IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

PC. CIVIL APPEAL NO. 14 OF 2023

(C/F Civil Appeal No. 47 of 2022, Arusha District Court, Original Matrimonial Case No. 66 of 2021 Arusha Urban Primary Court)

JOYCE ABIA MOLLEL ..... APPELLANT

VERSUS

ELISHA ELIAS LAIZER ..... RESPONDENT

JUDGMENT

10th August & 10th October, 2023

TIGANGA, J.

The appellant herein petitioned for divorce, division of Matrimonial properties, custody and maintenance of children vide Matrimonial Cause No. 66 of 2021 before Arusha Urban Primary Court (the trial court).

In her testimony before the trial court, the appellant averred that, she contracted a Christian Marriage with the respondent on 06th June, 2015 which was blessed with two issues, Elia and Abigal. Their marriage became not at peace and turned sour as a result of accusation of infidelity affairs by the respondent as he sired other three children from three different women out of wedlock. She also told the trial court that, during their marriage they acquired 12 roomed house for renting with other six rooms which were on

the finishing stage, a school which has up to standard VII, a farm measuring 100 acres located at Kiteto, two school vans, eight cows, 4 acres of land at Mkonoo, Arusha, 1 acre farm at Nduruma, Arusha and ¼ acre of land near the school. She therefore wanted their marriage to officially be resolved by divorce, the division of the properties that they jointly acquired during their marriage and the respondent to maintain their children.

The respondent on the other hand opposed the appellant's claims and argued that, their disagreements have been off and on particularly regarding the appellant's behavior of neglecting to take care of their household. More so, the appellant also has affairs out of wedlock to the extent of having a child (their 2nd issue) out of wedlock. As a result he prayed for the DNA test to prove parentage which came out that their second issue, Abigail Elisha was indeed not the respondent's child.

He also challenged the fact that, they had not acquired any properties together as the appellant found him with a three bedroom house and has left him with the same. Regarding the school, he claimed that, the same belongs to his sister. At the end, the trial court granted divorce, the appellant was left with custody of their 1st issue, Elia Elisha and the respondent was ordered to cater for all the maintenance. There was no division of

matrimonial assets on the ground that, the appellant herein failed to prove how they jointly acquire any properties she mentioned. Dissatisfied, the appellant herein challenge the trial court's decision before District Court of Arusha (1st appellate court) vide Civil Appeal No. 47 of 2022 which after hearing the parties, the 1st appellate Court upheld the decision of the trial Court. It further ordered the respondent to give the monthly maintenance of 100,000/= and also pay for Medical and education expenses for the 1st issue.

Still disgruntled, the appellant preferred the current appeal with the following grounds of appeal;

1. That, the 1st appellate court erred in law and fact in failing to appreciate the whole concept of equal distribution of matrimonial properties resulting into shoddy decision.
2. That, the 1st appellate court erred in law and fact in upholding the decision of the trial court which declared that, there is no matrimonial property to be distributed while the appellant vividly elaborated on her contribution towards acquisition of their matrimonial properties as a result an impugned decision was given.
3. That, the 1st appellate court erred in law and fact in treating the matter as a pure civil case of proving existence of fact through documents and failed to understand that in matrimonial cause spouses do not rely on documents rather on love and trust among them thus a bad decision was given.

4. That, the 1st appellate court erred in law and fact in failing to properly evaluate the evidence adduced before it, as a result a bad decision was pronounced.

During the hearing, the appellant appeared in person, unrepresented whereas the respondent was represented by Mr. Daudi Saimalie, learned Advocate.

Supporting the appeal, the appellant did not submit in particular order in respect of the grounds of appeal filed, she rather argued that, on their marriage, she found the respondent with a house but together they built a primary school which has up to standard VII classes now. Also, they had bought a 100 acres farm at Kiteto, 4 acres at Mkonoo Arusha, ½ acre near the school and two cows which have now reached 7 but all these properties were not recorded in the trial court's judgment. Also the respondent claim the school to be his sister's a fact which is not true. In that regard, the division was not fair, he contended.

In reply, Mr. Saimalie started by pointing out that, the appellant has not specifically submitted objecting anything in respect of the decision of the 1st appellate court. He submitted that, at the trial court, the appellant failed to prove acquisition of the alleged matrimonial properties hence the current appeal has no merit. He referred the Court to the case of **The Registered**

Trustees of Joy in the Harvest vs. Hamza Kisungura, Civil Appeal No. 149 of 2017, CAT (unreported) and argued that, this Court cannot intervene the concurrent findings of the subordinate courts unless there is a remarkable errors. He prayed that this appeal be dismissed with costs.

In her brief rejoinder, the appellant insisted that, she did not find the appellant with anything when they got married hence, all properties were jointly acquired. She prayed that this court do justice by awarding her share of the matrimonial properties acquired during their marriage.

In the light of the memorandum of appeal and the submissions by the parties, I think, the main issue for my consideration an d determination is whether the appeal by the appellant is merited. I wish to point out at the very beginning that I shall deal with the appeal in the manner that was adopted by the parties in arguing it.

To begin with, I should also point out that, the main contention here is on the division of matrimonial properties which the trial court did not touch on the ground that, the appellant failed to prove her contribution. After rival arguments between the parties the only issue for determination is whether the division of parties' matrimonial assets was proper and just. Times without number the Court of Appeal has said that the second appellate Court is

enjoined is restricted to interfere with the concurrent decisions of the lower court except where it is so necessary. See **Amrathlar Damadar & Another V A.H. Jariwalla** [1980] TLR, **Qamunga V Bi. Bura Nade,** Civil Appeal No.93 of 2013 (unreported) and **the Registered Trustees of Joy in the Harvest vs. Hamza Kisungura**, (supra) as cited by the Mr. Lairumbe.

Now the issue is whether it is necessary for this court to intervene with the concurrent findings of the trial and 1st appellate court? In resolving this issue another minor issue should be framed that is whether the trial and the 1st appellate Courts were justified the way they dealt with the issue of division of matrimonial Properties.

From the records and the arguments in appeal, it is undisputed that after the parties were granted divorce by the trial court, division of their matrimonial assets was not done on the ground that, the appellant did not prove her contribution towards the acquisition of the said assets. The law over division of matrimonial assets is very clear, and there are our jurisdiction is very rich in terms of jurisprudence. The general rule with regard to the division of matrimonial assets is that for the person to be entitled to the division of the properties he must prove his contribution towards the acquisition such properties. In ensuring the just division of the assets, courts

are guided by **Section 114 of the Law of Marriage Act**, [Cap 29, R.E. 2019] (Law of Marriage) which was well expounded in the case of **Bi Hawa Mohamed vs. Ally Sefu**, [1983] TLR 32 where the Court of Appeal discussed at length the import of the above section and held, *inter alia* that;

> *"(i) Since the welfare of the family is an essential component of the economic activities of family man or woman, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets.'*
> *(ii) The "joint efforts" and work towards the acquiring of the assets" have to be construed as embracing the domestic "efforts" or "work" of husband and wife."*

Further to that, in the case of **Reginard Danda vs Felichina Wikesi,** Civil Appeal No. 265 of 2018 (Unreported) the principle in the decision of **Bi Hawa Mohamed**, was restated by the Court of Appeal that;

> *"In the circumstances, while we are mindful of the provision of section 114 (2) (b) of the **LMA** as interpreted in **Bi. Hawa Mohamed's** case (supra) and **Yesse Mrisho Vs Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported), that in determining the division of matrimonial assets, the contribution of each party in acquiring them must be considered."*

In addition to the above, it has also been the position of the law that, the extent of the contribution made by each spouse is not restricted only to

material or monetary contribution, it extends to either matrimonial obligation or work or intangible considerations such as love, comfort, and consolation of wife to her husband, the peace of mind and the food prepared by the wife for her husband. See the decision of the Court of Appeal in the case of **Tumaini M. Simoga vs Leonia Tumaini Balenga** (Civil Appeal No. 117 of 2022) [2023] TZCA 249 (12 May 2023) (Tanzlii).

In essence, under the provision and authorities cited herein above, the petitioner in the matrimonial case needs to prove two things, **One**, that the property in question is matrimonial in that it was acquired during their marriage, or that it was acquired before but substantively renovated or improved during the tenure of the marriage. **Two,** what did he/she contribute in the acquisition of the said properties.

