IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

ONE STOP JUDICIAL CENTRE

PC CIVIL APPEAL No. 33 OF 2022

(Arising from Matrimonial Appeal No. 33 of 2020 at Kinondoni District Court).

ALEKUNDA JOHN URIO ..... APPELANT

VERSUS

BERNAD H. KONGOLA ..... RESPONDENT

JUDGMENT

Date of last order: 09/03/2023
Date of judgement: 20/06/2023

OMARI,J.:

The parties in this matter were husband and wife before the Appellant petitioned for divorce and orders for division of matrimonial properties at the Primary Court vide Kinondoni in Matrimonial Cause No. 38 of 3019. After the full trial their marriage was dissolved followed by subsequent orders for division of their matrimonial properties. The house located at Salasala Dar Es Salaam was divided to 30% to the Appellant and 70% to Respondent. The Appellant was also awarded a plot of land located at Pemba Mnazi, Kigamboni and TZS 10,000,000 as part of two motor vehicles. The Respondent was awarded a plot located at Kisesa North Dodoma and two motor vehicles.

The Appellant was not pleased with the said decision so she appealed to the District Court of Kindondoni where she raised five grounds all revolving around the issue of distribution of matrimonial properties and their acquisition. The Respondent filed a cross appeal also armed with five grounds all of which revolved around the distribution of matrimonial properties and their requisition.

After considering the parties submissions but also examining and re-evaluating, reconsideration of the evidence on record, the District Court partly allowed the Appeal and cross Appeal. It held that the house located at Mbezi Juu, kinondoni belonged to the Respondent as it was acquired before the marriage and the Appellant was given TZS 10,000,000 from the sale of the two motor vehicles make Toyota Rav4 and Toyota Hilux. The plot at Pemba Mnazi Kigamboni and that of Kisesa North, Dodoma were awarded to the Appellant. The other orders were to remain unchanged.

The Appellant is also dissatisfied with the District Court's decision, she therefore approached this court preferring a second appeal. In the memorandum of appeal she raised three grounds as follows:

1. That the district court erred in law and in fact by its failure to hold that the house situated at Salasala area Mbezi juu Dar es salaam is matrimonial property jointly acquired between the Appellant and the Respondent.
2. That the district court erred in law and in fact for sanctioning a purported loan that the Appellant was not party thus denying her rights in the two motor vehicles namely Toyota Rav 4 and Toyota Hilux.

3. That the district court erred in law and in fact by its failure to consider equal division of domestic utensils jointly acquired by the Appellant and Respondent.

Thus, the Appellant sought for orders that the judgment of the district court on the division of matrimonial assets listed above be quashed with costs, equal division of the house located at Salasala, equal division of the two motor vehicles namely Toyota Rav4 and Toyota Hilux, equal division of domestic utensils and any other relief the court may deem fit to grant.

On the date set for hearing this Appeal the Appellant was represented by Mr. Alphonce Katemi, learned advocate and the Respondent was represented by Ms. Maria Ntui also learned advocate. The matter was disposed by way of oral submissions.

Submitting in support of the Appeal the Appellant's counsel commenced with the first ground of appeal. The learned counsel submitted that, the parties got married on 12 April,2008 and get divorced in 2020. He averred that in the trial court the Appellant testified that the house is matrimonial asset and she contributed to its construction. The trial court declared it a matrimonial property but the District Court removed it from the list of matrimonial properties. He contended that the district court's judgment at page 17 quotes from the trial court proceedings, where one of the witnesses that is, SU2 testified that their house was constructed in 2006 to 2008 and that he gave TZS 45,000,000 to the Respondent to facilitate its construction. However, there was no evidence to prove that the amount was used for that purpose. He stated that the Appellant testified that she participated in the building of the house, for the reason that being a government official she earns income.

She also gave evidence on how her salary and traveling allowance was used in the construction of the house. The parties lived in that house for more than ten years, so the house is a matrimonial asset. Mr. Katemi submitted further that the District Court had no ground to exclude the said house from matrimonial properties thus denying the appellant her right to the house.

He went on to argue that the Appellant's economic status is beyond that of Bi Hawa of the **Bi Hawa Mohamed v. Ally Sefu,** (1983) T.L.R 32 case, contending that in the said case Bi Hawa did not leave the marriage empty handed in spite of being a housewife. Counsel went on to conclude the first ground of appeal by categorically stating, the period of time the parties lived together entitles the Appellant a share in terms of section 114(3) of the Law of Marriage Act Cap 29 RE 2019 (the LMA).

On the second ground of appeal, Mr. Katemi submitted that the Respondent disposed the two cars without the Appellant's knowledge and consent and the TZS 10,000,000 awarded to the Appellant did not match the value of the two motor vehicles. Thus, the Appellant demands an equal share of the two cars, either by handling one car to her or the half value of the two cars.

On the third ground the learned counsel submitted that the District Court failed to declare and determine the existence of the domestic utensils. He stated that during trial the Appellant was told to mention the substantive assets (motor vehicle, plots, and houses). However, the parties being high ranking employees who stayed together for more than ten years do have furniture and utensils. The learned counsel contended that despite the fact that the district court stated that there was no list from the trial court but in the reality of life, it cannot be said that the Appellant was sleeping on the

floor, she was entitled to be heard on that. Therefore, the Appellant is entitled to the domestic utensils which were acquired during the subsistence of their marriage and the same are at the matrimonial home.

Disputing the Appeal Ms.Ntui the counsel for Respondent also commenced her submission with the first ground of appeal as argued by the Appellant's counsel. She submitted that the Appellant did not testify on the extent of her contribution to the house at trial hence, failed to meet the requirements of section 114(2) (b) of the LMA. The Appellant's evidence just listed the matrimonial properties as seen at page 9 of the proceedings. According to the counsel, the Appellant did not prove her contribution rather she told the court that it is the Respondent who knows how they started life and requested him to give her what she deserves. That implies that she did not know anything about the construction of the house.

On the evidence given by SU2 that he participated in the construction of the house between 2006 -2008 the Respondent's counsel stated that there was a typing error in the judgment, since SU2 is recorded at page 43 of the proceedings that it was constructed between 2006 -2007, while the marriage was contracted in 2008, hence the house was constructed before the marriage. As regards the Appellant's claim that she was an employee therefore she participated in the construction of the house through her salary, the learned advocate argued that being a government officer is not a proof of the extent of her contribution. Ms.Ntui further argued that the Appellant did not prove how much she was contributing per month, she did not produce a salary slip to prove that the amount of the salary she earned was enough to contribute to the construction of the house. She also did not

bring any witnesses to the trial court to support her assertion that she contributed to the construction of the said house.

With reference to the Appellant's assertion that she took loans and used her travelling allowance to contribute to the construction, the Respondent's counsel averred that there was no evidence to show the source, date, purpose of the said loan. The learned counsel then went on to submit that there is contradicting evidence of the Appellant in the proceedings regarding the official trips. At page 3 of the primary court's judgment the Appellant is quoted to have complained that she was not assisted by Respondent to travel to Dubai for an official trip. To the contrary it was the Respondent who helped the Appellant as it was submitted at the district court. The burden of proof is with the one who alleges in terms of section 110-113 of the Evidence Act Cap 6 RE 2022 particularly section 110(1)(2). A similar position was stated in the case of **Joseph R. Logutu v. Gladius Myemba**, PC Matrimonial Appeal No. 4 of 2004 and in **Nimrodi Kurwijila V. Theresia Hassan Malongo**, Civil Appeal No 10 of 2018.

The learned counsel insisted that the District Court was right to grant the house to the Respondent because he gave evidence that the said house was acquired before their marriage as can observed on page 29-30, page 37 and page 39 of typed proceedings of the trial court. According to the Respondent the plot of land was bought in 2006 and the house was built in 2007. The evidence is also corroborated at page 43 of the proceedings by SU2.

Ms. Ntui went on to argue that when the Respondent used the descriptor "we" as seen in the proceedings, he meant himself and his father who was assisting him. She went on to state that SU3 also proved that the owner of

the house is Respondent as can be seen from page 44 through to 46 of the trial court's proceedings. SU3 also testified that the Respondent used to go alone at the said plot. She concluded her submission on this ground by citing the case of **Hemed Said v. Mohamed Mbilu**, 1984 TLR 113, where it was held that it is the party whose evidence is heavier that must win. Thus, it is her view that taking into account the provisions of section 58 of the LMA, the house was constructed before the parties got married therefore the first ground has to be dismissed.

On the second ground of appeal the learned counsel for the Respondent submitted that, the TZS 10,000,000 awarded to the Appellant is fair since she failed to prove the extent of her contribution towards the acquisition of the said cars. On the allegation by the Appellant that the cars were sold without her knowledge, the learned counsel contended that the Appellant was aware otherwise she should have filed a suit against the Respondent for selling the matrimonial property without her knowledge. Ms. Ntui went on to argue that the Appellant should have not advanced this issue in divorce proceedings since the cars were sold before the institution of divorce proceedings. The learned counsel also disputed the allegations on the manner in which the two vehicles were sold. She stated that the sale was precipitated on a loan of TZS 20,000,000 taken by the Respondent from SU4 to send the Appellant to Nairobi for medical treatment. Nevertheless, the Appellant did not cross examine the Respondent on this issue during the trial as can be seen on page 50 of the proceedings. Thus, the evidence by SU4 was not disputed at trial.

Further to that, she went on to state that when one reads page 31 of the proceedings it can be seen that the Appellant was aware of the loan and its purpose, therefore she cannot deny the truth at this second appeal. On that assertion the learned counsel made a reference to the case of **Abdul Karim Haji v. Raymond Nchimbi Aloyce and Another** (2006) TLR 419 and proceeded to the last ground of appeal.

On the last ground the Respondent vehemently argued that the Appellant did not mention domestic utensils as one of the properties jointly acquired by the parties. This issue was raised for the first time at the District Court as the first appellate court and it correctly rejected it. The learned counsel vehemently argued that the primary court was not the Appellant's mother to give her the properties she did not requested to be given as provided under 114 of the LMA and further to that there is a need for proof of contribution. Therefore, in the absence of the evidence in the trial court, the District Court could not grant this prayer. The counsel invited this court to see the case of **Kassim Salum Mnyukwa v. The Republic.,** Criminal Appeal No. 405 of 2019 and that of **Godfrey Wilson v. The Republic** Criminal Appeal No. 168 of 2019 as quoted from **Hassan Bundala @Swaga v. R.,** Criminal Appeal No. 386 of 2015.

The learned counsel contended that the Appellant did not list the said utensils because she was aware that the said utensils belonged to the Respondent and she did not contribute in their acquisition, hence she prayed this appeal be dismissed with costs.

In his rejoinder Mr. Katemi submitted that at page 16 of the trial court's judgment the Appellant gave evidence regarding her contribution to the

acquisition of the matrimonial properties. Likewise, the Respondent did not produce any evidence other than witnesses. Moreover, the claim that he got the money from his father was a mere assertion without any evidence, as well on the contradiction by Respondent regarding the time the house was constructed. The learned counsel stressed that the District Court decided to re-evaluate the evidence from the trial court and decided that there was no proof from the Appellant and the Respondent as well, hence the decision was not correct.

Regarding the cars both parties stated that they had cars but did not state on each party's contribution. That implies that there is equal contribution thus, necessitating equal division. Since the Respondent disposed of the cars without the Appellant's knowledge, she is entitled to her share as she was not privy to the sale agreement or the alleged loan.

Having heard the submissions by the parties the issue for determination is whether this Appeal is meritorious.

On the first ground of appeal the Appellant challenged the district court that it failed to declare the house at Salasala, Mbezi Juu as matrimonial property. Courts are vested with the power to order division of matrimonial assets subsequent to a decree of divorce or separation under section 114 (1) of the LMA.

It is a settled rule that a party claiming a share in the matrimonial property must prove the extent of the contribution in the acquisition of such property. Therefore, in using the powers conferred in the division of matrimonial

property a court must consider the extent of contribution of each party as stipulated under section 114(2) (b) of the LMA which 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.'*

The same position was explained in the case of **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 where the Court of Appeal made it clear 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.'*

Since the extent of contribution is a matter needing to be proved the Appellant had the duty to prove to the trial court on the extent she contributed in the acquisition and or construction of the house she is alleging to have contributed in the acquisition.

In the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** Civil Appeal No. 102 Of 2018 the Court of Appeal held 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. 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.'*

At the trial court the Appellant testified they have jointly acquired a house. At page 9 of the trial court's typed proceedings the Appellant stated:

> *'Katika ndoa yetu tumechuma nyumba moja ipo salasala mbezi juu kati ya ndungwi Dar es Salaam kunaitwa kwa barikwa...'*

The Appellant testified further that being a government employee her salary was used to improve the house. She also claimed that she used to get travelling allowances that enabled her to contribute to the construction of the house, however going through the trial court records there is no evidence to that effect. One might be inclined to consider the provisions of section 114(3) of the LMA, however, the Appellant did not testify or present evidence in that regard, her testimony was to the construction of the house and not improvements so to speak.

On the other hand, the Respondent testified that he bought the plot in 2006, constructed the house in 2007 and got married in 2008. Going through the primary court's record the Respondent tendered a sale agreement for the plot which was admitted as exhibit C3. The document indicates that the plot was purchased in 2006. That the parties contracted their marriage in 2008 was not a matter in dispute. There is also evidence by SU3 who testified that he was the one who constructed the house in 2007 and further to that he never saw the Appellant on site.

I amin agreement with the Appellant's advocate that the Appellant cannot be likened to Bi. Hawa from the **Bi Hawa Mohammed v. Ally Sefu** (supra) case for she is employed and earns an income. However, that in itself is not enough, she needed to assert the extent of her contribution to the acquisition

or improvements of the said house as the case may be. Considering the foregoing explanation, I am of the same opinion with the District Court that the Appellant did not prove the extent of her contribution towards the acquisition of the house thus it cannot be held to be matrimonial property. Based on the reasons elucidated above the first ground of appeal has no basis hence it is dismissed.

