IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MATRIMONIAL APPEAL NO. 4877 OF 2024

(Originating from Matrimonial Cause No.32 of 2023, delivered on 2nd February 2024 by Hon. MPESSA- SRM)

ABDALLAH ALLY SALUM .....APPELLANT

VERSUS

ASHURA ALLY MCHUMO.....RESPONDENT

JUDGMENT

10/05/2024 & 31/05/2024

SARWATT, J.;

The parties to the present appeal were a husband and a wife before their marriage came to an end on 2nd February 2024, upon being dissolved by the District Court of Temeke at one One-stop Judicial centre. During their on-and-off relationship, they were blessed with four children, the oldest was born in 1985, and the youngest in 2005.

According to evidence on record, the parties started living together as husband and wife in 1983 and finally decided to officiate their relationship in 1987 after contracting Islamic marriage. Their happily ever after marriage did not last long as, in 1989, they were separated, and the appellant issued a *talak* to the respondent. However, after the end of the *eddah* period, they decided to get back together and live as husband and wife. In 1998, the parties chose to contract another Islamic marriage. Despite contracting this marriage, according to the respondent, in 2012, the appellant totally deserted her. Following that, she petitioned before the District Court of Temeke for the decree of divorce and the division of their matrimonial properties.

Upon full trial, the Court was satisfied that their marriage had been broken beyond repair and issued a decree of divorce as well as ordering the division of their matrimonial properties, the division which did not amuse the appellant, thus preferred to appeal before this Court. The grounds of appeal as per the memorandum of appeal are;

1. *That the trial court erred in law and fact for including and distributing properties which do not belong to either of the parties as matrimonial properties.*

2. *That the trial court erred in law and fact for distributing one farm located at Kiguza to both parties (double distribution).*
3. *That the trial court erred in law and fact for awarding the respondent the properties while the respondent had failed to prove her contribution towards the acquisition of those properties which belonged to the appellant before the respondent was married to him.*
4. *That the trial court erred in law and, in fact for distributing all the properties without considering that the appellant has been married to four other wives who have interest on the same properties.*
5. *That the trial court erred in law and, in fact for, failure to consider the properties named by the appellant as matrimonial properties*
6. *That the trial court erred in law and, in fact for awarding the respondent all the matrimonial properties without considering that the appellant contributed much to their acquisition.*

During the hearing of the appeal, the appellant was represented by Jacqueline J. Kayombo, learned advocate, while the respondent was

represented by the learned advocate Hussein Hittu. By agreement of both parties, the appeal was heard by way of written submissions.

The appellant's counsel started by abandoning grounds Five and six and remained with grounds one, two, three and four Submitting on the first ground of appeal, the learned counsel advanced that it is a known principle envisaged under section 114 of the Law of Marriage Act that the Court when granting a divorce, shall have the power to order division of the assets that were acquired by the parties by their joint efforts. In the instant case, the Court erred as it included the house located at Mbagala rangi tatu biasi and a residential house situated at Mtongani as matrimonial property, while the same belongs to Mwamvua Mohamed, the appellant's first wife, who is now dead.

It was the learned counsel's further contention that the said houses do not fit the criteria of matrimonial properties as interpreted by the Court in the case of **Bi. Hawa Mohamed v Ally Seif** (1983) TLR 32 as the appellant had testified that he married Mwamvua Mohamed in 1979. He had bought the house at Mtongani, where he was residing with his first wife. This house was later demolished for road expansion. The compensation he got was used to purchase the house at Mbagala rangi tatu biasi for his first wife, in her

name. He brought another house at Mbagala Charambe for the respondent herein. According to the appellant, the remaining part of the house at Mtongani continued to be resided by Mwamvua, and he later gifted it to her prior to her death. Thus, the appellant advanced that the two houses are not matrimonial properties as they do not belong to either party.

On the second ground of appeal, the counsel advanced that the trial Court, in its decision, awarded the appellant the farm located at Kiguza. At the same time, it awarded the respondent a farm located at Mgawa and the house therein. It was Ms. Kayombo's contention that the said farm is the same farm and the house that was awarded to the respondent, therefore, the Court failed to resolve as to who the property is awarded to.

Submitting to the third ground of appeal, the counsel referred to the Court to section 114(2) of the Law of Mariage Act, Cap 29, which emphasizes the importance of considering parties' contributions before dividing any matrimonial assets. According to her, the trial Court awarded the respondent one house at Mkuranga despite the appellant's evidence that the five residential houses, including the one awarded to the respondent, were built in 1970 in the plot of land he had inherited from his father before meeting the respondent.

The counsel further argued that sections 114(1) and (3) of the Law of Marriage Act allow inclusion as matrimonial assets in properties that were acquired by a party prior to marriage, but the condition precedent to be fulfilled is that the other spouse needs to prove that she has substantially contributed in improvement of the property during subsistence of the marriage. In the instant case, according to her, the respondent has failed to prove that the houses were substantially improved during the subsistence of their marriage, and even if there were any improvements, the respondent didn't state that she contributed significantly to their improvement. Thus, the Court erred in including the houses as matrimonial properties.

Regarding the fourth ground, the learned counsel averred that, in the midst of the marriage between the appellant and the respondent, he was also married to three other wives, the respondent being the third wife, and to date, he is still married to the other two wives save for Mwamvua Mohamed who died a few years back. Ms. Kayombo contended that the appellant's first wife has an interest in almost all the properties, as they were married for long time ago and worked hard in the acquisition of many properties, including the farm at Mgawa, while the fourth and second wives have been living with the appellant at Mkuranga for more than ten years in the houses

which have been included as matrimonial properties. It was the counsel's contention that it was improper for the Court to determine the issue of division without considering there were other wives who had contributed to the acquisition of the said properties.

The respondent counsel, on his submission, opposed the appeal and referred the Court to section 114(1) of the Law of Marriage Act, which gave power to the Court to order the division of matrimonial properties and went on to submit that the Court was satisfied that the said properties form part of matrimonial properties due to evidence adduced before it. According to the counsel, the respondent had proved her case on the balance of probability as required under section 110 of the Law of Evidence Act, Cap 6. He further averred that no law prohibits a property from being distributed to the parties of the case. According to the counsel, the Court has the power to distribute one asset to either the respondent or the appellant depending on the contribution of each in its acquisition and cited the case of **Marcel Kichumisa v Mary Venant Kabigiri**, Civil Appeal No 52 of 2020, which emphasized the power of the Court to order division of matrimonial assets.

Mr. Hittu advocate further contended that the appellant never countered the evidence produced by the respondent, and he did not produce any document

like a title deed, residential license, deed of gift, or transfer deed to prove his statement that the house located at Mbagala rangi tatu and the house at Mtoni Mtongani belongs to Mwamvua Mohamed.

It was Mr. Hittu's further contention was that the respondent had shown her contribution towards the acquisition of the properties by tendering various exhibits that were admitted before the Court, which are records of business she participated in selling at various retail shops that the appellant and the respondent owned. He cited the case of **Bibie Maulidi v Mohamed Ibrahim** (1989) TLR 169, which insists on the production of evidence to prove the extent of contribution.

The counsel further insisted that the assets to be divided should not only be acquired during the substance of the marriage but also those that were acquired before the marriage and developed during the period of the marriage and though the appellant alleges that the houses at Mkuranga were built in 1970 but they were improved during the subsistence of their marriage. The learned counsel cited the case of **Dalia Njaro v Dominic Hyera**, Civil Appeal No. 9 of 2022, and insisted that one should not only be financially smart to contribute, but even taking care of children is a contribution towards the acquisition of matrimonial assets.

Regarding the appellant's claim that he has four wives, it was the learned counsel's contention that the appellant produced no evidence to prove his statement during the trial and insisted that the respondent proved her case on the balance of probability. He cited the case of **Oliva James Sadatally v Stanbic Bank Tanzania Limited**, Civil Appeal No. 86 of 2019.

In rejoinder, the appellant counsel insisted that the Court erred in relying on the ledger books produced by the respondent to conclude that she had contributed to the acquisition/ improvement of the properties, as she had the same because she was the manager at one of the appellant shops. She was paid a salary for the job. She further insisted that the income from the shops was not used to acquire the houses at Mkuranga Mtipesa, which were awarded to the respondent as they were built in 1970, and the respondent never lived in any of them.

Regarding the respondent's claim that the appellant had not tendered any documentary evidence to prove that the house at Mtongani and Mbagala belong to his late wife, Mwamvua Mohamed, during the hearing, it was the counsel's contention that the appellant couldn't tender the documents because they are under the custody of heirs of Mwamvua since her demise. According to the counsel, even though the appellant did not tender any

document but his answer to the petition of divorce, his testimony during the hearing and the testimony of his fourth wife supported the fact that the said houses belong to Mwamvua Mohamed therefore, could not form part of matrimonial assets.

On the issue of the Court distributing the same asset to both parties, the counsel concurred that the law does not limit the Court to distribute the same properties to both parties. However, she advanced that the situation is different in the present case as the distribution to both parties will create chaos since the property in question is a farm located at Kiguza Mgawa with a house built therein. It was the counsel's suggestion that awarding the same property to both would be practical if each was given a specific portion in terms of percentage. She added, the Court misdirected itself, thinking that there were two farms at Mgawa and Kiguza. In fact, it is the same farm located at Kiguza village and Mgawa is the locality name.

On the issue of proof of the appellant's other marriage, the counsel rejoined and submitted that, the fact that the appellant was required to prove his other marriages by documentation is farfetched as both parties did not dispute it during trial. She went further and submitted that it is a well-known principle that there is no need to make consideration of other spouses when

distributing matrimonial properties between parties who are in polygamous marriages. Thus, it was wrong for the Court to divide the matrimonial properties without making consideration of other wives. To support her assertion, she cited the case of **Nuru Abraham Sepetu v Yusuph Washokera**, Pc. Civil Appeal no. 24 of 2023.

Having gone through the record of the lower Court and the submission of the parties, I'm tasked to determine if the raised grounds of appeal have merit.

On the first ground of appeal, the appellant faulted the trial Court for regarding the house at Mbagala Rangi tatu and Mtongani as matrimonial houses while the said houses do not belong to either of the parties. The appellant advanced that the said houses belong to his late wife, Mwamvua Mohamed, and do not fit in the definition of matrimonial assets.

In order to determine if the said properties qualify to be matrimonial properties one has first to determine what amounts to matrimonial property. The Law of Marriage Act does not define what matrimonial property means. However, the Court of Appeal, on numerous occasions, has provided for the meaning. In the case of **Marcel Kichumisa vs. Mary Venant Kabirigi,**

Civil Appeal No. 52 of 2020, it referred to the meaning provided for in the case of **Bi Hawa Mohamed**(supra), in which the Court adopted the portrayal of the same in Halsbury's Laws of England 4th Edition at page 491, that, a family/matrimonial assets;

> *"refer to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole."*

From the above position, according to the evidence on record, it was the appellant who purchased the Mtongani house, and in 2008, part of the house was demolished for road expansion. The other part of the house remained, while the house at Mbagala Rangi Tatu biasi was bought in 2008. It can correctly be said that the houses were purchased for family usage, and they qualify to be regarded as matrimonial assets.