In her testimony after being probed by assessor, the appellant had this to say;

> *"Wakati SU1 ananioa nilikuwa nafanya kazi Hotelini hivyo nilikuwa nimejiwekeza na pia nilikuwa na vyumba vyangu mwenyewe saba vya kupanga ambapo nillkuwa nachukua fedha za kodi huko ninaleta nyumbani tunafanyia maendeleo kwani hata nyumba tuliyokuwa ilikuwa haina milango, tiles, haikuwa na umeme hivyo tuiianza kurekebisha na fedha hizo.*

Nilikuwa nauza hardware iliyopo nyumbani chumba ambacho SU1 alinipa katika vyumba viwili vya maduka nilivyomkuta navyo ambapo katika vifaa nilivyokuwa nauza mimi nilinunua simenti SU1 akanunua vifaa vingine.

Mifugo mimi nilikuwa nakamua ng'ombe na kuuza maziwa. Nilikuwa nalima mbogamboga ambazo zilikuwa zinalisha wanafunzi. Pia nilikuwa nafuga kuku hivyo nilikuwa nauza kuku pia. Shuleni pia nilikuwa nahakiki mahesabu ya malipo ya shule baada ya mhasibu kupokea fedha kwa wanafunzi kila siku jioni."

According to her, from the above mentioned efforts, they managed to jointly acquire the following properties together;

i. One 12 roomed house for rent with other six rooms which were on the finishing stage,

ii. One school which has up to standard VII,

iii. A farm measuring 100 acres located at Kiteto,

iv. Two school vans,

v. Eight cows,

vi. 4 acres farm at Mkonoo, Arusha, 1 acre farm at Nduruma, Arusha and ¼ acre of land near the school.

When she testified on these properties, the respondent never cross examined her on the same. He rather testified that, there is no single property he acquired with the appellant and even the school, he built it with his sister, thus, it was hers and not the appellant's. He however, did not prove if the said school really belonged to his sister. In the case of **Masanyiwa Masolwa vs. The Republic**, Criminal Appeal No. 280 of 2018, CAT at Shinyanga, the Court of Appeal had this to say regarding failure to cross examine;

> *"It is trite law that as a matter of principle, as indicated earlier on, a party who fails to cross examine a witness from the adverse party on a certain matter, is deemed to have accepted that point not cross examined and will be estopped to ask the trial court to disbelieve what the witness said. See,* ***Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi and Another****, Civil Appeal No. 85 of 2005,* ***George Maili Kemboge v. R****, Criminal Appeal No. 327 of 2013,* ***Damian Ruhere v. R****, Criminal Appeal No. 501 of 2007 and* ***Nyerere Nyague v. R,*** *Criminal Appeal No. 67 of 2010 (all unreported), just to mention but a few. In other words, failure by the appellant to cross examine PW1 amounted to his admitting the fact that what she testified was indeed true."*

Owing to the import of section 114 (2) of the Law of Marriage Act, what is important is the proof of extent of contribution. However, in Bi Hawa Mohamed, there are some factors which affect the share which the person who would have been entitled to the division of the matrimonial asset to be entitled either not or less. One of these factors are

> *"where a spouse commits a matrimonial mis-conduct which reduced to nothing her contribution towards the welfare of the family and consequential acquisition of matrimonial or family assets she or he would not be entitled to a share in the property."*

Although the appellant a the trial Court claimed on the respondent's infidelity, the same was not proved contrary to her allegations on the same. The DNA is a concrete proof that she conduct infidelity which reduces the percentage on acquisition matrimonial.

It is therefore my considered opinion that, the appellant managed to prove that they have jointly owned properties together and her extent of contribution is very vivid. However, there is one of the matrimonial misconduct she committed and which has been proved by DNA test, that the second issue of the marriage was not of the respondent. That, in my view, reduces her share from 50% to 35%. That said, I find the appellant to be entitled to 35% while the respondent is entitled to 65% of the properties

mentioned hereinabove except the school which has not been proved by the appellant who did not even mention its name, and the ¼ an acre land near the school, this also has not been thoroughly ascertained. Other orders regarding to maintenance of Elia Elisha remains untouched, and so upheld as passed by the 1st appellate Court.

In the upshot, this appeal is merited to the extent explained above. The decision of both subordinate courts are hereby quashed and set aside to the extent explained hereinabove. This being a matrimonial case, I give no orders as to costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 10th day of October, 2023

J.C. TIGANGA

JUDGE