IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MMILLA, J.A, MWANGESI, J.A AND MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 120 OF 2018

REHEMA SALUM ABDALLAH ..... APPELLANT

VERSUS

NIZAR ABDALLAH HIRJI ..... RESPONDENT

(Appeal From the decision of the High Court of Tanzania at Dodoma)

(Kalombola, J.)

dated the 20th day of December, 2017
in
Matrimonial Cause No. 1 of 2015

JUDGMENT OF THE COURT

21st & 29th August, 2019

MWAMBEGELE, J. A.:

Nizar Aballah Hirji; the respondent and Rehema Salum Abdallah; the appellant are, respectively, husband and wife. They started to cohabit in 1970 before they formally married in 1980. Out of the cohabitation before and after the formal marriage, they got four issues; Noormilla Dhalla; born in 1973, Azmina Kassam; born in 1974, Rahim N. Hirji, born in 1978 and Shazma Pabani; born in 1983. In

addition to the four children out of that union, they owned some property. They lived in Dodoma. It appears their marriage went on well all along until the year 1989 when the relationship started to go sour after the respondent married a second wife. Feeling that she could not stomach the bitter relationship any longer, the appellant relocated to Dar es Salaam in 2010 to live with one of their children.

On 10.12.2015 the appellant successfully petitioned for separation in the High Court in which she prayed for the following orders:

(a) An order granting a decree for separation
(b) An order for distribution of matrimonial assets to the petitioner as follows:
    (i) The whole of the property on Plot No. 23 Block "M" Tembo Avenue LO No. 13401 CT No. 8870 DLR Dodoma Municipality be given to the petitioner.
    (ii) The respondent be ordered to pay Tshs. 200,000,000/= to the petitioner being her share in various business jointly acquired during their subsistence of marriage.

(iii) An order for payment of Tshs. 50,000,000/= being the petitioners share in the motor vehicle and other assets joint acquired but sold by the respondent.

(c) An order for payment of Tshs. 3,000,000/= per month from 1st February, 2010 to the date of judgment being expenses for maintenance.

(d) An order for payment of interest at Court rate on the decretal sum from the date of judgment till payment of the decretal sum.

(e) Costs of this petition.

(f) Any other remedy the honourable Court will deem equitable to grant.

After hearing both parties, the High Court (Kalombola, J.) issued an order for separation and granted the appellant 20% share of the house the subject of prayer b (i) above. The appellant was not happy with the distribution of the matrimonial assets she got. She thus preferred this appeal in the Court. The appeal is predicated on seven grounds of grievance; namely:

1. That, having regard to the evidence on record Hon. Trial Judge grossly misdirected herself in failing to assess and consider

houses on Plot No. 221 Block "V" registered under CT No. 14670 DLR and Plot No. 6 Block B Mbeya/Tabora Avenue Dodoma Municipality as matrimonial properties and where they were properly disposed of by the respondent;

2. That, the trial Judge erred in law and fact by failing to consider whether or not there was evidence established by the appellant concerning the properties mentioned as matrimonial properties are assets which were jointly acquired by the parties during the subsistence of the marriage, hence denying the appellant's rights of her shares on Plots No. 221 and 6 Dodoma Municipality not withstanding that she has distributed some of the properties in the petition for separation;

3. That, the trial judge erred in law and fact in holding that it was not wise to deal with distribution of Plots No. 221 and 6 and their status at the stage of the Petition of separation because they will be determined at stage of divorce, notwithstanding that she has distributed some of the properties in the petition for separation;

4. That, having regards to the evidence adduced by both parties, the trial Judge misdirected not to consider the appellants contributions in acquiring other business which are now still operated by the respondent;

5. That, having regard to the evidence adduced during trial, the Hon. Judge grossly misdirected by failure to consider the legality of transfer of matrimonial properties Plots Nos 221 and 6 by the respondent to Fahim and Faizulla, (sons by the 2nd wife);

