IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO. 24 OF 2023

(Appeal from the decision of District Court of Temeke, One Stop Judicial Centre at Temeke in Matrimonial Appeal No. 69 of 2021)

NURU ABRAHAM SEPETU.....APPELLANT

VERSUS

YUSUPH WASHOKERA.....RESPONDENT

JUDGMENT

17th October & 03th November, 2023

BARTHY, J.

The appellant being aggrieved by the decision of the District Court of Temeke, One Stop Judicial Centre at Temeke in Matrimonial Appeal No. 69 of 2021 delivered on 15th March 2023, appeals to this court based on the following grounds;

1. *That, the trial magistrate grossly erred in law and fact by not considering the contribution of the appellant herein in the acquisition of the matrimonial properties.*
2. *That, the trial court erred in law and facts by holding that the property given to the appellant during subsistence of*

marriage amounts to distribution of matrimonial property after dissolution of marriage.

3. *That, the trial court erred in law and in fact by holding that the property under the sole name of their beloved issue given to the appellant amounts to the distribution of matrimonial properties during the dissolution of marriage.*
4. *That, the trial court erred in law and in fact by holding that the appellant is not entitled to any distribution of the company's proceeds that was acquired, registered, and operated by the respondent during subsistence of marriage.*

Wherefore, the appellant prays for appeal to be allowed and the judgment and decree delivered by the District Court to be quashed and set aside; the order of equitable distribution of matrimonial properties acquired during the subsistence of the marriage, the respondent to provide maintenance of three issues and bear the cost of the appeal.

Before embarking into substance of this matter, the background of this matter is crucial in order to appreciate this appeal. The appellant and the respondent were wife and the husband respectful who celebrate their

Islamic marriage in the year 2004. They are blessed with three issues Riffat, Sasha and Haidari. The oldest child born in the year 2005.

The couple had a humble beginning but they had quarrels for most part of their live including allegations of adultery, assault and a lot of misunderstanding. The respondent issued three talaq according to the Muslim law which was confirmed by BAKWATA. Then the appellant petitioned for decree of divorce before the primary court of Kawe and division of matrimonial properties.

The trial court upon hearing the matter granted the decree for divorce and went ahead to order division of the shared matrimonial assets. The decision which did not amuse the appellant who appealed to the district court, again not dissatisfied with its decision. The appellant then appealed to this court challenging the distribution of matrimonial assets.

At the hearing, the appellant enjoyed services of learned advocates. In consensus parties agreed this appeal to be disposed of by the way of written submission, both sides adhered to the filing schedule timely. Whereas the appellant's submission was drawn by Makubi Kunju Makubi and Hosea Chamba learned advocates and for the respondent it was drawn by David Andindilile learned advocate.

Arguing in favour of grounds of appeal, the counsels for the appellant prayed to make an amendment under Order VI rule 17 of the

Civil Procedure Code (Cap 33, R.E 2019) on the words "trial magistrate" appearing in 1st ground and "trial court" appearing in 2nd, 3rd and 4th grounds of appeal be cancelled and replaced by "first appellate court," Also the appellant chose to abandon the 3rd ground thus, remaining with three grounds.

Submitting on the first ground, the counsels for the appellant argued that, the first appellate court affirmed the decision of the trial court on the ground that, the appellant had failed to prove what she contributed towards the acquisition of matrimonial assets.

As the dispute was first referred to BAKWATA as their Marriage Conciliation Board and the appellant was given the total sum of fifty million Shillings, a car make Toyota Harrier (T804DCU) and two plots after talaq was issued.

The counsels for the appellant further submitted that, those properties were given to the appellant as gift (*Ihsan/Mut'ah*) which acts as appreciation to the appellant for the good years they lived together and the said properties were given before the marriage was dissolved or the referred to Kawe Primary Court.

It was their argument that the first appellate court failed to apply the principles laid down by the Law of Marriage Act and did not consider the contribution and give order to the division of matrimonial assets simply

on the ground that the appellant was already given which was said not to be proper.

The counsels for the appellant further argued that, the first appellate court confirmed the decision of the trial court on the award of 10,000,000/= which was said to be wrong and misapplication of the legal principles regarding the division of matrimonial assets under section 114(1) of the Law of Marriage Act.

It was their submission that, the appellant deserves to have a share in the matrimonial assets because she contributed towards its acquisition as the wife by maintaining and developing the matrimonial house at Mbezi Mbezi, Block E, Plot No. 541 for more than 19 years and for being a businesswoman working as the caterer, decorations services, company supervisor, contribution in household expenses and acquisition.

On the second ground, the counsels for the appellant stated that, the properties given to the appellant by the respondent during subsistence of marriage did not amount to distribution. The respondent gave the appellant a gift Mut'ah/Ihsan of 50,000,000/= Tsh, a car make Toyota Harrier (T804DCU) and two plots (Exh.. K-7).

