

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 177 OF 2017

*(Arising from the Decision of Kinondoni District Court in Matrimonial Cause No. 58 of 2014
dated 21st August 2015)*

HAMAD ABDALLAH..... APPELLANT

VERSUS

GERTUDE DESIRE KITENGO.....RESPONDENT

JUDGMENT

Date of the last Order 11th December 2017

Date of the Judgement 16th February 2018

SAMEJI, KEREFU R. J

The appellant, Hamad Abdallah, lodged this appeal to challenge the decision of the Kinondoni District Court issued on 21st August 2015 in respect of *Matrimonial Cause No. 58 of 2014*.

For the purpose of understanding the gist of this Appeal, it is necessary to give the following background. The appellant and respondent cohabited and lived as husband and wife since 1993 to August 2010 and among others, they were living in the house of the respondent's parents. They were blessed with two issues namely:- (1) Hadija Hamad (20 years old) and (2) Joyce Hamad (15 years old). The appellant put a condition towards their marriage that, the respondent should change her religion, the thing which was not accepted by the respondent. They however lived

peacefully and harmoniously life till 2008, when misunderstandings between them occurred, as the appellant started to accuse his wife of having extra marital affairs and developed a habit of beating her whenever she comes home late from her job. Due to the said prolonged mistreatment on several occasions, in 2009 the respondent decided to leave the matrimonial home and went to live with her friend for about a month. At that time they were constructing their matrimonial house at Buza. When she came back, she found the appellant had left and went to live at Buza with another woman. As such, the appellant had stopped completely to provide maintenance for the respondent and the children. The appellant as well denied the respondent her conjugal rights. The respondent reported the matter to the Social Welfare Offices, but without success.

She then decided to filed a Petition for Divorce before Kinondoni District Court, whereby after a full trial the trial court was of the view that the marriage between the appellant and the respondent had irreparably broken down and granted a divorce thereto. The trial court further divided the matrimonial assets jointly acquired by the parties, whereby the appellant was given 60% and the respondent 40%. The issues of marriage were left free to choose the parent to live with, but since the last born was 13 years old and schooling, the appellant was ordered to pay for her school fees and medical expenses as and when needed.

Being aggrieved by that decision the appellant filed this Appeal with the following grounds: -

1. *the learned Resident Magistrate erred in law and fact in failing to analyze the evidence adduced before the trial court and failing to find for the respondent;*
2. *the trial Magistrate court misdirected herself when considering division of alleged matrimonial house in failing to consider that the alleged house was acquired just after the respondent left the matrimonial home;*
3. *that, the trial Magistrate misdirected herself on the division of matrimonial house by allocating 40% to the respondent while the said house was acquired solely by the appellant;*
4. *the learned trial Magistrate erred in law and fact in granting custody of the issues of the Marriage to the respondent while they were above seven (7) years;*
5. *the learned trial Magistrate erred in law and fact in ordering to the respondent to provide for maintenances (sic) to the children whose were above seven (7) years instead ordering the custody of children to be under the respondent for the welfare of the family;*
6. *that, the learned trial Magistrate erred in law and in fact in ordering the appellant to pay Tshs 200,000/= per month as maintenance without considering the income of the appellant per month; and*

7. *that, having applied for valid decree, copy of Judgement, the same having been supplied with me. (Sic). However, time has been elapsed (sic), for that reason, I sought to the High Court to grant leave to appeal out of time, whereby the application was granted and leave is annexed herewith.*

At the hearing of this Appeal, both parties appeared in their personal capacities, unrepresented.

In support of grounds of appeal, the appellant stated that, the trial Magistrate did not do fairness to him as *he was not given time and chance to explain what happened* and she mainly based on the evidence adduced by the respondent. He said the 40% given to the respondent is not fair, because the matrimonial house was obtained in 2012. He however admitted that, he lived with the respondent from 1994 –August 2010 and that, they were blessed with two issues. The appellant argued that, they started to live in a rented house at Mwananyamala Komakoma Street and in 2006 they moved to the house of the respondent's parents, where they lived for four (4) years till August 2010. He said, he then caught the respondent with another man and as a result the respondent left the matrimonial home and went to live with that man at Buguruni. He said, the respondent left him in that house with his in-laws. He said he had tried to resolve the dispute between them, but in vain.

The appellant submitted further that in 2010 the respondent came back to her parent's house and chased him away. The appellant went to live with his aunt at Buza and started to construct his house at Buza and

after he finished one room he moved in and married another woman. He said, when the respondent received the information that he had moved to that house and married another woman, she called him and asked the appellant to live with her, but he refused. He said later he received a summons to appear before the Kinondoni District Court for this case. He claimed that, during the said case, the respondent told the children not to visit him. As for the maintenance of the children, the appellant submitted that, he is not in the capacity of paying Tshs. 200,000/= per month, as he is only a shoe maker and his income is not adequate. He said, can only afford to maintain his children by paying Tshs. 50,000/= per month.