6. That, having regard to the evidence adduced during trial, the Hon. Judge grossly misdirected herself in granting only 20% shares to the appellant on Plot No. 23 Block "M" Tembo Avenue under Ct No. 8870 DRL Dodoma Municipality and decided that one unit of the said Plot is occupied by the respondents 2nd wife; and

7. THAT, having regard to the evidence on record and circumstances of the case the trial Judge misdirected herself in law and in fact in including the 2nd wife's rights against the petitioner right over the said matrimonial properties and in holding that, the appellant did not establish the time of acquiring the said properties;

The appeal was argued before us on 21.08.2019 during which Mr. Richard Rweyongeza, learned advocate and Mr. Paul Nyangarika, also learned advocate, respectively, appeared for the appellant and respondent. Both parties had earlier on filed their respective written submissions and reply written submissions for or against the appeal

which they sought to adopt as part of their oral submissions. The learned advocates just sought to utilize the half an hour prescribed by Rule 106 Rule 11 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendment) Rules, 2019 – GN No. 344 of 2019 (the Rules) to clarify their respective written submissions.

But it transpired that the respondent had, on 16.08.2019, filed a lengthy three-point preliminary objection which for easy reference we find it apt to reproduce as hereunder:

1. The Index of the record of Appeal is incomplete as it lacks pages 49 and 50 and as such their contents are not known as required by Rule 96(1) (a) of The Tanzania Court of Appeal Rules, 2009 as amended.
2. The Record of Appeal is highly defective in that:-
   (a) The Memorandum of Appeal at pages A, B and C of the record of Appeal together with pages 14, 96, 97, 154 and 155 are not indicated on each 10th line as required by Rule 12 (4) of the Tanzania Court of Appeal Rules, 2009 as amended;

(b) Page 19 is a repetition of Page 18 as opposed to Rule 96 (1) (d) of the Tanzania Court of Appeal Rules, 2009 as amended;

(c) Page 21 is not part of the documents which were annexed to the Petition for separation as opposed to Rule 96(1) (d) of the Tanzania Court of Appeal Rules, 2009 as amended;

(d) After page 36 there were the following attachments to the Petition for separation but which are not included in the Record of Appeal thereby distorting the record of Appeal as opposed to Rule 96 (1) (d) of the Tanzania Court of Appeal Rules, 2009 as amended:-

(i) Agreement for conveyance of a house 'on Plot No. 221 Block "v" Airport Dodoma Municipality, with Title No. 14607 - DLR;

(ii) Transfer of a Right of Occupancy touching a house on Plot No. 221 Block "V" Airport Dodoma Municipality with Title No. 14667 – DLR;

(iii) Transfer of a Right of Occupancy touching a house on Plot No. 6 Block "B", Dodoma Municipality with Title No. 162005/121.

(e) After page 38 there were the following attachments to the document titled "Notice to Produce" which was made part of the petition for separation but which are not made part at the record of Appeal and thereby distorting the record

as opposed Rule 96 (1) (d) the Tanzania Court of Appeal Rules, 20U9 as amended:-

(i) Agreement for conveyance of A House' dated 21st December, 2010 from the Respondent to one Fahim Nizar Hirji in respect of Plot No. 221 Block V Dodoma Municipality;

(ii) Transfer of a Right of Occupancy from the Respondent to one Fahim Nizar Hirji in respect of Plot No. 221' Block V Dodoma;

(iii) Certificate of Occupancy No. 14607 - DLR , Plot No. 221;

(iv) Certificate of Occupancy No. 162005/121, Plot No. 6 Block B Dodoma;

(v) Transfer of a Right of Occupancy dated 26th January, 2010 in respect of Plot No. 6 Block n Dodoma Township from the Respondent to Fahim Nizar Hirji and Faizullah Nizar Hirji;

(vi) Marriage Certificate between the Petitioner and the Respondent of May, 1980; and

(vii) Marriage Certificate between the Respondent and one Razia Nizar Hirji of 1989.

(f) After page 111 the Exhibits were supposed to be there but are wrongly put at page 142 as opposed to Rule 96 (1) (f) of the Tanzania Court of Appeal Rules, 2009 as amended.

