IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB-REGISTRY
AT TABORA
MATRIMONIAL APPEAL NO. 14 OF 2023
(Arising from the District Court of Tabora in Matrimonial Appeal No. 13 of 2022 originating from Isevya Primary Court in Matrimonial Case No. 34 of 2022)

DEOGRATIUS OMARY ..... APPELLANT
VERSUS
TRIFAINA FRANCIS ..... RESPONDENT

JUDGMENT

Date of Last Order: 14.11.2023
Date of Judgment: 29.02.2024

KADILU, J.

The appellant and the respondent contracted a Christian marriage in 2007. They were blessed with three issues and acquired two houses and one plot, all located at Tabora Municipality. It appears their marriage went on well up to 2019 when the relationship started to be sour allegedly after the appellant had found his wife unfaithful. He petitioned for divorce and division of matrimonial property in Isevya Primary Court via Matrimonial Cause No. 34 of 2022. After hearing both sides, the court was satisfied that the marriage was broken down irreparably, then it granted the decree of divorce and proceeded to divide the assets jointly acquired. The appellant was granted two houses whereas the respondent was given a plot. The court directed further that the appellant should be a custodian of the children.

The decision annoyed the respondent who challenged it through Matrimonial Appeal No. 13 of 2022 in the District Court of Tabora. After

hearing the appeal, the appellate court overturned the trial court's decision. It allowed the appeal by quashing the decision and order of the trial court. It awarded one house to the appellant and the other to the respondent. The court also ordered the plot to be sold and the proceeds to be divided equally between the appellant and the respondent. Aggrieved by the appellate court's decision, the appellant filed the instant appeal in this court praying for a reversal order on the following grounds:

1. *That, the appellate court erred grossly in law and facts for quashing the decision of the trial court which correctly assessed the contribution of each party towards the acquisition of matrimonial assets.*
2. *That, the first appellate court erred grossly in law and facts for considering that mere living together is proof of equal contribution towards the acquisition of matrimonial assets hence, equal distribution of the same.*
3. *That, the first appellate court erred in law and facts for considering the existence and disintegration of marriage and forgetting evidence to prove the parties' contribution towards the acquisition of matrimonial assets.*
4. *That, the appellate court erred grossly in law and facts by failing to distinguish matrimonial home from matrimonial assets.*
5. *That, the first appellate court misdirected itself by arriving at the decision based on the evidence recorded on appeal instead of the evidence adduced during the trial in the primary court.*

On the strength of the above grounds, the appellant prayed this court to allow the appeal by nullifying the decision and orders of the first appellate court and upholding the trial court's decision. He also prayed for the respondent to be condemned to pay the costs of this appeal. The respondent

filed a reply to the petition of appeal in which she discredited all the grounds of appeal. She asserted that the appellate court assessed properly the contribution of each party towards the acquisition of matrimonial assets. She added that living together was not the only yardstick used by the appellate court in the distribution of matrimonial assets. She urged this court to allow (*sic*) the appeal and uphold the decision of the first appellate court. She also prayed for the costs of the appeal to be borne by the appellant.

The hearing of the appeal proceeded by written submissions. Both parties appeared in person as they had no legal representation. In support of the appeal, the appellant submitted that the distribution of matrimonial assets was determined correctly by the trial court which was in a better position to ascertain who deserved what as it was the court that heard the evidence. He expounded that mere living together does not automatically create the right to equal distribution of matrimonial assets between the parties. He added that the respondent did not adduce evidence about how she contributed to acquiring the properties at issue. The appellant contended further that he acquired some of the properties before the marriage and that the respondent was a mere housewife.

Citing Sections 58 and 59 of the Law Marriage Act [Cap. 29 R.E. 2019], the appellant argued that a property that was not acquired or developed by the joint effort of the spouses can never be a matrimonial asset. According to the appellant, the District Court misdirected itself in holding that mere living under the same roof is proof of equal contribution in the acquisition of

matrimonial assets. To buttress his argument, he cited the case of ***Bi. Hawa Mohamed v Ally Sefu*** [1983] TLR 32. He explained that the respondent had a duty to prove her contribution to the acquisition of the alleged matrimonial assets, but she failed. The appellant lamented that the first appellate court was not supposed to record evidence adduced during the appellate stage and use it to base its decision while disregarding the evidence presented in the trial court.

He referred to the case of ***Bibie* Mauridi *v* *Mohamed Ibrahim*** [1989] TLR 162 and ***Michael Simkoko v Elia Robson Myalla***, PC. Civil Appeal No. 31 of 2019, High Court of Tanzania at Mbeya. In the latter case, it was stated that an appellate court cannot interfere with the assessment of the evidence of the trial court unless there are compelling reasons to do so such as where there is serious misdirection, non-direction, misapprehension, or miscarriage of justice. Finally, the appellant submitted that he is not challenging equal distribution of matrimonial assets, but the extent of the respondent's contribution that has in turn entitled her to the equal share.

On her part, the respondent submitted that the distribution of matrimonial assets made by the District Court is fair and just because considering the requirements of Section 114 of the Law of Marriage Act, she used all her efforts, energy, love, and affection to protect and care about the appellant and the children believing that whatever they were doing was for the welfare of their family. For that reason, she testified that they acquired

the said assets together. She also testified that apart from being a housewife, she was carrying on a small business, and the profit obtained was used in the acquisition of matrimonial assets. She did not, however, disclose the nature of the business she was conducting.

According to the respondent, contribution to the acquisition of matrimonial assets needs not be in the monetary form, it can be in the form of property, work, or advice. To cement her proposition, she referred to the case of ***Yesse Mrisho v Sania Abdul***, Civil Appeal No. 147 of 2016, Court of Appeal of Tanzania at Mwanza. She submitted in addition that the appellant was supposed to prove that the respondent did not contribute equally to the acquisition of the contested properties.

I have examined keenly the petition of appeal, records of the lower courts, and submissions by the parties. There is no dispute that the parties were legally married, they were blessed with three issues and some assets, and that the marriage was lawfully dissolved. The only issues to be determined in this appeal are **first**, whether the alleged assets are matrimonial property, and **second**, whether the first appellate court divided the assets according to the law. I will start with the 5th ground of appeal in which the appellant complains that the first appellate court misdirected itself by arriving at the decision based on the evidence recorded on appeal instead of the evidence adduced during the trial in the primary court.

It is pertinent to observe that there was no harm for the District Court to consider the evidence received during the appeal. Section 21 (1) (a) of

the Magistrates' Courts Act permits the District Court when exercising its appellate jurisdiction, to direct the primary court to take additional evidence or to hear additional evidence itself. In the matter at hand, the learned District Court's Magistrate accepted the evidence from the parties which appeared to have been pertinent and worthy of belief concerning the appeal before it. The court was not satisfied that the appellant's evidence accepted by the Primary Court was pertinent and worthy of belief hence, it interfered with it. The court was, therefore, entitled to accept such proof as appears to be worthy of belief according to its value. In this regard, I find no merit in the 5th ground of appeal and I dismiss it.

Reverting to the 1st, 2nd, 3rd, and 4th grounds of appeal, I will condense them as correctly argued by the appellant that they all challenge the appellate court's assessment of the extent of the contribution made by the parties towards the acquisition of matrimonial property. It should be noted that Section 114 of the Law of Marriage Act empowers the Court to order the division of matrimonial assets between the parties after ordering the separation or divorce. For ease of reference, the provisions of Section 114 are reproduced below:

> *"(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— (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) any debts owing by either party which were contracted for their joint benefit; and (d)* ***the needs of the children, if any, of the marriage****, and subject to those considerations, shall incline towards equality of division. (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."*

From the excerpt above, it is clear that the law is in favour of equality of division of matrimonial assets. Nevertheless, before ordering equal distribution, the conditions set out under Section 114 should be met. Among the conditions are first, the assets must have been acquired or developed substantially by a joint effort of the parties during the subsistence of marriage. Second, each party's contribution towards the acquisition of the assets should be established, and third, the needs of the children of the marriage must be taken care of when ordering the division of matrimonial assets. The equality of division envisaged by the law cannot arise where there is no evidence of the extent of contribution. Thus, each party shall be entitled to a share that corresponds to the extent of her or his contribution.

In the case at hand, evidence adduced during the trial shows that the respondent left the matrimonial home with the furniture and household and after the decree of divorce, she was given the plot. However, she did not testify about how she contributed to the acquisition of the properties she

had parted with. She only stated that they had two houses and a plot. According to the proceedings of the trial court, the respondent prayed to be given a house or a plot. Her request was not controverted by the appellant hence, the trial court gave her the plot. For this reason, I find her complaint to the first appellate court about the unequal distribution of matrimonial assets was an afterthought. I will quote evidence from the parties when testifying in the trial court. From pages 3 to 5 of the trial court's typed proceedings, the appellant stated as follows:

"... Mimi katika utafutaji wa mali nilitafuta mwenyewe huku yeye akiwepo nyumbani. ... Mimi nimekuwa nikifanya shughuli ndogo ndogo za ujasiriamali ndizo zimenisaidia kupata nyumba mbili na kiwanja kimoja."

On the other hand, the respondent testified as hereunder from pages 9 to 10 of the typed proceedings:

"Mimi na mume wangu tuna nyumba mbili, kiwanja kimoja pamoja na samani za ndani. Kweli niliondoka na baadhi ya vitu vya ndani kwa vile yeye alisema hanitaki ... Mimi naomba aniachie chochote, kama ni nyumba au kiwanja ..."

The appellant asserts that he acquired the assets alone and he went further to state in the appellate court that he acquired some of the properties before the marriage. However, he did not tender any exhibit or adduce any oral evidence leading to proving his assertions. He only insisted that the respondent was a housewife suggesting that she did not contribute to the acquisition of the assets. I wish to remind the appellant that the law is now

settled in Tanzania that domestic works are recognized as contributing towards the acquisition of matrimonial assets.

The decision of the first appellate court is being challenged for not properly considering the contribution of each party in its division of assets. Evidence presented in court during the trial indicates that the appellant was an entrepreneur whereas the respondent was a housewife. The appellant told the court that the proceeds of the business were utilized to acquire the claimed assets. Evidence shows further that the respondent left their matrimonial home with TZS. 2,000,000/= being the rent collected from the tenants though she later remitted to the appellant TZS. 1,000,000/=. As hinted earlier, the respondent had neither adduced evidence to support her assertation that she was undertaking some business during the marriage, nor did she prove the extent of her contribution towards the acquisition of the contested assets.

Notwithstanding, given Section 114 (2) (b) of the LMA and the case of ***Charles Manoo Kasara & Another v Apolina Manoo Kasara*** [2003] TLR 425, domestic works entitle housewives to some shares of matrimonial assets. In the case above, the Court of Appeal held that the wifely service of a wife entitles her to the division of matrimonial property regardless of her direct contribution. In ***Reginald Danda v Felician Wikesi***, Civil Appeal No. 265 of 2018, Court of Appeal of Tanzania at Iringa, it was stated that domestic chores justify the wife to get a share of matrimonial assets even if she has not made any direct contribution towards their acquisition. Applying

the above position in the instant matter, it must follow as night follows day that the respondent is entitled to a share of matrimonial assets though not necessarily an equal share.

The share should not necessarily be equal to that of the husband. See the case of ***Yesse Mrisho v Sania Abdul***, Civil Appeal No. 147 of 2016, Court of Appeal of Tanzania at Mwanza. The law enjoins courts to incline towards equal division of matrimonial assets where there is evidence of equal contribution towards the acquisition of the said assets. That is why in the case of ***Bibie Maulid v Mohamed Ibrahim*** [1989] TLR 162, it was held that there must be evidence to show the extent of contribution before making an order for the division of matrimonial assets. In the instant appeal, none of the parties had presented a candid explanation about his or her extent of contribution to the acquisition of the matrimonial property they have.

Examination of evidence in this appeal reveals that the appellant contributed more to the acquisition of matrimonial property compared to the respondent. The parties' testimonies support the court's finding as they stated that the appellant was an entrepreneur while the respondent was a housewife. So, there was nothing wrong with the trial court awarding the appellant a bigger share than the respondent's share. The only error committed by both the trial court and the first appellate court is disregarding the needs of the children of marriage. By awarding 50% of the assets to each party, the courts did not consider the needs of the children. Since the

respondent is the custodian of the children, the lower courts were obliged to take it into account when distributing the assets amongst the parties.

From the foregoing analysis, the appeal succeeds to the extent stated. I nullify and set aside the decisions together with orders of the trial court and the first appellate court. I further re-divide the matrimonial assets as follows:

(i) The appellant shall be entitled to a house situated at Ipuli Kidatu and a plot located at Kidatu "B."

(ii) The respondent is hereby given a house located at Ipuli Uledi together with the households that she had already taken.

(iii) The respondent shall be the custodian of the children of the marriage who shall also bear food expenses for them.

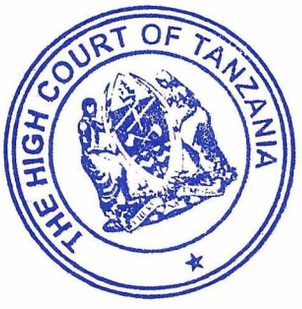
(iv) The appellant shall maintain the children of marriage in terms of health, clothing, and education expenses.

That division has taken into account the extent of each party's contribution to the acquisition of the said matrimonial properties as depicted by the evidence, and the needs of children of marriage. Given the circumstances of this case, I refrain from ordering for costs. The right of appeal is fully explained for any aggrieved party.

Order accordingly.

KADILU, M.J.
JUDGE
29/02/2024.

Judgment delivered in chamber on the 29th Day of February 2024 in the presence of Mr. Deogratius Omary, the appellant, and Mrs. Trifaina Francis, the respondent.



KADILU, M.J.,
JUDGE
29/02/2024.