IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., MWANDAMBO, J.A, And MASHAKA, J.A.)

CIVIL APPEAL NO. 61 OF 2020

HELMINA NYONI.....APPELLANT

VERSUS

YEREMIA MAGOTI..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Utamwa, J.)

dated the 1st day of November, 2018

in

PC. Matrimonial Appeal No. 1 of 2017

.....

JUDGMENT OF THE COURT

28th March, & 1st April, ,2022

MWANDAMBO, JA.:

The parties to this appeal were a married couple for 29 years having contracted their marriage on 01/07/1987. That relation came to an end by a decree of divorce granted by the Primary Court of Tabora District at Isevya. The instant appeal does not arise from the decree of divorce perse, rather, from subsequent proceedings for division of assets considered to have been acquired jointly during the subsistence of the marriage, hence matrimonial properties.

Some factual background will suffice to highlight the dispute between the parties and the issues involved in this appeal.

Subsequent to the dissolution of the marriage by a decree of divorce, the appellant instituted Matrimonial Cause No. 24 of 2016 before the Primary Court for division of assets acquired during the subsistence of the marriage. However, she did not specify such assets. The respondent resisted the petition contending that there were no any assets for distribution to the parties because, upon divorce, all assets ceased to be matrimonial.

During the hearing before the Primary Court, the appellant listed several assets she claimed to have been acquired jointly with the respondent during the subsistence of the marriage. Of particular interest and subject of the instant appeal, the assets comprise of house No. 1C, at Kitete ward, Kalunde street, house in Ipuli ward and seven plots in Mpera ward, Tabora municipality which were held to be matrimonial assets and subject of division in terms of section 114 (2) (b) of the Law of Marriage Act [Cap. 29 R.E. 2019], henceforth, the Act. The Primary Court did not find sufficient evidence in support of the appellant's claims on other assets, namely; a motor vehicle, brick making machine, motorcycle, grinding machine and a shot gun which it held to have been

exclusively acquired by the respondent hence, not subject of division. The respondent did not challenge that finding.

With regard to the assets held to be matrimonial, the trial Primary Court distributed the house at Kitete ward and three plots at Mpera ward to the appellant whilst the respondent got the house at Ipuli ward and four plots in Mpera ward.

Not surprisingly, the respondent was aggrieved by the division. He appealed to the District Court of Tabora which upheld the trial court's decision having been satisfied that it was unassailable. Undaunted, the respondent preferred a second appeal to the High Court at Tabora on more or less the same grounds he raised before the District Court. Critical of all was a complaint against the concurrent finding of fact by the Primary Court and the District Court thereby holding that the houses at Kitete and Ipuli wards as well as the farm at Mpera ward were matrimonial properties jointly acquired during the subsistence of the marriage and subject of the division between the divorced couple.

The second appellate court was unprepared to sustain the concurrent finding of fact by the courts below. It did so after being satisfied that the appellant had not adduced sufficient evidence in support of joint acquisition of the two houses and the farm neither did,

she lead evidence on the extent of her contribution towards their acquisition. At the end of it all, the second appellate court came to the conclusion that the two houses and the plots were the exclusive assets of the respondent and thus not subject of any division consequent to the decree of divorce.

That decision aggrieved the appellant who has preferred this third appeal on three grounds of appeal certified to be points of law for the Court's determination in terms of section 5 (2) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA).

Needless to say, we think the certification of points of law was not a condition for the appellant to institute her appeal. We say so mindful of the provisions of section 80 (4) of the Act which gives automatic right to an aggrieved party from the decision of the High Court in its appellate jurisdiction to appeal to the Court on any ground be it law or mixed law and fact. In **Gabriel Nimrod Kurwijila v. Theresia Hassan Kalongo,** Civil Appeal No. 102 of 2018 (unreported), we held that a certificate on a point of law in third appeals in cases arising from matrimonial proceedings is not a requirement in appeals to the Court. Worth for what it is, the certificate on a point of law certifying four points of law for the

Court's determination under section 5 (2) (c) of the AJA is, but superfluous.

Be it as it may, having examined the grounds in the memorandum of appeal, we think the determination of the appeal turns on two but interrelated issues, that is to say; **one**, whether, having regard to the fact that the marriage subsisted for 29 years, the High Court was correct in holding that the assets held by the two courts below to be matrimonial assets were not jointly acquired during the subsistence of the marriage and thus not subject to division, **two**, whether it was correct for the High Court to disturb the concurrent findings of the trial and first appellate court on the status of the disputed assets.

