IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB REGISTRY

AT SHINYANGA

MATRIMONIAL APPEAL NO. 20240521100001162 4

(Arising from Matrimonial Appeal No.47 of 2023, before Kahama District Court, the same arise from Matrimonial Cause No. 25 of 2023 Kahama Urban Primary Court)

OGANDA CHACHA OCHIENG .....APPELLANT

VERSUS

VAILETH WILLIAM BULILI .....RESPONDENT

JUDGMENT

18th & 26th June 2024

F.H. MAHIMBALI, J

The appellant and the respondent were married couples since 4th February 2012. They are blessed with two children. The two had been in peaceful matrimonial life until 2017 when their marriage turned into soar. Efforts to settle it before the elders, police –gender desk, social welfare office and marriage conciliation board all proved futile. Thus, resorted to the trial court for divorce where the same was granted. Subsequent to the issuance of the decree of divorce, division of matrimonial properties and custody of their two issues followed. Dissatisfied with the division of the matrimonial assets, the appellant

unsuccessfully appealed before the first appellate court. This now is the second appeal; the appellant is knocking the doors of this court armed with a total of five grounds of appeal which constructively are challenging the decision of the first appellate court on the division of matrimonial properties as being not just and fair. In essence, the appellant's concerns can be jointly condensed that his evidence on the acquisition/contribution of the matrimonial assets subject to the division was not just and fair as his evidence had been heavier than that of the respondent.

1. That, the first appellate court erred in law and facts by not considering appeal grounds by failure to record appellant's evidence during the hearing of the suit.
2. That, the first appellate court erred in law and facts by entertaining documentary evidence (print out electronic evidence) to which lack jurisdiction to try as per electronic evidence Act.
3. That, the first appellate court erred in law and fact in not taking into consideration appellant's heavy weight evidence.
4. That the appellate court erred in law and facts by not making analysis of the evidence in record.

5. That the both courts erred in law and facts by failure to analyze nature, substance and quality of evidence adduced by the appellant's side.

During the hearing of this appeal, both parties appeared in person and unrepresented. Arguing for the appeal, the appellant prayed for his grounds of appeal be adopted by the court to form part of his submission. In addition, he prayed for the appeal be allowed. Furthermore, he stated that there are some assets of his clients which he had held them in lien. The same are in custody of the respondent. He prayed that they be given back to him.

On the side of the respondent, she prayed for her reply to the grounds of appeal be adopted to form part of her submission. She also amplified that this appeal is bankrupt of any merit. The appellant has no any basis of this appeal. It be dismissed with costs. According to her, she bolsted having managed to establish on the fact of the acquisition of the matrimonial properties sufficiently.

Having heard both parties to the appeal, I have now to determine the appeal and the major issue for deliberation is whether this appeal has been brought with sufficient cause.

I have keenly followed the proceedings of the case at the trial Court, and what is complained by the appellant that there was unequal distribution of matrimonial assets and the extent of contributions towards the acquisition of the matrimonial assets were not regarded and further, there were some procedural irregularities.

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, unless the lower courts below have misapprehended the substance, nature and quality of such evidence which result into unfair decision in the interest of justice, then the second appellate Court may interfere. (See **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).**

The appellant had complained that the trial Court did not properly record the appellant and his witnesses' testimonies. Thus, he faults the both lower courts' judgement for that irregularity.

Before I proceed, I would like to highlight that, it is a trite law, court records are deemed authentic and cannot be easily impeached, since they accurately represent what happened. (See **Halfani Sudi vs Abieza Chichili [1998] TLR 527 and Hellena Adam Elisha @ Hellen Silas Masui vs Yahaya Shabani & Another [2021] TZCA 669 (TANZLII).**

Glaring from the principle above, it is very difficult to ascertain whether what was testified before the trial Court was not or properly recorded. Such complaint cannot hold water unless there is clear proof to that effect impeaching the integrity of the judicial proceedings. Judicial officers exercise their duties basing on their oath of diligence of their office at all time. In consideration of the fact that what is dully recorded must be accordingly signed, if that is all done, impeaching such a serious court record, is equal to opening up a Pandora's box where by any one aggrieved by that decision may end up complaining the same (See **Paulo Osinya V. R**, (1959) EA 353. The evidence in record, has not rebutted this presumption).

Despite that, I agree with the appellant that, the first appellate court did not touch the complained ground, yet the same has not vitiated the proceedings of the trial Court as per facts of the case. See **Halfani Sudi vs Abieza Chichili (supra), Hellena Adam Elisha @ Hellen Silas Masui vs Yahaya Shabani & Another (supra).**

There is also a complaint on the use of electronic evidence by the trial Court that it has no such jurisdiction and that the appellant was denied with such documents. Worthily, when the appellant had been given the floor before the first appellate court, did not mention what exactly electronic documents acted upon by the trial court. Instead, much time spent on division of matrimonial assets. However, I have endeavored my efforts to see those exhibits and came with the conclusion that the alleged printed out exhibits includes; the communication statement of Vailet from Tigo Tanzania PLC and the print out from Vodacom transaction. When looked thier admissibility, the same were admitted without objection. And the appellant did not ouster the court to receive it on reasons of lack of jurisdiction. Apparently, I do not agree with the Appellant on the firm stand that, the primary court lacks jurisdiction when evidence fall under electronic form. The Electronic Transaction Act under sections 2 and 18 allow its application

but insistence is on the compliance of the law. Though I am aware the rules governing evidence in primary Court do not incorporate the Electronic Transaction Act, but the same is used in isolation in its applicability (See **Christina Thomas vs Joyce Justo Shimba,** Pc. Civil Appeal No.84 of 2020).

However, my critic is, whether the appellant has been prejudiced with the said document? The answer is in negation. The admissibility of such evidence was in line to prove funds which the respondent had and used in development of the property (house). Therefore, it was for the court to weigh such evidence.

Therefore, that was in compliance with the elementary principle of he who alleges must prove as embodied in the provisions of Rules 6 of The Magistrates' Court (Rules of Evidence in Primary Curts) Regulations, also stated in the case of **Abdul Karim Haji v Raymond Nchimbi Alois and Another,** Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that: -

> *"..it is an elementary principle that he who alleges is the one responsible to prove his allegations."*

Applying the above authority of the law, the respondent was duty-bound to prove her allegations**.**

Over and above, the complaint of the use of electronic evidence is baseless and is devoid of any merit.

With respect to complaint of failure to make clear analysis on the weight of evidence. This court has endeavored its mind to weigh the evidence adduced by both parties before the trial Court. However, I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only.

The respondent had testified that when married to the appellant had a plot at Igomelo – Kahama Municipality. They jointly built a house and started living thereat, its title deed (right of Occupancy) was lost. Thereafter, the respondent had an idea that since she has other children not born by the appellant, she should therefore find separate properties for welfare of those children. To have a bless, she involved the appellant on that ambition. Both parties agreed that they can own properties solemnly and that will not be accounted as matrimonial properties. Being the case, the respondent bought another plot at Mwamva Igomelo from one Omary the sale of which was witnessed by the appellant. She then

started to construct a house but the same is not yet completed. The appellant also bought a plot from one Henry for his personal use. This is vividly via testimonies of SM1, SM2, SM3, SM6, and SU2.

Now, the dispute between the parties is that, the appellant claims that the alleged house by the respondent to be herself alone is not true rather it is a matrimonial asset subject for division.

Going through the evidence before the trial Court, the respondent much detailed how she built the house in question and how much has endeavored her efforts in construction of the house. Exhibits and witnesses had proven on that.

Notably, much complaint is on who purchased the plot at Mwamva Igomelo Kahama Plot No.258 block "V" HD. The respondent alleged that she is the first person to buy it and proceeded with construction at all period. She bought it from Omary Mohamed on 2/8/2015. Her evidence was in collaboration with the testimonies of SM2 street chairman, SU2 a seller and SM6. Lucky enough the appellant also had attested in the sale agreement of that plot. See exhibit PII. In meantime she developed the land and whatever injected thereto was in her name. See exhibit PIV.

On the side of the appellant had stated that the mentioned plot was bought by himself from Omary Mohamed on 2/8/2015. And thus, has injected his money in construction of the house.

Now, who is speaking the truth between the two mindful the seller is one person?

> SU2, (a seller of plot) " *Nakumbuka ilikuwa mwaka 2012 mdai alinitafuta akiwa anataka Kiwanja nilimpeleka kwenye kiwanja eneo la Mwanva akakiona akakipenda. Tukawa tumekubaliana mauziano ya Tshs 600,000/=. Akanitangulizia Tshs 400,000/=, ikabaki Tshs 200,000/= ambayo alikuja kuimalizia kwa muda mwingine tena. Siku anamalizia Tshs 200,000/= aliniita maeneo ya sasagi, nikamkuta na mdaiwa. Mdaiwa ndiye alinipa tshs 200,000/= akiwepo yeye mdai. Nilipomuuliza akasema mdaiwa ni mume wake. Baada ya miaka miwili au mitatu 2015 kama sijakosea, mdai alinifuata tena akiwa anahitaji kiwanja kingine. Tulienda hadi kwenye kiwanja tukakubalina bei kuwa thamani ya Tshs 2,200,000/=. Pesa hiyo nililipwa kwa awamu mbili, awamu ya kwanza nilipewa Tshs 1,100,000/= na mdai, baada ya mwezi mmoja mdai aliniita nyumbani*