3. The certificate of correctness as per Rule 96 (5) of The Tanzania Court of Appeal Rules, 2009 as amended is false given the omitted or added documents to the record of Appeal as cited above.

As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which we could not overlook. However, there was an agreement by the counsel for the parties and the Court to the effect that the substantive should be heard along with the preliminary objection. It was also agreed that, in the course of composing the judgment, should the Court find the preliminary objection meritorious, it will sustain it and that will be the end of the matter. However, should it not, the court will overrule it and proceed to compose the judgment on the merits or demerits of the appeal.

When we called upon Mr. Nyangarika to argue the preliminary objection, he first dropped the first point. Submitting on the second point, the learned counsel told the Court that the record of appeal was

highly defective in that; **one**, at pages A, B and C, 14, 96, 97, 154 and 155 of it, it was not indicated on each 10th line on the right hand as required by Rule 12 (4) of the Rules, **two**, p. 19 is a repetition of p. 18 thereby offending Rule 96 (1) (d) of the Rules, **three**; p. 21 is not part of the documents which were annexed to the Petition for Separation which is against Rule 96 (1) (d) of the Rules, **four**; after p. 36, there were attachments to the Petition for separation but which are not included in the record of appeal thereby distorting it and offended Rule 96 (1) (d) of the Rules. The documents referred to by the counsel for the respondent are: Agreement for Conveyance of a house on Plot No. 221 Block "V" Airport Dodoma Municipality, with Title No. 14607 – DLR, Transfer of a Right of Occupancy on a house on Plot No. 221 Block "V" Airport Dodoma Municipality with Title No. 14667 – DLR and Transfer of a Right of Occupancy touching a house on Plot No. 6 Block "B", Dodoma Municipality with Title No. 162005/121. **Five**, after p. 38 there were attachments to the document titled "Notice to Produce" which was made part of the petition for separation but which are not made part at the record of

appeal and thereby distorting the record and offending Rule 96 (1) (d) the Rules. The documents under reference were: Agreement for Conveyance of a House dated 21st December, 2010 from the Respondent to one Fahim Nizar Hirji in respect of Plot No. 221 Block "V" Dodoma Municipality, Transfer of a Right of Occupancy from the Respondent to one Fahim Nizar Hirji in respect of Plot No. 221' Block "V" Dodoma, Certificate of Occupancy No. 14607 - DLR, Plot No. 221, Certificate of Occupancy No. 162005/121, Plot No. 6 Block "B" Dodoma, Transfer of a Right of Occupancy dated 26th January, 2010 in respect of Plot No. 6 Block "N" Dodoma Township from the Respondent to Fahim Nizar Hirji and Faizullah Nizar Hirji, Marriage Certificate between the Petitioner (appellant herein) and the respondent of May, 1980; and Marriage Certificate between the Respondent and one Razia Nizar Hirji of 1989. **Six**, after p. 111 the Exhibits were supposed to be there but are wrongly put at p. 142 and that course offended Rule 96 (1) (f) of the Rules. **Lastly**, the learned counsel submitted that the certificate of correctness as per Rule 96 (5)

of the Rules was false because it omitted or added documents to the record of appeal as submitted above.

On the strength of the above reasons, the learned counsel beckoned upon the Court to strike out the appeal with costs.

Responding, Mr. Rweyongeza submitted at the very outset that the preliminary objection was without merit. He also had no qualms with the abandonment of the first point of the preliminary objection. He submitted that noncompliance with the provisions of Rule 12 (4) of the Rules was not fatal and has been so held by the Court in some of its decisions. The learned counsel referred us to our decision in **AAR Insurance (T) Ltd v. Beatus Kisusi**, Civil Appeal No. 67 of 2015 (unreported) in which we so held; that is, we held that noncompliance with the provisions of Rule 12 (4) of the Rules was not fatal.