We note that the appellant filed her written submissions in support of the appeal pursuant to rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) ahead of the hearing. The respondent did not file his reply. In her brief written submissions, the appellant argues that the High Court arrived at the impugned decision without taking into account the evidence adduced before the trial court which was sufficient to hold that the disputed assets were subject to division between her and the respondent. Relying on the Court's decisions in **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R. 32 and **Yesse Mrisho v. Sania Abdul**, Civil

Appeal No. 147 of 2016 (unreported), the appellant faulted the High Court for ignoring the length of the marriage; 29 years and the fact that when the couple contracted the marriage, the respondent was not a man of means as he only had a bed without a mattress, set of cushion less couches and a radio cassette. It is the appellant's submission that the learned second appellate Judge strayed into an error in failing to take into account her contribution in acquiring the assets in the form of her actual contribution and domestic chores. Other than that, the appellant had nothing to highlight by oral arguments during the hearing except imploring the Court to allow the appeal.

In his oral brief reply submissions, the respondent appeared to be at a loss why the appellant was asking for division of the assets when the marriage had not been dissolved. At any rate, the respondent contended that the assets cannot be divided between him and the appellant because they are for the benefit of the three issues of the marriage. Whilst admitting that some of the assets were acquired jointly with the appellant, he argued that the house at Kalunde street was not one of such joint assets because he bought it from the government through deductions from his monthly salary. He urged the Court to sustain the decision of the High Court and dismiss the appeal.

We find it convenient to begin our discussion with the second issue though we cannot avoid the overlap with the first one in the process. The second issue which reflects ground four in the memorandum of appeal is whether it was proper for the second appellate court to interfere with the concurrent findings of fact by the two courts below it. We are alive that settled law holds that second appellate courts should not lightly interfere with trial court and first appellate courts concurrent findings of fact.

In its judgment, the second appellate court took the view that the first appellate court did not evaluate evidence on the record but simply rubber stamped the trial court's judgment. With respect, that view does not appear to be supported. We say so because, on our examination of the judgment of the first appellate court, we do not find anything suggesting that the District Court merely rubber-stamped the trial court's decision. For instance, a look at page 58 of the record of appeal shows that when addressing ground one, the first appellate court concurred with the trial court that the disputed assets were acquired between 1987 and 2007 during the subsistence of the marriage thus, matrimonial properties. As to ground two, alive to section 114 (2) (b) of the Act, the District Court took the view that regardless of the acquisition of the

house at Kalunde street through the respondent's salary, there was evidence that the appellant contributed to its improvement during the subsistence of the marriage. Regarding ground three, the first appellate court reasoned that, from the evidence on record, there was no dispute that the shamba at Mpera ward from which seven plots were obtained was acquired through the parties' joint efforts during the substance of their marriage through different sources of income particularly, proceeds from sale of milk, pigs etc. In all fairness, we think there was no justification for the second appellate court saying as it did that the first appellate court had no further reasoning but merely rubber stamped the trial court's decision.

The totality of the foregoing is that the two courts below the High Court concurred on findings of fact that the two disputed houses and seven plots at Mpera ward were assets acquired jointly during the subsistence of the marriage hence, subject of division between the parties.

The next question for our determination will be whether there was any justification for the interference with the concurrent findings of fact by the two courts below in the manner the second appellate court did. It is trite law that second appellate courts should be reluctant to interfere

with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice. See for instance; **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31 and **Neli Manase Foya v. Damian Mlinga** [2005] T.L.R 167 cited in **Martin Kikombe v. Emmanuel Kunyumba,** Civil Appeal No. 201 of 2017 (unreported). In **Neli Manase Foya** (supra)**,** the Court had the following to say:

> "...*It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact.*"

It is noteworthy at this stage that the High Court was alive to the standard of proof in the case; preponderance of probabilities which means that the court will accept such version of evidence which is more

credible and probable than the other consistent with section 19 (2) of the Magistrate's Courts Act [Cap 11 R.E. 2019], henceforth, the MCA. That section enjoins a primary court to accept such evidence as is pertinent and such proof which appears to be worthy of belief according to the rule thereof and notwithstanding any other law relating to evidence or proof. Regulation 6 of The Magistrates Court (Rules of Evidence in Primary Courts) Regulations, 1964 G.N. No. 22 of 1964 mandates Primary Courts in ccivil cases to accept such evidence of one party whose weight is greater than the evidence of the other party but not beyond reasonable doubt. In other words, the proof is on balance of probabilities.

The Primary Court accepted the evidence from the appellant which appeared to it to have been pertinent and worthy of belief concerning acquisition of assets during the subsistence of the marriage between the parties. In terms of section 37 (3) (b) of the MCA, the District Court and the High Court were enjoined to follow suit. Apparently, the High Court was not satisfied that the appellant's evidence accepted by the two courts below was pertinent and worthy of belief hence, its interference with their concurrent findings of fact.

The High Court took the view that the evidence by the appellant was too scanty to be worthy of belief in proving that the disputed assets were acquired by the joint efforts of the appellant and respondent during the subsistence of the marriage. According to the High Court, much as the house at Kalunde street might have been acquired during the subsistence of the marriage, there was no evidence of joint contribution in acquiring it considering that the appellant did not produce any documentary proof of the monetary contribution towards its purchase. It also discounted the appellant's contribution to its renovation as irrelevant it being disproved by the respondent which meant that the house was exclusively owned by him.

The learned Judge made similar considerations towards acquisition of the house at Ipuli ward and the plots at Mpera ward discounting the appellant's evidence on the source of income for their acquisition. The second appellate court reasoned further that the fact that the appellant had gone for studies for some time, dented her evidence because such assets might have been acquired by the appellant during her absence thereby falling outside the purview of the matrimonial assets capable of division.

Mindful of the Court's decision in **Bi Hawa Mohamed** (supra), the High Court reasoned that that decision was *not a broad-spectrum remedy for division of matrimonial assets in every case*. Reasoning further, the learned second appellate Judge concluded that, the circumstances of the case did not permit an automatic application of **Bi Hawa Mohamed** (supra). It reached that conclusion based on the undisputed fact that the appellant had not been in the matrimonial home for some time which she did not disclose. If we may pause here, by this statement, the High Court appeared to be suggesting that it was the appellant rather than the respondent who had the duty to disclose the period of her absence from the matrimonial home who made that claim at page 18 of the record of appeal. In our view, doing so amounted to shifting the burden of proof to the person who had no such duty contrary to the relevant law thereby arriving at an erroneous conclusion. With that we now turn our attention to the first issue.

We have examined the record of appeal and the submissions in the light of the impugned judgment. Our starting point is section 114 (2) (b) and (3) of the Act which stipulates:

> "*In exercising the power conferred by subsection (1), the court shall have regard to:*

(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts."

The above provisions have been subject of interpretation by this Court in various cases in particular, **Bi Hawa Mohamed** (supra) cited in many subsequent decisions. In **Mohamed Abdallah v. Halima Lisangwe** [1988] T.L.R. 197, the Court underscored the principle behind section 114 of the Act as compensation for the contribution towards acquisition of a matrimonial property regardless whether the contribution is direct or otherwise. Later, in **Charles Manoo Kasara & Another v. Apolina Manoo Kasara** [2003] T.L.R. 425, the Court reiterated that wifely service of a wife entitles her to division of matrimonial property regardless of her direct contribution. In our recent decision in **Reginald Danda v. Felician Wikesi**, Civil Appeal No. 265 of 2018 (unreported), we held that the respondent was entitled to division of the matrimonial assets even if she had not made any direct contribution to their

acquisition for as long as she was a wife who had made indirect contribution though domestic chores. However, in view of the fact that the respondent was a teacher earning salary which she surrendered to the appellant for the running of the family affairs, she was entitled to equal division.

Against the above, we do not share the same view with the learned Judge on the application of **Bi Hawa Mohamed** (supra). It is obvious that the decision and others we have laid our hands on say nothing more than echoing the spirit of the law under section 114 of the Act. All it does and which it has consistently done, is to guide courts in determining the division of assets considered to be matrimonial assets upon dissolution of the marriage to the extent of the share rather than entitlement by individual spouse. This is so because section 114 (2) (b) of the Act enjoins courts to incline towards equal divisions where there is evidence of equal contribution towards acquisition of the matrimonial assets between the parties. Obviously, that case does not have an automatic application for an equal division and indeed that may not be realistic considering that each case has to be decided on its own individual facts.

The position in the instant appeal is that the appellant was not merely a house wife; she was more than that being a civil servant

earning salary just as the respondent. It was common ground that the appellant was a wife who, apart from her employment, provided domestic services. She had her contribution in the acquiring of assets and thus entitled to a division of the matrimonial assets.

The learned Judge reasoned in the judgment that the appellant had not adduced sufficient evidence of her direct contribution to the acquisition of the assets and which disqualified her from the division. With respect, as seen above, she was not required to adduce direct evidence to be entitled to a division. Such evidence would only be required to justify an equal division just as it was in **Reginald Danda** (supra). Needless to say, much as there was no direct evidence of the appellant's material contribution towards acquisition of the house at Kalunde Street, there was evidence of her contribution towards its substantial improvement consistent with section 114 (3) of the Act. The trial court and the District Court concurred on the appellant's contribution in the renovation of the sitting room of that house. Unlike the learned Judge who discounted the appellant's contribution as immaterial for being against the respondent's wishes, we do not agree that the appellant's evidence was wanting in the acquisition of that house in the form of its substantial improvement.

Next, we shall examine the appellant's contribution regarding the acquisition of the house at Ipuli ward. The substance of the appellant's evidence at page 15 of the record of appeal was that the appellant and the respondent used to contribute to the purchase of sundry assets including; heads of cattle through money from allowances paid to them upon transfer from Serengeti to Tabora. Evidence shows that, part of the allowances was spent towards preparation of house windows and doors for the Ipuli house which had not yet been constructed. Once again, we are unable to share the learned Judge's views that the appellant failed to lead direct evidence towards the acquisition of that house at least to the extent of contributing to the purchase of some materials in preparation for its construction. The same applies to the acquisition of a shamba at Mpera ward whereby the evidence shows that it was purchased for TZS.220,000.00 in 2007 during the subsistence of the marriage. The two courts below the High Court had unanimous findings upon being satisfied that the appellant's evidence was worthy of belief.

Upon our close examination of the impugned judgment, we cannot hold our misgivings behind the approach in treatment of the evidence by the second appellate Judge. It seems to us the learned Judge approached that evidence in isolation from section 114 (2) (b) and (3) of

the Act as well as the provisions of section 33 (3) (b) of the MCA. The latter section enjoins the High Court and District Court in exercise of their respective appellate jurisdictions to accept such proof as appears to be worth of belief according to the value thereof and notwithstanding any other law relating to the adduction and reception of evidence subject to any regulations made under section 19 (2) of the MCA.

The High Court appeared to have applied a higher standard of proof requiring the appellant to account for the acquisition of each of the assets. In doing so it found itself compelled to interfere with the concurrent findings of fact by the two courts below it. For our part, we have not seen any justification for the course of action taken by the High Court because there is no suggestion that the two courts omitted to consider or misconstrued some material evidence or acted on wrong principles or erred in their approach to evaluate evidence. The guiding principle was section 114 (2) (b) and (3) of the Act and **Bi. Hawa Mohamed** (supra) which the two courts had regard to. In doing so, the trial court found the evidence on the acquisition of the assets it held to have been acquired by the appellant exclusively to be worthy of belief considering that the respondent's line of defence was that the said assets were only matrimonial during the subsistence of the marriage and

ceased to be so thereafter. Apparently, the respondent had similar arguments before us and unsurprisingly so, he was adamant that the said assets are for the benefit of the children of the marriage. The burden in the respondent's argument lies in the fact that the trial court did not deal with any probate matter rather, matrimonial assets.

Be it as it may, we are satisfied that had the High Court directed its mind properly to its limited role in interfering with the findings of the two courts below it and paid regard to the provisions of section 33 (3) (b) of the MCA, it would not have interfered with the said findings in the absence of any material before it to justify that course of action. In view of the foregoing discussion, the appeal must succeed with an order quashing the decision of the High Court as it relates to the division of the three assets subject of this appeal. It follows that the division of the matrimonial assets by the trial court and upheld by the District Court is hereby restored. Nevertheless, considering that there is no dispute that the house at Kalunde street was acquired from Government with conditions against its disposition, we think the justice of the case requires that the appellant gets 50% of the value of that house. Going forward, we direct the expeditious valuation of the house conducted by an approved valuer. We direct further that the respondent shall

compensate the appellant in cash the corresponding amount equivalent to 50% of the established market value.

That said, the appeal succeeds to the extent indicated. As the appeal arises from matrimonial proceedings, we decline to make any order for costs.

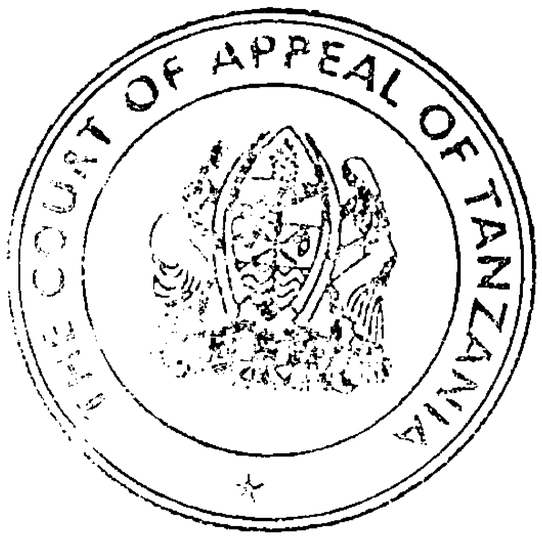
DATED at **TABORA** this 31st day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of April, 2022 in the presence of the Appellant and Respondent, both appeared in persons is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL