IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

PC. CIVIL APPEAL NO. 20240506100010146

(Arising from Civil Appeal No.47 of 2023 before Shinyanga District Court, the same arising from Matrimonial Cause No. 29 of 2023 before Kizumbi Primary Court)

MASHA JAFARI IBRAHIM .....APPELLANT

VERSUS

CHARLES AMOS MAYAYA.....RESPONDENT

JUDGMENT

29th May & 21st June 2024

F.H. MAHIMBALI, J

The Respondent had petitioned for divorce and division of matrimonial assets before the trial court. It was alleged that the parties contracted civilian marriage in 2018 here at Shinyanga. Marriage sweetness turned sour after several episodes of existing quarrels between them. More sadness arose within the family when information erupted that the appellant is on mission to poison the respondent and his kids. The act made the respondent more furious; he shifted his

children there at home and left only the appellant. The appellant notified the appellant's bosses including headquarter.

It was not settled; the matter went further to the ward tribunal for conciliation but in vain. Then the matter was preferred to the trial court where the trial court, after a full consideration issued a decree of divorce and ordered division of matrimonial properties. The appellant was not dissatisfied; she unsuccessfully appealed before the first appellate court, which dismissed the appeal for lack of merit.

The appellant is not amused with such decision, she has approached once again this Court, armed with three grounds of appeal namely;

1. That, the district court erred in law and in facts in holding that the appellant had not adduced enough evidence on acquisition of matrimonial assets subject to fair division between the spouses.
2. That, the first appellate court misdirected itself in holding that the trial court was correct in its decision over the disposed matrimonial motor vehicle to the effect that the proceeds were spent jointly by the spouse.
3. That, both the trial and appellate courts erred in law and facts in holding that the spouses started living as a couple in 2018 while

disregarding the 3 years under which they cohabited as wife and husband.

During the hearing of this appeal, both parties appeared themselves in person and unrepresented. Arguing for her appeal, the appellant prayed for her grounds of appeal be adopted to form part of her appeal submission. She also added that the fact that she had not adduced evidence in the acquisition and development of the matrimonial properties, but in reality she had explained sufficiently but unfortunately the length of her evidence was not recorded. She also alluded that in essence they had acquired several movable and immovable properties. The houses at Nachingwea - Lindi, and Kibaha. There was a motor vehicle, in which they had jointly acquired it. But unfortunately, its proceeds she was not given any.

The appellant also contended that she has been with the respondent since 2015 up to now. Today she has been divorced and left with nothing. She asked as to what is her benefit for being in this marriage for all this time. She thus prayed for her appeal be allowed with costs as she has been denied with the fair distribution of matrimonial assets jointly acquired.

Countering the appeal by the Respondent, he prayed for consideration to what he had stated at the trial court and ruled that way. He further argued that the two lower courts ruled properly as per law. The mentioned houses/assets belong to himself and that the appellant has no any contribution to its acquisition and development. As regards to the plot at Mlandizi, the same he had purchased it by salary loan. Thus, the appellant is not part in it.

With the said vehicle, it is true that he had it. He bought in 2016 prior to marrying her. The same when got an accident in 2021, he sold it and its proceeds were used together and for medication. At Nachingwea he has one plot which is undeveloped to date. The house in Nachingwea is old enough and he built in 2000 and later rebuilt in 2013. He contended that he was married to the appellant since March 2018 after he had met her in 2017. Thus, what he knows, the only assets they have acquired jointly during their life span, is only domestic properties - beds, sofa, TV, etc. But nothing more. He thus prayed that this appeal be dismissed as it is bankrupt of any merit.

In rejoinder, the appellant reiterated her submission in chief. She added that those alleged documents were tendered and admitted in court as exhibits unlawfully. She was an entrepreneur person, thus was

making good income to the family and development of the acquired properties. With the said vehicle, it was her who was maintaining it on service. The alleged salary bank slips are not conclusive proof that he had acquired them alone.

I have scanned the both lower courts' records, petition of appeal and the submissions of the parties, I have now to determine this appeal and the issue for consideration is whether the appeal has been brought with sufficient cause.

During the trial, the respondent argued that, in the subsistence of their marriage they acquired domestic utensils; tv screen,bed, coach, dinner set, "miguu ya cherehani" and alike. The respondent did not mention house or plot to have been jointly acquired, he later tendered evidence to prove that houses/plot were solemnly acquired before construction of marriage with the appellant.

On her side, the the appellant alleged that it is true that they contracted valid marriage in 2018 but prior to that, they had started living together as husband and wife since 2015. She therefore contended that the house and plots at Lindi (Nachingwea) and Mlandizi she contributed towards their acquisition.

I have keenly followed the proceedings of the case at the trial court, and what is complained by the appellant that the extent of contributions towards the acquisition of the matrimonial assets were not regarded.

I wish to preface my decision by stating from the outset that this is a second appeal. It is now settled law that where there are concurrent findings of facts of the two courts below, the second appellate court should not under normal circumstances interfere with such concurrent findings of facts. However, if such courts below have misapprehended the substance, nature and quality of such evidence which result into unfair decision in the interest of justice, the Court may interfere. This position was stated in the case **of Abdallahman Athuman v. Republic, Criminal Appeal No. 149 of 2014; Omari Mussa Juma v. Republic, Criminal Appeal No. 73 of 2005; 8 Josephat Shango v. Republic, Criminal Appeal No. 62 of 2012; and Yohana Dioniz and Another v. Republic, Criminal Appeals No. 114 and 115 of 2009(all unreported).**

For instance, in the latter case of **Yohana Dioniz and Another,** (supra) the Court stated as follows:

"This is a second appeal. At this stage the Court of Appeal would be very slow to disturb concurrent findings of fact made by lower courts, unless there are clear considerations or misapprehensions on the nature and quality of evidence, especially if those findings are based on the credibility of witnesses – "(see Salum **Mhando v. Republic, (1993) TLR. 170).**

In my firm findings, I have found that there is no dispute that the marriage between the parties was dully contracted in 2018, and thus the alleged properties house/plots at Nachingiwea- Lindi and that of Mlandizi were acquired before the construction of their marriage. There is no quite evidence that the appellant had any involvement in development of it/ them. However, the complaint that exhibits were unlawfully admitted, I do not agree with the appellant, as the appellant was given opportunity to counter for it and she did not object them hence her argument is an afterthought.

About the vehicle, it is apparently clear that, the alleged vehicle belonged to the respondent, but he sold it in order to be medicated when fell sick. This argument was not objected by the

appellant. He also proceeded that some of money which remained, was used by both for family upkeep. Despite the fact that the said sale as a matter of law needed the consent of the appellant it being a matrimonial property. But since is not in existence, then it cannot form part of discussion. What much the appellant could do if so aggrieved, was to challenge its sale. But so far, that is not the issue.

An order for division of matrimonial properties goes to the properties which exists and not else. I am therefore of the formed view that, in the absence of proof on the extent of contribution of the properties alleged to be matrimonial properties, one can hardly claim distribution of the said asset allegedly to be a matrimonial property.

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.*** **(emphasis added)**

(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) 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 and not because of being with a person for certain period of time.

Similarly, when one spouse finds properties acquired before contraction of their marriage, one must prove how he has been engaged in developing such existed properties for him to be entitled division/share of such alleged properties.

Nonetheless, the court 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 attempted to define 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. 197.**

In the instant appeal, the records of the trial court speak loudly that the properties jointly acquired by the parties were domestic utensils. There is no proof as apart from domestic utensils there any other property jointly acquired as contended by the appellant. The respondent managed to prove that the complained house at Nachingwea and plot at Mlandizi were solemnly acquired by himself before marring to the appellant. In reference to the exhibits tendered before the trial court, they all signify that the real owner of the such properties was the respondent who acquired it before marrying the appellant.

Leave apart the exhibits, there is no any piece of evidence suggesting as to whether the appellant involved in maintenance or developing it. There is no proof as to how she contributed thereto, there is no proof as to whether they had truly been cohabitation since 2015 to justify the fact of long cohabitation and to have acquired some of properties before the existence of their valid marriage. As I have noted earlier in absence of evidence it is hardly to ascertain the relief for division of matrimonial properties as it appears in case.

Mindful in civil cases, the burden of proof lies on the person who alleges anything in his favour as I have detailed herein. And that the burden of proof envisaged above is on the balance of probabilities as stated in various decisions of this Court, including **Anthony Masanga v. Penina Mama Mgesi and Another (supra) and Hamza Byarumshengo v. Fulgencia Manya and 4 Others, (supra).**

In a close digest of the respondent's case at trial court and the legal principle cherished in the case **of Hemed Saidi V Mohamed Mbilu [1984] T.L.R 113** at page 116 that a person whose evidence is heavier than that of the other is the one who must win. I fully subscribe to the said position. Further, I am also of the stance that in measuring the weight of evidence, it is not a number of witnesses that matters but

rather the quality of evidence. That being the position, the respondent has in balance of probability been able to establish the claims against the appellant.

By the way, I once ruled, and repeat it today that a mere fact of being spouse is not by itself a material contribution to the acquisition of matrimonial properties. It being a question of fact, evidence must be adduced to that fact.

All this said and done, I find no misdirection or misapprehension of evidence of both parties to warrant me to interfere with the concurrent findings of both courts below. I find this appeal is devoid of any merit. The same is dismissed. The trial court rightly applied its discretion, and I have not seen any fault when arriving at such a decision. Equally, the first appellate court had rightly not interfered with that discretionary power it enjoys.

It so ordered.

Right to further appeal is hereby explained.

DATED at SHINYANGA this 21st day of June, 2024.

F.H. Mahimbali

Judge.