IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 15 OF 2023

(Arising from Matrimonial Appeal No. 11 of 2022 at Mkuranga District Court
Original Matrimonial Cause no 23/2022 at Mkuranga Primary Court)

NUHU THABITI MOLI .....APPELLANT

VERSUS

RAHMA THOMAS MDAMO ..... RESPONDENT

JUDGMENT

10th & 15th Nov, 2023

KIREKIANO, J.

This is a second appeal. The parties herein in 1998 entered into a marriage covenant under Islamic rites. The marriage was blessed with three children who are now adults. The parties also acquired several properties during the existence of the marriage. While the covenant was expected to last till death do them apart, this union did not survive the tides of conflicts. The respondent believed she had enough she successfully petitioned for a decree of divorce and division of matrimonial assets.

The primary court of Mkuranga at Mkuranga issued a decree of

divorce and ordered the division of matrimonial assets. The respondent herein was not satisfied with the share of the division she appealed to the District Court. The District Court varied the order of division and decreed that:

1. *House situated at Mkuranga to remain with Rahma.*
2. *The house situated at Morogoro was allocated to Nuhu.*
3. *A house situated at Iringa be divided between the parties 70% to Nuhu and 30% to the appellant.*
4. *A car be sold and proceed to be divided at 70% to Nuhu and 30% to Rahma.*
5. *A farm at Tengelea be divided 50% apiece*
6. *A farm at Handeni was not part of the properties of the unions*

Dissatisfied with this decision the appellant herein preferred this appeal to this court on four grounds;

1. *That the Honorable appellate court erred in law and fact in making a decision that does not accord with or is unsupported by the applicable laws and authorities.*
2. *That the Honorable appellate court erred in law and fact in interfering with the findings of fact of the trial court regarding the contribution of the parties to the acquisition of properties hence division thereof thus upsetting part of the decision without sufficient reasons.*

3. *That the Honorable appellate court erred in law and fact as it misinterpreted and misapplied the law about the division of matrimonial assets.*
4. *That the Honorable appellate court erred in law and fact in invoking its prejudice and sentiments unsupported by law thereby ending at upsetting justice.*

This appeal was heard by way of written submissions. The appellant had the service of Mr. Amini Mohamed Mshana, advocate while Miss Mwanahamisi Rashid Kivaria, learned advocate appeared for the respondent.

Submitting in support of the appeal on the first ground, Mr. Mshana submitted that the District Court misdirected in reversing the decision of the Primary Court on division of properties specifically the house at Mkuranga by ordering the same to remain with the respondent. He argued that the reasoning of the district court was sentimental and lacking important considerations under section 114 (2) b that is; the extent of the contributions made by each party in money, property, or work towards the acquisition of the assets.

He argued that the District Court did not have justification to reverse the decision of the Primary Court without paying homage to the reasoning in the decision in **Bibie Maulid vs. Mohamed Ibrahimu [1989] TLR**

162, on extent of contribution as an important consideration to be taken into account when ordering the division of assets. He argued that the other property that is a car was in the name of the appellant and he obtained it by loan and thus had no connection with the respondent.

As such the appellant argued that the decision in **Bi Hawa Mohamed vs. Ally Seif** [1983] on a contribution by domestic work is appreciated but a contribution by the performance of domestic work does not support the notion of the contribution of equal division of 50 by 50. He cited the decision in **Yesse Mrisho vs Sanja Abdul,** Civil Appeal No. 147 of 2016 to support his proposition. He thus argued that the District Court should not have faulted the decision of the Primary Court.

In the 2nd, 3rd, and 4th ground, the same involves the division of other properties. The appellant submitted jointly arguing that the District Court ought to have considered the contribution of parties in the acquisition of properties, the manner of the acquisition, and consider what was equitable to the parties. He cited decisions in **Yesse Mrisho vs. Sanja Abdul**, Civil Appeal No. 147 of 2016 and **Gabriel Nimrod Kurwijila vs. Theresia Hassan Kalongo,** Civil Appeal No. 102/2018 **https://tanzlii.org/** that;

"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of the division of matrimonial property" In resolving the issue of the extent of contribution the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution.

He argued that the District Court did not properly direct its mind to the decision in **Bibie Maulid** and the above-cited cases, had it appreciated the primary court reasoning and consideration it could not have reversed the decision of the Primary Court.

Mr. Mshana was of the stance that considering that some properties were in the appellant's name then, given section 60 of The Law of Marriage Act Cap 29, then there was a rebuttable presumption that properties were the sole properties of the appellant alone. He thus prayed that the appeal be allowed and the order of the Primary Court be restored.

The respondent counsel Miss Kivaria responding on the first ground, she submitted that there was nothing sentimental on part of the District Court in reversing the decision of the Primary Court. According to her, there was evidence on record to show that the respondent contributed to the acquisition of the assets. The District Court therefore did comply with

section 114 (2) (b) of the **Law of Marriage Act Cap 29** on what the court should consider when dealing with the division of matrimonial assets but also should have considered the decision in **Bi Hawa Mohamed**. It was submitted that there was no evidence on the part of the respondent showing his contribution as he refused to testify before the trial court. Thus, it was not proper for the Primary Court to order division the way it did.

The counsel for the respondent was also of the view that it was even wrong for the Primary Court to award a division of properties to the appellant, the car and house at Iringa and Morogoro and a farm at Handeni. While the same was not prayed. She cited decisions in **Abel Maligisi vs. Paul Fungameza**, PC Civil Appeal No. 10/2018, and **Abraham Israel Shuma Muro vs. National Institute for Medical Research**, Civil Appeal No. 68/2020 CAT to the effect that;

> *"Court cannot grant a party or parties an order or relief which has not been prayed for".*

Responding to the argument as pointed in on the amount of award, given the decision in the **Bibie Maulid case**, the respondent counsel pressed that even if the court would have to decide 50% a piece, that would not be automatic the trial court ought to have been guided by evidence.

According to Miss Kevaria despite citing the decision in Bibie Maulid the Primary Court did not consider the weight of evidence adduced by the respondent. Even if the notion of 50 by 50 as discussed in the decision of Bibie Maulid was applied at the trial court as it did the respondent could still have more than 50 % shares.

Refereeing to the decision in the cited case of **Yesse Mrisho and Gabriel Kurwijila** that courts will mostly rely on the evidence adduced by the parties, Miss Kevaria argued that there was no evidence on the part of the appellant to prove his contribution.

Concerning the 2nd, 3rd, and 4th grounds, Miss Kevaria submitted that the submission by the appellant's counsel is new facts that did not feature in the trial or the first appellate court. She reiterated the position on the first ground that court cannot grant a party order or relief not prayed.

On the argument by the appellant that the properties were in the appellant's name, she argued this did not feature in the trial nor the first appeal. She said in the primary court the appellant did not raise the issue of comparison of the houses. According to her, this court cannot consider or deal with issue which was not canvassed in the lower court. She cited

number of decisions including **Abraham Shuma vs. National Institute for Medical Research and Attorney General,** Civil Appeal No. 68 of 2020 and **Farida and Another vs. Domina Kagaruki**, Civil Appeal No. 130/2006 as cited in **Edward Mbele vs. Magdalena Mbele,** High Court Dodoma Civil Appeal No. 130/2006 to the effect that, an appellate court cannot deal will issues that were not canvassed pleaded or raised in the lower court.

In his rejoinder, the appellant on the first ground submitted that the District Court being a first appellate court did not make enough effort to reevaluate the evidence of the trial court. He said on the issue of evidence it was not the appellant's burden to prove the claim never the less, the appellant's contribution is exhibited in the respondent's evidence.

I shall now address the grounds of appeal which as the parties' submission have indicated, boil down to two major complaints, **firstly,** the decision of the first appellate court was not founded on law, and **secondly,** the dissatisfaction with the division of the assets.

I will start with the first ground, that is the basis of the first appellate court decision, where the appellant complains that the decision was not

based law. I wish to say at this point what was said by the Court of Appeal in **Ahmed Mohamed Lamar vs. Fatuma Bakari and another, Civil Appeal No.** 71 of 2012 citing the decision in **Hadija Masudi** as the Legal Representative of the late **Halima Masudi vs. Rashid Makusudi,** Civil Appeal No. 26 of 1992 that;

> *"This Court like **all courts** can do justice only by the law and not otherwise.*

Both the Primary court and the district court referred to section 114 of the **Law of Marriage Act Cap 29**. This is the relevant provision of law when court deals with the division of matrimonial properties. There was nothing from the impugned decision of the District Court suggesting that the decision was reached based on sentiments. Whether the District Court got it right or otherwise is a different thing. I thus find no merit in the first ground.

On the division of the properties, the relevant law guiding the two lower courts is Section 114 (2) of the **Law of Marriage Act Cap 29 [RE 2019].** That is;

> *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) To any debts owing by either party which were contracted for their joint benefit; and

(d) to the needs of the infant children, if any, of the marriage,

There was no question of custom which arose in the trial court. As such it is on record of the trial court that there was no issue of consideration of infant children of the union. It appears from evidence on record that the children of the union were adults. The parties' focus of the contest is on the extent of the contribution made by each party in money, property, and work towards the acquisition of the properties in question.

As I have indicated above, courts can do justice only according to the law however in so doing, when dealing with the division of matrimonial assets to ascertain the extent of contribution, court should be guided by the evidence available on record. This the position fortified in **Gabriel Nimrod Kurwijila case** cited by the parties that;

> *"In resolving the issue of the extent of contribution the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution"*

At this point, I wish to remark on two aspects that featured in the parties'

submissions. **One**, the complaint that the district court being the first appellate court did not reevaluate the evidence of the primary court, and **two** the value of submission on the extent of contribution.

On the reevaluation of evidence, it was incumbent on the first appellant court to reevaluate evidence however, if that is not done this court can step into the shoes and do what the first appellate court omitted to do by re-evaluating the evidence.

Concerning submission by the appellant's counsel who intimated that some of the properties are in the name of the appellant alone, this does not find its base on the evidence on record. In **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government,** Civil Appeal No. 147 of 2006 the Court of Appeal had the following to say concerning submissions: -

> *"With respect, however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence".*

Now, according to the record, the respondent listed properties that were jointly acquired. However, during the hearing, the appellant did not tender evidence to prove his contribution to the acquisition of the properties. I have perused the record; it appears that on basis of reasons he believed to be correct the appellant did stick to his gun and refused to give defense evidence despite attending court and being accorded the opportunity to be heard.

I have made reflections on the argument by Miss Kevaria on the cited cases in **Abel Maligisi vs. Paul Fungameza.** What Miss Kevaria was bidding to persuade me is the fact that the respondent did not give evidence on the properties he cannot ask for such entitlement.

I am unable to subscribe to her position taking a different view that the fact that the appellant did not give evidence in his defense, did not automatically mean he surrendered what could have been awarded by the court as his share in matrimonial property. I have taken this view based on two reasons; **one,** the respondent participated in the cross-examination of the respondents. This was a point missed by the district court. As such, the respondent witnesses indicated the appellant's contribution to the acquisition of the assets. **Two,** the whole principle in the division of

matrimonial assets is that of compensation to the spouse's parting ways. This is a view stated in the case of **Mohamed Abdallah vs. Halima Lisangawe [1988] TLR 197 (Mnzavas, JK)** held;

> *"The principle underlying division of (matrimonial) property u/s 114 is one of compensation, it does not matter nor does it make any difference whether that being compensated is a direct monetary contribution or domestic services".*

The relief of division of assets was prayed by respondent, the trial court and first appellate court considered the amount of share to be awarded. This could not mean taking away all properties from the appellant because he did pray for them the prayer for division was already made by the respondent.

The District Court faulted the primary court that it did not consider the respondent evidence. With respect, this does not appear to be the case. Reading at page 7 of the decision of the primary court, the primary court clearly stated that it considered the evidence by the respondent on contribution by way of efforts and domestics work in the end the primary court recognized the respondent contribution equaling at 50%. The primary court was justified to decide on balance of probabilities. This is the rule under Regulation 6 of **The Magistrates Court (Rules of Evidence in**

Primary Courts) Regulations, 1964 G.N. No. 22 of 1964. If there was any issue with the finding then consideration will also be on the rule on what the primary court should have done

It is on record of the Primary Court at page 14 how the respondent contributed to the assets;

> *"Nyumba tatu ya kwanza iko Iringa na ya pili ni Mkuranga tunapoishi na ya tatu ipo Morogoro ina vyumba 2 na sebule huko Kihonda. Mchango wangu nilipikia mafundi na kusimamia ujenzi na kumwagilia tofali wakati huo nampikia, namfulia na huduma zote wakati akiwa kazini".*

This version was verified by PW2 Amani Alex who added that the appellant was the one paying money. What this evidence meant is that the respondent did supervision work and domestic work towards the acquisition of the properties while the respondent contributed by way of money. This proves the appellant's contribution by money as the evidence suggests the respondent's contribution was by efforts including domestic work.

The primary court having considered the respondent evidence found as a fact that there was evidence of contribution both monetary and contribution by work suggesting 50-by-50; *Mahakama inaridhika na ushahidi*

wa Mdai na kuona mizani iko Sawia.

In view of the above, I see no justification on part of the district court to reverse the decision of the primary court. In the end the second ground of appeal succeeds and thus this appeal is allowed. The decision of the primary court is restored. Considering that this is a matrimonial cause, I shall make no order as to cost.

THE HIGH COURT OF TANZANIA

A. J. KIREKIANO

JUDGE

15/11/2023

COURT: Judgment delivered in chamber in the presence of appellant and in the presence of Miss Mwanahamisi, advocate for respondent.

Sgd: A. J. KIREKIANO

JUDGE

15/11/2023