IN THE HIGH COURT OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 34 OF 2022

(Arising from Matrimonial Cause No. 116 of 2021 at the Temeke District Court at the One Stop Judicial Centre)

MWAJUMA MOHAMEDI MGANGA.....APPELLANT

VERSUS

MOHAMEDI SAID MOHAMED.....RESPONDENT

JUDGMENT

Date of last order: 02/06/2023
Date of Judgment: 25/07/2023

OMARI, J.

The Appellant in this matter is aggrieved by the decision of the District Court of Temeke at One Stop Judicial Centre (OSJC) in Matrimonial Cause No. 116 of 2021 that was delivered on 30 May, 2022. Armed with 6 grounds, she came to this Court for an Appeal seeking for orders that the Appeal be granted, the judgment of the Temeke District Court at OSJC be quashed and set aside on the issue of distribution of Matrimonial assets. She also sought for this court to declare that House No. KND/M2M/IDR 14/21 located at Magomeni, Kinondoni District in Dar es Salaam and a madrasa by the name Madrasatul Fauz Wasalaam which is in Magomeni, Kinondoni District are matrimonial properties

acquired during the parties marriage and not *Wakf* property. In addition to that the Appellant sought for this court to declare a 50% for each party as division of matrimonial properties acquired by the parties. Lastly for costs to be borne by the Respondent any other reliefs, the court deems fit to grant.

The Respondent contested the Appeal as prayed for it to be dismissed for the decision of the Temeke District Court at the OSJC made the correct distribution based on the contribution of the Appellant and the said house and *madrassah* are *Wakf* properties and cannot be subjected to distribution.

On the date set for hearing of this Appeal the Appellant had the services of Karilo M. Karilo and the Respondent enjoyed the services of Ibrahim Shineni both learned advocates.

In brief Mr. Karilo began his submission by stating that there are 6 grounds however, he prayed to consolidate and argue collectively the first, second, third, fourth and fifth grounds since they are related. The rest would remain as is making the grounds only two. Thereafter, he submitted that the parties were neither tenants in a house and that is where the Respondent started a *madrassah*, later on, one Ahmed Abdallah Ibrahim (also referred to as Ahmed Ibrahim) who was SU1 in the trial court bought the property. Counsel further submitted that because the parties were required to vacate the house the

buyer bought a plot of land where they built their house with the said *madrassah* on the side. This according to counsel makes the house matrimonial property jointly acquired by the parties. He went on to submit that during trial the Respondent maintained that it was not matrimonial property rather it was *Wakf* property donated by Ahmed Ibrahim that is SU1.

The learned Counsel turned to submit at length on the procedure for giving property for *Wakf* in that if it is joint property in accordance to Islamic Law the other owner has to be informed and the said donation not to exceed one third of the property being donated as *Wakf* He also made reference to chapter 16 :90 of the Qur – an and averred that Islamic law should not be used to hide evil intentions stating both the Respondent and SU1 purported the said *Wakf* property to deprive his client of her right to the property which is contrary to the Qur–anic teachings. Counsel further submitted that despite testimony that it was SU1 who bought the said plot which the house and *madrassah* are on it is the Respondent's name that is on the Residential Licence that is of Mohamed Said Hariri who is also known as Mohamed Said Mohamed, the Respondent herein.

Mr. Karilo vehemently argued that, although the Respondent and SU1 testified the dispute property was *Wakf* property nothing was adduced as evidence of

the same being so either per the teachings of Islam or as per the land law. He stated that, in his view the exhibit marked D4 tendered by SU1 was admitted but the trial court could not confirm its authenticity as it has no direct relationship to the *Wakf*. This, in Mr. Karilo's view was a contravention of section 10(1) and section 11 of the Evidence Act Cap RE 2022 (the TEA). He went on to challenge the existence of the institution of the Madrasatul Fauz as being non-existent for not being registered and there no evidence adduced as to its existence. This, he went on to state is one of the reasons they argue that the trial court erred by not looking into its existence yet concluded the disputed property was *Wakf* property.