All these were said to have been given to the appellant before the dissolution of marriage. Then, BAKWATA issued form No. 3 for the parties to go to court to petition for divorce, in all that aspect the marriage was

subsisting thus, the first appellate court affirming the decision of the trial court was erred in holding that parting gift/Mut'ah/Ihsan was a distribution of appellants share. The trial court failed to exercise its power in terms of section

Submitting on the last ground which was the fourth ground that, the first appellate court erred in law for holding that the appellant is not entitled to any distribution of the company's proceeds. It was the submission of the appellant's counsel that, the company shares allotted to one of the spouses are matrimonial assets and as decided in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo, Civil Appeal No.102 of 2018,** Court of Appeal of Tanzania. The most important factor for consideration was seeing when were the shares acquired.

It was stated that the two companies were established during the subsistence of marriage. The cited case included business assets to be matrimonial assets. It was therefore their argument that, company shares issued and allotted to the respondent was subject to matrimonial distribution the reference being the case of **Mbarouk Suya Bindo v. Mbonny Abdallah Maumba,** Pc Civil Appeal No. 41 of 2022 which held that companies' shares are also matrimonial properties so qualifying division.

Based on the above assertion the appellant prays for this court to quash the decision of the two courts below, order equal distribution of a house at Plot No. 514 Block E Mbezi, order equal distribution of 3,999,999 of shares jointly acquired to both companies.

Resisting the appeal, the counsel for the respondent submitted on the first ground that, lower courts did take into accounts the contribution of the appellant on what is purported to be matrimonial assets. Their basis being the extent of contributions towards acquisition of those matrimonial assets.

It was further countered that, the house at Mbezi on Plot No. 541 its land plot was bought and built by the appellant on 2003 (see Exh. K-B3) before their marriage on 1/10/2004 (Exh. K-B20 and Exh. K-7). The same was said to be supported by oral evidence of SU5 (see page 23 and 25 of the typed proceedings of the trial court), save for tiling work was said to have been done in 2011 (Exh. K- B16)

Responding to arguments of companies to be subjected to division of matrimonial assets, it was stated Avianca Freight Forwarders (T) Limited and Brooklyn Media (T) Limited were never mentioned by the appellant and her witnesses to be one of the matrimonial properties therefore, it should not feature in the appellate stage.

The respondent's counsel therefore referred to the case of **Richard Majenga v. Specioza Sylvester,** Civil Appeal No. 208 of 2018, Court of Appeal of Tanzania at Tabora. It was further countered that, the appellant had failed to establish how she contributed to the acquisition of shares in Avianca Freight Forwarders (T) Limited and Brooklyn Media (T) Limited, even proving how many shares were paid up subject to division.

It was further contended that, the sum of Tsh. 10,000,000/- and Tsh. 50,000,000/- awarded to the appellant by the trial court was beyond what she has contributed.

It was also stated that, before the appellant was married to the respondent, he was doing transport business with her mother and later on they opened a company named Brooklyn International (T) Ltd on 16/10/2006. The share-holders being Haiba Rajab and Yusuphu Washokera as per certificate of incorporation (Exh. K-B 35).

Responding to the second ground of appeal where the appellate court was faulted for distributing the properties which were already given to the appellant during the subsistence of their marriage.

The respondent's counsel observed that, the appellant could not show how she was entitled to the said assets, since the respondent was also ordered to pay 500,000/=Tsh per month for each of their three

issues, paying for school fees and health insurance which are the factors to be taken into consideration as per 114(2)(d) of the LMA.

It was also stated that, the trial court had considered that the respondent had three wives, who also have interest in matrimonial properties. It was stated further that, the provision of ection 114(2) of the LMA do not expressly guide how the court should consider the interest of other wives when giving order as to the division of assets acquired during subsistence of polygamy marriage. However, section 57 of the LMA gives equal rights when a man has two or more wives. He therefore urged the court to consider the interest of other wives.

Lastly on the issue of shares, the counsel for the respondent stated that, Avianca Freight Forwarders (T) Limited and Brooklyn Media (T) Limited are owned by Brooklyn International (T) Ltd through respondent and Tulakela Lupembe (SU3). Since the appellant has failed to prove her interest in Brooklyn International (T) Ltd, she would not have interests with Avianca Freight Forwarders (T) Limited and Brooklyn Media (T) Limited to be subjected to matrimonial division.

Thus, the case of **Gabriel Nimrod Kurwijila** (*supra*) and **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32 which are defining matrimonial assets were said not to be relevant to this matter. Moreso, going through Exh.s K -B40 and 41 respectivel,y the share-holders of Brooklyn

International (T) Ltd do not include the respondent as contended by the appellant.

It was again countered that, the assertation that the appellant used to supervise workers and supply their food was said to be just mere words and disapproved by evidence of SU-5 and SU-9, as seen on page 24 and 31 of the typed proceedings as the appellant was supposed to claim for payment from the company. The counsel for the respondent urged this court not to interfere with the decision of the lower courts and dismiss the appeal with costs.

In rejoinder submission the appellant counsels reiterates and maintained what has been submitted in their submission in chief and added that, two lower courts did not divide matrimonial assets by disregarding the evidence of the appellant. Hence, this court should make that division.

Before setting in to determine this appeal, since the appellant's counsel have move his court with the prayer to make amendments by substituting words "trial magistrate" appearing in 1st ground and "trial court" appearing in 2nd, 3rd and 4th grounds of appeal to be replaced by "first appellate court," under Order VI rule 17 of the Civil Procedure Code (Cap 33, R.E 2019).

The prayer which was not objected by the respondent's side and I find the same to be necessary for the purpose of determining the real questions in controversy between the parties. The same is hereby granted by this court for the interest of justice.

The appellant also chose to abandon the third ground, hence remained with three grounds of appeal for determination. Having heard the rival submission of both sides, this court is tasked to determine whether the appeal has the merit.

In my deliberation to the first ground, the same can be determined by addressing the issue as to whether the trial court failed to properly evaluated the evidence adduced especially by the parties towards the acquisition of matrimonial properties.

Before turning into the discussion of this issue, it should be noted that the present appeal is the second appeal by the appellant. Where on her appeal to the first appellate court the grounds of her appeal are centred on the same issues. The decisions of two lower courts were concurrent.

It is now the settled principle that, the second appellate court could only interfere with the concurrent decision of the lower court. Unless there was misapprehension of evidence that led to miscarriage of justice. This

was stated in the case of **Nchangwa Marwa Wambura v. Republic** (Criminal Appeal 44 of 2017) [2019] TZCA 459.

With respect to the present issue, going through the records of the lower court and the submissions of both sides, the appellant who testified as SM1 before the trial court, on her evidence seen on page 3 of the type proceedings; she stated they celebrated the marriage with the respondent in 2004 then things in their marriage went sour.

Again, on cross-examination with the respondent's side, the appellant acknowledged to have received Tsh. 50,000,000/-, 2 plots and a car make Harrier after the Islamic talaq was issued.

She also informed the court that, together with the respondent they have built 2 houses; in one of that houses the appellant was residing with her three children, they also acquired 2 companies; Brooklyn Media and Avianca Transport, and plots of land at Bagamoyo.

The appellant also stated she was doing catering business and the respondent was an accountant. The evidence which was collaborated by SM2, SM3 and SM4.

The respondent in his defence before trial court as seen on page 14 of the typed proceedings, he stated that before BAKWATA they signed an agreement to the distribution of the matrimonial assets as seen on Exh. K-4, to wit the appellant was to be given Tsh. 50,000,000/-, a motor

vehicle make Harrier, 2 plots at Gezaulole which are Plot No. 136/4 and other another plot measuring 100x100 square meter.

The properties were given to the appellant after she was issued with the alaq as part of division of assets and not *Ihsan* as claimed by her. Also, during cross-examination, the respondent claimed to have acquired the companies jointly with her mother and his first wife and not with the appellant.

Further to that, he gave his evidence that the house at Mbezi Beach was constructed in 2003 as captured on the judgment of the trial court. The trial court therefore considered the said evidence on the second issue as to whether the mentioned properties were matrimonial assets jointly acquired by the parties in the subsistence of their marriage.

The records of the trial court on page 11 to 13 reveal that the trial court in determining the division of matrimonial assets she considered the contribution of each party towards the acquisition of properties.

The trial court considered the evidence adduced by the respondent that the he tendered a proof of sale agreement showing the two landed properties that constructed two houses claimed to be matrimonial houses, one was the house of the former wife of the respondent and the other house its landed property was acquired even before the marriage was contracted between the parties herein. It was then constructed when the

respondent was his first wife, but later the appellant moved in and lived with the family years later after she got married to the respondent.

The trial court therefore considered there was minor contribution made by the appellant in the house at Mbezi beach where she was living with the family. Therefore, the trial court awarded the appellant Tsh. 10,000,000/- for her contribution in the said house. The decision which was upheld by the first appellate court.

Having gone through the arguments of both sides and ventured on the records of the trial court and first appellate court, it is my considered finding that both lower courts rightly made an analysis of the evidence tendered with regard to the contribution of both sides in acquisition of matrimonial assets by each party.

The reason for arriving to such findings is based on the fact that, the provisions of section 114 of the Law of Marriage Act considers joint efforts towards acquisition of matrimonial assets to also include direct monetary contribution, property or work in the acquisition of the house.

Domestic work and business claimed to be done by the appellant does not necessarily entail division of 50/50 shares to the house of Mbezi beach as decided in the case of **Bi. Hawa Mohamed v. Sefu Ally** (supra). Since there was no direct evidence to prove contribution of the appellant apart from domestic work and the same not being the

matrimonial property per se as conditions pre set in the case of **Samwel Moyo v. Mary Cassian Kayombo** [1999] TLR 197 requires.

Therefore, the extent of contribution by appellant was small and did not entitle the appellant equal share of the house as observed in the case of **Gabriel Nimrodi Kurwijila v. Theresia Hassan Malongo** (supra).

As properly intimated in the decision of the trial court that the appellant had the burden of proving her contribution towards the acquisition of the assets but she failed to do so in the required standard of law in terms of section 112 of the Evidence Act Cap 6 R.E. 2019. Hence, I find it affirmative that the trial court did evaluate and arrive into proper decision and therefore the first ground is devoid of merit.

Regarding the second ground, this court is asked to determine whether the appellate court erred in law and in fact for holding that the properties given to the appellant during the subsistence of marriage amounts to distribution.

As the records reflect, it is not in dispute that, the appellant was given the sum of fifty million Tsh, one car make Toyota Harrier (T.804 DCU) and two plots with before the matter was determined by the trial court.

It is the appellant's submission that, those properties were given to the appellant as a gift (*Ihsan/Mut'ah*), but later on the trial court after

granting the divorce decree she considered the assets prior gifted to the appellant as part of distribution of the assets and further awarded Tsh. 10,000,000/= to the appellant as her contribution toward her efforts made to the Mbezi House.

Whereas the respondent's side claim that the assets were distributed after talaq was issued to the appellant therefore form part of the division of matrimonial assets.

Certainly, the parties to this matter both prophesized Islamic faith as they celebrated Islamic marriage ceremony according to marriage certificate (Exh. ...) and referred their matter to Qadhi Court as per Exh. K-4 which is quoted for easy reference to read;

> ***"HUKUMU YA SHAURI LA NDOA NA MWENENDO WAKE KATI YA BW. YUSUFU WASHOKERA MDAI MUME NA BI. NURU ABRAHAM SEPETU MDAIWA MKE".***

Reading between the lines, it refers to the judgment and proceedings of BAKWATA which was also referred to QADHI Court after the appellant was dissatisfied with the decision of BAKWATA and refused to accept "*Mutah*" which were 2 plots at Kigamboni, a sum of Tsh. 30,000,000/- and a car make Toyota harrier.

Also, making reference to page 3 of Exh. **K-4** before "*Qadhi*" court the parties were asked to prove acquisition of the properties and its decision was the respondent to give the appellant Tsh. 50,000,000/- and maintain the issues of marriage upon issuance of three Islamic '*talaq*' and observed there will be no *'Eda' (waiting period)* or *'Mutah'.* As the appellant was not supposed to get anything else.

This court is now tasked to determine if *Ihsan* issued by the *Qadhi* Court amounts to the division of matrimonial properties? The provision of Section 101 of the Law of Marriage Act makes it mandatory for the parties to refer the matter to the marriage conciliation board before petitioning for divorce.

The board is vested with the power to resolve the matrimonial dispute or matter referred to it to the satisfaction of the parties and issue a certificate setting out its findings (see the case of **Fidelis Francis v. Paschalia Malima,** Pc. Matrimonial Appeal No. 03 of 2020, High Court of Tanzania, at Mwanza, Unreported).

The marriage between the parties was contracted in accordance to Islamic rites in accordance to section 10(2)(a) of the Law of Marriage Act and their marriage was considered to have been dissolved in accordance to Islamic laws after three *talaq* were issued by the respondent in terms of section 107(3)(c) of the Law of the Marriage Act.

Thus, since the properties divided came out of the parties' properties jointly acquired, and regarding to the fact that the respondent had other three wives would be unjust to skim other wives' properties to the expense of one party which had already received her share basing on the religious ground and admitted to have received the same basing on the ground that it was awarded by another forum which is not a court of law, the court looks mostly at the administration of justice, it is proven that the appellant herein had already received her share and that is justice seen to be done on her party. Hence I find the second ground not to have merit same as the third ground as the same division of shares had been already included in the division awarded to the appellant at Qadhi Court at Kinondoni.

From the above findings, I find this appeal to be misplaced and dismiss the same in its entirety. No order to costs due to the relationship between the parties.

It is so ordered.

Dated at Dar es Salaam this 03rd Novemver, 2023

G.N. BARTHY

JUDGE

Delivered in the presence of Mr. Makubi Kunju learned advocate for the appellant and Mr. David Andindilele learned advocate for the Respondent and the respondent in person.