The second ground of appeal is in relation to the Appellant's complaint that the District Dourt was wrong as it admitted that the cars with Registration No.T808 CKR and T658 CKS, are matrimonial property but then it gave the appellant only TZS 10,000,000. The Appellant's advocate claimed that the amount does not correspond to the value of the cars despite the fact that they were removed and sold by the Respondent without the Appellant's consent and submitted that the Appellant deserves an equal distribution of the said cars or to some extent the Appellant should be given one car or the amount of money obtained from the sale of cars which is equal to half of the value of both cars.

In response, the Ms. Ntui argued that the Appellant did not prove the extent of her contribution in the acquisition of those cars therefore the TZS 10,000,000 she was given is fair enough. The learned counsel also denied the allegation that the Appellant was not informed about the sale of the cars. Explaining that if she did not she would have sued the Respondent instead of waiting until she filed for divorce and prayed for this court to uphold the amount of TZS 10,000,000 already awarded to the Appellant as it is enough.

It is in the trial court's record that the cars claimed by the Appellant were mentioned by the Appellant as being matrimonial properties when testifying,

as can be seen on page 9 of the trial courts typed proceedings. The Respondent explained that the vehicles are among the joint properties and that they were both already sold as can be seen on page 37 and 40 of the trial court's proceedings. In addition, there is evidence of SU4 who testified at page 49 of the typed proceedings that he lent the Respondent TZS 20,000,000 to take his wife to the hospital in Nairobi. However, he failed to pay back, so he had to mortgage the two cars, that is the Toyota Rav4 and Toyota Hilux. As a result, the Respondent and SU4 they entered into an agreement that SU4 should sell the said cars hence, they were sold for TZS 12,000,000 for Toyota Rav4 and TZS 8,000,000 shillings for the Toyota Hilux. In his rejoinder, the Appellant's counsel claimed that the Respondent did not present evidence pertaining to the sale such as the contract of sale so the assertion that he sold them was unfounded.

I have searched record of the trial court, indeed there is no contract of sale of the cars. Similarly, there is no evidence by the Appellant indicating the value of the cars not being the amount that they were sold, which could have assisted the court to evaluate their value. The Appellant just complained that the documents for the properties are in the custody of Respondent.

Since the two cars were not disputed as being matrimonial assets and in the absence of evidence to prove their value it was right for the District Court to order TZS 10,000,000 be paid to the Appellant in consideration of the fact that the cars were already sold, hence this ground is also unmerited and it is hereby dismissed.

The third ground of appeal is on the District Court's failure to decide in relation to the domestic utensils. The Appellant's counsel explained that when the Appellant testified in the trial court she was told to list only the substantive assets which are cars, plots and houses. He argued that this couple who have lived together for more than 10 years do not lack domestic appliances considering that they are high-ranking officials employed by the government. He has claimed that in real life it is impossible that the Appellant was sleeping on the floor so she deserved to be heard in this.

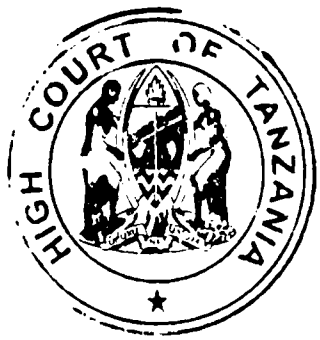
The Respondent contended that the Appellant did not list the domestic utensils as one of the joint assets, the issue was raised for the first time in the District Court and as the first appeal court it rejected this argument. The counsel cited the case of **Kassim Salum Mnyukwa v. The Republic** (supra) and that of **Godfrey Wilson v. Republic** (supra) where the court was of the view that a matter that was not at issue at the trail cannot be brought up at the appeal stage, see also **Richard Majenga vs Specioza Sylivester**, Civil Appeal No. 208 of 2018 where the Court of Appeal held:

> *'It is a settled principle of the law that at an appellate level the court only deals with matters that have been decided upon by the lower court.'*

In this case at the trial court, the Appellant did not mention household furniture, utensils or appliances as she was listing matrimonial assets. The counsel for the Appellant avers that the Appellant was told to name substantive assets such as cars, houses and plots only. This averment is not supported by the proceedings moreover, on page 9 of the proceedings it is clearly depicted she stated *"hizo ndio mali zote'* after listing what she considered matrimonial properties. While the learned counsel for the

Appellant's argument that they could not have been sleeping and sitting on the floor makes a lot of sense, it remains that this is a new matter as elucidated above cannot be entertained at this stage, thus this ground is also found unmeritorious.

For the reasons stated above, the Appeal is devoid of merit and subsequently it is hereby dismissed. This being a matrimonial matter I order each party to bear its own costs.



A.A. OMARI

JUDGE

20/06/2023

Judgment delivered and dated 20th day of June, 2023.

A.A. OMARI

JUDGE

20/06/2023