THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC. MATRIMONIAL APPEAL NO. 11 OF 2019

(From Nachingwea District Court at Nachingwea in Matrimonial Appeal No. 2 of 2019, originating from Matrimonial Cause No. 2 of 2019 from Nachingwea Urban Primary Court.)

HADIJA RASHID SANDARI..... APPELLANT

VERSUS

ISSA JUMA KAIMIKA.....RESPONDENT

JUDGMENT

26 Nov. & 22 Dec., 2020

DYANSOBERA, J.:

This is a second appeal. The appellant Hadija Rashid Sandari is, before this court, challenging the decision of the District Court of Nachingwea in Matrimonial Appeal No.2 of 2019 in which the appeal of the respondent was partly allowed.

The sequence of events leading to the appeal run as follows. On 1.4.2019 the respondent herein petitioned for decree of divorce and division of matrimonial assets before the trial court. It is either 1990 or 1995 the parties celebrated their Islamic marriage and were blessed with four issues. In 1998 the parties shifted from Mandawa village to Nachingwea urban area. It is in evidence that in 2006 the appellant suffered for a long time and she underwent hospital medication. Unfortunately, hospital medication did not work as a result of which the appellant decided to opt for traditional treatments. When the appellant started using traditional medicines deserted the respondent on the ground that the traditional healer gave her that condition. The respondent tolerated that situation of being deserted by the appellant until 2017 when he decided to marry his second wife and in the same year, the appellant was divorced by the respondent and each party lived separately. It is said the respondent did not provide services to the appellant during the period of Edda. In 2018 the respondent decided to divide their matrimonial properties. The exercise of dividing the matrimonial assets was witnessed by the relatives of the parties and the local leaders of their residential area. In that exercise the appellant was given the following properties: one house, a bicycle, one set of the coach, one cupboard, three beds, two mattress, one TV, one radio, three tables and three chairs. Whereas, the respondent was given one sprayer machine of the cashew nuts, one refrigerator, one bicycle, one motor cycle, one bed, one mattress, business store at Voda street, one plot situated at Nachingwea, five cattle and two farms of cashew nuts.

The act of marrying the second wife prompted matrimonial disputes between them whereby the appellant demanded a decree of divorce the state which resulted into their dispute to undergo various amicable settlements. At last, the matrimonial dispute of the parties was brought before the BAKWATA Marriage Conciliatory Board of Nachingwea which failed to settle the matrimonial dispute of the parties thus; it referred them to the trial court.

After a full hearing, the trial court was satisfied that the marriage of the parties was broken down irreparably under section 107(3) (a), (b) and (c) of the Marriage Act, Cap 29 R.E. 2002. With regard to the matrimonial assets, the trial court adopted the division of the matrimonial assets as was done by the parties themselves. The respondent was aggrieved by the decision and orders of the trial court, hence, he appealed to the first appellate court. The appeal before the District Court of Nachingwea was pegged on three grounds of appeal. For the purposes of putting the record clear the grounds were as follows: **one**, that, the trial court erred in fact in awarding the appellant the house situated in the clan land of the respondent. **Two**, that the trial court erred in law and fact by failure to take into account the effect of contribution by respondent in division of matrimonial property. **Three**, the trial magistrate erred in law and fact by failure to evaluate the evidence adduced by the appellant. The appeal was partly allowed since the first appellate court was satisfied that the house which was given to the respondent was found in appellant's clan land where he cannot stay. Thus, the first appellate court altered the division of the houses and instead the division of the house was as follows: the

appellant was given the house of Nangunde whereas the respondent was given the house of Majengo "F".

Dissatisfied with the decision of the first appellate court, the appellant has appealed to this Court on three grounds paraphrased as follows:

1. That, the trial Magistrate erred both in law and fact by failure to consider evidence adduced by the Appellant on how the house situated at Nangunde was built which of utmost important to the division of the matrimonial properties.
2. That, the trial Magistrate erred both in law and in fact by failure to consider the Appellant's contribution in acquisition of the house situated at Majengo 'F' which is among of the matrimonial properties acquired by parties.
3. That, the appellant Magistrate erred both in law and in fact by including the house situated at Nangunde among the matrimonial properties acquired by parties during their marriage and ordered the division of the same.

At the hearing of this appeal, the parties appeared in person and fended for themselves. The appellant submitted that she has filed three grounds of appeal and she had nothing to add. The same submission was made by the respondent who submitted that he filed a written reply and he has nothing to add.

I have heard the submissions of the parties and closely perused the lower court records. Beside I have taken into consideration the petition of appeal and reply thereof. The controversy of the parties is centred on the

division of the two houses situated at Majengo "F" and at Nangunde village. Before I chip in, this court is interested to know if the trial court proceeding is featured with evidence that the house situated at Nangunde village is within the clan land of the appellant. Second, whether the trial court divided the matrimonial assets of the parties. Three, if the answers of issue number two is affirmative then the next issue is whether the trial court considered the contribution of each party in dividing the matrimonial assets to the parties.

I will begin with the first issue which wants this court to look upon of the availability of the evidence that the house situated at Nangunde village is within the premises of the clan of the appellant. Iam satisfied that the trial court proceedings and judgment does not feature such evidence. For clarity I think it is important to reproduce an excerpt of the evidence of respondent and appellant respectively so as to see if they testified on such asset that is situated within the clan land of the appellant. At page 3 of the typed trial court proceedings the respondent testified as follows:

> "Amethibitisha na kueleza kwamba walioana na SU1 1995 na kujaliwa kuzaa watoto wanne.Tulifurahia ndo yetu kwa kipindi kifupi kabla mambo hayajaanza kwenda kombo.
>
> 1998 tulihamia Nachingwe mjini kutoka kijiji cha Mandawa.Mwaka 2006 SU1 aliugua kwa kipindi kirefu,na baada ya dawa za hospitali kushindwa kufanya kazi alianza kutumia dawa za asili.Toka wakati

huo mambo yalianza kubadilika kwani SU1 alianza kuninyima unyumba kwa madai kuwa anatimiza masharti ya mganga wa kienyeji.

Baada ya kuvumilia kwa muda mrefu bila huduma ya unyumba, 2017

niliamua kuoa mke mwingine lakini ni baada ya kushauriana na SU1.Hata hivyo SU1 alianza kudai talaka tulikaa vikao vingi kujaribu kupata suluhu lakini haikusaidia.Nilimueleza SU1 kuwa siwezi kuendelea na hali hiyo,hivyo baada ya suluhu kushindikana katika Baraza la kata na Bakwata,tulifika Mahakamani."

Also, at page 4 the respondent was asked some questions by the first court assessor by the name of M. Malemula and he replied as follows:

"Nilimpa SU1 talaka mwaka jana(2018)

- Tuna nyumba 2,

1. Ipo hapa Nachingwea Mjini
2. Ipo kijijini kwa SU1 na zote nilizijenga mwenyewe

- Pia tuna shamba moja lipo Mandawa.
- Banda la biashara mtaa wa voda
- Shamba lingine ambalo lipo Mkonjela ambalo ni langu na mdogo wangu kwani tulipata kabla ya kumuoa SU1.

Nilimpa SU1 Ng'ombe moja baada ya kumuacha na nyumba iliyopo Nangunde.Bado naendelea kumhudumia SU1 kwani nampenda."

Whereas, the appellant testified at page 7 and 8 of the trial court proceedings as follows:

"Amethibitisha na kueleza kwamba nimeolewa na SM1 mwaka 1990 namigogoro ilianzan 2016.Mwaka 2017 SM1 alinipa talaka 5/11/2017, hivyo kila mmoja akaanza kuishi kivyake(kwake).Hata hivyo SM1 hukumhudumia katika kipindi cha eddah.Mwaka jana (2018) SM1 aliamua kugawa vitu(mali)vyetu.ndugu wa pande zote mbili walihudhuria kushuhudia mgao ukifanyika.Pia viongozi wa eneo letu walikuwepo.

Nyumba nilipwea,Baiskeli,Seti ya kochi,Kabati,Vitanda Vitatu, Tv, Redio 1 Meza 3 viti viwili."

At page 9 the appellant when was responding to the question of the trial magistrate she replied that:

"Nina hati ya kugawana malo

SM1- nakubaliana na hali hiyo lakini kuna mambo/mali ambazo hazijaorodhesha

-Nyumba 1 iliyopo Nang'unde

- Ng'ombe 1."

From the above reproduced trial court proceedings, neither the appellant nor the respondent testfied that the house situated at Nangunde village is within the appellant's clan land. Besides, there is the piece of evidence of the respondent which reveals that the said house is situated in the appellant's village and was constructed by the respondent himself. Whereby; the appellant testified that one house is situated at Nangunde village. That is the only evidence available in the trial court proceedings but I wonder where the appellate magistrate got the evidence that the house at Nangunde village is within the clan land of the appellant. In the light of the aforesaid, it is clear that, the decision of the first appellate court which reversed the decision of the trial court and held in favour of the respondent was wholly influenced by the evidence not properly before the court.

In order to tackle the second issue I will ventilate on the trial court judgment particularly at page 7 of the typed judgment. For the best interest of justice I will reproduce an extract as follows:

"Matakwa ya sheria hutaka mali za wadaawa zigawanywe kwa kuangalia mchango wa kila mmoja na pia tamaduni na desturi za jamii watakayo wadaawa.Hili imeanishwa katika kifungu cha 114 (2)(a)(b) Sheria hivyo kwa busara ya Mahakama hii,imeona ni bora mgao ubaki kama walivyokubaliana wadaawa 8/3/2018 ili

kuepusha kuibuka mgogoro mpya. Hivyo kielelezo "U1" itatumika kama sehemu ya uamuzi huu."

From the above excerpt there is nowhere the trial court divided the matrimonial assets of the parties according to section 114(1) of the Law of Marriage Act except the trial court adopted what the parties agreed before the matrimonial cause was registered. Indeed, what the trial court did was to abstain from complying with the mandatory requirement of the law. To appreciate what the law provide I will reproduce the provision of section 114(1) as it appears in the statute book as follows:

> "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."

The above provision of law is very clear that the power to divide the matrimonial assets is vested to the court and not to the parties or any other authority. In addition, the law has put criteria to be complied by the court when exercising its power to divide the matrimonial assets to the parties. The power to divide the matrimonial assets is exercised one, when the court has granted or is granting a decree of divorce or separation. Two, when there are matrimonial or family assets which were acquired by the parties during the marriage; and three, when the acquisition of such assets was brought about by the joint efforts of the parties. Since the trial court granted a decree of divorced it had to proceed to divide the matrimonial or

family assets by complying with the requirements as provided by subsections (2) and (3) of section 114 of the Law of Marriage Act. If the trial court could have exercised its power it could have known if the disputed assets are matrimonial assets jointly acquired by the parties during the lifetime of their marriage. Also, to what extent each party contributed towards the acquisition of the matrimonial assets. Another thing which the trial court could have discovered is any improvement made by the parties to the assets acquired by one party before marriage of the parties if any. Lastly, if the trial court could have exercised its vested power it could have discovered if the gathered evidence could enable it to order an appropriate order on the division of the matrimonial assets.

In light of the foregoing reasons, I allow the appeal, quash and set aside the orders on division of the matrimonial assets made by both the District and Primary Courts. I direct the Primary Court to reconstitute itself and hear the parties on the matrimonial assets, how and when they were acquired, and the extent of contribution of each party and then distribute them according to the law that is section 114 of the Law of Marriage Act.

Any party who will be aggrieved by that decision will have the right to challenge it according to the law.

Each party to bear his/her own costs.

Order accordingly.

W.P. Dyansobera

Judge

22.12.2020

This judgment is delivered under my hand and the seal of this Court on this 22nd day of December, 2020 in the presence of the appellant and the respondent.

W.P. Dyansobera

Judge