IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODMA

PC CIVIL APPEAL NO. 24 OF 2022

(From the District Court of Dodoma in Matrimonial Appeal No. 25 of 2021: Original Matrimonial Cause No. 54 of 2021- Chamwino Urban Primary Court)

FATUMA RASHIDI KAFUKU ..... APPELLANT

VERSUS

SEIF YUNUS KADUGUDA .....RESPONDENT

JUDGMENT

Last Order: 14th August, 2023
Judgment: 8th September, 2023

MASABO, J.:-

The appellant in this second appeal is disgruntled by the decision of the District Court of Dodoma in Matrimonial Appeal No. 25 of 2021 which dismissed her appeal from the decision of Chamwino Urban Primary Court in Matrimonial Cause No. 54 of 2021. The nucleus of the appeal is a matrimonial dispute between the parties, a couple married on 10th March 2017 in accordance with Islamic rites. During the subsistence of their marriage, they were blessed with one issue who has now turned three years (when the matter was before the trial court the child was only one year). The appellant moved the trial court praying for divorce. Convinced that the marriage between the parties was beyond repair, the court dissolve the marriage, placed the issue under the custody of the appellant, ordered the respondent to pay a monthly maintenance fee of Tshs 60,000/= in addition to school

fees, medical and clothes expenses. With regard to distribution of matrimonial assets, the trial court stated that, the appellant did not show her contribution toward their acquisition.

The orders in respect of distribution of matrimonial assets and maintenance enraged the appellant. She appealed to the District Court of Dodoma, the first appellate court, which upheld the decision of the trial court. Aggrieved further she has filed this appeal on the following grounds: - **one,** the lower courts did not examine her evidence; **two**, the lower courts did not properly analyse the division of matrimonial properties while she proved their existence; and **three,** the lower courts failed to consider the issue of custody and maintenance of the child.

Hearing of the appeal proceeded by way of written submissions and both parties had representation. Submissions by the appellant were drawn and filed by Ms. Joanitha Paul, learned counsel whilst those of the respondent were drawn and filed by Mr. Robert Melea Owino, learned counsel.

In support of the first ground of the appeal Ms. Paul submitted that, during the subsistence of marriage the couple acquired different properties namely: a house at Nzuguni kwa masista, an unfinished house at Nzuguni kwa Dani, a shamba comprising of 7 surveyed plots, a plot at Kikuyu extension, a ninth plot at Nzuguni and a business premises at Nzuguni. The appellant contributed to their acquisition and maintenance as during their construction she was taking care of the house for the livelihood of the family. She was

also an entrepreneur importing properties from Turkey to increase the family economy. Thus, the assets were jointly acquired and had to be distributed to the couple but were not.

On the second ground, Ms. Paul submitted that the appellant's contribution to the acquisition of the asserts was mainly labour based and involving cooking for the family, opening gate, caring for the issue of marriage, attending sick persons in the family, receiving visitors, washing clothes and above all making love to the respondent all of which consisted valuable contributions as held in **Bi. Hawa Mohamed vs Ally Seif** [1983] TLR 23 and in the case of **Chakupewa vs. Mpenziwe and Another** EALR [1999] EA 32. It was her further submission that since the respondent opposed the issue of opening another case for division of matrimonial properties, it shows that the respondent was willing for division of matrimonial properties. Conclusively, she submitted and prayed that this court order division of matrimonial properties as the appellant was chased from the matrimonial home and has nowhere to live with her child and this was in contravention of section 114(2) of the Law of Marriage Act which requires consideration of infant child during division of matrimonial assets.

On the last ground, it was submitted that the monthly maintenance fee is not taking into account the current expenses and the fact that the respondent does not depend on monthly salary only as he has a lot of allowances from the Ministry of Works where he works as driver.

In reply, Mr. Owino submitted that, the trial court and first appellate court did not err in their decisions regarding the order of distribution of matrimonial properties because the appellant never satisfied the conditions under section 114(1) and (2) of the Law of Marriage Act, Cap. 29 R.E 2019. He submitted further that the appellant has added new facts in her submission in chief which were not stated and deliberated during trial. The fact that she was importing properties from Turkey, a shamba at Kiterela (Block N), the shamba with 7 surveyed plots, the plot at Kikuyu extension, and at Nzuguni nearby TRACD are all new facts. Hence, should not be considered. In fortification, he cited the case of **Juma Manjano vs. The D.P.P,** Criminal Appeal No. 211 of 2009 (unreported) **Samwel Sawe vs. Republic**, Criminal Appeal No. 135 of 2004 where it was held that the second appellate court cannot entertain matters not raised at the first appellate court. Moreover, Mr. Owino distinguished the case of **Bihawa Mohamed** and the case at hand stating that, in **Bi. Hawa Mohamed** (supra) the matrimonial properties, their location and how they were acquired by the parties were well articulated unlike in the present appeal where the properties subject to the dispute are not clearly stated on their existence, the size, how and when they were acquired.

