

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

MATRIMONIAL APPEAL NO. 2 OF 2015

(Arising from Matrimonial Cause No. 02/2013 of the District Court of Nyamagana)

NEEMA JUMA SAID -----APPELLANT

VERSUS

KHAMIS ABDALLAH MBARUKU-----RESPONDENT

JUDGEMENT

October 20th, 2023

Morris, J

It has taken about a decade for the parties' matrimonial dispute to reach at this stage. It is somewhat unusual. The marriage between them was celebrated on 31st March 2000. Thirteen years later, on 3rd September 2013, Neema Juma Said filed Matrimonial Cause No. 02 of 2013 against Hamis Abdallah Mbaruku in the District Court of Nyamagana (*the trial court*). She was pursuing her husband for divorce; division of matrimonial property; custody of children and maintenance of issues of their marriage. The trial court found the marriage between them had broken down irreparably and accordingly issued the decree of divorce.

Further, the trial court outlined matrimonial properties but found that the appellant was not entitled to any share due to matrimonial misconduct. It also placed the two issues of marriage under the custody of the respondent herein. The appellant was dissatisfied. She filed this appeal. The appeal was pegged on three grounds: the first two faulted the trial court for condemning her as having committed theft and matrimonial misconduct; and the third ground was that the trial court erred to denying her visitation right. This Court (Bukuku, J.) delivered its judgement on 30th November 2017 allowing the first two grounds to the effect that it was not proved that the appellant had committed theft or matrimonial misconduct. The court found: -

"In the result, this appeal succeeds with costs. The judgement and decree of the trial court are hereby quashed and set aside, it is further ordered that the case file be remitted back to the trial court as soon as possible, before another magistrate, in order to determine the issue of division of matrimonial assets, in accordance with the law and per the stipulated guidelines herein."

The foregoing decision aggrieved the respondent herein. He, thus, appealed to the Court of Appeal (Civil Appeal No. 277 of 2020). The Court



of Appeal faulted the decision of Madame Justice Bukuku for quashing and setting aside the decision of the trial court. According to the second appellate Court, the decision of this Court had the effect of vacating the orders regarding divorce and custody of children which were not subject of the appeal before it. Further, the Court of Appeal was of the view that, being the first appellate court, this court was mandated to step into the shoes of the trial court and determine the division of matrimonial properties. In this connection, the following order was handed down: -

"In the final analysis, we allow the appeal to the extent stated above. Accordingly, we remand the matter to the High Court for it to decide the pending question of division of matrimonial assets upon the evidence on record and in accordance with the law..."

Henceforth, this judgement is enjoined to determine only one issue. That is, division of matrimonial properties amongst the parties herein. Before I delve in such undertaking fully, I wish to point out some important but undisputed facts. **One**, by the decision of the Court of Appeal, the holding of the trial court regarding divorce and custody of children remains intact. **Two**, the decision of this Court that the appellant did not commit



theft and/or matrimonial misconduct was not appealed against. It also stands undisturbed.

Three, this Court also decided - at page 15 of its judgement (which was appealed against) that the during subsistence of the marriage, the appellant both carried on domestic works and assisted in the matrimonial shop business. This holding was not challenged at appeal. It too remains valid. **Four**, the trial court (page 4 and 5 of its judgement) shortlisted the matrimonial assets as being one house located at Igoma; one spare parts store at Igoma; and one shop at Sabasaba, Ilemela District. This holding did not find its way up to the appeal in this Court or before the superior Court hereof. In other words, it is yet to be challenged. It binds parties.

Five, the respondent herein was given custody of two issues of marriage. Such placement has not been vacated nor set aside. Accordingly, the respondent retains the custody. **Six**, though forming part of the appeal before this Court, the ground that the trial court erred to deny the appellant visitation rights was determined in her disfavour. Equally so, it was not a matter for determination by the Court of Appeal. As the same is not in the remand directives of the latter Court to this Court, this judgement does not disturb such *status quo*.

I have adequately considered the previous trio judgements (from the trial court, this Court and Court of Appeal) in this matter. I have also evaluated the evidence on record. At pages 7 and 8 of the trial court's proceedings, the appellant herein testified that the couple bought a plot at Igoma-Ndofye street and built a house thereat. That the said house comprises three rented shop rooms. During cross examination (page 9 of same proceedings) she also testified regarding the two spare parts shops mentioned earlier. In accordance with that testimony, one of the subject shops was written in her name and the other on the respondent's.

Nevertheless, the respondent in his testimony stated that, the house at Igoma was built during subsistence of the marriage but the money used in construction was accumulated from his personal projects (page 18 of the proceedings). Further, at pages 19 and 20 of the proceedings, he testified that the shop at Sabasaba area was opened in 2006 at no appellant's financial contributions howsoever. He also stated that the appellant was selling in that shop but ended mismanaging it to closure. And that he reopened it only to collapse again in 2010. Moreover, he claimed that he removed the appellant from management of the shop due



to such mismanagement. He too acknowledged that the couple had a spare parts shop at Igoma.

I am mindful of the relevant principles governing appeals of this kind. One of such principles is that the first appeal substantially takes a form of rehearing. Accordingly, the court enjoys the mandate to reappraise, re-assess and re-analyze the evidence before it. See the cases of ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; ***Kaimu Said v Republic***, Criminal Appeal No. 391 of 2019; ***Makubi Dogani v Ngodongo Maganga***, Civil Appeal No. 78 of 2019; ***Mwenga Hydro Limited v Commissioner General Tanzania Revenue Authority***, Civil Appeal No. 356 of 2019; and ***Diamond Motors Limited v K-Group (T) Ltd***, Civil Appeal No. 50 of 2019 (all unreported).

Division of matrimonial properties is governed by section 114 (2) of the ***Law of Marriage Act***, Cap 29 R.E. 2019. The section directs the court to consider the customs of the community to which the parties belong; the extent of contributions made by each party in money; property or work towards the acquiring of the assets; and debts owing by either party which



were contracted for their joint benefit and the needs of the children of the marriage, if any.

In this matter, the respondent testified further (page 20 of the proceedings) that he was taking spare parts on credit basis from Mohamed Masoud Mtore, Pius Melifedha and others. That, on such arrangement, he pays the whole-seller-lenders after selling the spares. However, the extent of his indebtedness or loan amounts were not stated. Accordingly, this Court (and maybe, as was the trial court's fate) is deprived the basis upon which to consider such allegations in determination of the proportions of distribution pattern. Also, he testified (page 19 of the proceedings) to had used the rent earned to pay for the children's school fees.

It is trite the law that the wife's contribution toward acquisition of matrimonial properties includes the domestic chores. I am guided by ***Charles Manoo Kasara and another v Apolina Manoo Kasara*** [2003] TLR 425; and ***Bi. Hawa Mohamed v Ally Sefu*** [1983] TLR 32. Nevertheless, the contribution of a mere housewife needs to be minimal compared to the contribution made by a wife who also works for gain. See the case of ***Helmina Nyoni v Yerima Magoti***, Civil Appeal No. 61 of 2020 (unreported). In our matter hereof, as pointed out earlier, this court



found that the appellant not only engaged in domestic errands but also took active part in the shops' businesses.

In this connection, considering the extent of contribution by parties herein; and the intact-court-order in respect of custody of children, which placement carries with it upkeep responsibilities to the respondent; I hereby order division as follows: the matrimonial house located at Igoma is divided on the basis of 30% to the appellant and 70% to the respondent. The appellant will also own the spare parts store at Igoma whereas the respondent shall own a shop at Sabasaba.

With regard to the now-apportioned matrimonial house above, after valuation, either party reserves the liberty to compensate the counterpart with the value of his/her share and retain with the house.

On the basis of what is elucidated above, the appeal succeeds with regard to division of matrimonial properties to the extent stated herein. This being a matrimonial appeal, parties shall bear own costs. I so order.



The right of appeal is fully explained to parties.



C.K.K. Morris

Judge

October 20th, 2023

Judgment is delivered this 20th day of October 2023 in the presence of Neema Juma Said (Appellant) and her advocate, Mr. Ruta Bilakwata; and Khamis Abdallah Mbaruku (Respondent).

C.K.K. Morris

Judge

October 20th, 2023