THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. CIVIL APPEAL NO 15 OF 2022

(Originating from Tandahimba District Court in Matrimonial Appeal No.4 of 2021 and Tandahimba Primary Court in Matrimonial Cause No.30 of 2021.)

BASHIRU FARAJI LIUMBA ..... APPELLANT

VERSUS

ZUENA SAID MOHAMED ..... RESPONDENT

JUDGMENT

14/12/2023 & 27/02/2024

LALTAIKA, J.

The appellant herein **BASHIRU FARAJI LIUMBA** is dissatisfied with the decision of Tandahimba District Court in Matrimonial Appeal No.4 of 2021 that arose from the Judgement and Decree of Tandahimba Primary Court in Matrimonial Cause No.30 of 2021. The appeal is based on the following grounds that:

1. *That the Honourable Magistrate erred in law and in fact for being silent on the matrimonial division made by BAKWATA simply because it was not supported by the law.*
2. *That the Honourable Magistrate erred in fact and in law by failure to analyze facts before arriving at the conclusion on dividing the matrimonial assets.*

3. *That the Honourable Magistrate erred in fact in law by holding that the Appellant and Respondent were not married.*
4. *That the Honorable Magistrate erred in fact and in law by dividing matrimonial assets without the contribution of the parties being proved.*

When the appeal was called for mention, the parties suggested proceeding in disposing the same by way of written submissions. A schedule to that effect was jointly agreed upon and the same has been spotlessly adhered to. It appears that the appellant was assisted by an anonymous legal aid provider while the respondent enjoyed the services of Ms. Rose Ndemereje, learned Advocate. I take this opportunity to register my appreciation for their invaluable services.

At this juncture, a factual and contextual backdrop necessary for connecting the dots on the present appeal is considered imperative. The parties herein contracted an Islamic marriage in 1998. During their marriage, they successfully acquired various matrimonial properties, including three houses, three farms, a motorcycle, one TV, 3700 bricks, and household utensils. Records indicate no issue that the parties were blessed with during the entirety of their marriage.

The parties enjoyed their union until 2018 albeit with normal disagreement before their marriage irreparably broke down. It was at this time that the Respondent filed for divorce and the distribution of their acquired matrimonial properties, initiating **Matrimonial Cause No. 30 of 2021 before the Primary Court of Tandahimba at Tandahimba**. Following a full hearing, the trial court issued a divorce and distributed the matrimonial properties accordingly.

Dissatisfied with the trial court's decision, the Respondent timely and successfully appealed before the District Court of Tandahimba at

Tandahimba. On the 10th day of May 2022, the judgment was delivered, and the appeal was allowed to a certain extent particularly on property distribution. The present appellant, discontent with the first appellate court's decision, filed this appeal on the 16th day of June 2023 premised on the grounds reproduced herein above.

The appellant prayed to abandon the third ground of appeal and proceed with the rest three. He argued on the first ground that the first appellate court erred in law and fact by remaining silent on the division of matrimonial assets by BAKWATA as a reconciliation board. Referring to the Judgment of the first appellate court, the appellant insisted that according to Section 114 of the **Law of Marriage Act, Cap 29 RE. 2019**, the provision bestows the power of the division of matrimonial properties to the Court.

The appellant referred to **Adelina Koku Anifa & Another Vs Byarugaba Alex** Civil Appeal No. 46 of 2019, where the Court commented that if a lower court or tribunal does not observe the demands of any particular provision of law, an appellate Court cannot close its eyes to such glaring illegality. The appellant expressed the view that if the Court remains silent on such an error, he will suffer injustice because the Respondent will enjoy double benefits from the same matrimonial assets.

On **the second and fourth grounds of appeal**, the appellant pointed out that Section 114 of the Law of Marriage Act Cap 29 R.E 2019 empowers the Court, when granting or after the grant of divorce, to order the division of the assets acquired during the marriage by joint efforts. In exercising such powers, appellant averred, the Court is required to consider

the extent of contributions made by each party in money, property, or work towards the acquisition of the assets.

The appellant argued that in the present matter, there is no proof of the existence or effort of either party in acquiring the claimed properties based on the proceedings of the trial court and the first appellate court. The appellant acknowledged the reasoning of the first appellate court, which considered admissions of the parties as sufficient evidence of the existence of the properties. However, he emphasized that the law requires proof of the extent of contributions made by the parties in acquiring the said property, and proving only the existence of the properties does not fully comply with this requirement.

Citing **Hidaya Ally Vs Amiri Mlugu** [2015] TLR 329 at Page 333, the appellant highlighted that the Court of Appeal of Tanzania held that adequate evidence is required to show the extent of contribution in terms of money or any other form of input in relation to the existence of the property subject to distribution. Referring to **Ally Linus and 11 others versus Tanzania Harbours Authority and Another** [1998] TLR 5, the appellant underscored the duty of the judge to act judicially and not to dissent lightly from the considered opinions of colleagues.

