IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

PC. CIVIL APPEAL NO. 27 OF 2022

(Originating from a decision of Chamwino Urban Primary Court Matrimonial Case No 10/2020 and Matrimonial Appeal No. 14 /2020 at Dodoma District Court)

HAPPINESS REUBEN GUNDA.....APPELLANT

VERSUS

EMMANUEL JUDICATE SHESHU.....RESPONDENT

JUDGMENT

Date of last order: 07/11/2023
Date of Judgment: 20/11/2023

LONGOPA, J.:-

This is a second appeal for a matrimonial matter originating from Chamwino Urban Primary Court in Dodoma. The Appellant and Respondent were wife and husband having celebrated their marriage on 1st September 2012. They were blessed with three issues, namely Gracenice Emmanuel Sheshu, Gladness Emmanuel Sheshu and Grayson Emmanuel Sheshu.

The Respondent petitioned before Primary Court for grant of decree of divorce, division of matrimonial assets and custody of the children.

Chamwino Urban Primary Court found that the marriage has broken down irreparably thus granted the order for divorce, the custody and maintenance of all three issues of the marriage was granted to the Respondent and ordered Respondent to compensate the Appellant a total of ten million shillings (TZS 10,000,000/=), pay for residential housing rent of TZS 100,000/= per month for twelve months and that Appellant shall have a right to visit the issues of the marriage at school and stay with them during holidays when possible. The order for compensation to the tune of ten million Tanzanian shillings (**TZS 10,000,000/=**) was arrived at after the Appellant failed to prove before the Primary Court on existence of the matrimonial properties acquired during subsistence of the marriage and that Appellant had contributed towards acquisition of such properties.

That being the case, the Appellant attempted to challenge the decision of Chamwino Urban Primary Court challenging custody of children especially of the youngest child aged 4 years old without considering best interests of the child and unequal division of the matrimonial assets. The District Court of Dodoma affirmed the decision of the Chamwino Urban Primary Court. In the District Court's decision and decree dated 2nd March 2021, the District Court ordered that:

1. That the decree of divorce be granted to parties.
2. The custody and maintenance of the three issues at hands of the Respondent.
3. The ten million Tanzanian shillings is given to the appellant in two equal instalments.

4. The appellant to have free access to visit the children.

Being aggrieved by the decision of the District Court in Matrimonial Appeal No. 14 of 2020, on 2nd November 2021, the Appellant preferred an appeal before this Court on two grounds, namely:

1. *That, the Appellate and trial Court erred in law and fact to decide the appellant's appeal without considered (sic) the relevant evidence adduced by Appellant during proceedings at this case at trial Court.*

2. *That, the Appellate and trial court erred in law and fact by ordering unequal distribution of matrimonial properties as they have acquired during subsistence of the parties' marriage.*

It was a prayer of the Appellant that this court allow the appeal, quash and set aside decision and decree of both appellate and trial courts. The Respondent resisted the appeal on account that the appellate and trial courts weighed the available evidence correctly to reach to the decision.

On 7th day of November 2023, the appeal was heard. Both parties were represented. The appellant was represented by Mr. Onesmo David, advocate while the respondent was represented by Ms. Margreth Mbasha and Ms. Catherine Wambura learned counsel as well.

It was submitted that basis of the Appellant's appeal is non-satisfaction with distribution of matrimonial assets upon dissolution of

marriage. It was submitted that parties acquired several properties, namely: a plot with two houses locate at Mwanza, a guest house at Buhongwa Mwanza, Plot at Ntyuka in Dodoma and a Motorvehicle which is now sold. It was argued that the plot with two houses at Mwanza was purchased by the Respondent in 2006 and the Appellant was a witness to that purchase allegedly during courtship with the Respondent. Both houses in that plot were built in 2006 and 2009 respectively. She prayed for equal division of the said asset as it was acquired during courtship prior to marriage. It was Appellant argument that given the parties were blessed with first issue on 17/10/2009 then she is entitled to equal division. This Court was invited to follow the decision in **Alfred Kinunda vs Maria Kumburu** (Matrimonial Appeal 2 of 2019) HCT Songea District Registry which caters for equal share of division of matrimonial asset acquired during cohabitation.

Regarding the guest house at Buhongwa Mwanza, it was submitted that purchase price and construction of the same was made through a loan the Respondent secured from his place of employment. The only role of the Appellant was supervision of the construction during subsistence of the marriage. It was a submission for the Appellant that she has a substantial contribution.

In respect of plot of land at Ntyuka Dodoma, it was the Appellant's arguments that she was once shown already purchased plot but claimed

later the documents were hidden by the Respondent. She prayed for equal division of this asset as well.

Further, it was averred that a motorvehicle was acquired on 7/2/2011 prior to celebration of the marriage between the parties. It was argued that parties were blessed with a second issue on 19/11/2011 thus it was acquired during cohabitation of the parties making it a matrimonial asset.

Furthermore, it was submitted that the Appellant is entitled to equal division of the matrimonial assets stipulated above on the basis of Section 114(1), (2) and (3) of the Law of Marriage Act on account that the properties were acquired prior to marriage but improved during subsistence of the marriage; even if the Appellant was a domestic wife still her contribution must be taken into account in division of matrimonial assets. It was further argued that there is an increasing trend of equal division of the matrimonial assets considering contribution of each party in the acquisition of those assets. Decisions in the cases of **Bihawa Mohamed vs Ali Seif** (1983) TLR 32; **Robert Aronjo vs Zena Mwinjuma** (1984) TLR 7 and **Bibie Maulid vs Mohamed Ibrahim** (1989) TLR 162 were cited to reiterate the position.

Further, it was stated that recent decisions in **Yesse Mrisho vs Sania Abdul**, Civil Appeal No. 147 of 2016 [2019] TZCA 414 TanzLII and **Mery Kichumisa vs Marcy Vanant Kibiringi**, Civil Appeal No 52 of 2020

[2023] TZCA 218 TanzLII are vital in deciding on division of matrimonial assets.

It was Appellant's prayer that this court should take note of the contribution of the Appellant in acquisition of matrimonial assets prior to and during the subsistence of the marriage and order equal division of the assets thus nullification of the decisions of the two lower courts as the Appellant participated fully in the acquisition of the matrimonial assets in question.

The Respondent disputed the submission by the Counsel for Appellant. The Respondent cited a case of **Kisandu Mboje vs Republic,** Criminal Appeal No 353 of 2018 [2022] TZCA 425 TanzLII where the Court stated that second appellate Court cannot determine a ground that was not determined in the first appellate court. Respondent prayed that first ground of appeal be struck out as it was not adjudicated before the District Court.

The Respondent argued that in respect of the properties, the record from Primary Court does not show that Appellant had contributed to the acquisition of matrimonial assets. It is settled principle of law that contribution towards acquisition of the matrimonial assets is important for division of the assets.

It was submission of the Respondent that Appellant failed to show any contribution in acquisition of alleged assets thus she is not entitled to equal division of matrimonial assets. **Gabriel Nimrod Kurwajila vs.**

Theresia Hassan Malongo, Civil Appeal No. 102 of 2018 [2020] TZCA 31 TanzLII case was cited to substantiate this version of story.

Further, Respondent argued that for all assets acquired before the marriage being contracted are Respondent's property. These include the House at Mkolani Mwanza and the motorvehicle. There is no iota of evidence that Appellant contributed to the acquisition of the assets. The Respondent urged this Court to consider a decision in **Nacky Esther Nyange vs Mihayo Marijani Wilmore** (Civil Appeal 207 of 2019) [2022] TZCA 739 (24 November 2022) on properties acquired before marriage.

In respect of plot at Ntyuka, it was argued that there was no evidence tendered in court to substantiate existence of that plot of land. There was no any exhibits tendered to substantiate that the plot exist and Appellant contributed towards its acquisition.

It was argued that all case cited are distinguishable. There was ample evidence on those cases on contribution towards acquisition different from the current case. According to arguments by Respondent, the Appellant failed to prove before the two courts below that she contributed towards acquisition of the said assets.

It was reiterated further that this being the 2nd appellate court its powers are restricted to legal issues only as it was stated in **Lucas Gabriel vs Republic**, Criminal Appeal No. 557 of 2017 [2021] TZCA 703 TanzLII.

Also, the two courts below were in concurrence of findings on entitlements of the Appellant, this court can only interfere with such findings only when it is satisfied that that there was miscarriage of justice.

The Respondent urged the Court to follow a decision in **Martin Kikombe vs Emmanuel Kunyumba**, Civil Appeal No. 201 of 2017 [2020] TZCA 224 TanzLII where the mandate of the second appellate court is not to interfere with concurrent findings of the courts below it. It was the submission of Respondent that this appeal deserves to be dismissed for lack of merits.

In rejoinder, it was reiterated that parties were cohabiting, and the Appellant is entitled to equal division though the assets were acquired prior to marriage but that acquisition was jointly before and after the marriage.

I had an opportunity to critically peruse the arguments by the parties in this appeal and record of both Primary Court which determined the matter and that of the 1st Appellate Court on this matter. The main aspect this court is called upon to determine is whether the Appellant is entitled to equal division of the so-called matrimonial assets which were acquired prior to existence of marriage between the parties.

I am aware that section 114(2) and (3) of the Law of Marriage Act, Cap 29 R.E. 2019 provides for the factors to be considered in determining the division of matrimonial assets. The law is clear that for a party to be

entitled to division of matrimonial assets then it must be proved that the assets were acquired during subsistence of the marriage or were improved during existence of marriage, that party contributed towards acquisition or improvement of the assets.

From this provision, the position of the law guiding division has set out some conditions or principles to be followed. **One**, it must be established that the said property is actually a matrimonial asset. **Two**, the court must have regard to customs of the community. **Three**, the court must be guided by contribution made by parties in acquisition of matrimonial assets. **Four**, courts must address its mind to the debts of the family, if any. **Five**, Courts must consider needs of infant children, if any.

In absence of a proof that such assets were acquired during the subsistence of marriage and the party participated to the acquisition or improvement of the said assets, the Court is enjoined to find that such party should not be entitled to division of those assets. In the case of **Yesse Mrisho vs. Sania Abdul** (Civil Appeal No. 147 of 2016) [2019] TZCA 597 (7 November 2019), the Court of Appeal observed the following on this assertion: -

> From the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. 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.

The Court is therefore required by law to consider whether, the asset in question were matrimonial assets, there was contribution made by each of the parties in the acquisition of such assets, the debts of the family, if any and the needs of the infant children if any.

It is on record of both the trial and appellate court that assets in question were acquired prior to celebration of the marriage between the Appellant and Respondent. There was no evidence on record indicating that there was actual contribution by the Appellant whether financial or efforts towards acquisition of the assets. The Appellant failed to satisfy the trial and appellate court that she had contributed anything towards the acquisition of the assets. Thus, Appellant failed to demonstrate that a prime factor of contribution in either acquisition of matrimonial assets existed or contribution in form of improvement of the assets was there.

The case of **Bi Hawa Mohamed vs Ali Seif** (supra) which e-echoes Section 114 of the Law of Marriage Act require that assets subject of division should be matrimonial assets; they should have been acquired by parties during their pendency of marriage through their joint efforts.

I am not pursued by the Appellant's submission that the fact that parties were blessed with issues on in 2009 and 2011, would entitle the Appellant to equal division of the assets. The law requires proof of joint contribution for assets acquired during subsistence of the marriage or improved by the parties during subsistence of the marriage. Lack of such proof regarding acquisition or improvement of the said assets makes the arguments by Appellant untenable in law.

Given the fact that Chamwino Urban Primary Court and District Court of Dodoma found that there was no evidence adduced in court by the Appellant on joint contribution towards acquisition of the assets in question to entitle the Appellant to equal division of the assets, I find that the courts below were correct to arrive at that decision as per evidence on record. Both the trial and appellate courts applied the law governing division of matrimonial property in a proper and correct manner.

In the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** (supra), the Court of Appeal stated that:

> 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.

> 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.

Evidence on record from the trial and appellate court does not reveal any tangible evidence on the Appellant's contribution towards acquisition of the properties in question. She failed to show that she contributed towards acquisition of the properties. There is no further evidence regarding improvement of the properties in question as she found the properties already in existence at the time of celebrating the marriage in 2012.

Further, there was no evidence on existence of a plot allegedly purchased by the Respondent at Ntyuka in Dodoma during existence of the marriage. It was therefore unsafe for trial and 1st appellate court to order for division of matrimonial asset that was not even proved to exist.

This being a second appeal, I am guided by the decision in **Martin Kikombe vs Emmanuel Kunyumba** (supra) [2020] TZCA 224 (13 May 2020), where the Court of Appeal stated that:

> It is settled law that a second appellate court's power to interfere with concurrent findings of the courts below is limited to situations where it is plain that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice.

On perusal of record for both trial and appellate courts I have found nothing worth to warrant the same being considered as miscarriage of justice. This courts applied relevant principles of law to reach to the decisions.

The amount of ten million shillings (TZS 10,000,000/=) ordered to be paid to the Appellant as compensation is fair and adequate to recompense her as she had offered domestic work in the family. Indeed, the evidence on record indicates that at different times the Appellant was misusing the assets by taking loans that were discharged by the Respondent. If the trial and appellate court would have found sufficient evidence that the properties were acquired by joint efforts, the share of the Appellant would have been reduced significantly for reasons of misappropriation of the same.

It is the foregoing analysis that I find the decision of District Court of Dodoma was proper and in accordance with the law in respect of division of matrimonial assets in Matrimonial Appeal No. 14 of 2020. I have nothing

to fault that decision. Both the judgment and orders of the Chamwino Urban Primary Court and District Court of Dodoma are hereby upheld.

That said and done, I find that this appeal has no merits. Accordingly, I hereby dismiss it. No order as to costs.

It is so ordered.

DATED and **DELIVERED** at Dodoma this 20th day of November 2023.

Longopa,

E.E. LONGOPA

JUDGE

20/11/2023.