On the issue of custody and maintenance of the issue, it was stated that the appellant was given custody of the child and the respondent was ordered to pay a monthly maintenance fee of Tshs 60,000/= which did not include school fees, medical and clothes. The submission that the amount be increased is unfounded as it does not match with his salary. The submission

as to allowances, he argued, are hearsay and should not be considered as they were not proved by the appellant during trial. In the foregoing he submitted and prayed that the appeal be dismissed for lack of merit.

In rejoinder, the appellant submitted that assets above were proved during hearing as the appellant specifically stated how and when the assets were acquired. Thus, the argument that they are new inventions is without merit and should be ignored. Also in regards to maintenance, it was submitted that during trial it was testified that the respondent has a salary Tshs 390,000/=. This marked the end of submissions.

I have carefully considered the grounds of appeal, the records and submissions of both parties and I shall now proceed to determine the appeal, I shall do so mindful that the two lower courts have concurrent findings in matters complained against by the appellant. It is a settled principle of the law that second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that such findings are based on misdirection or misapprehension of evidence or violation of some principles of law or procedure hence occasioning a miscarriage of justice (see **Helmina Nyoni vs. Yeremia Magoti**, Civil Appeal No. 61 of 2020, [2022] TZCA 170 (Tanzlii) **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs. A.H Jariwala t/a Zanzibar Hotel** [1980] TLR 31 and **Neli Manase Foya vs. Damian Mlinga** [2005] TLR 167. In **Neli Manase Foya vs. Damian Mlinga** (supra) at page 172, the Court of Appeal had the following to say:

> It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurrent with a finding of fact. The District court which was the first appellate court, concurred with the finding of the fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence upon which both the lower courts could make concurrent findings.

In view of these authorities, I shall carefully consider whether the concurrent findings of the lower courts were wrongly arrived at as a result of misdirection or misapprehension of evidence and whether there is a violation of some principles of law or procedure occasioning a miscarriage of justice. Starting with division of matrimonial assets, the law permits the court while granting decree of divorce or separation to subsequently distribute matrimonial assets acquired by the couple or developed by their joint efforts during the subsistence of their marriage and make orders as to custody of the issues of marriage, if any, and maintenance. In respect of matrimonial assets, the relevant provision, section 114 of the Law of Marriage Act, Cap 29 RE 2019 which reads that: -

> 114 (1) The Court shall have power when granting or subsequent to the grant of a decree of separation or divorce to the division between the parties of matrimonial 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.
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> 2. In exercising the power conferred by sub section (1), the Court shall have regard to-

a) The customs of the community to which the parties belong;
b) The extent of the contribution made by each party in money, property or work towards the acquisition of the assets;
c) Any debts owing by either party which were contracted for their joint benefit;
d) The needs of infant children, if any, of the marriage and subject to those considerations, shall incline towards equality of division.

Accordingly, the assets acquiescent to distribution are those acquired by the spouses during the subsistence of marriage and those acquired by one spouse prior to the marriage but substantially improved during the subsistence of marriage.

As for the orders for maintenance of issues of marriage, section 129 of the Law of Marriage Act, read together with section 44 of the Law the Child Act, Cap 13 RE 2019, provide guidance. As per these two provisions, determination of maintenance need not only consider the duty of a man to maintain his children but also the income and wealth of both parents, the financial responsibility of the parents, and the costs of living among others all of which require evidence to substantiate.

