIAL APPEAL NO. 21 OF 2022

(Originating from Matrimonial Case No. 14 of 2022 at Tandahimba Primary Court within Tandahimba District, arising from Matrimonial Appeal No. 06/2022 at Tandahimba District Court)

SALUMU MAKOMBE ---------- APPELLANT

VERSUS

ASHA SAID NANGUMI ----------RESPONDENT

JUDGEMENT

Date of last Order: 05.04.2023

Date of Judgment: 21.07.2023

Ebrahim, J.

This is a second appeal. The appellant SALUMU MAKOMBE challenged the judgment dated 2nd September, 2022 of the District Court of Tandahimba District, at Tandahimba in Matrimonial Appeal No. 6 of 2022. The matter arose in Matrimonial Cause No. 14 of 2022, in the Primary Court of Tandahimba District, at Tandahimba.

The brief background of this matter, according to the record, goes thus; the appellant and the respondent were husband and wife

respectively. Their union was so considered under the principle of presumption of marriage since they started living together in 1997. They were blessed with one issue (21 years old). However, after some years their marriage turned sour. In the year 2022 the respondent filed a matrimonial matter before the Primary Court (the Matrimonial Cause No. 14 of 2022) claiming for divorce and division of matrimonial assets. The respondent disputed the claims. After hearing both sides, the Primary Court found the marriage has broken beyond repair and distributed the property. The respondent was aggrieved with the decision, she appealed to the District Court on the ground that the Primary court erred in the distribution of the matrimonial assets. She petitioned for division of matrimonial assets.

In its turn, the District Court allowed the appeal and substituted the order for the matrimonial assets to be divided among them at the ratio of 60% to the appellant and 40% to the respondent. Being discontented by the District Court decision, the appellant preferred the instant appeal raising five grounds of appeal as follows:

1. That, the learned trial Magistrate erred in law and in fact by including some of the assets to be amongst the matrimonial

properties meanwhile the some of the assets it's belongs to the appellant only;

2. That, the learned trial Magistrate erred in law and in fact by failure to consider, analyse and weigh the evidence of the appellant that was strong and established his case on the balance of probabilities, that some of the assets is not matrimonial properties and the respondent participated nothing in the improvement.

3. That, the learned Magistrate seriously erred in law and in fact by order the division of the said some of the assets, while some of the asserts of the respondent thereon were not included in the same;

4. That, the learned Magistrate erred in law and in fact for holding in favour of the respondent despite the respondent failure to produce any strong evidence to prove that she has contributed more to the acquisition of the matrimonial assets;

5. That, the learned Magistrate erred in Law and in fact by holding that the respondent should get 40% of matrimonial

properties while she did not contribute the same.

6. The grounds of appeal can mainly be condensed into two grounds which are weight of evidence; and the ratio of distribution of 40/60.

Owing to these five grounds of appeal the appellant prayed for this court to quash and set aside and upheld the judgment of the Tandahimba Primary Court.

When the appeal was called for hearing, both parties appeared in person, unrepresented.

The appellant adopted his grounds of appeal and submitted that the respondent wanted to be allocated properties which she found him with which are the properties left by another woman. He claimed that the respondent had admitted before the District Court that she found him with those properties, but the District court distributed only his properties and left the respondent's properties that they jointly acquired. He prayed for the court to reverse the decision of the District Court and uphold the decision of the Primary Court.

Responding to the arguments by the appellant, the respondent told the court that she also contributed her energy in acquiring the said properties that is why the court divided the same. As for the argument that the Primary Court apportionment was not right. She said it was not true that he found the appellant with the said properties. She contended that they started together and all the properties were jointly acquired.

In rejoinder, the appellant said that each one has his/her own properties, but the District Court did not look on the distribution but rather on the weaker part and it distributed the properties left by other women.

In determining the same, I shall be guided by the principle of the law that "he who alleges must prove; and that a burden of proof lies on a person who would fail if no evidence at all were given on the other side" - **Section 110 (1) and 111 of the Law of Evidence Act Cap 6 [R.E 2022]**.

Now looking at the evidence of both parties on the question of division of the properties acquired during the subsistence of the

presumption of their marriage; the appellant claimed that the District court distributed the properties which the respondent found them with the appellant and she did not contribute to the acquisition. Also that the court did not distribute the properties of the respondent which were jointly acquired. The respondent submitted that they started together and they have been staying together for 26 years. The respondent claimed that she did not find him with properties and she had contributed her energy and they acquired together the said properties.

In reading the hand written records of proceedings of the trial court, the appellant when he was cross examined by the respondent told the court that:

> "- ***Vitu vingine ulivyovitaja ndivyo tulivyochuma, pamoja*** *na nyumba na shamba ambavyo upande wa Mdai hawataki kuvitaja.*
>
> ***-Kwenye hiyo nyumba sikushiriki sababu kwenye hilo shamba pia nilikuwa sihusishwi,*** *hakukuwa na uwezekano wa mimi kushiriki."* [Emphasize added].

Looking at the piece of evidence I find that the appellant had

agreed that all the properties which were listed by the respondent were the properties which they had acquired together and he did not challenge that some of the said properties were not matrimonial. Nevertheless, going through the testimony of the respondent at the trial court, she testified that after their marriage their main business was farming. They found an open space at Mivanga and they started planting cashew nut tress, but before the harvesting of the cashew nuts the appellant got a job at "Ghalani." Further to that the appellant in his testimony agreed that he did not contribute anything on the construction of the said house.

The law, i.e., **Section 114 (1) of the Law of Marriage Act Cap. 29 [R.E 2019] (LMA)** provides that a court may order division of matrimonial assets which in our case properties acquired during the subsistence of the cohabitation between the parties. However, the court does not perform that exercise arbitrarily. The law sets some factors to be considered by the court in performing such task. Such factors are set under **Section 114 (2)** of the same Act. The Court of Appeal of Tanzania (the CAT) in the case of **Yesse Mrisho v. Sania Abdul,** Civil Appeal No. 147 of 2016, CAT at Mwanza (unreported) underscored

the import of **Section 114 of the LMA**, that distribution of matrimonial property is guided by the principles enshrined in the said section. These provisions of **Section 114 (2)** are couched in mandatory form as follows, and I quote them for a readymade reference:

> *"114(2): In exercising the power conferred by subsection (1), the court shall have regard to –*
>
> *(a) the customs of the community to which the parties belong;*
>
> *(b)* ***the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;***
>
> *(c) any debts owing by either party which were contracted for their joint benefit; and*
>
> *(d) the needs of the children, if any, of the marriage,"* [Emphasize added].

It is my position that the provisions of the law apply to division of jointly acquired assets depending on the circumstances of each case. In the matter at hand, as alluded earlier, the evidence is clear that both parties contributed to the acquisition of the same. The appellant did not clearly list which were not matrimonial assets and which assets he claims not to be included in the list

The above notwithstanding, looking at the records of the proceedings, the said matrimonial assets were acquired when the parties were still cohabiting and regarded as husband and wife under the presumption of marriage. Thus, I find no viable reason to interfere with the distribution of the District Court.

In the end result, I find this appeal to be devoid of merits and I dismiss it. Following the relationship of parties that it is a matrimonial matter, I give no order as to costs. Each party to bear its own.

Ordered Accordingly.

R.A Ebrahim
Judge.

21.07.2023
Mtwara.