In response, the respondent noted that, all what was said by the appellant is not true. She said, they started to live together in 1994, after the appellant had impregnated her. After the birth of their first child, the appellant paid the bride price and promised to marry her. She further submitted that, they jointly acquired the Plot at Buza in 2002 at the consideration of Tshs. 450,000/=. She said they all contributed, as at that time, she was doing her saloon business and later on in 2008, after completing a hotel management course, she was employed as a cooker at Cat Hotel. She also submitted that, in 2004 her mother passed away and they moved to live in her parent's house at Mwananyamala kwa Kopa. At that time, they have already started constructing their house at Buza i.e 2004 - 2010. She said, they did not contract any marriage because the appellant imposed a condition that she has to change her religion, the thing which was not acceptable to her. She thus said, the

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appellant started to beat her and accusing her that she had extra marital affairs. In 2010 the appellant decided to leave the parents' house and went to live at Buza and stopped to pay for the maintenance and school fees for the children. The respondent submitted that it is her brother who is paying for the school fees for the children. That, whenever she asks the appellant to pay for the maintenance and school fees for the children, he used to tell her that, he has no capacity to afford paying the same for the two families.

The respondent was wondering why the appellant is not satisfied with the division of the matrimonial house and she said they even deserve to get equal shares each and not 60% to 40%. She as well argued that the Tshs 50,000/= claimed by the appellant is on the lower side, as she said the appellant has the capacity of paying Tshs, 100,000/= per month.

In rejoinder submission, the appellant also claimed that all what has been said by the respondent and even the trial Magistrate are not true. He challenged the year indicated for the purchase of the Buza Plot. He said the Plot was bought in 2003 at the price of Tshs. 370,000/=, which he paid through installments. He admitted that, his wife, the respondent was doing business and was also employed as a cooker. He said, the disputed house is for himself and his children.

Having digested the parties' submissions, the pleadings and the record of the case, I am settled that, the main issues for determination at this juncture are *whether the subordinate court correctly determined the division of matrimonial assets and the custody of the children.*

I must state at the outset that, I have observed that, in his submission the appellant has raised new grounds which never featured in the grounds of appeal, for instance the issue of him not being accorded the chance and right to express himself before the trial court. This is not acceptable in law, as a case is built up by pleadings that are before the Court i.e. in this case "*the Memorandum of Appeal*". It is a principle of the law that parties are bound by their pleadings and are required to stick to their pleadings. In the case of **Philipa Anania Masasi Vs. Returning Officer Njombe North Constituency and Others**, Misc. Civil Cause No. 7 of 1995, Songea (Unreported) where Samatta, J stated "*Litigation is not a game of surprise*".

Likewise, the appellant in this case is required to stick to his grounds of appeal submitted with the Memorandum of appeal, raising new grounds and issues at the time of submission and even without leave of the Court is not acceptable, as will only prejudice the respondent, who will be taken by surprise. As such, all matters submitted by the appellant, which are not part of the pleadings, will be disregarded by this Court.

I have further observed that in the appellant's submission together with grounds number 4, 5 and 6 of the Appeal, the appellant has misconstrued and misinterpreted the decision of the trial court, hence confused himself and complained on matters which were never ordered by the trial. For instance, on the issue of custody and the maintenance of the children, the trial court decided that:-

"...both issues have an age whereby they can choose by themselves whom to live with. As to Joyce Hamad (13 years) the respondent is ordered to pay for her school fees and medical expenses when needed". [Emphasis added].

Now in his 4, 5, and 6 grounds of Appeal, the appellant has indicated that:-

4, the learned trial Magistrate erred in law and fact in granting custody of the issues of the Marriage to the respondent while they were above seven (7) years;

5, the learned trial Magistrate erred in law and fact in ordering to the respondent to provide for maintenances (sic) to the children whose were above seven (7) years instead ordering the custody of children to be under the respondent for the welfare of the family;

6, that, the learned trial Magistrate erred in law and in fact in ordering the appellant to pay Tshs 200,000/= per month as maintenance without considering the income of the appellant per month;

I have perused both the hand written and typed Judgement of the trial court and I wonder where the appellant is getting all these orders from. I therefore finds the grounds of the appeal and the submission by the appellant to be misconceived and not reflecting what was decided by the trial court.

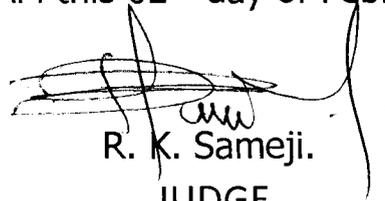
As regards the issue of division of matrimonial assets, the law, as it is, is very clear and self-explanatory. Section 114 of the Law of Marriage Act, [Cap 29 R.E. 2002], provides that *"the court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order 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 the sale"*

Gathering from the record and the parties' submissions, it is clear that, the trial court after hearing the matter was satisfied that the appellant and the respondent through their joint efforts had acquired the house located at Buza. The said court clearly applied the above principle by granting each party a share to the said house. I therefore concur with the position taken by the trial court thereto.

In the circumstances and for the foregoing reasons I have endeavored to provide, the appeal is hereby dismissed. Considering the nature of this case, I make no order as to costs, each party to shoulder his or her own costs.

It is so ordered.

DATED at DAR ES SALAAM this 02nd day of February, 2018.

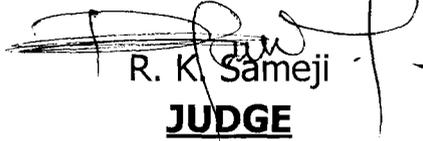


R. K. Sameji.

JUDGE

02/02/2018

COURT- Judgement to be read and delivered by the Deputy Registrar.



R. K. Sameji

JUDGE

02/02/2018