The trial court record reveal that in the course of her testimony, the appellant told the court that when she married the respondent, he was working at a private security company and later on he was employed by the Government and after that he was transferred to Dodoma where, they constructed two

houses, a residential house they used as matrimonial home and an unfinished house. Also, they had 9 plots, a one-acre farm and a business premise. The respondent did not cross examine her on matrimonial assets but cross examined her on maintenance fee where she stated that Tshs 60,000/ is not enough as after deduction of remission fees she only remains with Tshs 52,000/. On the respondent's side, testifying as DW1, he stated that the appellant deserved no share in the assets as her testimony does not indicate where the houses are and how they were acquired. He stated further that, in respect of maintenance, out of his net salary of Tshs 212, 807.11 (Basic Salary Tshs 390,000/=), he pays the appellant a monthly maintenance fee of Tshs 60,000/= for the infant which is on the higher side and he prayed that it be reduced to Tshs 50,000/=. On the assets, he stated that he built the houses out of his salary, loans, grants from the relatives while the appellant has no contribution as he was a mere house wife and totally dependent on him for her needs.

His witness, DW2 testified that he built houses for the respondent at Nzuguni kwa masista in the year 2019. He told the court that the respondent is the one who paid him and was the one buying all building materials. With this evidence on record, I fail to comprehend how the trial court refrained from distributing the assets between the parties because in my firm view, much as the appellant did not describe the location of the two houses, their existence and their acquisition during existence of marriage was undisputed as so was the financial contribution of the respondent towards acquisition. It would appear that, the lower courts overlooked the fact that contribution

to acquisition of matrimonial assets need not necessarily be monetary or material contribution. Contribution in the form of labour, broadly construed to include domestic work is a valuable contribution worth consideration in the division of matrimonial assets (see **Bi Hawa Mohamed vs Ally Seif** (supra)

The parties here contracted their marriage in 2017. As per the appellant's evidence as corroborated by the respondent and DW2, the two houses whose existent was undisputed were acquired during the subsistence of marriage. Hence a rebuttable presumption that they were jointly acquired by the spouses. The burden to rebut the presumption rested upon the respondent and he did so through his evidence as corroborated by DW2 which shows that he was the sole bread winner of the family and he single handedly constructed them using the money he obtained from his salary, allowances, loans and assistance from his relative while the appellant rendered no financial or building materials contribution to the construction as she was a mere wife and totally dependent on him. As the appellant did not cross examine on these issues, it presupposes that he found the assertion correct hence implicitly confirming that, the respondent has a lions share contribution to the acquisition of the two houses. I however disagree with his suggestion that, the contribution in the acquisition of the asset, in this case, the construction of the two houses should be assessed based exclusively on his financial and materials contribution while totally disregarding the wifely duties performed by the appellant, which as stated above constitute a valuable contribution.

In the foregoing, I am convinced that the two lower courts partially misapprehended the evidence on record and in so doing, declined to distribute the matrimonial assets holding that there was no evidence on record while, as shown above there was sufficient evidence as to the two houses. The assets to which they were no evidence include the farm allegedly surveyed and divided into 7 plots, the two additional plots and the business premise. For these assets, the trial court and the first appellant court cannot be faulted as the evidence thereto was elusive. As for the financial contribution allegedly made by the appellant from her clothing business, I agree with Mr. Owino that these are alien facts and should not be entertained as it is not the place of this court, being the second appellate court, to look into new matters neither raised nor decided by the two lower courts.

That said, I am of considered view that the misapprehension above stated, constitutes a good cause for interference with the concurrent findings of the lower courts by distributing the two houses between the couple so as to cure the injustice occasioned. Accordingly, the two houses to wit, the house used as matrimonial home and the unfinished house are distributed as follows: because of his financial and materials contribution to their acquisition the respondent shall have 70% whereas the appellant shall get 30%.

As for the orders for maintenance, having paired the relevant provisions above cited and the evidence produced above as regards the respondent's

income, I find the order for payment of a monthly maintenance fee of Tshs 60,000/= exclusive of school fees, medical and clothing expenses fairly sufficient. Hence, uphold the concurrent findings of the lower courts.

Accordingly, the appeal partially succeeds to the extent that the first and second ground of appeal are found with merit as the trial court and the first appellant court misapprehended the evidence on record hence wrongly declined to distribute the matrimonial assets. To cure the anomaly, it is hereby ordered as follows, the house used as matrimonial home at Nzuguni kwa masista and the unfinished house are distributed to a ratio of 70 by 30 meaning that the respondent shall get 70% of the total value of each of the assets and the appellant shall have the remaining 30%. The parties shall bear their respective costs.

DATED and **DELIVERED** at Dodoma this 08th day of September 2023

J.L. MASABO

JUDGE