On the second ground of appeal the learned counsel argued that the trail court erred by not distributing the matrimonial property in accordance to section 114 (1)(2)(b) of the Law of Marriage Act, Cap 29 RE 2019 (the LMA). He argued that the Contribution of the Appellant in the acquisition of the said properties was explained in the trial court and in addition to others she has counselled and advised the Appellant on how to acquire the properties they have. Mr. Karilo further argued that the trial court should have considered the parties efforts especially because the Respondent could not even testify how the said

properties were acquired. Having said that the learned counsel reiterated the prayers as in the Memorandum of Appeal.

When Mr. Shineni took the floor, he began his submission by acknowledging that Mr. Karilo had consolidated the grounds thus, he would also submit along the same lines. Mr. Shineni then went on to argue that his learned brother's submission connotes that he does not know that matrimonial property is likewise *Wakf* property. He challenged Counsels contention that *Wakf* can only be in one third of the property and said that was not true and that rule only applies to matrimonial property which the property in question is not.

The Respondent's counsel went on to submit that the property in dispute was given to Madrasatul Fauz by SU1 so it is not matrimonial property rather it is a *Wakf* property given to the *madrassah*; thus, the one third rule is irrelevant. The learned counsel went on to submit that a *Wakf* Deed was adduced and admitted as Exhibit D4, however, there are other documents showing the purchase of the property all the way to the *Wakf*. He went on to submit that section 63 and 64 of TEA is clear on how documents are to be admitted and it is not the role of magistrate to judge a conflict regarding a document and this is what the trial magistrate did. He argued that the Appellant's counsel brought up the relevance of evidence because he has failed to understand the

difference between *Wakf* property and matrimonial property; the former being a donation from an individual to the *madrassah*.

As for the parties contribution to the acquisition of the said property Mr. Shineni argued that it cannot be there since the *Wakf* Deed is clear and gives directives on the use of the property this was dealt with by the trial Court; making the Appellant's Counsel submission on there being unethical conduct seeking to deprive the Appellant's right to matrimonial property in the name of religion lacking in any legal basis so long as the *Wakf* is in existence.

Further to that the advocate submitted that the development of both the house and *madrassah* was done through charitable donations as it was testified in the trial court thus, no contribution was done by the parties. On the submission that the *madrassah* does not exist counsel argued that the registration or non – thereof on institution does not affect a *Wakf* donation that being the case even the *madrassah* cannot be divided as matrimonial property. As for the Residential Licence from 2013 bearing the Respondent's name, the counsel for the Respondent stated that the *Wakf* was denoted in 2003 and up to the time when the donor testified it was intact and in existence; thus, the trial court did not error in admitting the *Wakf* deed.

Submitting on the second ground of appeal counsel averred that the court considered the parties contribution and divided the properties the way it did. He went on to argue that section 114 of the LMA applies to matrimonial properties jointly acquired by the parties in this case the properties are not and then he cited the **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R 32 case as a case that recognizes contribution of domestic activities which they are not contesting only that the property in question is not matrimonial.

Counsel concluded by averring that the Appellant's advocate prayed for the judgment of the district court to be quashed and set aside without considering she was given the Tanga property thus, he prayed for this court to find the appeal unmeritorious and it be dismissed with costs.

In his rejoinder Mr. Karilo spoke to section 10 and 11 of TEA which he cited as regards to relevancy of the evidence adduced then disputed the treatment of the said property as *Wakf* on the basis of Exhibit D4 which event the trial court called "*Karatasi ya Wakf*" meaning it had no registration. Mr. Karilo added to his argument that the said property is in the name of the Respondent thus, SU1 could not have given anything since he has nothing to give, adding that if the *Wakf* is for 2003 yet the licence for 2006 and the 2013 renewal all read the Respondent's names why did he then build on the institution's property,

likewise, if the house was built by volunteers then why is there nothing on record to show for this. He argued that the *Wakf* is fictious because this individual is hiding in a *Wakf* while a *Wakf* can only be given to an institution. He conducted his submission by stating that the house and the *madrassah* are on the same property thus one and the same thing matrimonial property.

Before going into the grounds of Appeal raised by the Appellant I find it pertinent to do two things. The first is to admit that I am aware and are paying heed to the decision of the Court of Appeal in the case of **Faki Said Mtanda v. Republic**, Criminal Application No.249 of 2014 (Unreported) where the Court cited the decision of then East African Court of Appeal in the case of **R.D.Pandya v. Republic** [1957]EA 336 quoting the same where it was stated that:

> *'It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion'*

This being a first appeal then I am mandated to go back to the evidence that is available on the record and re-evaluating the same and arrive at a conclusion, see also **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another,** Civil Appeal No. 421 of 2021.

The second thing I have to do is to make an elucidation as to the concept of *Wakf* and as alluded by Respondent's counsel perhaps put it in context of the case at hand. *Wakf* (which can also be spelled as Waqf) is an Arabic term which in its literal meaning it means to detain property; see Guelida, B., *et al* (2022) **The Moroccan Waqf and the Common-Law Trust: A comparative Study** in UUM Journal of Legal Studies, 13(1), 283-309 at https://doi.org/10.32890/uumjls2022.13.1.12. *WaKf* is an established practice in Islam from the time of advent of Islam to date. It has its foundations Qur anic verses enjoining charity and perpetual charity. According to Mufti Faizal Dhada in his unpublished work titled **A Legal Analysis of the Compatibility Between Waqf and the English Trust**, Presented at De Montfort University, 2017 the majority of Islamic jurists define *Wakf* as:

> *'...confining property, which is possible to take benefit from whilst its corpus remains intact [i.e. it is non consumable], by cutting off right of usage in its ownership from the settlor and others, [for the benefit of] an existing object or by spending its yield upon a noble cause or [some] good, [with the intention of] gaining closeness to Allah, the exalted.'*

In other words when a person dedicates a *Wakf* they are detaining the property so dedicated for use and purpose that the donor has identified. Another

definition which in my view is a much simpler and perhaps a user-friendly form of explaining what a *Wakf* is found in the forward of a 2015 study titled: **Comparing the Effectiveness of Waqf and English Charitable Trusts**, by the Islamic Relief Academy, Birmingham, UK available at https://pure.coventry.ac.uk/ws/portalfiles/portal/30177061/Comparing_the_Effectiveness_of_Waqf_and_English_charitable_Trusts_English.pdf. *Wakf* is described as:

> *'In its simplest form, a Waqf is a charitable endowment that allows a person to dedicate his or her property to Allah (God) for the benefit of the public good. In conventional terms, this would often be in the form of building mosques, schools and hospitals all aimed at perpetually benefitting local Communities.'*

In the Tanzanian legal context, a *Wakf* is a recognized entity, for instance the Probate and Administration of Estates Act, Cap 352 RE 2019 *Wakf* is defined by section 140 as:

> *'An endowment or dedication in accordance with Islamic law of any property within Tanzania for religious, charitable or benevolent purposes or for maintenance and support of any member of the family of the person endowing or dedicating such property.'*

In other words, a *Wakf* is a dedication of one's property for a charitable or other religiously acceptable purpose. The Person giving or detaining property

as a *Wakf* is surrendering such property to the cause or purpose they have so chosen. According to the decision of the Court of Appeal in **Hassan Matolla v. Kadhi wa Msikiti wa Mwinyi Mkuu** (1985) TLR 54 a *Wakf* can be created by the donor/endower either *intervivos* or by Will. The alleged donor in the present case created a *Wakf intervivos*. Furthermore, *Wakf* is also provided for in the context of registration of landed property that has been dedicated or donated as *Wakf.* Section 80(4) of the Land Registration Act Cap334 RE 2019 states:

> *'An estate which has been validity dedicated or endowed as Wakf when registered shall be in the name of the trustee or mutawalli, with addition after his name of the words as "mutawalli" or in the name of the Wakf commission as the case may be.'*

Having established what a *Wakf* is and can be the question that remains is whether the disputed property is a *Wakf* or not and in any case whether it is matrimonial property.

Matrimonial property is not defined in the LMA but has received broad elaboration through case law. In the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 (unreported) as regards matrimonial property the Court of Appeal stated that:

'On the other hand, the phrase matrimonial property has a similar meaning to what is referred as matrimonial asset and it includes a matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage.'

In an earlier case of **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 (unreported) it was stated that:

'Matrimonial properties are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts.'

The LMA vests courts with the powers to order division of the properties jointly acquired when issuing a decree of divorce or separation, section 114 (1) of the LMA provides:

'...the Court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any 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.'

Moreover, section 114 (2) in part states:

*'In exercising the power conferred by subsection (1), the court shall have regard to: -... (**b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; ...'** (emphasis supplied)*

Additionally, section 114(3) of the LMA provides further guidance to the courts as regards what is to be distributed as matrimonial property; it states:

'For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.'

From the above provisions and the cases of **Pulcheria Pundungu v. Samwel Huma Pundungu**[1985] T.L.R 11 and **Samwel Moyo v. Mary Cassian Kayombo** (1999) T.L.R 197 in exercising the powers conferred under section 114 of the LMA a court has to ensure three conditions are established. The three conditions are; that the assets set for distribution must be matrimonial assets, they must have been acquired by the parties during the subsistence of the marriage and they must have been acquired by the joint efforts of the parties; see also **Bi Hawa Mohamed v. Ally Sefu** *(supra).*

Guided by the said conditions this court has to interrogate whether the house in dispute is matrimonial property and whether the Appellant had any contribution in its acquisition. I am well aware that in the trial Court the Respondent presented a *Wakf* Deed in the form of Exhibit D4 and when testifying about the Residential License of the disputed property he stated as is reproduced on page 28 of the typed proceedings:

'Mwaka 2008 Wizara ya Ardhi ilitangaza majengo yote ambayo yapo eneo ambalo halijapimwa yapate leseni za muda. Ikabidi tukae kikao pale Madrassah na

wenzangu wakasema niandike jina langu kwenye Leseni ya Makazi ya muda'

In this context one might assume that the above testimony might have been a result of being aware of the provisions of section 80(4) of the Land Registration Act, however, the question that there is no descriptor any kind after the Respondent's name as per his own testimony and that of the Appellant. I will however leave the question of the registration disputed property which is *Wakf* in the name of the Respondent for another time since assumptions are not good in law.

As for the Appellants contention that a *Wakf* can only be one third of the property if the *Wakf* is of matrimonial Property this should not detain me for counsel has mixed up the concept of *Wakf* and that of *Wasiyyah.* The former I have already described and the latter is basically an Islamic Will or a Will under Islamic law. In the practice of *Wasiyyah* the testator is permitted to bequeath by Will only one third of his property. See **Waziri Maneno Choka v. Abas Choka**, Civil Appeal No. 51 of 1999, **Re the Estate of the Late Suleiman Kusundwa** [1965] EA 247 and this court's decision in **Salma Moshi Athuman v. Asha Kimolo**, Probate and Administration Cause No. 37 of 2007 all of which discuss the one third rule. Although it is prudent to mention that there are varying opinions and interpretations by jurists of the various

schools of Islamic jurisprudence (*fiqh*); however, that is also a subject for another forum.

In the current Appeal the alleged *Wakf* is *intervivos* thus, the one third rule does not apply or it would only apply if the *Wakf* were to come into operation after death of the donor/endower which is not the case.

The Respondent in his defence produced Exhibit D4 which is a document supposedly executed by Ahmed Ibrahim (SU1) stating the following:

> *'Mimi Ahmadi Abdallah Ibrahim wa SLP 36531 Dar es Salaam nimenunua Banda na Kiwanja kilichopo mbele ya Banda hilo la vyumba vitano; kuinunulia Madrasatul Fauz Wassalam na nimeitoa kama hadia (Wakf) kwa ajili ya madras hiyo pasomwe Qur-an ya Allah (SW) milele na milele. WABILLAH TAWFIQ ALHAMDULILLAH RABBILAALAMINA.'*

Though done clumsily the document constitutes an endowment and the purposes of which is clear. The only question that remains would be the connection between the said *Wakf* and the Respondent for he is not named as the trustee or *mutawalli* of the *Wakf*. From the trial court's proceedings his attempt to adduce a Registration Certificate for the *madrassah* showing that he is the owner were not successful. His testimony is that the name in the Residential Licence was because he is the one who is responsible for the

madrassah. The Appellant on the other hand did not adduce any evidence in this regard during trial other than her testimony and that of SM2.

Albeit the Respondent's testimony having holes in it I am inclined to agree with the trial magistrate that matrimonial property is property that was acquired by joint efforts of the spouses, during the pendency of their marriage. The disputed property is unfortunately not matrimonial property and at trial the Appellant herself testified as reproduced on page 5 of the proceedings:

> *'wafadhili walikuja na wakajenga madrassah. Baada ya hapo, Shehe Ally Mzee Kamoriani alimchukua na kumpeleka kwa mtu ambaye angejenga nyumba nzuri na choo. Na kama alivyo ahidi wafadhili walijenga 2003 tulihamia. Upade mmoja kulikuwa na chuo cha madrassah, wakati sisi tulikuwa tulikuwa tunaishi upande mwingine.'*

In her own testimony the Appellant acknowledges the land was bought by SU1 the house and *madrassah* was built by donors. On the same page she testified that during the formalization the Respondent got a Residential Licence of the said land. Later on, she testified:

> *'Alpo safari kwenda Marca (sic) na alipopata pesa akanionyesha. ALipo safari kwenda Marca(sic) aliniachia pesa na kama tulivyo kubalina niliweka magrill, vigae (tiles) na nikanunua Tv.'*

The Respondent did not contest this testimony in the trial court. On page 6 of the proceedings she has further testified:

> *'Ugomvi uliendelea kuongezeka, Dugumbi ndipo nilipo sikia eti nyumba sio yake ni Wakfu wakati sio kweli. Sijawahi ona nyaraka. Hata watu wa benki walipo kuja kutaka kuinunua nyumba, aliwapa picha yake nilipo muuliza kwa nini hakunishirikisha, alisema kuwa aliandika jina langu'*

On the said issue it is in the proceedings that the Respondent testified:

> *'Nilisema hivi huu mradi unalipa majumba, nitakacho kuwa nacho change mimi nitakupa'*

He also said:

> *'Niliandika jina langu kwenye malipo ya mradi kwa kuwa mimi ndio msimamizi'*

In my considered opinion the Respondent's testimony regarding having his name as the owner of the said property yet the same is *Wakfu* does not resonate with the picture he was trying to paint. This drives me to now look at the district court's judgment. In his judgment the learned trial magistrate stated:

> *'kwa mantiki hiyo, pamoja na kwamba kuna wakati mjibu maombi alifanya marekebisho madogo madogo na kubadilisha majina kwa namna ambayo inaibua maswali, bado haifanyi eneo hilo kuwa ni mali ya ndoa. Kwa namna yoyote, eneo hilo linabaki kuwa la*

Madrassatul Fauz ambalo mjibu maombi amejimilikisha kimakosa.'

This is basically stating that the property is *Wakf* property that belongs to the *madrassah*, however, the Respondent wrongly changed the names which neither makes the *Wakf* void nor make the property matrimonial property. I am in agreement with the trial court magistrate that the said property is not matrimonial property for from the evidence adduced by the Appellant it was not acquired by either of the parties through their joint efforts.

However, the Respondent having done a chaotic job of administering the *Wakf* to the extent of his spouse thinking it is their property though that testimony also raises questions for the Appellant failed to explain if the said property is not *Wakf* to the *madrassah* how the same shifted from being Ahmad Ibrahim's property and making it matrimonial property for it was not testified in the trial court that the same is a *Wakfu* to the parties. The Respondent also failed to contradict the Appellant's testimony that he gave her money and she installed grills, tiles and bought a television.

This in my view means the Appellant worked on the improvement of the said property feasibly believing it is theirs; and in my considered opinion she entitled to some of form of compensation.

Applying the restoration principle; see this court's decision in **Mbarouk Suya Bindo v. Mbonny Abdallah Maumba,** PC Civil Appeal No. 41 of 2022 I order the Respondent to pay to the Appellant 10% of the disputed property's value to compensate her for the work that she was doing in the form installation and or supervision of the installation of the grills and tiles among others thinking it is hers and her husband's property and not an act of charity which seemingly never set out to do. The other orders of the trial Court remain undisturbed.

It is so ordered.

A.A. OMARI

JUDGE

25/07/2023

Ruling delivered and dated 25th day of July, 2023.

A.A. OMARI

JUDGE

25/07/2023