On the argument that some documents were missing, the learned counsel submitted that the documents mentioned at p. 36 of the record of appeal appear at pp. 143,145 and 146. Likewise, Mr. Rweyongeza submitted, the Notice to produce appears at p. 37 and

the document mentioned in the notice appear elsewhere in the record of appeal; that is, pp. 143,145 and 146 as well as p. 142 where the Marriage Certificate between the appellant and respondent is found.

Regarding improper arrangement of documents, Mr. Rweyongeza had a very short response it; that it was not fatal.

As regards the other ailments; improper arrangement of documents, repetition of pages, misplacement of documents and improper certificate of correctness, the learned counsel was of the view that they were not fatal to the record of and the appeal itself.

We have dispassionately considered the so called preliminary points of objection. With due respect to Mr. Nyangarika, we do not think most of what he terms as preliminary points of objection fall within that basket. The issues regarding, say, improper arrangement of documents, repetition of pages, misplacement of documents and improper certificate of correctness, in our considered view, do not fall within the scope and purview of a preliminary objection within the meaning of the oft-cited **Mukisa Biscuit Manufacturing Co Ltd v.**

West End Distributors Ltd [1969] 1 EA 696. In that case, at p. 700, Law, J.A, observed:

> *"So far as I am aware,* ***a preliminary objection consists of a point of law*** *which has been pleaded or which arises by clear implication out of pleadings, and which,* ***if argued as a preliminary point may dispose of the suit****. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*
> [Emphasis added]

Concurring, Sir Charles Newbold, P., at p. 701, added:

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law*** *which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*
> [Emphasis added]

We seriously doubt if the ailments referred to above; that is, improper arrangement of documents, repetition of pages, misplacement of documents and improper certificate of correctness, consist of points of preliminary objection as envisaged by the **Mukisa Biscuits** case to the extent of disposing of the case if argued as points of preliminary objection. In the premises, we overrule the purported points of preliminary objection as appearing in 2 (b), (d) and (f) and 3 of the Notice of Preliminary Objection reproduced above.

The above said and done, we think the gist of the remaining points of the preliminary objection boil down to only three main points; **one**, that the appeal is wanting of some relevant documents that ought to have been part of the record of appeal thereby offending against the provisions of Rule 96 (1) of the Rules, **two**, the tenth line is not indicated in the right hand side of the sheet at pp. A, B, C, 14, 96, 97, 154 and 155 thereby offending against Rule 12 (4) of the Rules and, **three**, the record of appeal consists of a document which was not part of the proceedings in the High Court. We now proceed to discuss and make a decision on these three points.

On the complaint that some of the documents are missing in the record of appeal, we think this issue will not detain us, for, Mr. Rweyongeza provided an answer to it and, to our mind, that answer was quite satisfactory. It was Mr. Nyangarika's complaint that the documents mentioned at p. 36; that is, the Agreement for Conveyance of a house on Plot No. 221 Block "V" Airport, Dodoma Municipality, with Title No. 14607 – DLR, Transfer of a Right of Occupancy touching a house on Plot No. 221 Block "V" Airport Dodoma Municipality with Title No. 14667 – DLR and Transfer of a Right of Occupancy touching on a house on Plot No. 6 Block "B" Dodoma Municipality with Title No. 162005/121, have been omitted in the record of appeal. These documents, as Mr. Rweyongeza rightly put, are found at pp. 143, 145 and 146 of the record of appeal. Likewise, the other document complained of as missing in the record of appeal is the marriage certificate of the appellant and respondent. This one if found at p. 142 of the record.

Admittedly, the marriage certificate between the respondent and Razia Nizar Hirji of 1989 is missing in the record of appeal. This was

one of the complaints by the respondent. We have deliberated on this missing document in the record of appeal. Having so done, we think its absence in the record of appeal has not prejudiced anybody and therefore not fatal. This appeal, we think, can be judiciously determined without it. It can therefore be dispensed with. We thus find this complaint as misconceived and dismiss it.

The complaint against the noncompliance with Rule 12 (4) of the Rules is equally without merit. As rightly put by Mr. Rweyongeza, the same was the complaint in **AAR Insurance** (supra) and the Court relied on its previous decision in **Maneno Mengi and 3 Others v. Farida Said Nyamachumbe & Another** [2004] TLR 391 to observe:

> *"It is not in every situation that a non-compliance with a rule as contended by Mr. Mushobozi, renders the appeal incompetent simply because the word 'shall' is used in the rule. Noncompliance which do not go to the root or substance of the matter can be overlooked provided there is substantial compliance with the rule read as whole and no prejudice is occasioned."*

And the Court went on:

> *"In this case the respondent and the Court were able to read the record without any difficulty, notwithstanding non-compliance with Rule 12 (4) of the Rules. And since the omission did not prejudice the respondent, we hereby overlook that matter and overrule the objection."*

We are guided by the stance we took in the decision above. In the case at hand, like in **AAR Insurance** (supra), the parties were able to read the record of appeal at the pages complained of and, above all, the respondent did not tell us how the noncompliance prejudiced him. Like we did in **AAR Insurance** (supra), we overlook the noncompliance and overrule this point of the preliminary objection.

The third point is that the record of appeal consists of a document which was not part of the record at the trial. This complaint is pegged on a document appearing at p. 21 of the record. Mr. Rweyongeza clarified that the document appearing at p. 21 is an Exchequer Revenue Voucher (ERV) issued to the appellant after

depositing security for the costs of the appeal in terms of Rule 90 (1) (c) of the Rules. The document was made part of the record of appeal just to show compliance with the requirement of the law, he submitted. We have considered the arguments on the point from either side. Having so done, we do not think inclusion of the ERV in the record of appeal prejudiced the respondent. The document, as already pointed out above, was made part of the record just to show compliance with Rule 90 (1) (c) of the Rules. We do not think its inclusion would render the record of appeal defective to warrant the appeal being struck out. We overrule this point as well.

The cumulative effect of the foregoing discussion is to render the preliminary object without merit. We overrule it entirely.

The second part of this judgment is the decision on the substantive appeal, the preliminary objection having been overruled.

In clarifying the written submissions earlier filed, Mr. Rweyongeza submitted that the main complaint in the appeal was division of matrimonial assets after separation. The order for

separation has not been appealed against, he submitted. He went on to submit that the High Court awarded only 20% of only one house among the matrimonial assets. That, he submitted, was against the principle enunciated in **Bi. Hawa Mohamed v. Ally Sefu** [1983] TLR 32. The learned counsel went on to submit that the house; that is, the house standing on Plot No. 23 Block "M" Tembo Avenue under Ct No. 8870 DRL Dodoma Municipality was built during the subsistence of the marriage and as appearing a p. 55 of the record, the house was there when the second wife came. It was therefore unfair for the court to give the appellant only 20% of the matrimonial house standing on Plot No. 23 Block M Tembo Avenue under Ct No. 8870 DRL Dodoma Municipality.

Mr. Rweyongeza went on to submit that the rest of the houses were not divided. The trial Judge said they were to be divided at divorce stage because there was another woman (who was not party to the case). That was unfair on the appellant because the houses fell among the matrimonial assets which were obtained before the second wife came in the marriage and which were transferred by way of sale

to the second wife's children without the consent of the appellant, he submitted. Counsel for the appellant submitted further that the appellant did not want to have the sales revoked but that she prayed to be allotted the whole house on which she was given only 20% and Tshs. 200,000,000/= as her share of the sold houses and payment of Tshs. 50,000,000/= being her share in motor vehicles and other matrimonial assets sold by the appellant. He went on to submit that the trial court having found and held at p. 136 that the same were jointly acquired the appellant is entitled to a share. The fact that some of the matrimonial houses have been disposed of, he argued, does not deprive the appellant of her share.

On the strength of the above, the appellant's counsel prayed that the appeal be allowed with costs.

Responding, Mr. Nyangarika, also clarifying on the reply written submissions earlier filed, submitted that at separation, the two houses standing on Plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora Avenue were not in the names of

the appellant and Respondent. They therefore did not form part of houses jointly acquired. There was no problem at all before the separation, he submitted, and no complaint was raised by the appellant before. She never complained before a proper court; Land Court, he added.

