IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 102 OF 2018

GABRIEL NIMROD KURWIJILA ..... APPELLANT

VERSUS

THERESIA HASSANI MALONGO ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tanga)

(Msuya, J)

Dated 17th day of August, 2015
in
(PC. Civil Appeal No. 8 of 2014)

JUDGMENT OF THE COURT

10th & 20th February, 2020

MZIRAY, J.A.:

This matter originated from Manundu Urban Primary Court in Korogwe in Matrimonial Cause No. 16 of 2013. In that case, the herein appellant, a Resident Magistrate, successfully petitioned to the trial court for three reliefs of divorce, division of matrimonial properties and custody of the two issues, namely Leah and Nicodemus, who were born during the subsistence of the marriage, before it went in the rocks.

Essentially, after the Primary Court heard the petition it granted the divorce and awarded the appellant a house located at Ifakara in Morogoro Region, 12 heads of cattle and one motor vehicle make Toyota OPA with Registration Number T432 CFG. The two children were also placed in the custody of the appellant. On the part of the respondent, she was awarded a plot of land measuring ¾ of an acre at a place known as Bagamoyo in Korogwe, 51 heads of cattle, four butcher shops at Korogwe, one motor cycle with registration number T760 CGA and two motor vehicles, a Suzuki pick up with registration number 921 CHC and a Honda Accord with Registration Number T 545 AGN.

The respondent was aggrieved with the decision of the trial court. She unsuccessfully appealed to the District Court of Korogwe. Still dissatisfied, she preferred Civil Appeal No. 8 of 2014 in the High Court of Tanzania at Tanga.

Having heard the appeal, the High Court (Msuya, J), on 17/8/2015 confirmed the divorce and order of custody of the two children born in the wedlock. It varied the order of division of matrimonial properties to the extent that the house at Ifakara was declared the property of Leah Kurwijila – the daughter of the parties', and the motor vehicles Toyota OPA, Honda Accord and the motor cycle were exempted from matrimonial properties; while the division of other properties remained undisturbed.

The outcome of the appeal aggrieved the appellant. He then lodged a notice of appeal on 27/8/2015 and later sought a certificate on point of law which was granted by the High Court in Civil Application No. 21 of 2015 wherein two points were certified i.e. whether there is evidence on record indicating the extent of contribution by the parties and whether the matrimonial assets between the parties were arbitrarily divided.

From the memorandum of appeal lodged on 25/4/2018 the appellant had three complaints: -

1. *That the learned High Court Judge having found and held as a fact that the house at Ifakara is a matrimonial property she erred in law and in fact in ordering that the said house be property of the parties' daughter, Leah Kurwijila.*
2. *That in the alternative, but without prejudice to the first ground of appeal, the learned High Court Judge erred in law and in fact in ordering that the house at Ifakara be the property of Leah Kurwijila who was and still is a minor without assigning any of the parties or any other adult person in charge of the said house as a guardian pending maturity of the said Leah Kurwijila, a minor.*
3. *That the learned High Court Judge erred in law and in fact in reviewing division of matrimonial assets without any regard to*

extent of contribution made by each party and without any inclination towards equality of division.

At the hearing of this appeal the appellant enjoyed the services of Mr. Alfred Akaro, learned advocate and on the part of the respondent had the services of Mr. Dennis Msafiri, learned advocate. Mr. Akaro abandoned the second ground of appeal and proceeded with the first and third grounds.

In answer to the question posed in the first ground of appeal, Mr. Akaro submitted that it was not proper for the High Court Judge to hold that the Ifakara house is a matrimonial property and simultaneously the property of the parties' daughter Leah Kurwijila on account of the fact that there is no even a shred of evidence indicating that the parties purchased the Ifakara house for their daughter; rather, it was a sheer formality. To underscore the point, the learned advocate referred us to the decision of this Court in **Odhiambo Eduor v. Jane Thomas Abuogo**, Civil Appeal No. 21 of 2012 (unreported) on which the decision of the High Court was upheld that properties (houses and plots) purchased by one of the parties in the name of his children were matrimonial properties. It is the contention of the learned advocate that the parties' daughter being a minor could not be awarded ownership of the house without any of the parties being given charge over the same.

He insisted that management of land cannot legally be done by a minor and in his view the High Court seems to have created circumstances for abandonment of the Ifakara house.

In elaborating the third ground, Mr. Akaro submitted that the trial judge did not consider the contribution of each party in the spirit of section 114(2) of the Law of Marriage Act, Cap. 29 R.E. 2002 (LMA) which is inclined torwards equality of division of matrimonial properties jointly acquired. He supports the findings of two courts below and in his view, there was no point for the High Court to disturb and reverse their findings.

He finds that the review of the division of matrimonial assets was uncalled for without consideration of extent of contribution by each party. When quizzed by the Court on the exhibit of sale agreement which appears at page 155 of the record of appeal he conceded that the sale agreement is in the name of Leah for convenience purposes, but it was not the intention of the parties that the house be owned by Leah.

In reply, Mr. Msafiri adopted the written submissions he earlier filed and supported entirely the decision of the High Court. He argued that the intention of the High Court was to exclude the house at Ifakara which apparently is owned by a third party, from the list of matrimonial assets as vividly shown at page 146 and 155 of the record of appeal. He

submitted that, the decision of the High Court was in line with what is contained in the sale agreement. He argued that the house at Ifakara cannot at all be considered as a matrimonial property when in actual fact the plot is in the name of Leah. He submitted that the house will always remain the property of Leah as correctly decided by the High Court even if the parties contributed towards its construction. He stressed that they had constructed it for their daughter hence none between them can claim ownership.

In response to the third ground, the learned advocate argued that there was no evidence adduced at the trial court on the extent of contribution of the appellant to justify the division he is seeking, bearing in mind that the burden was on the appellant to give evidence on the extent of his contribution. He rested his submission by asking the Court to dismiss the appeal with costs. Responding to a question posed by the Court he submitted that, in view of the provisions of section 80(4) of the LMA, a certificate on a point of law is not a requirement on the matrimonial proceedings.

In a brief rejoinder Mr. Akaro reiterated that the intention of the parties was not to vest the property in their daughter but rather it was for convenience hence the division was not equitable.

Upon going through the entire record, the written and oral submissions of the parties through their respective learned counsel we find two issues calling for our determination; one, whether the house at Ifakara was a matrimonial property. If this issue is answered in the affirmative, then the next issue is whether the extent of contribution was established.

Before we embark on the issues for determination, we unhesitantly agree with the respondent learned counsel that a certificate on a point of law in matrimonial proceedings is not a requirement of law as envisaged under section 80(4) of the LMA which provides;

> *"Any person aggrieved by a decision or order of the High Court in its appellate jurisdiction may appeal there from to the Court of Appeal on any ground of law or mixed law and fact."*

Turning to the merit of this appeal, it is evident that the LMA has not specifically defined the term *"matrimonial assets."* Unlike in other jurisdictions like India, the term "matrimonial assets" is defined in section 4(1) of the Matrimonial Property Act, Chapter 275 of the Revised Statutes, 1989 as hereunder:-

> *"In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses*

before or during their marriage, with the exceptions of

(a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;

(b) an award or settlement of damages in court in favour of one spouse;

(c) money paid or payable to one spouse under an insurance policy;

(d) reasonable personal effects of one spouse;

(e) business assets;

(f) property exempted under a marriage contract or separation agreement;

(g) real and personal property acquired after separation unless the spouses resume cohabitation."

The definition given is not far from what this Court stated in the famous case of **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32 when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. The Court stated:-

"The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our

considered view, the term "matrimonial assets" means the same thing as what is otherwise described as "family assets". Under paragraph 1064 of Lord Hailsham's HALBURY'S LAWS OF ENGLAND, 4th Edition, p. 491, it is stated,

> *"The phrase "family assets" has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and the furniture in it (2) those which are of a revenue nature – producing nature such as the earning power of husband and wife."*

The position in India, which we take inspiration, is quite similar to that in our jurisdiction when it comes to interpret the phrase "matrimonial assets", which in our view is similar to the phrase *"family assets"* used in the Indian Act. They refers to those property acquired by one or 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.

The immediate question we pose now is whether the house at Ifakara constitutes a matrimonial asset within the purview of section 114 of the LMA. It is undisputed that the plot at Ifakara was purchased in the name of the parties' daughter Leah as shown at page 155 of the record of appeal where there is a document termed *hati ya mauzo (Deed of Sale).* In the said document it is crystal clear that the respondent purchased the plot on behalf of Leah, who was a minor, and the appellant was a witness to that transaction. The intention of the parties could be derived at page 148 when the appellant stated that;

> *". . . we intended the same to be the property of Leah but it was a matrimonial asset."*

From the above excerpt, we tend to agree with Mr. Msafiri that the decision of the High Court was more inclined in the sale agreement at page 155 of the record of appeal and as correctly held by the High Court Judge at page 289 of the record of appeal that,

> *"And since it is in the name of their daughter, the same should remain the property of the daughter, one Leah Kurwijila as intended by the parties."*

We think that the High Court Judge made a correct conclusion in the circumstances of the case, because as per the evidence on record there is no dispute that the respondent bought the land at Ifakara in the

name of their daughter, Leah under her guardianship, as by that time Leah was still a minor. Therefore, the argument by Mr. Akaro that the said house cannot simultaneously be a matrimonial property and also a property owned independently by Leah is valid. We have however observed that, though the High Court Judge wrongly categorized the said house as a matrimonial property, she arrived at an appropriate conclusion that the said house belongs to Leah. We thus find the High Court Judge to have wisely concluded on the matter and for that reason, the first ground of appeal is partly allowed to the extent of the High Court Judge categorizing the Ifakara House as a matrimonial asset. We emphasize that, since the Ifakara house is the property of Leah cannot be grouped in the matrimonial assets. As the plot was purchased by the respondent we assign charge of the said house to the respondent until such time the child Leah attains the age of majority.

Having abandoned the second ground of appeal, the last complaint of the appellant is that in reviewing division of matrimonial assets the High Court Judge did not consider the extent of contribution made by each party and without any inclination towards equality of division. The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on

the evidence adduced by the parties to prove the extent of contribution. What we observed in the proceedings before the Primary Court is that, neither the appellant nor the respondent did testify anything regarding the extent of contribution when acquiring the matrimonial properties. The appellant dwelt deeply in leading evidence for proving divorce. The only evidence as to properties as rightly pointed by Mr. Msafiri was when he was being cross-examined by the trial magistrate at pages 12 and 13 of the record of appeal and he ended up only mentioning the properties without more. It was expected for him to adduce evidence showing his extent of contribution on each and every property but such evidence was not forthwith coming. The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property. In **Yesse Mrisho v. Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported) this Court stated that,

> *"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."*

It is clear therefore that extent of contribution by a party in a matrimonial proceeding is a question of evidence. Once there is no

evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise also where there is no evidence to prove extent of contribution.

In view of the foregoing, we find this appeal to be devoid of merit and consequently dismiss it. Given the nature of the case and the circumstances pertaining therein, we make no order as to costs.

DATED at **TANGA** this 18th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 20th day of February, 2020 in the presence of Mr. Alfred Josephat Akaro, learned Counsel for the Appellant and Mr. Hassan A. Kilule, learned counsel holding brief for Mr. Denis Msafiri, learned counsel for the Respondent is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL