IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

PC CIVIL APPEAL NO. 13 OF 2021

(Arising from Matrimonial Appeal No. 6 of 2020 at Masasi District Court and originating from Matrimonial Cause No. 08 of 2020 at Lisekese Primary Court within Masasi District.)

BETWEEN

STEVEN M. PUNDILE ----------APPELLANT

VERSUS

EVODIA KALIBWANI ----------RESPONDENT

JUDGEMENT

24.02.2022 & 15.03.2024

EBRAHIM, J.:

The Appellant herein unsuccessfully sought to appeal before this Court against the decision of the District Court of Masasi, i.e. Matrimonial Appeal No. 6/2020 vide PC Civil Appeal No. 13 of 2021. On 06.10.2022 the appeal was dismissed with costs for want of prosecution. Still wanting to pursue the appeal, the Appellant successfully filed an application praying for this Court to set aside its order vide Misc. Land Application No. 12 of 2022. On 15.12.2023 the appeal was restored.

Aggrieved by the decision in Matrimonial Appeal No. 6/2020, the Appellant lodged four grounds of appeal as follows:

1. That the appellate court erred in law and fact by failure to decide the appeal in respect of the grounds of appeal formulated and filed by the Respondent;
2. That the appellate court erred in law and fact by departing from the decision of the trial court without any substantive reason;
3. That the appellate court erred in law and fact by dividing the properties without assessing the contribution of the parties to the acquisition of the said properties; and
4. That the appellate court erred in law and fact by dealing with an appeal like a fresh Petition.

The brief background of this matter, according to the records goes thus; the Respondent initiated divorce proceedings at the Primary Court of Lisekese claiming that they have been cohabiting with the Appellant from 1990 as husband and wife. She claimed that in 2019 the Appellant married another woman. The Respondent contended that during the subsistence of their marriage, they acquired a small

business shop in 2000 that the Appellant opened for the Respondent. She said they also bought a plot in 2003 at Mkuti Street of which they mortgaged it for a loan from Mwangaza Saccos and the Respondent contributed to the payment of the loan. In 2005 they bought a plot at Kisiwani and they started building a house in 2019 of which she contributed TZS. 500,000/=. In the same year, the Respondent claimed to have bought a plot at Chingale for TZS. 1,600,000/= and in 2007 she bought a plot at Bondeni Kisiwani for TZS. 1,870,000/=. She testified that together they also purchased a car for TZS. 1,500,000/= in 2006 and a plot at Matankini where they built a house and she contributed TZS 1,000,000/=. She listed another two plots they bought at Wabiso which she said she did not contribute anything and a farm at Napupa which was bought by the Appellant.

After considering the evidence presented before him, the trial magistrate found that the parties were cohabiting under the presumption of marriage under **Section 160 (1) of the Law of Marriage Act, [Cap. 29 R.E 2019].** Thus, there would be no order for the decree of divorce. The trial court proceeded to distribute the

properties acquired during the subsistence of their marriage under **Section 114 (1) of the Law of Marriage Act, [Cap. 29 R.E 2019]**. The trial court ordered that the properties i.e, two plots at Kisiwani and a farm at Chingale be divided equally between the parties. A house at Matankini be divided at the ratio of 20% to the Appellant and 80% to the Respondent; and a house at Mkuti be divided at a ratio of 60% to the Appellant and 40% to the Respondent.

Aggrieved, the Respondent successfully appealed to the District Court of Masasi. The first appellate court after evaluating the evidence on record reversed the decision of the trial court and substituted the division of matrimonial assets to the respondent one house in which she resides, one cashew nut farm at Chingale and one business stall. The first Appellant court also ordered the Appellant to compensate the Respondent because he has been staying with her since she was a young girl. Aggrieved, the Appellant appealed to this court.

The appeal was disposed of by way of written submission as per the schedule set by the court. The Appellant was represented by advocate Anastazia Minja and the Respondent was presented by

advocate Radhia Luhina. The appeal was heard by way of written submissions.

In determining the appeal, I shall not reproduce the submissions by the parties but shall refer to the relevant submissions in the cause of traversing substantive issues. I shall address the grounds of appeal generally.

I have dispassionately gone through the rival submissions by counsels from both parties as well as the evidence on record. Moreover, before I proceed to address the facts in the issue, I find it apt to determine the point of law raised by the respondent that this appeal is time-barred.

The Respondent argued that the appeal was filed out of time. To cement his argument, he cited **Section 80 (2) of the Law of Marriage Act, [Cap. 29 R.E 2019].** Responding to the point of objection, the Appellant contended that the impugned judgment of the District Court was delivered on 18.02.2021 and the appeal was filed on 11.03.2021. The payment was done on the same date i.e, 11.8.2021 as per Exchequer Receipt No. 24477523 issued at the District Court of

Masasi at Masasi. Thus, the appeal was filed within twenty-one (21) days from the date of judgement.

Section 80 (1) and (2) of Law of Marriage Act, [Cap. 29 R.E 2019]. As per the time limit to appeal to this court from the decision of the District Court and Primary Court is 45 days from the date of the impugned judgement. In the instant case, the impugned judgment was delivered on 18th February 2021 and the appeal was filed on 11th March 2021. I have noted that the Petition of Appeal was presented for filing on 11th March 2021 and the payment was made on the same date. Therefore, the appeal was filed within 21 days before the expiration of 45 days. I hereby dismiss the said point of law.

Counsel for the Appellant also raised the issue of jurisdiction that the matter did not pass through the Marriage Reconciliation Board as there is no certificate issued contrary **to Section 101 and 106 (2) of the Law of Marriage Act, [Cap 29, R.E 2019].** She cited several cases to cement the issue of jurisdiction and the effect of the absence of a certificate accompanying the petition. This line of argument prompted me to go through the records.

The Appellant and the Respondent were husband and wife respectively. Their union was considered under the principle of presumption of marriage since they started living together in 1990. Under the presumption of marriage, a woman shall be deemed a legal wife devoid only of the legal right to petition for divorce or separation. Therefore, the law does not require parties under presumption of marriage to petition for a decree of divorce or separation in court. However, the law allows a woman only to apply for maintenance of herself and that of the children obtained during the period of their presumed marriage. A man or woman is also vested with the legal right to apply for custody of the children of their union and some other reliefs which may include division of properties acquired during the subsisting of the union by the joint efforts of the parties.

Section 101 of the Law of Marriage Act, [Cap 29, R.E 2019] provides that;

> ***"No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties;"*** [Emphasis added].

In the case at hand parties were not legally married for them to petition for divorce, thus why their marriage falls under **Section 160 (1) and (2) of the Law of Marriage Act, [Cap 29, R.E 2019]**.

In the case of **Hassani Ally Sandali vs Asha Ally** (Civil Appeal 246 of 2019) [2020] TZCA 14 (24 February 2020) it was observed that;

> *"..... the granting of the divorce under section 107(3) of the Act was not an end in itself. It was subject to compliance with section 101 of the Act. That section prohibits the institution of a petition for divorce unless a matrimonial dispute has been referred to the Board and such Board certifying that it has failed to reconcile the parties. That means that compliance with section 101 of the Act is mandatory except where there is evidence of existence of extra ordinary circumstances making it impracticable to refer a dispute to the Board as provided for under section 101(f) of the Act. However, there is no indication of any extra ordinary circumstances in this appeal which could have attracted dispensing with reference of the matrimonial dispute to the Board."*

Verily, since there is evidence on the record that the parties' union was so considered under the principle of presumption of marriage, the requirement of the certificate from the marriage reconciliation

board was not a pre- requisite to them. Therefore, I find the argument that the petition was prematurely filed to be unmeritorious.

Having carefully read the rival submissions of the parties, it is obvious that the bone of contention is whether the properties owned by the parties were acquired during the substance of their presumed marriage.

In determining this appeal, I shall be guided by the salutary principle of law in civil proceedings that whoever alleges the right on the existence of a fact, has an onus of proving the existence of such fact. This principle has been stated in the case of **Anthon M. Masaga vs. Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 CAT (Unreported) and **Sections 110 and 111 of the law of Evidence Act, Cap, R.E. 2019**. Equally the same, a party with the legal burden of proof also bears the evidential burden on the balance of probabilities as provided under **Section 3 (2) (b) of the Evidence Act [Cap 6 R.E 2019]**.

It follows therefore that a court shall sustain more credible and heavier evidence to prove a particular fact.

The appellant claimed that the District Court distributed the properties without considering the distribution of each party as he was a government employee. The Appellant contended also that the court did not consider the value of the properties.

The respondent submitted that the District Court analyzed the properties acquired during the subsisting of their marriage and considered their joint effort.

Now, owing to the submissions made, I find that the four grounds of appeal can be smoothly determined by this court on one issue as follows:

a.) Whether the District Court was justified in making the order for the division of matrimonial assets.

Section 114 (1) of the Law of Marriage Act [Cap. 29 R.E 2019] provides that a court granting divorce may order the division of matrimonial assets between the parties. However, the court does not perform that exercise arbitrarily. The law sets some factors to be considered by the court in performing such task. Those factors are set under **Section 114 (2) of the same Act.** The Court of Appeal of Tanzania (the CAT) in the case of **Yesse Mrisho vs. Sania Abdul,** Civil

Appeal No. 147 of 2016, CAT at Mwanza (unreported) underscored that the import of **Section 114 of the LMA** is that distribution of matrimonial property is guided by the principles enshrined in the said section. These provisions of **Section 114 (2)** are couched in mandatory form as follows; I quote them for a readymade reference:

> *"114(2) In exercising the power conferred by subsection (1), the court shall have regard to –*
>
> *(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 ....."*

If is my position that these provisions apply to the division of matrimonial assets depending on the circumstances of each case. In the matter at hand, the records show clearly that the District Court did not rightly reverse the Primary Court's order. The District Court did not consider which were matrimonial properties; at what percentage should the properties be divided between the parties; and the debts owned by either party (if any).

The Appellant contended that he was a government employee, so the properties were acquired by using his own money. On the other hand, the Respondent listed the properties which she bought.

However, from the records, the proved matrimonial properties were a house at Matankini, a house at Mkuti which is mortgaged at Mwangaza Saccos, a house and a plot at Bondeni Kisiwani, a farm at Chingale, a farm at Napupa and two plots at Wabiso. There was no evidence tendered by either party to suggest that neither of the listed properties was acquired during the cohabitation period. For that reason, it is prudent to state clearly that even if the Appellant was the one who was earning for the family, the Respondent on the other hand brought up a family, did her small businesses and maintained a home. Thereby, she was supporting the Appellant in his bread-winning activities by relieving him from family duties. and it amounts to contribution. When their relationship came to an end, the Respondent had a right to claim a share of the properties based on her vital contribution towards maintaining and nurturing the family as illustrated in the prominent case of **Bi hawa Mohamed vs. Ally Seif** [1983] TLR 32.

As for the car which was claimed by the Appellant to have been sold at Dar es Salaam, there was no any proof brought at the trial court to that effect.

In the case of **Asile Ally Said vs Irene Redentha Emmanuel Soka @ Another** (Civil Appeal No. 80 of 2020) [2024] TZCA 33 (8 February 2024) it was observed that;

> "It is now a settled law a property acquired by a husband or wife during the subsistence of their marriage, is a matrimonial property. Irrespective of the fact that where purchased, the purchase money is provided by one spouse, that property is taken to have been acquired through their joint efforts. In the case of Bi Hawa Mohamed having construed the provisions of s. 144 of the Law of Marriage Act, (Supra), the Court held inter alia as follows;
>
> (i) Since the welfare of the family is an essential component of the economic activities o f a family man or woman, it is proper to consider the acquisition by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets.
>
> (ii) the 'joint efforts' and work towards the acquiring of assets have to be construed as embracing the domestic 'efforts' or 'work' of husband and wife."
>
> At page 45 of the judgment, the Court underscored the position that, a property acquired during marriage

is matrimonial property because, even if the same is purchased and registered in the name of an individual spouse, it is taken to be a matrimonial property because it was acquired through the joint efforts of a husband and wife. The Court stated as follows;

"The correct position is that husband and wife, in performing their domestic duties are to be treated as working not only for their current needs but also for their future needs. In the present case, the appellant, in looking after the matrimonial home, must be regarded as working not only for her matrimonial needs, but also for her future needs and such future has to be provided from the matrimonial or family assets jointly acquired during the marriage in keeping with the extent of her contribution."

Deriving from the above illustrated principle from the case law of which I subscribe to, I allow the appeal to the extent explained above. In the circumstances and in the exercise of the powers of this court under **Section 44 (1) (b) of the Magistrate Court Act, Cap 11 [R. E 2019]**, I hereby vary the ratio of division of all the matrimonial properties (a house at Matankini, a house and a plot at Bondeni Kisiwani, a farm at Chingale, a farm at Napupa and two plots at Wabiso) to 70% to the Appellant and 30% to the Respondent in reliant to valuation fallouts by a government valuer. A house at Mkuti

which is mortgaged at Mwangaza Saccos shall be the sole property of the Appellant as he is the one paying for the mortgage.

Before I pen off, I feel obliged to discuss the issue of retirement benefits which was raised by the Respondent at the first appellate court. The Respondent raised a new issue which was not determined at the trial court. In the case of **Nurdin Musa Wailu vs. Republic,** Criminal Appeal No. 164 of 2004 (unreported), it was observed that;

> *"...usually the Court will look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."*

Due to that reason, this Court cannot determine the said issue. Nevertheless, and in passing, pension benefit is in alienable and cannot be subject to the division as a matrimonial property.

Therefore, on the above expounded propositions; the appeal partly succeeds. Taking into account the nature of this matter being a matrimonial case, I gave no order as to costs. Each party shall been its own.

It is ordered accordingly.

R.A Ebrahim

JUDGE.

Mtwara

15.03.2024