kwake, nilipofika niliwakuta wote wawili, wakanipatia Tshs 1,100,000/= iliyokuwa imebakia. Kuhusu kuandika mkataba kuwa nimemaliza kulipwa ilibidi aandike jina la mke (mdai). Tulikaa kama miaka miwili nikawauzia kiwanja kingine tena. Baada ya kuwauzia kiwanja cha tatu tuliachana muda mrefu. Baadaye alinipigia mdai simu, akanieleza amepoteza nyaraka zake hivyo tuende tukaandike mkataba mwingine. Nilikataa nikasema siwezi Kwenda kuandika mkataba mwingine, nikamweleza atafute loss report ndipo nikaenda kuandika mkataba. Badaye alikuja kunipigia simu wakili lema akanieleza niende kuandika mkataba na mdai kwa kuwa ana loss report. Nilienda nikaandika mkataba tulikaa kama miezi miwili huyu bwana mdaiwa naye akanitafuta. Mdaiwa akanieleza nyaraka hazionekani, akaniomba niende kuwaandikia nyaraka nyingine. Nilikataa lakini naye akatumia kigezo cha Kwenda kwa wakili Lema, lema akaniita nikamwandikia mkataba mdaiwa."

When cross examined by the respondent;

"***Kiwanja cha kwanza nilikuuzia mwaka 2012 hatukuwa tunafahamiana kwanza. Mara ya pili pesa***

ulitoa wewe, wewe ndiye ulinipigia simu kutafuta kiwanja na muda mwingi nilikua nawasiliana na wewe, nimeshawahi kuuza kiwanja kinachomilikiwa na mume na mke, Kiwanja hiki PII nakitambua muuzaji ni mimi na mnunuzi ni wewe shahidi wako alikua Oganda. *Alinitafuta mdaiwa Kwenda kuandika nyaraka nyingine. Sikukushirikisha wakati naenda kuandikisha mkataba kiwanja cha tatu .....*" (**emphasis added)**

SM2, street chairman " *mimi nilikua mwenyekiti wa mtaa wa Igomelo kwa awamu tatu mfululizo kuanzia mwaka 2004 had 2019. Wanandoa hawa walikua wananchi wanaoishi katika mtaa wangu. Mdai alianza kununua kiwanja cha kwanza kwa mama igomelo, kiwanja kilileta shida mara ya kwanza. Cha pili mdai aliniita nyumbani kwao akiwa na mume wake mdaiwa.* ***Nilivyofika pale nilikuta ameshamuandaa muuzaji alikua Omary akimuuzia Vaileth (mdai). Kabla sijaanza kuandika na kuthibitisha maandishi niliwauliza kiwanja hicho wakiandike kwa jina la nani, wakakubaliana kiwanja***

hicho kiandikwe jina la Vaileth, Mume wake (mdaiwa) akawa shahidi mali zikawa zinaachana kwani mdaiwa naye alikuja kununua kiwanja kwa Henry Mihayo na mwanaume akaandika kwa jina lake yeye" (emphasis is mine)

From the extract above, it is therefore without scintilla of doubts that; the first plot was bought through joint efforts of the parties, the other plots were bought through sole efforts of the respondent.

Therefore, the plot bought by the respondent is not a matrimonial property. And therefore, whatever attached to it belongs to the owner. Leave apart the sufficient evidence adduced by the respondent in developing the suit premise. Similarly, whatever attached to the joint property belonged to them. **see Zacharia S. Kalenga and Another vs. The Registered Trustee of Evangelical Lutheran Church of Tanzania Iringa Dioceses**, Land Case No.4 of 2020 at page 8.

It is therefore in my considered view that reading thoroughly the evidence at the trial court records, the Appellant is claiming ownership of the land that has been in actual possession and occupation of the respond]ent for a very long period of over nine years. The respondent,

who have long occupied the land and constructed the house is entitled to the plot in question under the prescriptive right and the principle *"quicquid plantatur solo, solo cedit".* - That whatever is planted in the ground belongs to the ground.

Since much have been said, the respondent's testimony was heavier in proving the acquisition and development of the house located on the disputed plot than the appellant. I must therefore conclude that, the said house is not matrimonial assets and not subject for division. 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 :*

(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***", (emphasis 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. 197.

However, taking into consideration that the fourth and fifth grounds of appeal fall on the question of division of matrimonial properties, I will not therefore discuss them separately as the issue for division of matrimonial properties I have detailed it when discussing ground number three.

All this said and done, I agree with the respondent that 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 of the trial court. That said, the appellant's appeal is devoid of any merit and is accordingly dismissed. It being a matrimonial matter, parties shall bear their own costs.

It is so ordered.

Right to further appeal is explained.

DATED at SHINYANGA this 26th day of June, 2024.

F.H. Mahimbali

Judge