Despite the fact that the said houses are seen to qualify as matrimonial assets, the appellant alleges that the said houses do not belong to either party. Thus, the Court erred in dividing the same. During his evidence, the appellant had told the Court that when part of his house at Mtongani was

demolished, he received compensation, which he used the money to buy the house at Mbagala rangi tatu biasi for his first wife, Mwamvua Mohamed, whom after her death her children had inherited it. The appellant, however, during the trial did not tender any evidence to prove the said ownership.

It is a known principle of the law that whoever wants the Court to believe the existence of a particular fact has to prove it before the Court. The Law of Evidence Act, Cap 6 R.E 2019, places a burden of proof of any particular fact on a person who wishes the Court to believe in its existence. The section reads;

> *"The Burden of Proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."*

Since the appellant failed to prove that ownership of the said houses was transferred to his late wife, Mwamvua Mohamed, in my view, the trial Court correctly regarded them as matrimonial assets. For that reason, this Court finds that that ground lacks merit, and it is hereby dismissed.

On ground two of the appeal, it was the appellant's contention that the Court erred as it divided the same farm to both parties, while I agree with Mr. Hittu

that the law does allow the exact property to be given to both parties, I also agree with Ms. Kayombo that, in the present case, under the circumstances, giving the same farm to both parties without specifying the percentage each gets will create chaos, especially since in the said farm there is a house which was distributed to the respondent alone. Thus, this Court finds this ground has merit, and the same should be considered during distribution.

On the third ground of appeal, it was the contention of the appellant counsel that the Court erred when ordered one of the houses at Mkuranga to be given to the respondent while the same was built by the appellant in 1970 before meeting with the respondent, and the respondent had failed to prove that there was any improvement on the said house and if they were, she failed to prove that she contributed to the improvement. I agree with Ms. Kayombo that, for the matrimonial property to be subject to division between the parties upon dissolution of the marriage, it must be shown that it was acquired by the parties during marriage by their joint efforts.

However, section 114(3) clarifies that even assets that were acquired by one party before marriage qualify to be matrimonial assets if they are substantially improved during marriage by joint efforts. The provision says;

"For the purpose of this section, reference to assets acquired during 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."

In the present case, even though the appellant alleges that the houses were built in 1970. According to the evidence of the respondent, they constructed five houses in the area, a fact which the appellant did not dispute as he had agreed that there were five houses in the area, some of which he had sold to other persons. Since, at that time, it is shown in evidence that the respondent was doing business with the appellant, it goes without saying that she had contributed to the acquisition of the houses, and for that reason this ground fails.

On the fourth ground of appeal, the appellant challenged the division of the assets as done by the trial Court since it did not consider the fact that the appellant has other wives who have an interest in the properties. In his submission, Mr. Hittu attacked the argument and advanced that the appellant failed to prove that he had other wives. It has to be noted that this was not among the issues that were contested during the trial. During the trial, the fact that the appellant has other wives was not among the issues

that the Court determined, as both parties, even the respondent herself, acknowledged that she was the third wife and the appellant had other wives. Since it is evident that the appellant has other wives apart from the respondent, it is obvious that the other wives also have an interest in the properties. The Court ought to have considered this fact when making the order for distribution, and due to that, I find that this ground has merit.

Considering the above factor and the fact that the Court had allocated the same farm to both parties, it is imperative now to change the order of distribution. In that regard, since the appellant has other wives and his contribution towards the acquisition of the properties is immense, I find it just and fair to distribute the house at Mbagala Rangi tatu, a house at Mtoni Mtongani, the remaining three houses at Mkuranga to the appellant and the respondent should get a house at Ngunguti Mkuranga, a house at Mgawa Mkuranga and a farm at Mgawa Mkuranga.

In the event this appeal is allowed to the extent provided above, and I make no order as to costs.

Dated at **Dar es Salaam** this 31st day of May, 2024.

S. S. SARWATT

JUDGE

Delivered in the presence of the appellant and the respondent in persons, and Mr. Hussein Hittu advocate for the respondent.

Right of appeal is fully explained.