IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 84 OF 2020

SAID ABDALLAH SHINGWA..... APPELLANT

VERSUS

TATU MUSSA MLEKWA..... RESPONDENT

(Appeal from a decision of Ilala District Court)

(Nassary- Esq, RM.)

dated 29th October, 2019

in

Matrimonial Cause No. 61 of 2018

JUDGEMENT

26th October & 23rd November 2020

ACK. Rwizile, J

Said Abdallah Shingwa was married to Tatu Mussa Mlekwa under Islamic rites in 2009. Their marriage however was short-lived. Nearly four years after their marriage without a blessing of children, the marriage turned acidic. Their relationship became corrosive. There were reports of mistreatment and allegation of denial of conjugal right as a bone of contention of their marriages.

To bring peace and tranquility to her mind, Tatu, fruitfully, petitioned for a dissolution of their marriage and division of their family assets to wit one house at Kinyerezi, two shops at Kinyerezi and a motorcycle. It was in the ration of 40% to 60%, and 30% to 70% on the two properties respectively. However, Said Abdallah Shingwa was not happy with the distribution of the same. He has now filed this appeal challenging it on three grounds;

One, that the trial Magistrate grossly erred in law and in fact by considering a house at Kinyerezi Songas to be a matrimonial property subject of division without evidence to prove so, **second**, that the trial Magistrate erred in law and in fact when making distribution of matrimonial assets for failure to consider that the respondent had moved away with household utensils and left home with 2,000,000/= without consent of the appellant, **third**, that the trial magistrate made an error of law and fact for failure to consider that the respondent bankrupted the second shop located at Tabata Kinyerezi and for failure to consider that the shop at Tabata Liwiti was not a matrimonial asset.

When the matter was due for hearing, it was agreed that the same be argued by written submissions. Said being represented by Mr. Silvanus Nyamikindo of Didace & Co. Advocates, while Tatu has been represented by MS Mariam Hussein Abdullahman of MB and AA Attorney.

Mr. Nyamikindo argued all grounds of appeal together, that it was not proper for the trial court to consider the shop at Kinyerezi is a matrimonial property because it was started in 2004 when the marriage occurred in 2009 as it shown by exhibit D1. Apart from D1, it was added that Dw1 and Dw2 proved so and that it was so admitted by the respondent at the trial.

It was his argument further that another shop, according to evidence was established in 2011 which however was squandered by the respondent basing on her sickness. He went on submitting that the source of marrying another woman was due to infertility of the respondent which was highly resisted by the respondent.

Adding on the reasons why the trial court was not fair to him, it was said before the respondent got a decree of divorce, she left her matrimonial house with house hold assets, and 2,000,000/=, with it was also taken 20 boxes of tiles, 22 pieces of gypsum boards and other goods worth 12,000,000/=. To prove so he said, Dw3 and exhibit D2. It was the learned counsel's submission that section 114 of the Law of Marriage Act [Cap 29 R.E 2019] provides for principles of fair distribution of family assets. He said, it all includes any contribution of the spouses be it money, property or work. It was submitted further that the respondent developed cruel behaviour towards the appellant and was regarded as a dangerous person to his life. This according to him led to the misunderstanding hence this case. He supports his view with the case of **Said Mohamed versus Zena Ally** [1985] TLR 13. He further said, when a spouse commits a matrimonial misconduct it reduces her contribution towards family welfare and therefore not entitled to any share as held in the case of **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32.

It was his submission that because the respondent left home with money and household utensils, she should not be allowed to benefit more than that. He made reference to the case of **Martin vs Martin** [1976] ALL ER. 629

On party of the respondent, it was submitted that the trial court considered the evidence of her contribution. She said, she did not only do her wifely duties but also contributed entrepreneurially towards acquisition of the assets. It was submitted that she borrowed 700,000/= and injected it in development of family business.

Relying on section 114 of LMA, it was submitted that the properties to include the plot she bought before marriage are regarded as jointly acquired because of the improvements made during the marriage. It was the view of the respondent that her contribution was vivid and so falls in the principles stated under section 114 of LMA. Like the appellant, she referred the case of **Bi Hawa Mohamed** (supra)**.** She submitted with vigor that**,** she did house duties of cooking for the appellant and shopkeepers. This amounted to contribution worth compensation as in the cited authority.

Arguing the second ground of appeal, it was submitted that there is no evidence to support allegation that she left the house with an amount of 2,000,000/= as well as other items. She said, if that is true, the appellant ought to have instituted criminal proceedings against her.

Dealing with the third ground, she submitted that the respondent did not fail to run the shop at Kinyerezi. It was submitted that she could not properly run it because of her health problems. It was added, she did not bankrupt the same as alleged. Finally, it was the view of the respondent's counsel that basing on the decision in the case of **Mohamed Abdallah vs Halima Lisangwe** [1988] TLR 197, even house duties deserve enjoyment of her contribution after dissolution of marriage.

As well, it was concluded that the division of matrimonial assets at 50 by 50 should be done regardless of how the same were acquired. She was referring to the case of **Richard Wilham Sawe vs Woitora Richard Sawe** 1992 in Civil Appeal No. 38 of 1992, TZ Court of Appeal.

Upon being given a chance to rejoin, the appellant mostly reiterated principles of fair division of matrimonial assets in the section 114 of the LMA as interpreted in the case of **Bi Hawa** (supra) in that performance of domestic duties done by spouses. As well, the extract in the case of **Martin** (supra) that the spouse should not be allowed to flitter family assets extravagantly and ultimately claim a great share of what is left, as he would be entitled to, if he had behaved reasonably. Accordingly, it was said, the respondent should not be allowed shares she got on assets that are not family assets to wit a house and a shop.

It is my turn, after having gone through the evidence on record and submission of the parties, to decide on whether this appeal has merit or not. To begin with, I have to note here that the respondent before the trial court appeared with two witnesses, her father (Pw2) and a neighbour who also happened to be her cousin (Pw3). Apparently, she testified first. Her evidence did not show if the parties owned any property. She did not mention any property. Her two other witnesses did the same. On perusal, it seems the properties allegedly were stated in the petition.

The appellant who also called witnesses, was clear that he married the respondent and at that time she owned a house-built months before marriage in 2009.

The supervisor of building activities of the same house, is Ismail Hayma Ngatunga who also testified. He said the house was built before marriage between the two occurred.

I have to clearly say here that there is no dispute that the two parties to this matter were legally married and have not been blessed with children. In law there is a presumption that properties jointly acquired are those garnered by the parties during pendency of their marriage or acquired before but substantially improved by their joint efforts. Section 114 of the LMA as submitted by both parties is good to that claim. It lays the principles to guide courts when distributing the family assets.

> *114.-(1) 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.*
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> *(2) In exercising the power conferred by subsection (1), the court shall have regard to –*
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> > *(a) the customs of the community to which the parties belong;*
> >
> > *(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
> >
> > *(c) any debts owing by either party which were contracted for their joint benefit; and*

(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Peculiar circumstance of this case is that there are no children to be considered because the parties were not blessed with any. But apart from customs of the parties and debts owing, contribution of the same in terms money, property or work has to be considered. It has been submitted and agreed by parties that money, domestic duties performed by wife count even though not at equal footing with the other types of contribution. That has been the position in **Bi Hawa's** case (supra).

To dealt with the first ground of appeal, the appellant has complained that the house at Kinyerezi was not a matrimonial property. It was said it was built and completed before marriage. In evidence he so testified and tendered a purchase agreement. It was D1, and it shows he bought a plot of land. His defence also included a person he called the one who constructed the house. It is noted that their marriage was contracted in 2009. That may be true because evidence, has shown he bought the plot before the alleged marriage. But as to when the house was built, it remains clear that it was in 2009. Evidence of Ismail Hayma Ngatunga state that the same was built before marriage.

The appellant only relied on the evidence of Ismail. In my view, that evidence is not enough to prove otherwise that the house does not belong to their family. He ought to have called at least neighbours and other relatives to support that finding. I have therefore in the absence of any evidence to contrary agree with the respondent that this house is a matrimonial property. This holds water regardless of the contribution of either of the parties. I therefore hold that the first ground has no merit. It is dismissed.

On the second ground of appeal, this should not even detain me. There is evidence that the respondent left her home upon the second wife being married, which she resisted. That appellant claimed she left with household utensils, is a matter of evidence and needs to be proved. The appellant merely alleged. This unlike other points touching the crux of the case, the fact cannot be presumed. Cogent evidence must have been adduced to that effect. That said and done, this second ground of appeal lacks merit. It is therefore dismissed too.

Lastly, evidence has been brought that the respondent had health problems leading to failure to manage the shop at Kinyerezi. That was not only testified by the respondent but also the appellant. It is therefore certain that there is no evidence of bankrupting the same shop but rather evidence to the contrary. The respondent being sick, could not have managed the shop in the capacity of a health person. It has been submitted, and rightly so that the spouse should be allowed to squander family assets extravagantly and ultimately claim a great share of what is left, as he would be entitled to if he had behaved reasonably (**Martin's Case**).

I have to add here that this must be proved first in order to apply this principle. There is no evidence proving she did what has been alleged.

It has been submitted though by the respondent and relying in the case of **Richard Wilham Sawe** (supra). That there must be division of 50 by 50 regardless of how the properties were acquired. I do not believe that is the position of the law. I do not think it must be followed. First its citation is not clear, second a copy was not furnished to me even though it looks not reported but lastly the manner of acquisition of the property matters because one cannot distribute what has not been acquired.

As I have said before, what the court has to deal with is whether the properties are jointly acquired and second the amount of contribution by the spouse towards acquisition of the same. This was therefore the position in the cases I have referred above.

In this case, it was the duty of the respondent to prove her amount of contribution for the purpose of getting an equal share or put it differently a fair share on her party. There is evidence that the appellant has brought exhibit and oral evidence to show that he bought a plot of land and built the house. He has also shown that he had a business even before marrying the respondent, that is why he has complained of the share that the respondent has been allotted.

Basing on the evidence on record, the respondent has not endeavored to prove she deserves the share was given or even bigger share. I do not therefore agree with the trial court decision that the ration of 40% and 30% she got on both properties, was a fair one.

She deserves the amount lesser than that in the first property. Having dismissed the appeal partly. I quash the 40% given to her in the matrimonial house and reduced it to 30% while leaving the 30% given in the rest of the properties.

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY