IN THE HIGH COURT OF TANZANIA

TEMEKE SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 32 OF 2023

(Originating from Matrimonial No. 181 of 2022 at Temeke District Court at One Judicial Stop Centre)

PRISCA OSCAR MLOKA .....APPELLANT

VERSUS

VALLERY RAFAEL LUANDA .....RESPONDENT

JUDGMENT

Date of last order: 02/02/2024
Date of Judgment: 29/02/2024

OMARI, J.

The parties herein married in the Christian form on 28 September,1996. Problems emerged and the Respondent herein filed Matrimonial Cause No. 181 of 2022 in the District Court of Temeke One Stop Judicial Centre at Temeke seeking *inter alia;* for the marriage to be declared irreparably broken down and a grant of divorce to be issued; an order that the Appellant herein is not entitled to two houses acquired during the marriage; an order that the Appellant hands over to him a motor vehicle make Toyota Runx with Reg. No. T282 DDP and that she accounts for a business from 2010 to date.

The Appellant did not contest the Petition, however, she sought for equal distribution of matrimonial property.

From the pleadings and testimony of the witnesses the trial court deduced that; it is undisputed between the parties that during the subsistence of their marriage they acquired two houses one at Tabata Kisiwani and another at Salasala, a unsurveyed plot at Salasala, a three acre farm at Mkundi Morogoro, a 36 acre farm at Bagamoyo, as well as plot at Nane Nane Morogoro. They also acquired two motor vehicles. During trial the farm in Bagamoyo was said to have been sold thus, removed from the list of matrimonial properties.

What was in dispute is the parties' contribution to the acquisition of the properties and what is the deserved portion for each, as they part ways.

In his judgment the trial magistrate considered the evidence of both sides and was not convinced that there was a justification for equal division of the properties. Guided by section 114 of the Law of Marriage Act, Cap 29 RE 2019 (the LMA) and the cases of **Mohamed Abdallah v. Halima Liswangwe** (1988) TLR 197, **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 and **Gabriel Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 he ordered that the Respondent herein get 65% of the two

houses and a farm at Morogoro so that the Appellant gets 35% of the same properties. The trial court also ordered that the Respondent remain with the motor vehicle make Toyota Kluger with Registration No. T771 BDR. The motor vehicle make Toyota Runx with Registration No. T282 DDP was to remain with the Appellant. The Appellant also remained with the Salasala plot which it was proved to be her personal property.

Aggrieved with the above decision the Appellant approached this court seeking to challenge it on three grounds to wit:

1. That the trial magistrate erred both in law and in fact by recording and regarding the farm located at Lung'wawa Mkundi area in Morogoro as matrimonial property while it belongs to the Appellant as her personal property.
2. That the trial magistrate erred both in law and fact by not considering the farm located at Bagamoyo as matrimonial property.
3. That the trial magistrate erred both in law and fast as he misdirected himself by ordering unequal and unfair distribution of the matrimonial property.

It is on the basis of these three grounds that the Appellant prays for this court to *inter alia* quash and set aside the judgment and decree on the aspects of the division of matrimonial properties.

At the hearing of this appeal the Appellant was represented by Ms. Pamela Kiumo while the Respondent had the services of Mr. Jamhuri Johnson both being learned advocates.

To commence her submission on the first ground of appeal Ms. Kiumo stated a marriage does not operate as a bar for the parties to own personal property. Citing section 58 of the LMA and the case of **Bahati Boniphace Kazuzu v. Ruth Alex Bura,** Civil Appeal No. 287 of 2021 counsel argued that the farm at issue was declared matrimonial property and distributed to the Respondent only. Counsel stated this is an infringement of the Appellants right to own property as enshrined in Article 24 of the Constitution of the United Republic of Tanzania, 1977. According to counsel, the Appellant bought the farm through her own efforts and the same is in her names counsel argued that the Respondent is not concerned with the farm, thus, incorrect for the trial court to distribute it to the Respondent.

Submitting on the second ground counsel argued that in the trial court the Respondent testified he sold the Bagamoyo farm and used the proceeds for

family needs, however he did not state what were the family needs and the Appellant's share from the proceeds. The Appellant was not aware of the disposition she only heard of it during his testimony and she did not consent this according to counsel is contrary to section 161(3) of the Land Act and discussed in the case of **Rehema Salum Abdallah v. Nizar Abdallah Hirji**, Civil Appeal No. 120 of 2018 at page 26 through to 27. She continued to argue that there was no evidence adduced in the trial court to prove the farm is not part of matrimonial property and being it was acquired jointly then it would be just and fair if the trial court to give the Appellant her share.

As regards the third and last ground of appeal counsel submitted that it is on the face of the judgment of the trial court that the Appellant was a business woman doing business and she had different business and currently runs a shop near their house at Salasala. She referred to the case of **Rehema Salum Abdallah v. Nizar Abdallah Hirji**, *(supra)* at page 29 through to 30. Counsel argued that the trial court did not take into consideration how the matrimonial assets were acquired jointly and awarded 35% to the Appellant without mentioning the criteria used to arrive at the distribution. She further argued that this is a misdirection that has occasioned injustice to the Appellant. According to counsel, the Appellant proved that the properties

were acquired by joint efforts. Therefore, the just division would have been 50% to each party. She argued that granting 35% to the Appellant is inappropriate as what her deserved share is 50%.

Counsel then concluded her submission by praying that the appeal be allowed with costs and any other reliefs and orders the court deems to grant.

When it was his turn Mr. Johnson opposed the appeal and submission by the Appellant's counsel. On the first ground of appeal counsel stated that he does not dispute the principle stated, however, went on to argue that before declaring a property owned solely by a person there must be proof to that effect and that the said property was acquired by the party or it was registered in their name. And, according to counsel there was nothing adduced in the trial court by the Appellant to prove this. It was mere words thus; the trial magistrate was correct in finding the property matrimonial property in absence of proof to the contrary.

On the second ground counsel argued that it is a fact that the farm was sold and this was not contravened at trial. It was also stated that it was the Appellant who got the lion's share of the proceeds that were distributed with some balance going towards the construction of the matrimonial home. This, according to counsel was undisputed during trial thus, it is incorrect for her

to raise it now. Counsel further argued the cited case is not applicable for there was no fraud and the proceeds were used by the parties and this was not contested in the trial court.

On the third and last ground counsel argued that the trial magistrate was correct in ordering the matrimonial assets to be divided at the ratio of 35% and 65% to for the Appellant and Respondent and respectively. This, counsel argued is due to the fact that the Respondent adduced evidence to prove his financial contribution to the acquisition of the assets. On the contrary the Appellant did not do this, as even the businesses that the Appellant referred to were mere words as nothing was brought to court to evidence the same. To buttress his argument, counsel referred to the case of **Regina Itandula v. Pendo Joseph** [2017] TLS LR 51 where in it was stated that a spouse must lead evidence to show the extent of her contribution and argued that even in the case of **Bi Hawa Mohamed v. Ally Sefu**, Civil Appeal No. 9 of 1983 the parties did not get equal distribution as they did not meet the guideline for equal distribution. Furthermore, the Respondent's counsel argued that during the trial there was undisputed testimony on how the Respondent not only educated and introduced the Appellant to the various business ventures but also gave her money to establish the same. Thus,

according to counsel the trial court properly applied the principles of division of matrimonial property. Counsel concluded his submission by praying that the court finds the appeal is without merit thus, it be dismissed with costs.

In rejoinder Ms. Kiumo choose to only address on the second and third grounds he stated that the Appellant does not dispute the sale of the plot, however, she is seeking her share as she denies getting any share of the proceeds. As regards there being no documentary evidence to prove her contribution the Appellant's advocate argued that she still deserves to get more than 35% since she used her income for the development of the family including purchasing bricks for the Salasala house while the capital for the *batik* business was an award from VETA for being the best student in her course.

Having considered the opposing submission by counsel for and against the appeal; it is discernible that there is only one issue to determine that is whether the grounds of appeal; all based on the division of matrimonial properties are meritorious. And, if so what is the way forward. Nonetheless, before I proceed to do so I wish to state that I am alive to the principle that a first appellate court is obliged to re-evaluate the evidence adduced in the trail court. This has been the subject of many decisions see for instance;

Hassan Mohammed Mfaume v. Republic, (1981) T.L.R 167 and **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another,** Civil Appeal No. 421 of 2021. See also **Faki Said Mtanda v. Republic**, Criminal Application No.249 of 2014 where the Court of Appeal cited the decision of then East African Court of Appeal in the case of **R.D.Pandya v. Republic** [1957]EA 336 quoting the same where it was stated that:

> *"It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion."*

This being a first appeal, I am therefore mandated to go back to the evidence that is available on the record and re-evaluate the same and arrive at a conclusion if need be. Since all the three ground of appeal are pivoted on the issue of distribution of matrimonial properties, I shall collectively discuss them and consider the individual properties in the course of my determination of the question as to whether the distribution done by the trial court was done in accordance to the law and the evidence adduced in court.

From the record of the trial court the properties that were listed as matrimonial properties include the three-acre farm at Lung'wawa Mkundi

Morogoro (also the Morogoro property). This, the Appellant is claiming to be her personal property thus, wrongly distributed to the Respondent. On page 14 of typed trial courts proceedings the Respondent had this to say as regards to the said property:

> *"Later I took a loan I bought almost 3 acres land and Lung'wawa one bus stop before Mkundi Morogoro municipally. It used to be a farm now they are plots. She is the one who did the surveying and 15 plots came out one of which she gave our child. So, 14 plots still exist but I had no idea that all that was going on"*

This testimony was not contradicted during cross examination. During her testimony the Appellant had this to say as regards the Morogoro property:

> *"Together we have a house at Tabata, Salasala, A 36 Acre farm at Bagamoyo. After that I went a bought a farm at Morogoro."*

In her testimony it is not clear how the said land in Morogoro was bought. However, the same was not contradicted during cross examination. Throughout her testimony the Appellant maintained she run businesses; a salon, a *batik* making venture, and later on a shop selling *vitenge* and bed sheets. Unlike the Respondent, she did not testify how the business were

yielding and enabled her to contribute financially. All the same, she in one way or another contributed to the family's wellbeing and development to the extent of purchasing 70 bricks so that a plot in Salasala could appear developed to escape repossession by the government. The Respondent on the other hand had documentary proof in the form of salary slips, loan contracts and statements from banks and SACCOS to evidence his financial contribution.

After considering the evidence of both parties the trial court on page 6 of the trial court's judgment had this to say:

> *"On my part while I readily agree with Mr. Johnson that the Petitioner has supplied with enough evidence and justification to indicate that he played a largest role in the acquisition of the said properties, I still cannot reasonably rule out the Respondent's participation completely. In my view, despite the absence of proof to support her oral testimony it is hard to believe that throughout the two decades they lived together, she did nothing to assist the Petitioner in his endeavors. For just that reason, I find her assertion that she helped by supervising the construction, speaking to the Petitioner about things the want to do, buying 70 bricks for the Plot at*

Salasala so that it would not be possessed by the government meritorious"

This, in my view is a conclusion the trial magistrate arrived at after weighing the evidence as adduced by the Appellant (the then Respondent) against that of the the Respondent who was the Petitioner in the trial court. As stated by the Respondent's counsel in his submission while the case of **Bi Hawa Mohamed v. Ally Sefu** *(supra)* laid down the principles for equal division of assets it did not take away the requirement for a party seeking such division to be equal to adduce evidence as regards the same. This was also canvased by the trial court on page 6 through to 7 of the judgment. It had this to say:

> "***The law is still clear under section 114 of the LMA that division of matrimonial properties is based on contribution towards the acquisition of the said property.*** *In this regard there is a plethora of authorities from the case of Mohamed Abdallah v. Halima Lisangwe 91988) TLR 197, Yesse Mrisho v. Sania Abdul, Civil Appeal No 147 of 2016 and Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo, Civil Appeal No 102 of 2018 CAT unreported to mention a few" (emphasis supplied)*

This clearly depicts that after scrutinizing the evidence before him the trial magistrate, who also had the advantage of hearing first hand from the parties

and witnesses went on to apply the same to the law. He was guided further by the **Mohamed Abdallah v. Halima Liswangwe** *(supra)* case wherein the court held that division of matrimonial property under the LMA is guided by a principle of compensation whether it be monetary or domestic work. Furthermore, in the case of **Gabriel Kurwijila v. Theresia Hassan Malongo** *(supra)* the Court of Appeal held the view that in resolving the question as to what is the extent of each party's contribution a court will mostly rely on evidence adduced by the parties.

As already stated the Respondent's evidence was backed by documentation and explanations on how he contributed while that of the Appellant was mainly anecdotal and general. It is on that basis and on the strength of the authorities he so cited the trial magistrate found as follows:

> *"On that note the properties shall not be divided equally. Instead as to the two houses and farm at Lung'wawa Morogoro the Petitioner shall get sixty five percent of the value whereas the Respondent shall get thirty-five."*

This, in my view, means that as regards the two houses one at Tabata Kisiwani and another at Salasala the Appellant is entitled to 35% of each houses' value. Furthermore, she is entitled to 35% of the value of the farm

at Lung'awawa Mkundi area. Therefore, submission by the Appellant's counsel that the said farm was distributed to the Respondent only is misguided if not conjecture for it not backed by anything in the judgment or decree of the trial court. The said farm was distributed to both of the parties. Which brings me to the Appellant's complaint that the said farm is hers and should not have been considered as matrimonial property.

After having gone through the record I see that the Appellant testified that she bought the Morogoro property and it is she who processed the same into plots. The Respondent also testified that he took out a loan and bought the said property in the form of a farm. He went further and acknowledged that it is the Appellant who did the surveying which resulted into 15 plots 1 of which was given to the couple's child.

While he admitted that the plots still exist he also testified that he is unaware of what is going on. Both parties stated they bought the property and this testimony was not contradicted by either party nor was there any documentary evidence adduced by either party as regards the ownership of the said property. The Appellant in her testimony stated she surveyed the said property and this was also the testimony of the Respondent.

Two questions arise that need to be answered. The first is whether any of the parties proved that they have exclusive rights over the said property and the same is not matrimonial property. In my view the answer is a simple no. Therefore, the trial magistrate did not err in considering the same as matrimonial property. The second question is, what is the contribution of each party in the acquisition of the said property. Once again, both parties testified to have bought the said property, however there is undisputed evidence that the Appellant did the surveying on the plots thus, adding value to the said property. None of them has an actual claim of the extent of contribution so it is only fair that the property be equally divided amongst the two. In this regard, I am persuaded by this court's decision in **Joyce Nyantori v. Ibrahim Yeremiah Mwayela**, Civil Appeal No 12 of 2021 wherein this court dealt with a situation like in the present case where none of the parties adduced any evidence on the contribution made by either party which makes it justifiable not to require any of the parties to give evidence but divide the property equally. I therefore adjust the percentage of the property in Lung'wawa, Mkundi Morogoro to 50% to the Appellant and the remaining 50% to the Respondent.

I now turn to the farm at Bagamoyo which the Appellant's counsel is acknowledging it is sold, however, the Appellant is seeking her share of the proceeds. In her testimony she did not contest the Respondent's testimony that she was given TZS 5,000,000 of the proceeds and that remaining sum was given to the issue of marriage and used for finishing some parts of the couple's house and other uses. This in my opinion renders her argument of not consenting the sale unmeritorious. I agree with the Respondent's counsel that the cited case of of **Rehema Salum Abdallah v. Nizar Abdallah Hirji** *(supra)* is distinguishable from the appeal at hand. Likewise, the argument of the farm being considered matrimonial property is futile since the same is not existing as property of either one of the parties since it was sold during the pendency of the marriage and there was no evidence to dispute this. It is for this reason I find the second ground unmeritorious and dismiss it. Having discussed all the above the third ground of appeal is also found partly meritorious as the first ground.

Accordingly, the Appeal is only allowed to the extent stated; for clarity the property at Lung'wawa Mkundi area in Morogoro is ordered to be divided equally between the parties that is 50% to the Appellant and the remaining

50% to the Respondent. The other orders of the trial court remain undisturbed. This being a matrimonial matter, I make no orders as to costs.

It is so ordered.

A.A. OMARI

JUDGE

29/02/2024

Judgment delivered and dated 29th day of February, 2024 in the presence of Jamhuri Johnson advocate for the Respondent and the Appellant appearing in person.

A.A. OMARI

JUDGE

29/02/2024