

“ORIGINAL”

**IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA**

**MATRIMONIAL APPEAL NO. 03 OF 2016
(Appeal from the District Court Singida
Matrimonial Cause No. 02 of 2015)**

JUMA ATHUMANI KITIJA APPELLANT

VERSUS

TATU JUMA MAHUMBIRESPONDENT

JUDGEMENT

Date of JUDGEMENT- 02/06/2017

Mansoor, J:

The appellant, Juma Athumani Kitija appealed against trial court decision in Matrimonial Cause No.2 of 2015, raising three grounds of appeal that the trial court erred to give custody of the issues of marriage to the Appellant without ordering the Respondent to assist, that he does not own the twelve cows, and that the 12 cows belongs to her sister as they



“ORIGINAL”

were paid by the sisters’ husband as bride price, and that the Farm at Mayuda Area does not belong to him, it belongs to his uncle, and he only hired the farm for temporary use, that there is no shop as the respondent bankrupted the shop, and there was no proof that the shop existed and it is worth THz 8,000,000.

The brief background of the matter was that the appellant and the respondent were married and during the subsistence of their marriage, they were blessed with three issues aged 17, 16 and 14 years old. The Trial Court declared the marriage irreperably broken down and gave liberty to the children to live with either parent but ordered the appellant to pay for their maintenance. The trial court did not give the amount of meintanance to be paid.

On the division of matrimonial assets, the trial court ordered division of 12 cows equally, that the respondent be given one acre of land located at Maloda Area, and the Shop located at Sepuka Area was valued at THz 8,000,000, and the Appellant



“ORIGINAL”

was ordered to give the Respondent THz 4,000,000 being half of the value of the shop. She was also given one bed and one mattress. On the division of matrimonial assets, the appellant contended he does not own the 12 cows, and that her sister one Hamida Athuman (DW2) testified that the cows are only kept by their brother, and that they belong to them as they were paid by their husbands as bride price. I read at page 10 of the proceedings and the Appellant admitted to own 12 cows. He never said the cows belong to her sisters. In fact at trial, the Appellant said he inherited the cows from his parents, and that the respondent did not contribute anything in acquisition of the same. On this I will refer to the various cases such as **PULCHERIA PUNDUGU v. SAMWEL HUMA PUNDUGU L.R.T. 7; MARIAM TUMBO v. HAROLD TUMBO (1983) T.L.R. 293; BI HAWA MOHAMED v. ALLY SEIF (1983) T.L.R. 32**, all of which discuss the right of a wife to share in the matrimonial assets on the basis of her contribution to the acquisition of those assets, and in the case of **Eliester Philemon Lupangahela vs. Daudi Makuhana , Civil Appeal No. 189/2002 (HC, DSM, unreported)**, Hon Judge Oriyo, while



“ORIGINAL”

citing SECTION 114 (2) (b) and (d), the Law of Marriage Act, which provides that:

SECTION 114(2) provides:

"(2) in exercising the power conferred by subsection (1), the court shall have regarded:

(a) N/A;

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

(c) N/A

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

She also said:

“Under subsection 2(b), the law recognizes spouse’s contributions in terms of money, property or work. The appellant's contribution towards the acquisition of matrimonial assets was in terms of work that is, including household chores, bearing and rearing of children, making the home comfortable for the

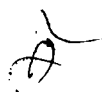


“ORIGINAL”

respondent and the issues. In addition to her domestic duties, the appellant engaged herself in the sale of buns and vegetables. Undoubtedly, whatever the appellant earned in the business, it went into the maintenance of the family and the assets.”

The Appellant and the respondent were married and their marriage subsisted over a number of years since 1993. The wifely duty of the wife in the acquisition of the property has been recognised to be part of the contribution of a wife in the acquisition of matrimonial property. The appellant failed to give any proof as to how he inherited the cows from his parents or that he had the cows before he married the respondent. The Trial Court did not err in awarding the respondent six cows.

Regarding the one acre land, again at page 10 of the proceedings the appellant admits to have inherited 3 acres farm from his parents. He also says he has hired the land in Maloda Area from his uncle. This fact was not substantiated,

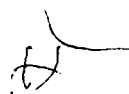


“ORIGINAL”

the uncle was not brought to court to certify of ownership of the land in Maloda. That being the case, the Trial Court did not err in ordering that the respondent be given a one care land in Maloda Area.

Regarding the shop, I agree that the respondent was duty bound to not only establish the existence of the shop, but also to prove that the shop value was THz 8,000,000. The respondent was supposed to at least present in court a valuation report. Under the Evidence Act “When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.” it was the duty of the respondent to establish the existence and value of the shop. Since the existence or the value of the shop was not established, the order of payments of THz 4,000,000 to the appellant as half value of the shop is set aside.

On the award of custody of the children the trial court was right in deciding on the custody of two older children that they are free to choose where to reside as the court's paramount



“ORIGINAL”

consideration is the welfare of the children more than anything else; see **CELESTINE KIJIJ and HALIMA YUSUFU VS RESmUTACELESTINEKIJiJ [1980] TLR 76**; and SECTION 125 of the Laws of Marriage Act. “It is the law that there is a rebuttable presumption that custody of a child below the age of seven years is better placed with the mother. For those over 7 years of age; custody is determined on the basis of the welfare of the child principle and” the court shall, have regard to the undesirability of disturbing the life of an infant by changes of custody” (Section 125 (3) Law of Marriage Act).”

Since out of the three children only one resides with the respondent, and it is noticed that at trial the appellant did not disclose his true income, this Court being an appellate Court cannot draw a presumption against him and accept the allegations of the wife as to the income of the husband. This Court and the Court below has a duty to ensure that the Court does not give an order of maintenance of a child to any amount not substantiated as by doing so the appellant will be



“ORIGINAL”

forced to pay maintenance to the extremes. This Court is of the view that the parties should be directed to go back to Trial Court and file a detailed affidavit of their assets, income and expenditure and the supporting documents in order to determine their true income, if they so wish, before the appellant is ordered to pay any amount of maintenance with regards to the 3rd child who is in the custody of the respondent.

Consequently based on the above, this appeal is partly allowed in the aspect of payment of THz 4,000,000 to the respondent as half value of the shop, and the decision in that regard is quashed and set aside. The decision on the division of 12 cows into half and the allocation of one acre of land to the respondent is confirmed.



“ORIGINAL”

Each party shall bear his/her own costs.

DATED at DODOMA this 2ND day of JUNE, 2017



L. Mansoor
L. MANSOOR,

JUDGE

2ND JUNE, 2017