

# **IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM  
CIVIL APPEAL NUMBER 84 of 2009**

**JULIE A. MMASI.....**

**APPELLANT**

**VS**

**AUGUSTINO MMASI.....**

**RESPONDENT**

## **JUDGMENT**

**Date of last Order:** 02-07-2010

**Date of Ruling:** 17-08-2010

### **JUMA, J.:**

This appeal revolves around the question whether when issuing an order for matrimonial separation the trial court should automatically also issue an order for the division of matrimonial assets. Aggrieved by the decision of the District Court of Bagamoyo (S.A. Mkasiwa-RM), appellant has preferred a single ground of appeal to contend that the trial court upon issuing an order of matrimonial separation should also have ordered the division of jointly acquired matrimonial assets.

The backdrop to this appeal is a matrimonial case number 1 of 2006 originating from Bagamoyo District Court wherein the respondent (Augustino Mmasi) sought the assistance of the district court to order the return of his wife Julie Augustino Mmasi (appellant herein) back to their matrimonial home. In addition the respondent also sought an order to restrain one Thomas E. Malya from keeping his wife away from their matrimonial home. In the same district court; appellant filed a counter claim of her own seeking a judicial separation from her husband (the appellant). She also sought an order for division of their matrimonial property and a right to visit her children.

On 14-05-2007 the Bagamoyo District Court (Mkeha-RM) in essence found that the petition which the respondent had filed against both the respondent and Mr. Thomas E. Malya to have been without merit. Respondent was informed that courts in Tanzania are not vested with the power to compel spouses to cohabit. After finding that the matter had not previously been referred to the Marriage Reconciliation Board, the district court (Mkeha-RM) advised the parties to formally refer their dispute to the Board. Appellant was aggrieved by the decision of the district court and decided to appeal to this Court in the Civil Appeal No. 108 of 2007. On 31<sup>st</sup> March 2008 this Court (Mwarija, J.) allowed the appeal and referred back the matter to the trial magistrate with a direction to determine a cross petition. In that cross petition appellant herein sought an order for judicial separation and division of matrimonial assets.

In compliance with the order of Mwarija, J., the learned trial magistrate (S. A. Mkasiwa-RM) determined the cross petition on the basis of the evidence

already tendered by the disputing parties. This evidence which was already on record included the one of appellant herein testifying about her mistreatment by the respondent and keeping her away from her children. According to the appellant, her marriage to the respondent had irretrievably broken down. Appellant asked the trial magistrate to grant her request for separation, access to her children and division of matrimonial assets.

The learned trial magistrate (S. A. Mkasiwa-RM) was guided by two issues. The first was whether there was sufficient ground for the court to issue an order for separation. And the second was whether the order for division of matrimonial assets can on available evidence be issued. The trial magistrate granted the appellant both the order of separation and granted her the right to visit her children. The trial magistrate refused to grant the order to divide the matrimonial assets which appellant and respondent had jointly acquired during the subsistence of their marriage.

When this appeal came up for hearing on 2 July 2010 appellant was represented by Mr. Tesha Florence, the learned Advocate. Mr. Maige was the learned Advocate who represented the respondent. Mr. Tesha faulted the trial magistrate for failing to exercise the power conferred on courts by section 114 of the **Law of Marriage Act, 1971** (LMA) to order the distribution of jointly acquired matrimonial assets. Further, Mr. Tesha asked this appellate court to order the division of matrimonial assets because appellant's contribution to the jointly acquired assets is reflected in the records of trial court.

4

On behalf of the respondent, Mr. Maige referred this Court to section 111 of the **Law of Marriage Act** which according to the learned Advocate does not on separation, discharge married couples from their existing marital relationship and their subsisting marriage. According to Mr. Maige, separation does not rule out the possibility of reconciliation of spouses. Mr. Maige was in no doubt that the trial magistrate was within the requirements of the law when he declined to grant an order of division of matrimonial assets. Though conceding that in terms of section 114 of the LMA the trial magistrate could order division of matrimonial assets upon ordering the judicial separation of couples, Mr. Maige hastens to point out the provision does not oblige the court to exercise this power to order division of matrimonial assets whenever an order for judicial separation is made. According to the learned Advocate, the courts are enjoined to take into account the special circumstances of individual cases before them.

Mr. Maige further supports the decision of the trial court by expounding on the special circumstances of the matter that was before the learned trial magistrate. That the nature of pleadings and evidence adduced before the trial court, indicated that the appellant and the respondent, were more concerned with judicial separation and maintenance than they were keen for division of matrimonial assets. The learned Advocate concluded his submission by contending that should the appellant be interested in the division of matrimonial assets, she should lodge a petition for divorce.

