IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO. 03 OF 2023

(Arising from Matrimonial Appeal No. 63 of 2022 of the District Court of Temeke at One Stop Judicial Centre, Originating from Matrimonial Cause No. 11 of 2018 of Kigamboni Primary Court)

HAMISI JAFARI HAMISI ..... APPELANT

VERSUS

ZAWADI SAID ABDALLAH ..... RESPONDENT

JUDGMENT

Date of last Order: 10/07/2023
Date of Judgment: 26/07/2023

OMARI,J.,

The parties herein celebrated their marriage in the Islamic form in 2000. The marriage was blessed with three issues. They also succeeded to acquire some properties together. In 2018 the Respondent petitioned for divorce in the Primary Court of Kigamboni praying for decree of divorce, custody of children and division of matrimonial assets.

In its judgment dated 06 April, 2018 the trial court dissolved the marriage and ordered the custody of the children to both parties. It was also ordered that matrimonial properties be evaluated and be divided 50% by 50% between the parties.

This irked the Appellant who then appealed to the District Court of Temeke which ordered that the matter be returned to the primary court for retrial. The matter was tried *denovo* after which the court being satisfied that the marriage had irreparably broken down; ordered the division of the matrimonial properties to the tune of 50% by 50% for each party. Similarly, the Appellant was ordered to provide the amount of TZS 100,000 per month as maintenance for one issue.

Once more, the Appellant was not satisfied with the decision thus, he appealed to the Temeke District Court at One Stop Judicial Center on five grounds as listed:

1. That the trial magistrate erred in law and facts for granting divorce without the matter being referred to the marriage reconciliation board to prove that the same failed to reconcile the parties and instead relied on the *talaka* issued by the Appellant.

2. The trial magistrate erred in law and in facts for ordering maintenance in the tune of TZS 100,000 without considering financial stability of the Appellant
3. The trial magistrate erred in law and facts for ordering equal division of the alleged properties while the Respondent contributed nothing towards acquisition of the properties.
4. The trial magistrate erred in law and facts to determine the matter without considering the evidence adduced by both parties.
5. The trial magistrate erred in law and facts for not recording evidence adduced by the Appellant during trial.

The district court after hearing the appeal upheld the judgment of the trial court regarding maintenance. In addition, the Appellant was ordered to continue taking care of the issue until he reaches the age of majority. Regarding the division of matrimonial properties, the district court nullified the order on the division of the plot at Mwasonga as it was proved that it had already been sold. In relation to the house at Kisiwani the district court sustained the division ordered by the trial court. Displeased with the decision of the district court, the Appellant knocked on the doors of this court armed with three grounds of appeal to wit:

1. That the 1st appellate court erred in law and facts for holding and sustaining the decision of the trial court of equal division of the alleged matrimonial house without considering the extent of contribution of the parties herein towards the acquisition of the said matrimonial house.
2. That the district court of Temeke at One Stop Judicial Centre erred in law and facts for holding that the certificate of reconciliation board issued on 19.30.2018 was still valid and the arguments of expiry of the same on the part of the appellant does not hold water.
3. That the 1st appellate court erred in law and facts for not evaluating properly the evidence adduced and tendered by the parties herein during trial.

On the basis of those grounds the Appellant is beseeching this court to quash and set aside the judgment and decree of both District Court of Temeke and Kigamboni Primary Court regarding the division of the matrimonial house. At the hearing of this Appeal the Appellant was represented by Said Ally Said, learned advocate and the Respondent enjoyed legal assistance from Women's Legal Aid Centre (WLAC). The Appeal was disposed of by way of written submissions.

The Appellant's counsel began his submissions by suggesting the issues which are centered on the division of matrimonial properties and invited the court to consider the same when determining the grounds of appeal.

On the first ground of appeal the Appellant began by making reference to section 114 (1) of The Law of Marriage Act, Cap 29, R.E 2019 (the LMA) as regards to the courts powers to distribute matrimonial properties upon divorce. Counsel for the Appellant submitted that after the grant of decree of divorce the parties are entitled to the division of the alleged matrimonial properties which purported to be acquired during the subsistence of their marriage. However, he argued that before the division to the parties a court is duty bound to consider the extent of contribution of the parties through their joint efforts as per section 114(2) of the LMA. He argued further that the extent of contribution is a paramount factor in the division of matrimonial assets as was stated in the case of **Bibie Mauridi v. Mohamed Ibrahim** (1999) T.L.R, 162, where the court held that there must be evidence to show extent of contribution before distribution is ordered. He went on to add that according to the case of **Mariam Tumbo v. Harold Tumbo** (1983) T.L.R 293 this is a mandatory obligation for the parties.

Mr. Said went on to argue that from the provisions and cases referred to, the court cannot grant a division of matrimonial properties unless and until the extent of contribution of each party is determined by the trial court. That is; the less the contribution the less share a party is entitled.

According to Mr. Said, the trial court and the first appellate court did not evaluate the evidence adduced on the extent of contribution of each party. Had the lower courts properly evaluated the evidence of both parties on the extent of their contribution, they would not arrive into an unfair division of the alleged matrimonial properties. According to him the Respondent does not deserve 50% as the extent of her contribution is minimal.

On the third ground of appeal the Appellant's counsel submitted that the first appellate court erred in law and facts by not evaluating properly the evidence adduced and tendered by the parties during trial. Moreover, the testimony by the Appellant at the trial is that the plot at Kisiwani, Kigamboni was given to him by his father and a two acres shamba at Kibada. The Appellant stressed that all these properties were obtained prior to his marriage to the Respondent. Furthermore, during the trial he averred that the proceeds obtained from the sale of the shamba at Kibada were used to construct the matrimonial house.

- He argued that despite the Respondent's contention that she was doing petty business of *mama lishe* but she did not prove how much she contributed to the acquisition of the said house, therefore the Appellant has more contribution than the Respondent.

The counsel further argued that the exhibit marked '**KL1'** bears the name of the Appellant this is presumption that he is the lawful owner of the said properties. Therefore, basing on the above testimony, the trial court was wrong to divide the matrimonial home equally as the extent of contribution was not considered at the trial court and at the firs appellate court. The Appellant is therefore praying for the judgment and decree of the lower courts to be quashed and set aside.

With regard to the second ground of appeal which is centered on the assertion that the district court erred in law and facts for holding the certificate of the Marriage Conciliation Board (the MCB) issued on the 19 March, 2018 was still valid and the arguments of expiry of the same on the part of the Appellant does not hold water. The Appellant's counsel disputed that the certificate accompanied Matrimonial Cause No. 11 of 2018 was not valid as the same expired on 28 April,2022 when the matter was ordered to be tried *denovo.* He argued that at the time the matter was referred to

Kigamboni Primary Court, the certificate was outdated contrary to section 106(2) of the LMA. According to the counsel the above provision is formulated mandatorily to mean that when a matrimonial cause was ordered for trial *denovo* it was supported by an MCB certificate which had already been expired since 19 September, 2018. This is contrary to law and had an effect of making the trial court lack jurisdiction to entertain the case and to proceed to determine it.

The Appellant's counsel also argued that there is nowhere in the record that shows the Respondent sought the leave from the trial court to tender an outdated certificate thus, vitiating the proceedings of the trial court. In conclusion the Appellant prayed that the decisions of both lower courts be quashed and set aside with costs.

Contesting the Appeal the Respondent submitted on the first ground of appeal by arguing that it is undisputed that with regard to section 114(1) of the LMA the parties are entitled to division of matrimonial assets jointly acquired during the subsistence of their marriage. Also, the court is required to consider the extent of contribution of both parties towards the acquisition of the matrimonial properties as provided under section 114(2) of the LMA and this is articulated in the district court's judgment. The Respondent

asserted that same position was enunciated in the case of **Mariam Tumbo v. Harold Tumbo**, (supra) and that of and **Bibie Maurid v. Mohamed Ibrahim** (supra). According to the Respondent, the duty of the court is to assess whether the properties exist and if yes, the contribution made by each party has to be taken in carefully scrutiny. The trial court and the first appellate court assessed the existence of the properties and the contribution.

As regards the second ground of appeal the Respondent submitted that the district court was correct by upholding that the MCB certificate as still valid. The Respondent supported her contention by making reference to the district court's judgment which after scrutiny of the evidence held the certificate was still valid.

On the third ground of appeal that the district court failed to evaluate the evidence adduced and tendered by the Appellant, the Respondent argued that the first appellate court considered the evidence through the trial court's records which shows that both parties were accorded with the right to be heard and the trial court decided the matter in accordance to the evidence. To buttress her argument the Respondent referred to the case of **Hemed Said v. Mohamed Mbilu** (1984) T.L.R 113 where the court held that the person whose evidence carries a heavier weight is the one that will win. In

that regard the Respondent stated that the first appellate court found that the trial court correctly analyzed and considered the evidence from the parties thus, it reached to a fair and just decision. Furthermore, the Appellant failed to prove his allegation as the burden of proof lies on him according to section 111 and 112 of The Evidence Act, Cap 6 R.E 2019. The Respondent averred that the trial court judgment correctly considered the evidence and contribution of both parties as per section 114(2)(b) of the LMA. She then concluded her submission by a prayer that the Appeal be dismissed for lack of merit, and the decisions of the trial court and the first appellate court be upheld.

After considering the competing submissions by the parties, it is now opportune for this court to determine one issue; whether the Appeal before it is meritorious. In doing so I shall go through the grounds of appeal as presented and argued by both counsels as well as the lower courts' decisions and record. I should outrightly state that I am alive to the fact that this being a second appellate court is not expected to disturb the lower courts' concurrent findings unless there is a misapplication of the law or misdirection of the evidence as was held in **DPP v. Jafari Mfaume** [1981] TLR 149 see

also **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31.

In the first ground of appeal the Appellant complained that the district court was wrong when it decided and upheld the decision of the trial court on the division of matrimonial assets without considering the contribution of each party in the acquisition of the said assets. The court is empowered to order division of matrimonial assets when it issues a decree of divorce or separation. Section 114(1) of the LMA provides that:

> *'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'.*

It is also a legal requirement that when issuing an order for division of matrimonial assets the court ought to consider the contribution of each party in the acquisition of the same. This position is reflected in section 114(2) (b) of the Law of marriage act which in part provides:

> 'In exercising the power conferred by subsection (1), the court shall have regard to— ...(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;...'

- This was further enunciated the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** Civil Appeal No. 102 of 2018 where the court of appeal explained that:

> *'The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property'*

According to the evidence adduced by the parties at the trial court the Respondent is quoted on page 14 of the trial court proceedings that:

> *'Katika uhai wa ndoa yetu tulijaaliwa kupata mali ambayo ni nyumba moja iliyopo Kisiwani – Kigamboni, shamba ekari moja Mwasonga, wakati wa upatikanaji wa mali hiyo mimi nilikuwa nikifanya biashara ya mama lishe na mdaiwa alikuwa akifanya kazi ya kuuza duka Kariakoo'*

On his part, the Appellant did not give any testimony about his contribution to the acquisition of the property in question. In addition, he did not agree whether the assets mentioned by the Respondent were their matrimonial properties but he disputed that during their marriage they did not acquire any property, but the Respondent found him with a farm and houses that were given to him by his father. He averred further that they sold the farm and then bought the plot at Mwasonga which he has already sold. In determining the issue of division of matrimonial properties, a court is required to consider the testimony of the parties.

In the record of the trial court it is clear that the Respondent explained how she contributed to the acquisition of the assets she mentioned. She also submitted exhibits which were tendered and admitted as KL1 and KL2. On the part of the Appellant, he did not object to the exhibits, however in his submissions he has claimed that the same has his names therefore it is assumed that the property is his personal property and that if the properties were jointly owned by the them then the exhibits would have the names of all parties. Besides that, he did not indicate or testify about his contribution to the acquisition of the property. Despite claiming that he did not acquire the property with the Respondent but it was given to him by his father, the Appellant did not provide any evidence to prove his assertion.

Basing on the above explanation it is indisputable that, the issue of the contribution of in acquisition of matrimonial assets is a matter of evidence as stated by the Court of Appeal in the case of ***Gabriel* Nimrod Kurwijila v. Theresia Hassani Malongo** (supra) where the Court stated:

> *'It is dear 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 111(2) of LMA cannot arise where there is no evidence to prove extent of contribution.'

With reference to the of section 114 and the case cited, I have the same view as the district court that the Appellant did not adduce enough evidence to convince the trial court that he had a greater contribution to the acquisition of the property to the extent that he deserved a larger percentage than the Respondent in the distribution. Therefore, the first appellate court was correct to hold and sustain that the trial court considered the extent of contribution of each party in the acquisition of the matrimonial house so it ordered equal distribution. The first ground fails for being unmeritorious.

On the second ground of appeal it is the Appellant's contention that the first appellate court erred for holding that the certificate from the MCB issued on the 19 March 2018 was still valid. He explained that the certificate used to file the Matrimonial Cause No. 11 of 2018 was invalid as its validity expired on 28 April 2022 when this matter was ordered for retrial, hence it was outdated contrary to section 106(2) of the LMA. On her side the Respondent resisted this contention stating the argument has no merit because the order for a trial *denovo* did not struck out the MCB proceedings.

I agree with the Appellant that according to the LMA under section 106(2) all divorce petitions must be accompanied by certificate from the MCB issued not more than six months; section 106 (2) provides:

> *'Every petition for a decree of divorce shall be accompanied by a certificate by a Board, issued not more than six months before the filing of the petition in accordance with subsection (5) of section 104...'*

It is therefore true that a Petition for divorce needs to be accompanied with a certificate that has been issued by the respective MCB not more than six months preceding its filing. In the current Appeal, the records depict that Matrimonial Cause N.o 11 of 2018 was filed for the first time on 19 March 2018. The records are also clear that the Appellant preferred an appeal at the Temeke District Court, which resulted into the order for retail before another magistrate. The question is whether Form No. 3 which is the Certificate of the MCB used in filing Matrimonial Cause No. 11 of 2018 expired after or as a result of the order for retrial. The answer is simply no, because, the Form was not found with any defect from the beginning, also the order for retrial did not automatically struck out the matter. In addition, the order clearly directed that the matter should be re-tried by another

magistrate, there was no order that removed the matter from the court or directed the parties to start over in the reconciliation stage. Moreover, when this matter was registered for the first time, the form was within the legally prescribed time. At this juncture I would like to agree with this court's reasoning in **Hassan Mohammed Timbulo v. Rehema Clemens Kilawe,** Civil Appeal No. 163 of 2020 that a certificate of the Board is something that is required at admission stage, it must exist before the case is registered and given a number. It is a registration condition which might not necessarily be needed later. What is important is that it must be in existence as part of the pleadings. The court in this case likened a certificate of the Board to a Certificate of Death in a probate case, it must be attached to the Petition and must be seen before any step is taken. Therefore, I also agree with the district court that the Form was still valid, and the Appellant's argument that it had expired is meritless. This ground of appeal is also failing as it lacks merit.

On the third ground the Appellant's counsel complained that the district court failed to consider the testimony adduced by the Appellant at the trial court. He has claimed that the Appellant testified that the plot in Kisiwani in Kigamboni and the farm was given to him by his father before his marriage

to the Respondent and later the properties were sold and they built their matrimonial home, while the Respondent was doing a petty business as a food vendor or *mama lishe* so the Appellant has a greater contribution than the Respondent. Conversely, the Appellant did not explain how much he contributed to the acquisition of the house. The Respondent has contested with an explanation that the district court considered the evidence given at the trial court that, it was correct according to the parties thus reaching a fair decision.

The Respondent claimed that the burden of proof is on the side of the claimant and the one with the strongest evidence should win and quoted section 111 and 112 of the TEA as well as the case of **Hemed Said v. Mohamed Mbilu**(supra). The law imposes a duty to prove by a party who wants the court to give justice in his favor.This principle is enshreined in section 112 in the TEA which states:

> *'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.'*

Moreover, in the case of **Anthony M. Masanga v. Penina (Mama Mgesi) and another,** Civil Appeal No. 118 of 2014 it was stated that;

'Let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2002 which state inter alia ...'

The question is therefore whether the Appellant has managed to prove that he had greater contribution than the Respondent towards the acquisition of the alleged house. The Appellant's testimony at the trial is that, before he married the Respondent the two-acre farm and a house was already allocated to him by to his father in 1995. He added that they later sold the area and built the house. With the proceeds from the sale he bought an area of one acre in Mwasonga which he has already sold. The Appellant asserted to have acquired the property in question before his marriage to the Respondent, however in the records at the trial court there is no evidence provided by the Appellant to prove that he was given those properties in the said year. To the contrary, there is evidence from the Respondent which is the purchase documents (Exhibits KL1 and KL2) which shows that the properties were bought after the two got married. Despite the fact that the exhibits have the names of the Appellant, but the evidence is clear that the properties were acquired during the marriage, so they are qualified to be

matrimonial properties. Likewise despite the Appellant's claim that he was given the properties by his father, there is evidence that the properties were brought from Hasan Mwinyijuma and Mwinyi Othmani Ramadhani.

Based on the sated circumstances the district court was satisfied that the trial court considered the evidence testified by the parties at the trial court as to how each party played his part towards the acquisition of the disputed matrimonial assets.

In the event, the three grounds of appeal are all unmeritorious and the prayers by the Appellant cumulatively untenable. The Appeal is dismissed. This being a matrimonial matter I make no order as to costs.

HIGH COURT OF TANZANIA

A.A. OMARI

JUDGE

26/07/2023

Judgment delivered and dated 26th day of June, 2023.

A.A. OMARI

JUDGE

26/07/2023