IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
PC. CIVIL APPEAL NO. 12 OF 2019

(From Matrimonial Appeal No. 11/2018 at Kinondoni RM'S Court delivered by Kasalio RM on 10th August, 2018: Originating from Matrimonial Cause No. 10 of 2018 at Kawe Primary Court)

HALIMA JAMES MGENDERA..... APPELLANT

VERSUS

ATHUMANI MUSA SHEKIGANDA.....RESPONDENT

JUDGEMENT

MASABO J.L.:-

This is second appeal. It originates from Kawe Primary Court in Madai ya Talaka Na. 10/2008 in which the Respondent herein the Respondent hereis petition for divorce and consequential orders of division of matrimonial assets. Having found the marriage to be irreparable the court granted a decree pf divorce and proceeded to issue equal division of a matrimonial asset to wit a residential house situated at Tabata in Dar es salaam while it decline to make any order for a business house (a guest house) allegedly situated in Tanga on ground that the Appellant rendered no tangible evidence as to its existence. Disgruntled the Appellant herein appealed before Kindondoni District Court on grounds that the court erred in holding that the house at Tabata was a matrimonial asset and in failing to order division of the house situated in Tanga. Having applied the provisions of the law and the relevant authorities to the facts of the case, the first appeal court preceeded by Kasailo RM, upheld the decision of the trial court and ordered

equal division of the house at Tabata. Disgruntled further the Appellant has appealed to this court, Her appeal is based on the following grounds:-

1. That, the appellate magistrate erred in law and fact by holding that the Appellant's property at Tabata was matrimonial property which is not true.

2. That, the appellate magistrate erred in law and fact by rejecting the appellant's submission that there is a Matrimonial House at Tanga.

3. That, the appellate magistrate erred in law and fact by rejecting the appellant's submission that there was an omission of some facts which were adduced by the appellant during the trial.

4. That, the appellate magistrate erred in law and fact on relying onto week evidence submitted by the respondent.

5. The appellant magistrate erred in law and fact by disregarding strong evidence adduced by the appellant hence ended up into erroneous decision.

On the date of hearing, the Appellant represented by Mr. Jacob Sarungi learned counsel, opened his submission by consolidation ground no.1 and 5 into one ground, and grounds no. 2, 3 and 4 into one ground. Submitting on the consolidated ground 1 & 5 he argued that pursuant to Section 55 of the Law of Marriage Ac, production of certificate of marriage is the proof of existence of marriage hence the court erred in failing to rely on the certificate of marriage as proof of existence of marriage. He argues that according to the certificate of marriage admitted as evidence in court, the marriage between the parties herein was concluded in 1999 and that the house in

Tabata having been acquired prior to 1999 was not a matrimonial asset and should not have been treated as such. He argues that even if the same was acquired in 1999 or 2000 it would still not be a matrimonial asset as it was acquired by the appellant single handedly. Citing section 56, 58 and 59 of the Law of Marriage Act, 1971 he submitted that ownership of the property acquired single handedly by a spouse during the subsistence of marriage vests in the respective spouse if there is proof that they were acquired by the said spouse on their own means.

On the consolidated ground No. 2, 3 and 4 he submitted that the court erred in denying the appellant matrimonial assets located in Tanga in that, although there was documentary evidence in proof of the same, the appellant eloquently explained her contribution to the acquisition of the said house in that she told the court that she was giving part of her salary to the husband as contribution towards construction of the house which is now used as a guest house and that such evidence amounts to proof s per section 61 of the Evidence Act, 1967.

On his part, Mr. Francis Magare Counsel for the Respondent submitted that, the argument that the court should rely on certificate of marriage is meant to misguide the court as the parties cohabited prior to the cerebration of the marriage in 1999 and that it was on that basis the primary court ordered division of the house. He reasoned that, the court records will demonstrate that the parties started to live together in 1994 and in 1995 the appellant gave the respondent the money to buy the plot at TABATA the assertion

which was also corroborated by Winfrida James Mgendela. Thus, in dividing the assets, the court did not err in taking into consideration the fact that there was a presumption of marriage which was later blessed by the Islam marriage which entitled them to the certificate. He submitted further that while it is true that it the Appellant was the source of the money that was used to buy the plot at Tabata, the respondent contribution to the construction of the house was in terms of work hence he is entitled to a share under section 114 (3) of the Law of Marriage Act which regulates assets acquired by one party and substile improved through joint effects by the parities. He argued that the section 56, 57 and 58 of the Law of Marriage are misconceived.

Regarding the consolidated ground 2, 3 and 4, he submitted that that the first appeal court correctly directed itself to the issue of proof in that the law requires that the person who alleges existence of a certain fact bears the burden of proving its existence and since the appellant rendered no proof of the existence of the house at Tang and that she jointly acquired the house the court could not have ruled in her favouor. He reasoned that since the appellants allegation was that she was informed about the existence of the house by his brother in law whom she did not disclose his name nir called to testify. He argued that the said person was a material witness and failure to call him discredited her claim. In support he cited the case of **Said v. Mohamed Mbire** [1984] TLR 113.

In rejoinder, Mr. Sarungu submitted that the Appellant does not dispute that they had a relationship prior to contracting the marriage and that it is possible that during that relationship, the Respondent contributed but in the cacity of boyfriend hence his contribution if any is immaterial to the division of matrimonial assets. As for the house in Tanga, he submitted that the Appellant being the wide of the Respondent was best positioned than anyone else to know how the house was acquired and how she contributed.

Having considered all the submissions, I wish to state from the outset that this is being a second appeal, I am not enjoined to interfere with findings of fact by the courts below, unless there are misdirection's or non-directions on the evidence. Only then can this court be to look at the relevant evidence and make its own findings of facts (**The Director of Public Prosecutions V. Jaffari Mfaume Kawawa** [1981] TLR 149; **Buruhani Hawezi v R** Criminal Appeal No. 51 of 2012, Court of Appeal of Tanzania at Mtwara.) The issue for consideration is therefore whether or not whether or not there is any reason for interfering with the concurrent findings of fact by the courts below to the effect that the house at Tabata was a matrimonial asset and that there was no proof that the house in Tanga was existent or if existent was jointly acquired by the parties.

Starting with the house at Tanga, it is on record that the Appellant herein claimed that the Respondent has a house at Tanga and that the same was constructed from the money that the Respondent was collecting as rental fee for the house at Tabata but she did not adduce any evidence in support.

She alleged that he was informed about the existence of the house by one of the Respondent's relatives whom she did neither mentioned nor called to testify in court. The trial court and the first appeal court considered this testimony but found it to be lacking in that the Appellants testimony was based on hearsay and she rendered no testimony to corroborate her story. Having carefully scrutinized the court record, I am of the settled view that the trial court as well as the first appeal court correctly directed themselves to the law as it applies to the facts of the instant case. As held by both courts it is the principle of law that he who alleges must prove. The principle is well elucidated under Section 110 (1), (2) of the Evidence Act Cap 341 RE 2002 that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. That when a person alleges the existence of certain fact/right the burden to prove the existence the fact alleged lies on that person **(Anthony M. Masanga v. Penina(mama Mgesi) and Lucia (mama Anna) Civil Appeal No 118 of 2014,CAT (Unreported). In the** instant case, the onus of proving that the existence of the house in Tanga and the contribution there to rested on the appellant. The question therefore is, did the Appellant discharge her burden? The answer to this is strictly in the negative. While it is true that facts may be proved by oral evidence as per section 61 of the Evidence Act, 1967, the oral evidence adduced by the Appellant was entirely hearsay. Her failure to name the relative who told her of the existence of the house and the failure to call that person testify significantly impaired the credibility of the Appellants' testimony in this issue leaving the court with no credible evidence upon

which to base a finding that there is indeed a house at Tanga and that the same was acquired jointly as alleged by the appelants. This ground is therefore devoid of merit.

Reverting to the first complaint regarding the house at Tabata, the principle and the main question corresponds to the one above stated. The Appellant being the one asserting that she acquired the house single handedly, had a duty to prove that indeed the house was acquired through her own means in the absence of contribution by the Respondent. From the records, it is a common ground that the parties formally contracted their marriage in 1999. It is equally a common knowledge that prior to contracting the formal marriage the parties cohabited for several years. The respondent in his testimony told the trial court that:

> "mdaiwa ni mke wangu tulifunga ndoa mwaka 1999 tulianza Kuishi toka 1984"

On her part, the Appellant testified that:

> "mdaiwa ni mme wangu. Tulianza kuishi 1987"

Although there are differences on when exactly the parties started to cohabit, from their testimony above it could be safely concluded that they cohabited for 12 years or more prior to contracting the marriage. It is likewise on record that the it was the appellant who raised the purchase price in consideration of the plot on which the disputed house is situated. The Respondent did not contribute to the purchase price but he contributed his labour in the construction of the house. In his testimony he stated that:

> "Nilichimba msingi mimi mwenyewe, fundi alijenga hadi juu, nilimchukua mdaiwa akaenda kuona alishanga nilipaua na kuhamia. Pesa za manunuzi ya kiwanja alitoa mdaiwa, mimi nilitoa pesa za ujenzi na nguzu zangu."

This is also confirmed by the appellants testimony. His testimony was to the effect that she gave the Respondent money to buy the plot, cement, sheeting material, doors and windows but she did not explains how the house was constructed and who supervised the construction which makes the Respondent's case more probable. Based on these facts, the court held that the parties lived under a presumption of marriage prior to formally contacting a marriage and that the property acquired during the presumption of marriage was a matrimonial property liable for distribution. The question that follows is whether the court misdirected itself on the point of law. In my settled view, the trail court and the first appeal court correctly directed themselves to the law. Regards the issue of presumption of marriage, section 160 (1) (2) of the Law of Marriage provides in unequivocal terms for presumption of marriage where it is proved that a man and woman have lived together for two years or more and have acquired the reputation of being husband and wife and enjoins the court in such cases to issue orders of separation, maintenance and other consequential orders. In the instant case, the couple cohabited for 12 years and it is uncontroverted that during these years they lived as husband and wife.

Section 114 (2) of the Law of Marriage Act, 197 states that in distribution of matrimonial assets the court shall have regard due regard to the to the

extent of the contributions made by each party in terms of money, property or work towards the acquiring of the assets. This position was firmed up in the landmark case of **Bi Hawa Mohamed v Ally Sefu** [1983] TLR 32 (TZCA). Therefore, the contribution done by the Respondent in terms of labour/work cannot be ignored.

Nevertheless, considering that that it not controverted that the Respondent did not contribute to the acquisition of the plot but he contributed to the construction of the house, I am of the view that the decision of the primary court that the house at Tabata be sold and its proceeds be shared equally by the parties after deduction of the cost for purchase of the plot was well grounded. However since the value of land constantly appreciates it is obvious that the value of the plot is no longer the same and hence deduction of the consideration price paid for the plot 20 years ago in 1999 will not save the interest of justice as the said consideration could be to minimal to match the current value of the plot.

Accordingly, I partly allow the appeal to the extent explained above. I further order that the house at Tabata or proceeds from sale of the said house be shared on the ratio of 60% for the Appellant and 40% for the Respondent. No orders as to costs.

DATED at DAR ES SALAAM this 6th day of December 2019.

J.L. MASABO

JUDGE