With regard to the share of Tshs. 200,000,000/= and 50,000,000/=, the learned counsel submitted that they were just imaginary and that there was no proof that the appellant contributed to its acquisition. The learned counsel submitted that the **Bi. Hawa Mohamed** case (supra) did not say the distribution of matrimonial assets should be half by half. In the premises, he submitted, the 80% to 20% share for the respondent and appellant, respectively, was quite appropriate.

He, therefore, on the strength of his submissions above, argued that the appeal was without merit and prayed for its dismissal with costs.

In a short rejoinder, Mr. Rweyongeza submitted that one of the issues at the trial as appearing at p. 49 of the record was whether the houses on Plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora Avenue were properly disposed of and the trial court refrained from deciding on them under the pretext that the same will be determined at divorce stage as there was another wife in the marriage. He added that there was evidence that the appellant did not consent to their disposition.

We have dispassionately considered the grounds of appeal in the light of the submissions of both parties. Having so done, we think, the first five grounds of appeal are related. They can, and will be, determined together. Likewise, the last two grounds are intertwined. They also can, and will be, determined together. That is, we will first determine grounds 1, 2, 3, 4, and 5 together and then grounds 6 and 7; also together.

The issue that comes out of the five grounds is as rightly posed by Mr. Rweyongeza, in his written submissions. This issue is whether

Plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora Avenue are matrimonial properties jointly acquired by the parties. And, if the answer to the issue is in affirmative, whether they were legally/properly transferred to Fahim and Faizulla.

It is not disputed by the parties that the landed property referred to above; that is, the houses on Plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora Avenue were acquired during the subsistence of the marriage between the appellant and respondent. Equally undisputed is the fact that the said landed property were transferred to Fahim and Faizulla. The question which immediately comes to the fore is whether the said houses on Plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora Avenue, which fall under the group of matrimonial assets, were properly disposed of.

As already seen above the appellant gave evidence that she did not consent to the disposition of the houses on Plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora

Avenue. The evidence on record bears it out that, despite the fact that the respondent asserted that the appellant was aware of the disposition of the said houses, the former equally testified that the latter did not consent to the disposition of the houses. We shall demonstrate.

When cross-examined at p. 73, the respondent is recorded as saying:

> *"Plot No. 221 is owned by Fahim. Plot No. 6 Block "B" Mbeya/Tabora Avenue is owned by Fahim and Faizulla. They own them since 2009/2010. Before these were my properties and my two wives. I transferred this house myself. When I got these properties I was living with both wives.* ***Rehema did not consent to this transfer but she was informed."***
> [Emphasis added].

He went on:

> *"... I stated to have sold the plots. I say I sold them to my children. It can be more than 100*

million. I sold plot No. 221 to Fahim Shs. 100,000,000/=. I have the sale agreement, but it is with my son. Rehema did not sign to consent."

Likewise, Fahim Nizar Hirji (DW2) who testified at p. 79 corroborated that "Rehema did not give a consent in writing" to the disposition of the house sold to him supports the averment that the appellant did not consent to the disposition of that landed property.

The above evidence is clear testimony that the appellant did not consent to the disposition of the houses. That offended section 161 (3) of the Land Act, Cap. 113 of the Revised Edition, 2002 (the Land Act). For easy reference, the provisions of section 161 (3) of the Land Act read:

"(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then–

(a) N/A

> *(b) Where that disposition is an assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer ...,"*

And the proviso to the subsection reads:

> *"and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b),* ***the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition****."*
> [Our emphasis.]

Our reading of the above subsection, particularly the proviso thereof, reveals that the sale becomes voidable at the instance of the spouse who did not consent. In the case at hand, the appellant did not consent to the disposition but has no qualms with it. What she wants is her share in that disposition. We do not find any problem in

her choice. If anything, it depicts maturity. As the two houses were disposed of at Tshs. 100,000,000/= each and could have fetched more than that if it were not for the injection by the respondent of natural love and affection to the consideration, she claims to be paid Tshs. 200,000,000/= as her share. We have seriously considered this prayer. Having so done, we think, as the appellant acquiesced to the disposition, she is still entitled to some share. As it is not disputed that the houses were sold at a total price of Tshs. 200,000,000/=, and, as it is not disputed that the house could have fetched more at market value but was sold at such a price because of consideration of natural love and affection, we think, a share of 50% in the transaction would have met the justice of the parties in the case. We therefore find and hold that the appellant is entitled to Tshs. 100,000,000/= as a 50% share in the disposed of matrimonial assets.

Next for consideration are the last two issues which we shall determine together as alluded to above. The first limb in this consolidated ground is a complaint that the trial Judge misdirected herself in granting only 20% share to the appellant on the matrimonial

home; the house standing on Plot No. 23 Block "M" Tembo Avenue under CT No. 8870 DRL Dodoma Municipality. The learned trial Judge, correctly in our view, addressed the contribution of the spouse at p. 25 of the typed judgment (p. 136 of the record) as follows:

> *"... the law recognizes spouse's contribution in terms of money, property or work. The petitioner in this case contributed to the acquisition of the matrimonial properties in terms of work that she was doing house chores, making the house comfortable as well as she contributed when she engaged herself in selling the house blocks and buns."*

That was the correct exposition of the law as it currently is in our jurisdiction. Having so analyzed the stance of the law on contribution of spouses in general and the contribution of the appellant in particular, the trial Judge went on to award the appellant 20% on the matrimonial home. We have considered the complaint of the appellant on this aspect on the one hand and the response of the respondent on the other. We seriously think the extent of contribution of the appellant deserved a share more than what was awarded by the

trial High Court. It is not disputed that the matrimonial home was constructed before the second wife of the respondent came on board and that the appellant contributed in terms of house chores, making the matrimonial home comfortable and, in addition, she sold house blocks and buns which income contributed to the construction of the matrimonial home. That was adequate contribution on the part of the appellant to warrant the trial court award a considerable percentage, above the 20% awarded in the share of the matrimonial home. Having deliberated over the matter at some considerable length, we are of the settled mind that the court should have awarded the appellant 50% as her share of the matrimonial home. We therefore vary the 20% awarded by the High Court and, in lieu thereof, award the appellant 50% as her share of the matrimonial home.

For the avoidance of doubt, regarding payment of Tshs. 50,000,000/= being her share in respect of the motor vehicles and other matrimonial assets, we do not think the appellant proved this allegation to the required standard. There was evidence at the trial from the appellant that the vehicles were dilapidated and could not be

disposed of as such. Instead, it was the parts thereof which were sold and at a throw-away price. We think the trial court was justified in not awarding the appellant anything under this arm. As regards the prayer for maintenance of Tshs. 3,000,000/= per month from 01.02.2010 to the date of judgment, we do not think the appellant was entitled to it. There was evidence at the trial that the respondent was at a very advanced age without any means to generate any income to take care of the appellant. Having divided the matrimonial assets in the manner we have done, we think it will not be in the interest of justice to grant the appellant this prayer. We are of the considered view that the High Court was quite justified to refuse the prayer.

In the upshot, we allow the appeal to the extent shown above and order that the appellant be paid Tshs. 100,000,000/= as her 50% share of the two houses transferred by the respondent; that is, houses standing on Plots No. 221 Block "V" held under CT No. 14670 DLR and No. 6 Block "B" Mbeya Tabora Avenue. We also order that the appellant is entitled to 50% share of the matrimonial home; the house

standing on Plot No. 23 Block "M" Tembo Avenue under Ct No. 8870 DRL Dodoma Municipality.

This appeal is allowed. It being a matrimonial matter, we make no order as to costs.

Order accordingly.

DATED at **DODOMA** this 29th day of August, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of August, 2019 in the presence of Mr. Deus Nyabiri, counsel for the Appellant and Ms. Josephine Mnzava Paulo, learned counsel for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL