`IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

PC. CIVIL APPEAL NO. 57 OF 2023

(Originating from Civil Appeal No.7/2023 of Bariadi District Court, the same arise form Matrimonial Cause No. 3/2023 before Dutwa Primary Court)

NYAOGA MAYUNGA .....APPELLANT

VERSUS

YOMBO BUDOBUDO .....RESPONDENT

JUGDMENT

31st Jan & 12th February 2024

F.H. MAHIMBALI, J

The respondent herein petitioned for divorce and division of matrimonial properties following the desertion of the appellant and attempt to poison the respondent. The tale of the case is that the parties contracted customary marriage according to Sukuma rites in 2018 and thus they were blessed with one issue namely Baraka Yombo. During the existence of their marriage the respondent managed to build a house on a plot owned by the appellant. When the life went on, the respondent managed also to build another house on a different plot. He also launched business activity for the appellant.

In the course of living, one day the respondent was warned and told not to drink tea prepared by the appellant on the allegation that it has poison. On the material date when the respondent went back home, he found the appellant had collected all domestic utensils, her clothes and had stolen Tshs 2,000,000/= and moved away. Efforts to reconcile the situation was done but the respondent stance was that he wants divorce and no more.

The trial court heard the matter and consequently granted decree for divorce and subsequential reliefs thereto.

The respondent was aggrieved by the decision by the trial court, on the effect that the division of matrimonial properties was not just. The 1st appellate court rectified the decision of the trial court and vacated the order of sale and distribution order per rate of 60%*40%, instead it issued an order that each party to have his/her own house (the house of Sengerema be owned by the Respondent and the house of Isenge be owned by the Appellant).

The appellant was dissatisfied with the decision of the 1st appellate court, she has then approached this court, based on four grounds of appeal which are marshalled into two major grounds of appeal which are

to the effect that there was unequitable distribution of matrimonial properties and that the evidence of the appellant was not considered.

During the hearing of the appeal the parties appeared in person and unrepresented. In a foregoing the appellant adopted her grounds of appeal to form part of her submission. She further added that the house at Isenge is owned by herself and the house at Sengerema was jointly acquired as she contributed money to purchase the plot. Hence, she has a share to it, likewise to Majaruba and refrigerator.

On the side of the respondent, he submitted that by the time he married her, she had one small house at Isenge - Dutwa. The respondent then built for her one house of 62 corrugated iron sheets in her own plot. Later, he bought a milling machine for flour and paddy proceeding. He mounted it into another place where he had bought land for it at Sengerema village. In that plot, the respondent registered it in his son's name born with her. They then shifted from Isenge village to Sengerema (in a mud house). The respondent got a land plot for building another house. He started building a modern house, as he ran short of fund, he had to sell that milling machine for completing the said construction. By that time the appellant was running restaurant business (cafeteria). As she realized super profit in hotel business, she dared to kill him by poison.

He also added, it is not true that there is any error in the distribution of the alleged matrimonial property by the first appellate court. All those were his as rightly ruled, and the appellant had her own properties and it was him who developed for her. The respondent denied all the allegations in the petition of appeal. The alleged chairs, cooking pots etc are just with her. He finally pressed that this appeal is devoid of any merit. The same be dismissed.

In rejoinder, the appellant had nothing to add. She only insisted for her submission to be considered.

Having heard both parties to the suit, I have now to determine the appeal and the major issue to be considered is whether this appeal has been brought with sufficient cause. Mindful this appeal is centered on the division of matrimonial assets to wit the houses located at Sengerema Dutwa and Isenge Bariadi, majuruba and domestic utensils. I have scanned the trial court's records, petition of appeal and the submission of the parties. And therefore, being the case, the following are the thorough findings to the appeal preferred and argued.

During the trial, the appellant argued that in the subsistence of their marriage, they jointly acquired properties and some properties were not jointly acquired. He mentioned the house at Isenge was her own

property solely acquired by herself. And the house of Sengerema she contributed her money for purchasing it amounting Tshs 1,200,000/=.

> *"Mchango wangu kwenye majaluba nilitoa laki saba na SM1 hajachnagia chochote kwenye kiwanja mimi nilitoa laki tano na SM1 alitoa laki, kwenye nyumba kiwanja cha sengerema nilitoa 1,200,000/= na SM1 hakutoa"*

On the side of the respondent testified that

> *"Nilimjengea nyumba SU1 nyumba kwenye kiwanja chake na baadae nilipata sehemu nyingine na nilijenga nyumba ya block. Na nilimfungulia biashara na kumnunulia mwanangu hekari moja ya majaruba Ramadi".*

From the above extracted piece of evidence, it is therefore clear that, the appellant does not dispute the fact that the appellant built the house at Isenge on a plot primarily owned by the appellant. The concern by the appellant is that the plot a Isenge was bought by the appellant and not the respondent. The assertion which is not in dispute with the testimony of the respondent. In other words, the respondent made

development of it by constructing one house on the plot owned by the appellant.

However, the appellant fortified that the house at Sengerema she had contributed the purchasing of it by paying money of Tshs 1,200,000/= and the respondent did not.

I should sincerely disagree with the appellant on that issue based on the ground that there is no evidence adduced to prove her argument. For example, no evidence from the seller or even sale agreement to prove she really bought the said plot at Sengerema and not the appellant.

The argument by the respondent is clear that after he had built a house at Isenge, he managed to buy a house at Sengerema Dutwa and developed it by building another house. The respondent had testified how he built the house by selling his milling machine in order to complete its construction. Such a testimony was not disputed by the appellant.

In line with all this, the conclusion could be, the house at Isenge on the plot owned by the appellant was constructed by the respondent. And the house located at Sengerema was constructed by the respondent without involvement of the appellant and so it is not subject for division as it is not a matrimonial property. See section 60 of the Law of Marriage

Act, Cap 29 R: E 2019 and the case of **Hilda Rwejuna v. Philbert Mlaki,** Matrimonial Appeal No.5 of 2018 to that effect.

However, Section 114 (1) of the LMA provides that:

> *"(1) 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.*
>
> *(2) In exercising the power conferred by subsection (1), the court shall have regard to :*
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> *(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) not relevant;*
>
> *(d) not relevant*
>
> *(3) 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", (emphasizes is mine)

According to the above extract, there is no dispute that section 114(1) vests powers to the court to order division of assets between the parties which were jointly acquired during subsistence of their marriage. Nonetheless, before exercising such powers, it must be established that, first, there are matrimonial assets, secondly, the assets must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts. See **Bi Hawa Mohamed v. Ally Sefu** (1983) TLR 32 and **Samwel Moyo v. Mary Cassian Kayombo** [1999] T.L.R. 197.

Though what constitutes matrimonial assets/properties for the purposes of section 114 has not been defined under the LMA, in **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo,** Civil Appeal No. 102 of 2018 and **National Bank of Commerce Limited v. Nurbano Abdallah Mulla,** Civil Appeal No. 283 of 2017 (both unreported), the Court of Appeal defined matrimonial properties as those properties acquired by one or the other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives. Likewise, the Court emphasized in **Yesse Mrisho v. Sania Abdul,** Civil Appeal No. 147 of 2016 (unreported) 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. Section 114 of the LMA has been a subject of interpretation by the Court in a number of cases, in particular, **Bi Hawa Mohamed v. Ally Sefu** (supra). The Court has underscored the principle envisaged in section 114 of the LMA as compensation for the contribution towards acquisition of matrimonial property regardless whether the contribution is direct or otherwise see: **Mohamed Abdallah v. Halima Lisangwe** [1988] T.L.R. 1991. Further, the Court emphasized that services of a wife entitle her to division of matrimonial properties regardless of her direct contribution or otherwise. In the case of **Reginald Danda v. Felichina Wikesi,** Civil Appel No. 265 of 2018 (unreported), it was held that a wife is entitled to division of matrimonial properties even if she had not made any direct contribution to their acquisition for, she has that entitlement so long as she was a wife who made indirect contribution through domestic chores.

In the instant appeal, the appellant did not dispute the contribution done by the respondent towards the improvements made to the house located at Isenge which was their first matrimonial house. Never the less the respondent had also involved in doing domestic activities during the existence of their marriage and therefore is entitled for the share. See

section 114 (3) of the Law of Marriage Act(supra) and the cases of **Reginald Danda v. Felichina Wikesi,** (supra), **Mohamed Abdallah v. Halima Lisangwe(**supra) and **Yesse Mrisho v. Sania Abdul** (supra).

Guided by the above principles and in the circumstances of this case in which a Court of law while giving its verdicts must consider peculiar facts of each case. While I appreciate the little contribution of the spouse appellant to the acquisition of the matrimonial properties, and since there is ample evidence the extent of contribution done by the respondent to the house at Isenge, I think there must be equitable consideration to the acquisition of the said house for him to get a share.

In my considered view, since what the appellant contributed to the acquisition of the said matrimonial house was not commercial banking that it should earn profit in future but intended for their joint life, in the event of dissolution of the said marriage, the extent of contribution is what matters. It is not only a question of being a spouse.

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

contribution (See **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**- supra).

What I observed in the proceedings before the Primary Court is that, the appellant didn't testify anything further than saying that the plot at Isenge where the house was built belong to her as she purchased the said plot herself.

The appellantt dwelt deeply in leading evidence for proving divorce. The only evidence as to properties as rightly pointed by the appellant ended up only mentioning the properties without more. It was expected for her to adduce evidence showing her extent of contribution on each and every property but such evidence was not forthwith coming. I am aware that the issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property. In **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (unreported) the Court of Appeal stated that,

> *"There is no doubt that a court when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."*

All that taken as a whole, while appreciating that the spouse appellant did some contribution to the acquisition of the said house at Isenge, I wonder if there is any material contribution beyond the said purchase of the plot. I am persuaded that by the Court of Appeal's remarkable stand that the extent of contribution is question of fact which then must be established by evidence (see **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** (supra). Similarly, there has not been evidence by the appellant on how she contributed to the acquisition of properties (majaruba) than a mere mentioning them.

The respondent testified that he also bought one acre of majaruba for his son and so it is not a matrimonial property. Such argument was not disputed by the appellant. She just admitted that the Majaruba was bought in the name of their child.

> *"wakati unaenda kununua ulienda na mtoto wangu uliandikisha jina la Baraka S/O Yombo"*

I paused to ponder the rationale behind the couples (husband and wife) purchasing the plot in the name of their child. In my view, the reason is that, the couples wanted to exclude the said property from the list of matrimonial properties and placed the ownership in the hands of their child; Baraka Yombo. Whatever effort that was put to improve or develop

it whether jointly or separately, was intended to eventually benefit their child not any of the parties who were husband and wife. In that regards therefore, I hold without hesitation that the said house (front house) was not a matrimonial property. Where the property is purchased by husband and wife in the name of their child/children, that asset cannot be said to be a matrimonial property subject to division.

I am fortified in this stance by the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurwijila vrs Theresia Hassani Malongo (supra)**) wherein the Court when confronted with a similar matter came up with the stated stance.

That said, I do not see the reasons to fault the 1st appellate court judgment, and therefore it is hereby subsequently upheld and thus the appeal is dismissed for being devoid of any merit.

I make no order as to costs.

It is so ordered.

DATED at Shinyanga this 12th day of February, 2024.

THE HIGH COURT OF TANZANIA

F.H. Mahimbali
Judge