IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

PC. CIVIL APPEAL NO. 23 OF 2020

(Civil Appeal Originating from the decision of District Court of Arusha at Arusha on Civil Appeal No. 42 of 2019 C/F From Arusha Urban Primary Court in Matrimonial Cause No. 86 of 2019)

TUMAINI NGEREJA .....APPELLANT

VERSUS

ANNA JAMES ..... RESPONDENT

JUDGMENT OF THE COURT

25/05/2021 & 22/7/2021

M. R. GWAE, J

I am asked to first determine if this appeal was filed out of time or not, and if it is answered in affirmative what consequential order can be properly made by this court. In the event the preliminary objection is found not attainable I shall determine the appeal on merits. However, it is found to be apposite if brief facts are recapitulated herein under;

That, the appellant, Tumaini Ngereja and the respondent, Anna James were husband and wife respectively. That, the parties' marriage was under the doctrine of presumption of marriage as they lived together as husband and wife since 1991. The parties' marriage was blessed with three issues however in the

year 2009 the parties' marriage became sour. On the 13th August 2019, the appellant filed a matrimonial proceeding in the Arusha Urban Primary Court (trial court) where a divorce decree was issued and matrimonial properties were distributed to the parties through the judgment delivered on the 13th September 2019. The trial court's distribution was follows, that the appellant was given 20% of the value of the house located at Njiro area, 5% of the plot at Njiro adjacent to the residential house whereas the Plot located at Njiro area Block "F" and Plot o. 255 Block "C" were not given to the appellant on the grounds that the former bears the name of Josephine Mollel (respondent's wife) and the later bears the name of the joint owners namely; appellant and one Agness Tumaini Ngereja. More so, the appellant was denied any divisional right as to the company's properties, (Hinderland Trading Company Ltd).

Aggrieved by the decision of the primary court, the respondent filed an appeal in the District Court of Arusha at Arusha (hereinafter to be referred to as the 1st appellate court). The respondent's appeal was partly allowed on the 28th February 2020. The 1st appellant duly reversed the trial court's distribution of the parties' matrimonial assets in favour of the respondent to the extent that, the respondent was entitled to 50% of the house and plot adjacent or nearby the house. Rest of the trial court findings were left undisturbed.

Dissatisfied with the 1st appellate court's decision, the appellant filed his Memorandum of Appeal in the District Court on the 2nd April2020 for the purpose of appealing to this court mainly challenging equal distribution of the said matrimonial landed properties as per the 1st appellate court's decision, his grounds of appeal center on the three complaints, **firstly**, that 1st appellate court erred in law for considering evidence that was not tendered during trial on the properties located at Njiro, **secondly**, that, the 1st appellate court erred in law by holding that the matrimonial assets be equally divided to the parties and thirdly, that, there was misconstruction of court's decisions in **Adriano Degard v. Ester Ignas,** Civil Appeal No. 95 of 2011 and that of **Bi. Hawa Mohamed v. Ally Sefu,** (1983) TLR 132.

Upon service of the copy of the appellant's Memorandum of Appeal, the respondent filed a notice of preliminary objection on a point of law to wit; this appeal is time barred, he consequently sought an ordering dismissing it with costs.

When this appeal was called on for hearing the parties' advocates namely; Stephen Mushi and Mr. Rodger Godfrey Mlacha representing the appellant and respondent respectively sought and obtained leave to dispose of the PO and appeal by way of written submission.

In support of the PO, Mr. Mlacha, the learned counsel for the respondent premised his argument on section 25 (1) (b) of the Magistrate Courts' Act, Cap 11 Revised Edition, 2019 as well as Civil Procedure (Appeals in proceedings originating in Primary Courts) Rules, 1963 (GN No. 312 of 1964) where time limit for filing an appeal for matter originating from primary court is 30 days from the date of judgment or order. He added that the delay of even a day, without leave of the court extending time, is fatal. Cementing on his arguments, the counsel urged this court to make reference to a court's decision in **Gregory Raphael vs. Pastory Rwehabula** (2005) TLR 99.

Opposing the PO, appellant's counsel argued that, this appeal is not time barred since its proceedings are governed by provisions of section 80 (1) of the law of Marriage Act, Cap 29 Revised Edition, 2019 being a specific law providing for time limit (45 days) and Matrimonial proceedings Rules. He embraced his arguments by citing a decision of this court (**Lwizile**, J) in **Tumpe Thomson Mwakyonde v Josiah Abdul Kulwa**, PC. Civil Appeal No. 90 of 2020 (unreported – HC) where it was held that provisions of the magistrate courts' Act (Supra) do not apply in the matrimonial proceedings.

Considering the parties' arguments in respect of the preliminary objection raised by the respondent, I am not legally justified to believe that, this appeal is time barred as purportedly argued by the respondent's counsel since there is a

specific piece of legislation which governs matrimonial proceedings, it follows therefore, the Magistrate Courts Act, a general law governing civil matters in the subordinate courts, is inapplicable in the matrimonial proceedings emanating from primary courts. Hence limitation of time for filing an appeal to this court or courts of Resident Magistrates or District Courts is provided under the law of Marriage.

According to wording of section 2 of the Marriage, Cap 29 Revised Edition, 2019, the word "court" connotes any court having jurisdiction under section 76 of the Act. That being the position, it is therefore more important to reproduce section 76 of the Act herein under in order to know if the Law of Marriage is applicable in primary courts or not;

> "76. Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court.

According to the quoted provision of the law, it is quite clear that courts with jurisdiction to entertain matrimonial proceedings include primary courts, district courts and Resident Magistrate's Court as well as High Court. since matrimonial proceeding in question was heard and determined by the District court on its appellate jurisdiction, the appellant's appeal to the High Court ought therefore to be filed in the magistrate's court within 45 days as envisaged by section 80 92)

of the Law of Marriage (supra). Provisions of Section 80 of the said Act read and I quote

> "80 (1) Any person aggrieved by any decision or order of a court of a resident magistrate, a district court or a primary court in a matrimonial proceeding may appeal therefrom to the High Court.
>
> (2) An appeal to the High Court shall be filed in the magistrate's court within forty-five days of the decision or order against which the appeal is brought"

According to the wording of section 80 (1) of the Act, in my view, there is no restrictive clause in the application of the Law of Marriage in appealing to this court merely because the matter was determined by the District Court when exercising its appellate jurisdiction.

There is another preliminary objection raised by the respondent's counsel in the course of his submission with effect that, this appeal is incompetent due to the fact that the appellant filed a "Memorandum of Appeal" instead of "Petition of Appeal". Without Wasting the court's precious time, I am of the thought that the difference is mere of semantics as it does not go to the root of the case even the law, as the case in the Magistrate Courts' Act that appellant should file a petition of appeal. More so courts are required to have regard to substantive

justice in terms of our Constitution under article 107A and in consideration of the principle of overriding objective brought by the written law (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 and in view of the principle of overriding objective brought by the written law (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018.

Nevertheless, the position has been judicially stressed by the courts where such difference of the word "Memorandum" and "Petition" in the heading or title is not capable of rendering an appeal incompetent. In answering this point of objection, I fell bound to subscribe to a judicial precedent in **Basil Masare V. Petro Michael** (1996) TLR 227 where it was judicially stated;

> "If an appellant used the word "memorandum" instead of "petition" in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent since that would be "making a mountain out of a mouse mound"

Having determined the respondent's points of objection as herein above, I hereby overrule his preliminary objection on both points of law and proceed to determine the appellant's appeal on merit.

For the sake of avoidance of repetition of the parties' arguments, I shall not reproduce what parties' advocates have argued for and against this appeal

but I shall consider the same in the course of determining the appellant's ground of appeal.

As to the 1st ground of appeal on **alleged reliance of evidence which was not tendered or adduced during trial by the primary court**. It is the contention by the appellant that the 1st appellate magistrate cooked some of evidence which was not given during trial especially she held that the respondent at certain point used her money in the construction of the house located at Njiro area.

Admittedly, the respondent argued that no court's judgment which is free error in the wording of the judgment of the 1st appellate court but what courts aspire to do is to occasion substantive justice. Supporting his arguments, the respondent's counsel cited the case of **Chadrakant Patel vs. The Republic**, Criminal Application No. 8 of 2002 (unreported-CAT). However, according to the learned advocate for the respondent, the respondent as per her testimony had monetary contribution towards acquisition of the house situated at Njiro.

Regarding the evidence on the acquisition of the house, it is clearly established from the trial court record as depicted in the testimonies of the both parties that the one who bought two plots at Njiro area and whose money was used for construction was the respondent and that the respondent supervised

the construction of the parties' residential house (see testimonies of the respondent at page 1 of the typed proceedings reproduced herein under.

> "Tulifanikiwa kununua kiwanja Njiro baada ya mdai kupambana na biashara zake akanunua. Tulifanikiwa kujenga nyumba ambapo aliyekuwa anatoa hela ni mdai na mimi niliuwa nasimamia tu"

Though, according to the evidence adduced by both parties, it is amply established that, the respondent was sometimes also engaging herself in the economic activities for the family however it seems that, it was after the construction of the residential house in question. The 1st appellate court therefore misdirected itself as complained by the appellant by holding that the respondent used her money in the construction of the house. This ground of appeal is therefore allowed.

In the 2nd ground of appeal that reads; that, the **1st appellate court erred in law by holding that the matrimonial assets be equally divided to the parties.**

Court are bestowed with powers to divide matrimonial assets between the parties who were living as husband and wife. Provisions of section 114 of the law of Marriage Act, Cap 29, Revised Edition, 2019 (Act) do emphasize judicial considerations as to spouse's contributions towards acquisition or improvement

of the matrimonial assets. This position has been consistently interpreted by our courts in numerous decisions for instance in **Mariam Tumbo v Harold Tumbo** (1983) TLR. 293.

> "In accordance with S. 114 92) (b) of the law of Marriage Act, 1971, the court is required in the exercising its power of division of assets to have regard to the extent of contributions made by each party in money, property or work towards the acquiring of the assets, housekeeping is a conjugal obligation and cannot be equated to work which refers to the physical participation in the production of the asset itself".

Also, in **Bibie Mauridi v Mohamed Ibrahimu** (1989) TLR 162 where this court held;

> "There must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets, performance of domestic duties amounts to contribution towards such acquisition but not necessarily 50%".

It is apparent from the citation and the wording of section 114 of the Act that, the assets must, **Firstly** be matrimonial assets and **secondly,** they must have been acquired by the then spouses during marriage by their joint efforts.

In our instant matter, it is certainly clear that, the house in question was bult while the parties' marriage was still subsisting as its construction is said to

have begus since 1996 as rightly depicted by the evidence on record (see testimony of the appellant at page 6 of the typed proceedings). It is also clear from the trial court's record that, the respondent contributed to the acquisition of the house in question in terms of her participation towards construction of the house by supervising its construction and domestic works particularly taking care of the welfare of the family which, in law, constitute to contribution towards acquisition of matrimonial assets. As the appellant also amply contributed in terms of money, thus there was joint efforts between the parties (See **Bi Hawa's** case).

Regarding the 3rd ground, that, there was misconstruction of court's decision in **Adriano Degard v. Ester Ignas ,** Civil Appeal No. 95 of 2011 and that of **Bi Hawa Mohamed v. Ally Sefu,** (1983) TLR 132. As earlier explained, it is therefore not necessary when a spouse id found to have contributed towards acquisition or improvement of matrimonial assets must get fifty percent (50%) of the property jointly acquired during subsistence of the parties marriage unless the evidence adduced supports an order of equal distribution of the matrimonial assets or in other words there ought to be evidence justifying equal contributions to the achievement of the same. In the absence of evidence justifying equal division, issue of equality of division of the matrimonial assets as envisaged under section 114 (2) of LMA Cannot rise as was rightly stressed in the case of

Gabriel Kurwijila vs Theresia Hasani Malongo, Civil Appeal No 102 of 2018 (unreported), Court of the appeal at Tanga where extent of contribution was found necessary before making an order of equal division.

Respondent's efforts namely; supervision to the construction of the house and her taking welfare during construction and appellant's participation in his business must be considered as joint contribution towards acquisition of the house located at Njiro area (See decision in the case of **Uriyo V. Uariyo** (1982) (TLR 355 and **Hidaya Ally Vs Amiri Mluguli,** Civil appeal No 105 of 2008 (Unreported–CAT)

The appellant is trying to persuade this court that the trial court decision in respect of the house and a plot nearby the house by giving the respondent 20% be upheld and the 1st appellate court distribution be quashed and set aside. As explained herein above, the respondent's contribution does not only centre to supervision of the construction of the house but also her taking of welfare of the family which is not is dispute. The respondent, though not entitled to 50% share of the value of the house and plot near or adjacent thereto but she is entitled shares just nearby 50%. According to what I have explained, I am of the view that, forty percent (40%) of the value of the house and plot saves interest of this particular case.

That said and done , this appeal stands partly allowed and partly dismissed and the decisions of the courts below are quashed and set aside to the above extent that is to say the respondent is now entitled to forty percent (40%) of the house and plot located at Njiro area. Considering the relationship of the parties, I am justified to refrain from making an order as to costs in this appeal and the courts below.

It is accordingly ordered.

M. R. Gwae
Judge
22/07/2021

Right of appeal fully explained.

M. R. Gwae
Judge
22/07/2021