After hearing the able submissions made on behalf of both the appellant and respondent, the main issue for my determination is whether when issuing an

order for matrimonial separation the trial court should also have ordered the division of matrimonial assets. For this I will be guided by the provisions governing the power of courts to divide matrimonial assets deriving from section 114-(1) of the **Law of Marriage Act, 1971**,

*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.*

Appellant requested the trial court to grant her not only a judicial separation but also the division of the assets they acquired during the subsistence of their marriage. In my opinion, following this request for division of matrimonial assets, the trial magistrate was obliged to make a specific finding whether an order for division of assets should also be issued together with an order for judicial separation. I am satisfied that the trial magistrate addressed this issue. On page 4 of his considered Judgment, the learned trial magistrate stated the following reason to justify his refusal to grant an order for division of matrimonial assets,

*"...since the marital status of the Petitioner and the respondent is still maintained during the period of separation, assets also shall be maintained as matrimonial assets, during that period."*

But with due respect to the learned trial magistrate, after issuing a separation order, the law does not prevent the trial court from issuing an order for division of matrimonial assets simply because an order for separation does not in law dissolve a subsisting marriage. There are other factors on records of the trial court which in my view precluded the trial magistrate from ordering the division of matrimonial assets. Evidence on record of the trial

court show that the appellant identified matrimonial assets in very general terms; making it hard for trial magistrate to base any order for division of matrimonial assets upon judicial separation. The generality of the identification of matrimonial assets is evident in the following excerpt from evidence in chief by the appellant,

*".....After we had built our house we got a tenant. We then started business.....  
- ..... in Dec 1982, my husband had built another house. It is in the very year we had a formal marriage ceremony... in 1987 he built a third house at Ubungo. I supervised that construction... .....we built three rooms more at Ubungo. That was in 1989... [Page 13 of the typed record of proceedings]*

In the circumstances there was no concrete evidence on record from which the trial magistrate would have determined not only the identities of matrimonial assets but also the extent of contribution by the appellant and respondent. As was stated by the Court of Appeal in the case of **Bi Hawa Mohamed vs. Ally Sefu, 1983 TLR 32 (CA)**, court's power to divide matrimonial or family assets under section 114-(1) of the Law of Marriage Act is invoked only when the following conditions exist:

- (i) When the court has granted or is granting a decree of divorce or separation; and
- (ii) When there are matrimonial or family assets which were acquired by the parties during the marriage; and
- (iii) When the acquisition of such assets was brought about by the joint efforts of the parties.

While there is ample evidence on record to support the trial magistrate's order for judicial separation, it was not established on balance of probabilities that the assets which the appellant mentioned in her evidence in

chief were actually acquired by the respondent and appellant during the subsistence of their marriage by their joint efforts. The trial court could not in my opinion issue an order of division of assets on basis of such tenuous and general evidence that the appellant had supervised the construction of their house which now has a tenant.

The words "*when granting or subsequent to the grant of a decree of separation or divorce,*" in section 114-(1) of the **Law of Marriage Act** imply that courts are vested with power depending on evidence to order the division of matrimonial assets at the same time courts grant decrees for separation or divorce or may leave open the question on division of assets till later. Section 114-(1) of the **Law of Marriage Act** does not automatically require the trial court to order division of matrimonial assets at the very same time and moment when a divorce or separation is ordered. It is the evidence on record and special circumstances of the case which determine whether an order for division of matrimonial asset can be made at the same time with an order for divorce or separation.

Since the trial court granted an order for judicial separation without at the same time issuing an order of division of matrimonial assets, it is open to either the appellant or respondent to lodge another application to seek specifically for the division of matrimonial assets. I am in agreement with this interpretation of section 114-(1) of the **Law of Marriage Act, 1971** as restated by Kazimoto, J. in **Fatuma Mohamed V Saidi Chikamba, (supra)** to the effect that where the trial court granted a decree of divorce without at the same time issuing an order of division of matrimonial assets,

the affected parties may later lodge an application specifically for division of identified matrimonial assets in the same court but need not be heard by the same magistrate and certainly there must be a different file.

Appellant or respondent are at liberty to lodge a fresh application specifically to prove and seek the division of identified matrimonial assets in the same District Court of Bagamoyo.

For the foregoing reasons this appeal is hereby dismissed. No order is made with respect to costs because this appeal was filed on Certificate of Legal Aid by the Women's Legal Aid Centre (WLAC).

  
**I.H. Juma**  
**JUDGE**  
**17-08-2010**

**Delivered:**

For appellant:  
For respondent:

  
**I.H. Juma**  
**JUDGE**  
**17-08-2010**