In conclusion, based on the arguments and cited authorities, the appellant prayed for this Court to reverse and set aside the Judgment and Decree of the first appellate court and allow the appeal with costs.

The respondent replied to the grounds of appeal in the order followed by the appellant starting with the first ground. She expressed that the appellant failed to understand the judgments of the first appellate court

and the trial court, as they were clear and self-explanatory when read between the lines.

The respondent mentioned that the court overruled BAKWATA'S decision on pages 5-6 of the typed judgment, and she had never appealed on that particular issue. At the appellate stage, the respondent asserted, the District Court of Tandahimba appreciated the trial court's judgment on that aspect.

The respondent acknowledged that, according to section 102 (1) of the **Law of Marriage Act,** Cap 29 R.E 2019, BAKWATA is empowered as a Marriage Conciliation Board to deal with Muslim matrimonial disputes before the spouses seek a divorce through the court, as the respondent did. She expressed the opinion that the appellate court being silent on the matrimonial division made by BAKWATA, simply because it was not supported by the law, was correct.

Although BAKWATA was not bestowed with the power to deal with the division of matrimonial properties; Respondent reasoned, it was empowered to resolve and reconcile the spouses' disputes. The respondent argued that this did not cause any injustice, as claimed by the appellant.

Regarding the second and fourth grounds of appeal, the respondent asserted that it is undisputed that, in matrimonial cases, there is no distribution of properties without the parties demonstrating and establishing the extent of their contribution in terms of monetary, property, or work towards acquiring matrimonial assets. She referred to section 114 (1) (2) (b) of the Law of Marriage Act (supra) and cited the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R. 32, emphasizing that the extent of contribution required by the law should be demonstrated by both spouses.

The respondent pointed out that the case originated from the Primary Court of Tandahimba at Tandahimba, and the trial magistrate was in a position to note the extent of the contribution done by the parties towards the acquisition of the alleged matrimonial properties. Both the Primary Court and the District Court admitted that the properties were equally contributed, and therefore, they deserved to be equally distributed.

The respondent reminded the court that failure to cross-examine amounts to admission, citing the case of **Hawadi Msilwa Vs. R** Criminal Appeal No. 59 of 2019 (Unreported) and **Fabian Dumila vs. R**, Criminal Appeal No. 136 of 2014 CAT (Unreported). She argued that both parties admitted to the acquisition of matrimonial properties at the trial court, and based on the governing principles and cited cases, there was no need for them to prove how the properties were acquired unless one party objected to the allegations made by the other party.

In conclusion, the respondent, based on the above submissions and authorities cited, expressed that the appeal had no merits and prayed for this Court to dismiss the entire appeal with costs.

I have dispassionately considered the rival submissions and carefully examined the lower courts' records. I commend the learned trial and first appellate Magistrates for their attention to details and sound reasoning. I am especially impressed by the trial Magistrate who flexibly dealt with the illegality occasioned by BAKWATA's Reconciliatory Board in dividing the matrimonial property while its mandated is limited to reconciliation. The first appellate Court, having discovered that some properties were left out endorsed the trial court's finding that the properties were acquired through joint efforts and proceeded to divide them equally.

Do I find any merit in the present appeal? May be not but let me address the grounds of appeal in simplest of expressions.

The complaint in the first ground of appeal that it was erroneous for the first appellate court to keep silent on the matrimonial division made by BAKWATA simply because it was not supported by the law is, to say the list, unnecessary usurpation of technicalities. Admittedly the learned first Appellate Magistrate wrote in his judgement the following sentence:

> *"This court is silent on the matrimonial division made by BAKWATA simple because it was not supported by the law."*

I agree with the respondent that the appellant missed the point in both the trial and the first appellate court's judgement. One needs only to go back to the trial court's judgment to realize that the learned Magistrate confronted the illegality head on. He proceeded to state that although the division of property made by the reconciliation board was illegal, he was not going to order the parties to return whatever they had exchanged between themselves. He proceeded to take such division into consideration as he outlines what he considered equal distribution.

I should add also that it appears the appellant benefitted from the division made by the reconciliation board and implemented it albeit with frequent unfulfilled promises prompting his ex-wife to knock on the doors of Tandahimba Primary Court as narrated. I see no merit and the ground of appeal hereby fails.

With regards to the 2nd, 3rd, and 4th grounds of appeal, they all deserve at most one sentence each. As alluded, I have read the first appellate court's judgement and I see no failure to failed to analyze facts by whatever standard. Both lower courts impressively articulated the presumption of

marriage for a couple that lived together for 23 years. Lastly, I cannot agree more with the learned District Court Magistrate that if the parties were both farmers it is logical to assume that they contributed equally to the acquisition of the farms and other properties. The only chance to refute such a claim was during cross-examination. Failure to cross-examine is tantamount to acceptance.

Premised on the above, this appeal lacks merit and is hereby dismissed in its entirety. I make no orders as to costs as this is a matrimonial dispute.

It is so ordered.

E.I. LALTAIKA
JUDGE
27.02.2024