IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NYALALI, C. J., MAKAME, J. A. AND KISANGA, J. A.)

CIVIL APPEAL NO. 9 OF 1983

BI HAWA MOHAMED……..…APPELLANT

VERSUS

ALLY SEFU…….RESPONDENT

(Appeal from the Judgement/Decree/Order/ Finding/Decision of the High Court of Tanzania at Dar es Salaam)

(Kimicha, J.)

dated the 2nd day of May, 1981

in

(PC) Matr. Civil Appeal No. 39 of 1980

J UDGEMENT OF THE COURT

NYALALI, C. J.

The appellant Bi Hawa Mohamed and Ally Seifu were wife and husband respectively until the dissolution of their marriage by court decree of the Primary Court of Ilala District, at Kariakoo, Dar es Salaam in 1980. In subsequent proceedings, seeking the division of matrimonial assets, the Primary Court held in effect that Bi Hawa Mohamed was not entitled to any share in the matrimonial assets as, to use the words of one of the assessors, “She was only a mere wife, and the house was bought by the husband with his own money”. The Primary Court went on to accept the offer made by Ally Seifu to pay a sum of shs.2,000/= as a parting gift to her in accordance with his religious tenets. On appeal, the High Court, Kimicha, J. substantially agreed with the views of the trial Primary Court but increased the amount of the parting gift to shs.3,000/=. Bi Hawa Mohamed was further aggrieved by the decision of the High Court and she obtained legal aid from the Tanganyika Law Society, hence this appeal to this Court. Mr. R. C. Kesaria, learned Advocate, appeared on legal aid for the appellant. The Respondent appeared in person. The High Court certified that a point of law was involved. It can be broadly stated as follows:

"Did the High Court and Primary Court erred in law in holding the view that domestic services of a housewife do not amount to contributions made by her in the acquisition of matrimonial assets".

From the proceedings in the High Court and the Primary Court the following facts were established on the evidence. The appellant and respondent were married according to Islamic rites in Mombasa, Kenya, sometime in 1971. The respondent had a house in Mombasa and they used it as the matrimonial home. Furthermore, the respondent was a Seaman and his work involved traveling abroad for many months. While so traveling, he would provide adequate maintenance for the appellant, who remained at Mombasa, to look after the matrimonial home. On one occasion, he gave her an additional sum of shs.18,000/= to set up business activities. She however failed to establish any business and the money cannot be accounted for. In 1974, the respondent purchased a house in Dar es Salaam with his own money. This house is House No. 40 along Swahili/Mhoro Streets and is the subject of this case. In 1975 the

spouses moved from Mombasa to this house in Dar es Salaam and they were using this house as the matrimonial home at the time of their divorce.

The power of the Court to divide matrimonial assets is derived from section 114(1) of the Law of Marriage Act, 1971 which states:

> 114. (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.

It is apparent from the citation to and the wording of section 114 that the assets envisaged thereat must firstly be matrimonial assets; and secondly, they must have been acquired by them during the marriage by their joint efforts.

The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view, the terms `matrimonial assets` means the same thing as what is otherwise described as `family assets`. Under paragraph 1064 of Lord Hailsham`s HASBURY`S LAWS OF ENGLAND, 4th Edition, p. 491, it is stated,

> "The phrase "family assets" has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parties (1) those which are of a capital nature, such as the matrimonial home and the furniture in it (2) those which are of a revenue – producing nature such as the earning power of husband and wife".

The next important point of law for consideration and decision in this case is whether the assets in question – that is House No. 40 situated along Swahili/Mhoro streets in Dar es Salaam was a matrimonial or family asset at the time of dissolution of the marriage of the parties. The answer here is easy. On the facts established in the two courts below, that house was used by the parties as their matrimonial home after they moved from Mombasa to Dar es Salaam. It was therefore a matrimonial or family asset.

The next point of law for consideration and decision is whether this matrimonial or family asset is subject to division between the parties under the provisions of section 114(1). It is apparent that the Court`s power to divide matrimonial or family assets under section 114(1) is invoked only when the following conditions exist:

(i) Whe the Court has granted or is granting a decree of divorce or separation; and

(ii) When there are matrimonial or family assets which were acquired by the parties during the marriage; and

(iii) When the acquisition of such assets was brought about by the joint efforts of the parties.

There is no controversy regarding the existence of conditions (i) and (ii). The real dispute centers on condition (iii) – that is, on whether the matrimonial home was acquired by the joint efforts of the appellant and respondent.

It is the appellant wife`s contention that her efforts in performing her domestic duties had the effect of placing the respondent husband in a financial position to buy the house in question. As already mentioned, the two courts below rejected this contention on the ground that performance of domestic duties by a housewife does not count in the acquisition of matrimonial or family assets. The fundamental question now is whether this view of the two courts below is erroneous.

We are aware that there are two schools of thought which currently contend in the High Court on this issue. In the case of

ZAWADI ABDALLAH VS. IBRAHIM IDDI, Dar es Salaam High Court Civil Appeal No. 10 of 1980 (unreported), Mapigano, J. referred to these two schools of thought by stating:

"There are those who maintain that under section 114 the term joint effort is limited to direct contribution by a spouse by way of money, property and work, to the acquisition of the asset in question and that housekeeping and raising the children count for nothing. On the other hand, there are those who take the view that household work must be regarded as part of the joint effort or contribution towards the acquisition of any asset by the husband and wife's citing of the husband's marriage vow and the fact that she has been running the home operate to entitle her to a slice in her husband's estate. You may, if you prefer, describe the two constructions as narrow and broad, respectively. The question which I am called upon to answer in this case is which one of these views is correct. This is an important matter and I confess I have not found it all easy. To my knowledge not much has been said about it in this country and there is a paucity of judicial pronouncement on the matter. Such few decisions as there are either way and happily I am not bound by any.

"Those who champion the broad view see no valid distinction, in principle, between the wife who takes up employment or carries on business or profession and the one who remains at home and devotes her time running the home. They would construe the terms contribution and joint efforts liberally to include domestic services rendered by the full time "domestic" wife. They would advance several reasons to back up their viewpoint. Among the reasons: (1) that it is the philosophy and spirit of our time and that it is quite in harmony with the realities and changed social and economic circumstances; (2) that the domestic work may be more difficult and more valuable to the family than of a wife who is self-earning; (3) that the husband can hardly conduct his business if his wife does not cook the dinner and mind the children; (4) that in certain instances the wife may have sacrificed her own career on the altar of matrimonial life and if say after twenty or thirty years of marriage her husband for old man's reasons or no reason whatsoever (as probably was the position in the case before me), sees fit to banish her, the decree of divorce may have the further undesirable and sad effect of practically thrusting her into destitution; and (5) that in yet certain instances the

estate of the husband may have been built up by the industry of the husband and the thrift and prudence of the wife in running the home and that, therefore, it is in conformity with one's sense of justice and fairness that she should share as of right in the fruits of his success. They would find encouragement and comfort in the words of Searman L. J. which appear in the Medico – Legal Journal, 1966 Vol. 34 at p. 19 that:

> "It is recognized that a married woman who brought up a family and maintained a home was thereby actually supporting her husband in his bread – winning activities by releasing him from family duty. Quite plainly if the marriage broke down she must have a claim upon the family funds by reason of that vital contribution to the family life. It was here that the law of England (as it then was) went wrong".

These are, I think, strong and weighty reasons and no doubt that the strict operation of the doctrine of separate property can occasion a

great deal of distress to a divorced woman. But we should bear in mind that the whole question is a legal one.

"Judge Makame for one has taken a stand on the side of the liberal school. Sitting in this Court at this place he felt himself prepared and able to say that the domestic services that a wife renders count. That was in the case of Rukia Diwani Konzi VS. Abdallah Issa Kihenya – Matrimonial Cause No. 6 of 1971. His reading of section 114 does not square with that of the magistrate who heard this case. The learned judge thought that the section has sufficient width to embrace the broad view. Stated the learned judge:

> "There is a school of thought which says that domestic services a housewife renders do not count when it comes to acquisition, and therefore the subsequent possible division, of matrimonial assets ……
> I find this view too narrow and conservative and I must confess my inability to subscribe to it. Section 114 of the Law of Marriage Act does not really

> support the school of thought referred to and is, in my view, capable of accommodating a more liberal interpretation".

A little further on Makame, J. continued:

> "Even in a country like Britain, where salaried married women are quite common, the modern progressive view, with which I wish to associate myself, is that looking after the home and bringing up the children is a valuable contribution. See for example the recent case of Bateman VS. Bateman. The law Report 1979 FAM 25".

"But be it noted that in this respect our statutory Law compares unfavourably with the English Law. The perimeters or ambits of the English Law are simply and expressly more extensive. The English case to which the learned judge made reference was an application by the wife for financial provision and adjustment of property in her favour, upon the dissolution of the marriage between her and the

respondent. The decision of the court was manifestly predicated upon the provisions of the English Matrimonial Causes Act, 1973, which makes explicit provisions to the effect that in adjusting property rights under that act, the contribution made by each of the parties to the welfare of the family, is a relevant consideration to be taken into account. So in my respectful opinion the decision in that case can hardly be helpful or persuasive".

Mapigano, J. continues:

"As shown, in this case the learned magistrate expressed and followed the narrow interpretation. He argued that since traditionally the looking after the household and caring for the children is the occupation and responsibility of a wife, just as the feeding and clothing the family is the occupation and responsibility of the husband, then that should not be considered as a contribution or joint effort. Was he wrong? At the risk of being deemed a conservative, though I would like to believe that I am not, I must say that on the view that I take of the law I feel compelled to pronounce that the decision of the learned magistrate is, in the final analysis, sound. I

share his opinion that under section 114 the housework of a wife and looking after the children are not to be equated with the husband's work for the purpose of evaluating contributions to marital property. I hold as he did that such domestic services are not to be taken into consideration when the court is exercising its powers under the section. I will give my reasons.

"First, I think that the broad view is inextricably linked with other matters. It does bring to the fore other issues which are arguably troublesome in regard to which the statute does not appear to make any clear provisions. Two such issues come to my mind. One, there would be in many cases the question whether the matter is to be decided with reference to the matrimonial differences which may in fact have made it necessary to consider the matter – in the light of the principle that no one should be allowed to benefit from his own wrong. To put it interrogatively: will a wife be allowed to benefit from a marriage which she has wrecked? Two, there would be the relationship between the order under section 114 and the order which the court may make with regard to maintenance under section 115.

"Secondly, and I regard this to be a stronger point, the question can be asked: Is there really anything in law to give any strong colour to the suggestion that is put forward by the liberal school. Certainly it was not part of our own law before the enactment of the Law of Marriage Act. See for example Iddi Kungunya VS. Ali Mpate (1967) HCD 49. And to be sure, there is no provision in the Law of Marriage Act which says so in terms. That throws up a question of judicial policy. It is this: that where there are no clear rules of law governing matters of such general social importance, matters which directly affect the interests of almost every matrimonial couple and which raise issues that might be the subject of public controversy and on which laymen are as well able to decide as lawyers, can the courts properly proceed on their view of public policy? (there is the warning uttered by a judge over a century and half ago that public policy is a most unruly horse, you can never known where it will carry you). Would it be not be to encroach on the province of the Legislature? Patel , J. thought so. He observed briskly in the case of Hamid Amir Hamid (supra) that if the Legislature had intended that domestic services performed by a wife be regarded as contribution and joint effort it would have said so in language clear and plain. But the

liberal school might put forth the line that the law should be innovative and responsive to societal aspirations. I would embrace that principle. I do understand that judges must develop the law and that indeed it is now generally accepted that sometimes they must, and do, legislate. The myth that common law judges merely enunciate or discover the existing law should now stand discredited. Blackstone was, I think,

one of the leading proponents of that theory. However, as the great American judge Holmes once said, and many subscribe to that viewpoint, the judges should do so only interstitially, and with molecular rather than molar motions. In 1969 (in his paper which he read at the University College Dar as Salaam) Sir Charles Newbold, then the President of the Court of Appeal for East Africa, put the point in this way:

> "The power of the judges to make Law is a power which can be exercised within circumscribed limits. The power is exercised in two fields. The first is

> where rights and duties of a member of the community are determined by legislation; and in that field the circumscribing limits are the doctrines of equity and the indefinable but real customs and needs of the community …….
>
> Within the field in which rights and duties are specified by legislation a judge's duty is to apply and enforce the legislation and, save as regards subordinate legislation, he cannot challenge the validity or effectiveness of the legislation".

"Further, I think perhaps I should read a short passage from the decision of Parks B in Egerton VS. Brownlow (1953) 4 HLCL, a passage which has been frequently quoted with approval by many judges including Sir Charles Newbold:

> "It is the province of the statesman, and not the Lawyer, to discuss, and of the Legislature to determine, what is best for the public good and to provide by proper enactments. It is the province

> of the judge to expound the law only; the written from the decisions of our predecessors and of our existing courts, from textwriters of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community".

In my considered opinion, I think that if at all there is any grey area in respect of the matter, the appropriate solution to the problem lies in the intervention of the Legislature and not in judicial Legislation. But is there a grey area? That leads me to my next point and this is where I would put the emphasis.

" I apprehend that to follow the broad view would be to give recognition to the concept of community of property between the husband and the wife – communio bonorum – and perhaps with its logical corollary community of loss and debts. And, specifically, it would run directly counter to sections 58 and 60 (1) of the Law of Marriage Act and empty those two provision of all meaning effect.

Those sections are some of the stricking features of the statute and seem to reflect the notion of separate property. They say that subject to the provisions of section 59 (which relate to matrimonial homes) and to any agreement the parties may make, any property acquired in the name of the husband or of the wife, presumptively belongs exclusively to that person.

"There are material which strongly point t a definite legislative intention that domestic services should not count when the court is dealing with the matter of division of assets under section 114. In this regard attention should be called to the fact that the Act is based on the work of the Kenya Commission on the Law of Marriage and Divorce which was headed by Spry J. A. and which is comprised in the Commission's report of August, 1968. The Act borrows heavily from the draft bill prepared by the said Commission – Appendix VIII to the report. For instance our sections 58, 60 and 114 are, respectively, exactly the same as sections 66, 68 and 123 of the draft bill. Now the view and recommendations of the Spry Commission on the subject now at hand are contained in paragraphs 177 – 184. It is patently clear that the Commission rejected the broad view and

section 123 of the draft bill must, therefore, be taken to embody or reflect that standpoint. Our Government White Paper No. 1 of 1969 – which preceded the enactment contains nothing which suggests a difference between the ideas of the Spry Commission and those of the authors of the White Paper. The White Paper has only a few words about the subject. It is the last sentence of paragraph 19 and it merely says that:

> "The proposed law should provide expressly that either spouse may own his or her own separate property which he or she owned before, or acquired after, marriage".

I am well aware that the Spry Report cannot be treated as authority in any technical sense. But I find it valuable because it provides the background to our Law and helps to discover the intention of the Legislature. I think I can treat the background as strongly indicating that our Legislature adopted the ideas and philosophy contained in that report. It should, therefore, be inferred that the purpose for which section 114 was enacted by our Legislature was not all that broad as

canvassed by the liberal school. It seems, from a historical perspective, that the section was not designed to help a married woman who has no property or has failed to acquire any during marriage because of household duties. In other words, it was not written into section 114 that a wife's marital status and duties should per se make her a partner in the husband's economic enterprises or gains. That in my opinion, is the true construction of the section.

"I am not of course saying that that is good law. I am not for instance gainsaying the fact that one of the ills of the breakdown of marriage is the economic hardship that a woman may have to suffer, where, as is common in Tanzania, the woman has not acquired any property, and I think, therefore, that there is much to commend the liberal viewpoint to serious reflection, and consideration. What I am saying is that the broad view does not comport with the history of the legislation and that the other provisions of the Act would make little sense if that view is adopted. I am saying that if the law is unsatisfactory the proper solution to the problem should be legislative rather than judicial".

We have, with respect, quoted Mapigano, J. at length because he appears to deal adequately with the arguments in favour of the opposite views of the High Court and because we are satisfied that the narrow view is wrong and the broad view is correct. We hereafter demonstrate what we mean.

Although it is correct to say that under English Law, the joint efforts or contributions of spouses is considered directly in relation to the welfare of the family rather than directly in relation to the acquisition of matrimonial or family assets, we do not see any difference between the effect of English and our Law on this issue since the welfare of the family is an essential component of the economic activities of a family man or woman. So, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets.

With regard to the fear that the broad view might result in a wife being “allowed to benefit from a marriage which she has wrecked” we think, with respect, that it is misguided because what is in issue is the wife`s contribution or efforts towards the acquisition of matrimonial or

family assets, and not her contribution towards the breakdown of the marriage. Of course there may be cases where a wife`s misbehaviour may amount to failure to contribute towards the welfare of the family and thus failure to contribute towards the acquisition of matrimonial or family assets; but this has to be decided in accordance with the facts of each individual case.

As to the alleged difficulties of making orders under section 114 along with orders under section 115 of the Law of Marriage Act, we do not think that the provision of these two sections are contradictory or irreconcilable. It is apparent that the two sections deal with different matters. Section 114 deal with the apportionment of family assets and liabilities in general, whereas section 115 concerns assignment of a specific liability – that is, the liability to maintain a wife or former wife. Moreover where a former husband is ordered to maintain his former wife after divorce or separation, such an order amounts to a revenue producing asset vested in the wife within the scope of the second category of family assets as defined under paragraph 1064 of HALSBURY`S LAWS OF ENGLAND cited earlier

on, and has to be taken into account in the division of available matrimonial or family assets.

The point made that the broad approach to the issue presupposes the existence of common ownership of matrimonial or family assets contrary to the concept of separate ownership recognized under sections 58 and 60 is not correct since the issue of division of matrimonial or family assets arises only when the Court is granting or has granted a decree of separation or divorce but not otherwise.

As to the point to the effect that the broad view of the law on the issue is not supported by authority existing before the enactment of the Law of Marriage Act, we do not think that it is logical or sensible to take the absence of earlier authority as precluding progress in the law of the Land.

The argument that the broad view of the law amounts in effect to judicial legislation, is not supportable since the court is not making or introducing a new rule in a blank or grey area of social relations but

is interpreting existing statutory provisions – that is – the words “their joint effects” and “the contributions made by each party in money, property or work towards the acquiring of the assets” used under section 114.

Undoubtedly, these provisions are not free from ambiguity. In such a situation the court has to be guided by the established rules of construction of statutes. Mapigano, J. used the report of the Kenya Commission of the Law of Marriage and Divorce which, it is said, was the basis of our Law of Marriage Act, 1971. We think such a report should be used only as a last resort upon failure to make sense of these statutory provisions on application of the normal rules of construction.

One such normal rule of construction of ambiguous provisions is the MISCHIEF RULE. Under this rule, the court, in looking for the true meaning of ambiguous, statutory provisions, is guided by the defect or mischief which the statute was enacted to rectify or cure. On examination of the Law of Marriage Act, 1971, and the law as it existed before its enactment, one cannot fail to notice that the

mischief which the Law of Marriage Act, 1971 sought to cure or rectify was what may be described as the traditional exploitation and oppression of married women by their husbands. It is apparent that the Act seeks to liberate married women from such exploitation and oppression by reducing the traditional inequality between them and their husbands in so far as their respective domestic rights and duties are concerned. Although certain features of traditional inequality still exist under the Act, such as polygamous marriages, these do not detract from the over-all purpose of the Act as an instrument of liberation and equality between the sexes.

Guided by this objective of the Act, we are satisfied that the words “their joint efforts” and “work towards the acquiring of the assets” have to be construed as embracing the domestic “efforts” or “work” of husband and wife.

The other point of law for consideration and decision in this case is whether the appellant (former wife) is entitled to any share in the house in question. On the facts established by the two courts below, it is apparent that the appellant’s domestic “efforts” or “work”

consisted mainly in looking after the matrimonial home. She neither cooked food nor washed clothes for her husband nor did she make his bed except on the few occasions when he was not traveling in ships abroad. Moreover the couple had no children for her to take care of. As the respondent (former husband) was frequently away from home while working as a Seaman, it is obvious that the main beneficiary of such “effort” or “work” was not the respondent but the appellant herself who lived in that house. Of course this does not mean that her domestic “effort” or “work” was worthless. It is common knowledge that lack of care of a house results in deterioration of such house.

The principles which guide a court in determining the shares of husband and wife in matrimonial or family assets are spelled out under sub-section 2 of section 114 which states:

> “(2) In exercising the power conferred by subsection (1), the court shall have regard –
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> (a) to the custom of the community to which the parties belong;

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

(c) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division".

On the established facts of this case, it would seem that the principles stated in (a) and (b) are the only ones relevant to the present case. The parties are Moslems, and it was established that as a Moslem (or at any rate according to their own sect of Islam) the respondent is expected to give a parting gift to his former wife according to his abilities. We are satisfied that such religious practice, which was undisputed, can properly be construed as a "custom of the community to which the parties belong". The High Court found that the appellant was entitled to Shs.3,000/= under this head. The record shows that she received the money in court. We find no reason to interfere with this payment.

With regard to the principle stated under paragraph (b) of sub-section 2 of section 114, it is evident that the extent of the appellant's contribution is indicated by her "efforts" or "work" in looking after the matrimonial home as against the respondent`s performance of his own part of domestic obligations towards the appellant. On the established facts the respondent adequately provided for the maintanance and accommodation of the Appellant. As a matter of fact, no complaint is made against him in respect of performance of domestic duties towards his former wife. The question arises whether this diligent performance of his own domestic duties can be taken as disentitling the appellant from claiming a share in matrimonial or family assets. We do not think so. The correct approach is that husband and wife, in performing their domestic duties are to be treated as working not only for their current needs but also for their future needs. IN the present case, the appellant, in looking after the matrimonial home, must be regarded as working not only for her current needs but also for her future needs and such future has to be provided from the matrimonial or family assets jointly acquired during the marriage in keeping with the extent of her contribution.

On the facts of this case, the appellants was paid a sum of Shs.18,000/= apparently when the spouses were still resident in Mombasa. The money was to be used by her to set up some family business. She did not use the money for the purpose it was intended. She apparently squandered it away. What is the significance of these facts?

There are two ways of looking at this situation. Firstly, the money can be regarded as an advance made by the respondent towards the future needs of the appellant. Taking into account the nature of the appellant's contribution, the advance of Shs.18,000/= at the time was in our considered view sufficient provision for the future needs of the appellant and she is not entitled to claim a further share in the matrimonial or family assets. Secondly, the squandering of that money by the appellant when weighed against her contribution, can be regarded as a matrimonial misconduct which reduced to nothing her contribution towards the welfare of the family and the consequential acquisition of matrimonial or the family assets. As was said in the English case of MARTIN v. MARTIN (1976) 3 ALL ER. 629 by CAIRNS, LJ" …….. Such.

Conduct must be taken into account because a spouse cannot be allowed to flitter away the assets by extravagant living or reckless speculation and then to claim as great a share of what is left as he would have been entitled to if he had behaved reasonably".

We are satisfied that on this basis also, the appellant is not entitled to claim any share in the available matrimonial or family assets. So this leaves only the sum of Shs.3,000/= already paid and received in accordance with the religious customs of the parties. In the final analysis therefore, this appeal fails and we hereby dismiss it. Bearing in mind that this is a legal aid case, we see no reason to order the appellant to pay costs. Each party therefore is to bear his or her own costs and we order accordingly.

DATED at DAR ES SALAAM this 29th day of November, 1983.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(L. B. KALEGEYA)
SENIOR DEPUTY REGISTRAR