

TANZANIA / JUDGMENT

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28 March 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA SUB - REGISTRY AT MBEYA MATRIMONIAL APPEAL NO. 8416 OF 2024 (Appeal from the decision of the District Court of Ileje at Itumba (Hon. D. A. Magezi – PRM) dated 28 March 2024 in Matrimonial Appeal No. 5184 of 2024, Originating from Matrimonial Cause No. 13 of 2024 at Itumba Urban Primary Court in Ileje District) JOHN KIBONA.....
APPELLANT VERSUS VUMILIA KIBONA.....RESPONDENT

JUDGMENT

Date: 14 June 2024 & 19 July 2024 SINDA, J.: The respondent had petitioned for divorce, custody and maintenance of the child and division of matrimonial assets at Itumba Urban Primary Court (the Trial Court). The Trial Court found that the marriage had broken down irreparably and issued a divorce. Dissatisfied with the decision of the Trial Court on the distribution of matrimonial properties, the respondent 1 successfully appealed to the District Court of Ileje at Itumba (the District Court). The brief facts of the case are that the appellant and the respondent were married in 2019 and had one (1) issue. The respondent decided to petition for divorce at the Trial Court because the appellant dissented her and went to live with the first wife. Aggrieved with the decision of the District Court, the appellant appeals on three grounds as follows:

- (i) The trial and appellate court erred in law and facts when failed to determine the extent of the contributions made by each party towards acquiring of the assets (ii) That, the trial and appellate court erred in both law and fact relying on insufficient evidence in balancing of probabilities. (iii) That, the Appellate Court erred in law and in fact, by ordering the division of matrimonial property equally between appellant and respondent without considering the contribution of the first wife. At the hearing of the appeal, both parties appeared in person unrepresented. The appeal was argued by way of written submission. In his submission in chief, the appellant argued the first and second grounds together. He stated that before ordering the division of matrimonial assets the court must assess the contribution made by each party towards the 2 acquisition of the assets. He added that the court relies on the evidence adduced by the parties to prove the extent of contribution. He contended that the respondent failed to show the extent of contribution towards acquiring of the assets claimed. He cited the case of Bibie Mauridi vs. Mohamed Ibrahim [1989] TLR 162 and Gabriel Nimrodi Kurwijila vs Theresia Hassan Malongo, Civil Appeal No. 102 of 2018

(unreported) to support his assertion. He further contended that nothing in the records of the Trial Court evidences that the respondent proved her case on the balance of probabilities. He maintained that in proceedings of the Trial Court the respondent contradicted herself and thus failed to comply with the provisions of section 112 of the Evidence Act, Cap 6, R.E 2019 (the Evidence Act). He referred to the case of Paulina Samsoni Ndawavya vs. Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported). Regarding the third ground, the appellant submitted that where a man has two or more wives they shall enjoy equal rights, equal liabilities and have equal status in law in accordance to section 57 of the Law of Marriage Act, Cap 29, R.E 2019 (the LMA). He stated that he had another wife before he married the respondent. A fact that even the respondent acknowledged at the Trial Court. He summed up his submission by faulting the first appellate court for ordering the division of matrimonial property equally between the appellant and respondent without considering the contribution of the first wife. In support he cited section 114 (1)(2)(b) of the LMA. In her reply, the respondent argued the first and second grounds together. She submitted that the appellant has appealed against the decision of both the Trial Court and the District Court while he should have appealed only against the District Court decision as in the second appeal there are limitations on what can be entertained. She argued that one cannot challenge the Trial Court's decision in the second appellate court unless there was a misdirection or non-direction on a matter of fact by the lower court. She prayed this court to expunge the first and the second ground. Further, she submitted what is in dispute is the extent of contribution to the properties obtained during the marriage between the appellant and the respondent. She continued that the appellant claimed that the respondent failed to prove her contribution towards the acquisition of the assets as she provided insufficient evidence. She argued that section 112 of the Evidence Act is misapplied in this case as it does not pertain to matters originating from the Primary Court. She suggested the more relevant provision is that of section 114 (2)(b) of the LMA with regards to the extent of contribution made by each party in money, property or work towards acquisition of the assets. Moreover, the respondent submitted that she conducted business with the appellant and she supervised the business. Therefore, it is evident that she had significant contribution to acquiring the assets. She cited the case of Gabriel Nimrod Kurwijila vs. Theresia Hassan Malongo (supra) to support her argument. Addressing the third ground she argued it is not disputed that the appellant had two wives. She added when dividing the matrimonial assets, the court must consider the extent of contribution between the husband and each wife individually if both wives are living in the same household. She submitted that in this case, the wives were not living in the same household. 5 The respondent continued that she contributed in the acquisition of their matrimonial properties and supervised some of them. Therefore, she argued, the appellant cannot exclude the respondent from the acquisition of the matrimonial assets and the 50% division of those assets. In rejoinder on the contention that the respondent conducted business together with the appellant. He argued that from the proceedings the respondent contradicts herself particularly on page 4 paragraph 10 of the proceedings of the Trial Court. He added that the District Court was wrong to order that each party gets 50% of the matrimonial assets while the respondent failed to prove her

contribution towards the acquisition of the said properties. I have considered the grounds of appeal, the parties' written submissions, and the evidence on record. First, I would like to address the issue raised by the respondent that the appellant has appealed against the decisions of both the Trial Court and the District Court. Thus, the respondent prayed for the first and second grounds of appeal to be expunged. I agree with the respondent that this being the 6 second appellate court, the appellant should have raised his grounds of appeal in relation to what was decided at the District Court. However, seeing that no party was prejudiced by the said action, I will borrow a leaf from the case of Felician Muhandiki vs. The Managing Director Barclays Bank Tanzania Limited, Civil Appeal No. 82 of 2016, at page 15, where the Court of Appeal held: "It is a settled jurisprudence that procedural irregularity cannot vitiate proceedings if no prejudice has been occasioned to a party." Hence, I find no need to expunge the first two grounds and will proceed to discuss them on merit. Based on the submissions and the evidence on records, it is not disputed that the appellant and respondent herein contracted a customary marriage where the appellant paid 400,000/= Tshs as dowry. It is also not disputed that at the time the appellant got married to the respondent he was already married to one Esther Mtawa (DW2). It is further not disputed that during the existence of their marriage, the appellant and respondent acquired matrimonial properties, which after being divorced were subject to division. The main issue is what properties should be subject to division. The respondent claimed that during their marriage they acquired a house, a 7 groundnut machine, tricycle, TV and utensils. Save for the TV and the utensils, the appellant claimed the rest of the assets he acquired with his first wife. That being the case, I will refer to Section 57 of the LMA, that reads: "57. For the avoidance of doubt, it is hereby declared that, subject to the express provisions of any written law, where a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law." That above provision should go hand in hand with what was held in case of Gabriel Nimrodi Kurwijila vs. Theresia Hassan Malongo (supra), to wit: "The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property." From the above, it goes without saying that the extent of contribution by a party in a matrimonial proceeding is a question of evidence. The appellant during trial brought a witness, DW2, that testified the claimed assets by the 8 respondent belonged to her. The respondent's witness, PW2, testified on the repeated disputes between the parties and did not mention on the assets. The appellant and his witness explained on how the assets were acquired and so did the respondent. In my opinion both parties explained how the assets were acquired but did not explain in detail on their contribution towards the acquisition of the same. That is a result of scarcity of evidence adduced before the Trial Court. It has to be noted that acquisition of an asset is one thing and the extent of contribution is another thing. It is trite law in civil matters, that the one whose evidence overweighs the other wins the case, as it was discussed in the case of Hemedi Said vs. Mohamed Mbilu [1984] T.L.R 113, where the court held that: "According to

the law the person whose evidence is heavier than that of the other is the one who must win.” On matters concerning matrimonial properties, both spouses are to show the extent of contribution to the acquisition of the assets so as to determine the division. The principle of “who alleges must prove” is still applicable, but it should not protect the respondent or defendant from proving his contribution as well. 9 In the matter at hand there is no concrete evidence to prove that the said properties were obtained by the appellant and his first wife. Mere words by the appellant that he obtained the said properties with his first wife without evidence is not enough to prove those arguments. I am lured to believe that the said properties are matrimonial assets between the appellant and the respondent and are subject to division. Accordingly, I believe that the first appellate court did consider the available evidence and measured the same on balance of probabilities in reaching its decision. Therefore, I find the first and second ground of appeal with no merit. On the third ground, I will again quote what was stated in the case of Gabriel Nimrodi Kurwijila vs. Theresia Hassan Malongo (supra), the Court of Appeal state: “Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114

- (2) of LMA cannot arise also where there is no evidence to prove extent of contribution” As per the above provision, it is true that equality in division of matrimonial asset cannot arise where there is no evidence to prove extent of contribution. 10 However, I do not see how the District Court would have decided otherwise in this particular situation. Besides, in the present case it's not that there is no evidence, but the available evidence is not sufficient to show the contribution of each party in the acquisition of the said properties. For that reason, I believe it was fair to divide the assets equally, while keeping in mind the case of Hemedi Said vs. Mohamed Mbilu (supra) to the effect that no party's evidence in this case overweighed the other. In conclusion, I find this appeal to be devoid of merit and dismiss it. This being a matrimonial case, I make no order as to costs. It is so ordered. Right of appeal explained. DATED at Mbeya on this 19 Day of July 2024 A. A. SINDA JUDGE 11

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Prepared on 14 October 2026 · Esheria