

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC CIVIL APPEAL NO. 65 OF 2017

**(Arising from the decision of the Temeke District Court in
Civil Appeal No. 100 of 2016. Originating from Mbagala
Primary Court in Matrimonial Cause No. 78 of 2016)**

CHABANDI WILLIAM CHABANDI..... APPELLANT

Versus

DINA KIDAI..... RESPONDENT

JUDGMENT

B.R. MUTUNGI, J:

It is all started at the Mbagala Primary Court in Matrimonial Cause No. 78 of 2016 where the respondent successfully petitioned for a divorce and division of matrimonial assets. The orders that were granted by the trial court were such that, the appellant was to get 100% share in the house acquired at Malamba Mawili since the respondent had contributed nothing towards the acquisition of the same. Further, the appellant was to give

the respondent 2,000,000/= as money to start her new life. The issues below the age of 7 to remain with the respondent whereas the one above 7 years to live with the appellant (Father). It was further ordered that the appellant to contribute 50,000/= for each child per month (maintenance), the same to be deposited with the court. In the event the children fell sick, the respondent was duty bound to notify the appellant accordingly. Lastly, the appellant was granted visitation rights whenever he felt like.

The respondent aggrieved by the above orders filed an appeal in the District Court contesting the division of the matrimonial properties specifically the house in issue. The District Court (appellate court) ruled that the evidence adduced indicated that, the appellant had largely contributed to the acquisition of the said property but likewise the respondent deserved some kind of token as the same was acquired during the 12 years of marriage.

In view thereof, it was ordered that a Government valuer should evaluate the said property and the respondent be given a 10% share whereas the appellant should be given 90% of the value of the said house.

The appellate court went further and found that in the best interest of the children they were to remain with their mother (respondent) and the appellant to maintain the visitation rights. Apart from this, the appellant was to deposit Tshs. 200,000/= per month as maintenance of the three children and the same to be deposited at the Mbagala Primary Court. Lastly, the furnitures jointly obtained during the subsistence of marriage to be equally divided among the two.

The appellant is now aggrieved, hence the instant appeal. He has raised four grounds of appeal which are;

- 1. That the trial magistrate erred in law in holding that the issue of (sic) the maintainance of the*

three child (sic) to the appellant to pay Tshs. 200,000/= per month without considering the appellant has a loan of Tshs. 40,000,000/=.

2. That the trial magistrate erred in law by basing on the evidence of respondent without considering the evidence adduced (sic) by the appellant.
3. That the trial magistrate erred in law by giving 10% of the house in disputes (sic) while the respondent did not provide evidence before the trial on how she contributed to the house.
4. That the trial magistrate erred in law in holding the maintenance of the three child (sic) while one of the child is at a boarding school.

The facts leading to the dispute at hand are that, the appellant and respondent had lived under the same roof for 12 years. During this time they were blessed with three issues namely Gladness Chabano, Galdius Chabandi and Mtiha Chabandi. The two ultimately landed into matrimonial squabbles which finally led to the dissolution of their

marriage. They both agreed and admitted that, they had acquired some matrimonial properties during the subsistence of their marriage. These include the house at Malamba Mawili and the furnitures in the house.

The appellant alleged on the other hand he had acquired the said plot and house therein from a loan he got from the Zanzibar Bank (Tshs. 40,000,000/=) and the respondent had contributed nothing. While on the other side of the story, the respondent alleged she had contributed a great deal since she had pretty businesses such as selling clothes (vitenges) and taking care of the technicians during the construction of the said house.

As already stated, the trial court decided in favour of the appellant.

The appellant in support of this appeal argued, it was not proper for the respondent to get 10% of the said house

alleged to be a matrimonial property. The reason for saying so was that, the respondent did not contribute anything. Regarding the issue of maintenance of the children, he submitted he was aggrieved since one child is at a boarding school (Atlas), he cannot go on making contribution to a child who is in school. The appellant further complained to have been denied access to see his children.

In reply, the respondent insisted she had contributed in the acquisition of the alleged house, hence she deserved to get 100% of her contribution. She also appeared to support the decision of the first appellate court in relation to the maintenance of the children.

In his rejoinder the appellant stressed the respondent had failed to prove her contribution towards the acquired said property. Regarding the maintenance of the three

children, he preferred to contribute for only two children and leave out the one who is in the boarding school.

The issue here is whether the appeal has merits or otherwise.

Starting with the issue of the alleged house which the appellant strongly alleged the respondent had made no contribution at all, instead, he had taken a loan of Tshs. 40,000,000/= from the bank to construct the same . Whereas the respondent on the other hand strongly contended that she had contributed to its construction. For the sake of clarity, this is found in the third ground of appeal.

Upon going through the entire court record specifically the proceedings of the trial court as well as the submissions from both parties, I find no sufficient reason to fault the first appellate court's finding. That is the respondent is only

entitled to get 10% of the said house as far as her contribution is concerned.

The above is supported by the respondent's evidence that she made contribution from the money she got as a businesswoman. Dispute the fact that the respondent throughout the entire testimony did not state exactly how much she had contributed, but it was an open truth that she had some contribution since in cross examination she itemized the kind of business she was involved with.

Be as it may, the evidence is loud that the two had lived together for 12 solid years and they reaped fruits (3 children). It does not take a prophetic mind to find that it was out of the peaceful atmosphere created by the respondent that the appellant could even get out of the way and apply for a loan. He must also have been in good health to even think of constructing a house. Considering the foregoing all indications point out that, the said house

was acquired as matrimonial property during the subsistence of their marriage and it was built while they were together under the same roof. In my settled view the respondent is entitled to get her matrimonial contribution of 10% and not 100% out of the said house from her domestic efforts. This position was propounded in the case of **Bi Hawa Mohamed Versus Ally Sefu [1983] T.L.R 32** where it was held;

'the 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.'

In the event, I find the third ground of appeal lacks merit. Consequently, I hereby dismiss it.

Regarding the issue of maintenance of the children which is found in ground 1 and 4 of the appeal, the appellant is obliged to take care of his children considering the fact that all of them are under the age of majority in

which their best interest was resolved to be in the custody of the respondent. It would appear the appellant's major complaint is the child in the boarding school. He does not see why he should pay his share to the mother (respondent). Further he has a loan of Tshs. 40,000,000/= to service. The appellant at the trial court prayed to stay with his children, The question is why at the later stage is he absconding from his responsibilities of taking care of his children be it whether these children are staying with the appellant or respondent. These children are growing likewise their needs are growing.

For that reason, I also find no sufficient reasons to fault the first appellate court's finding on the issue of maintenance of the children. Therefore the 1st and 4th ground of appeal are hereby dismissed.

I now turn to the second ground of appeal which ground should not detain me long. Having gone through the entire judgment of the first appellate court, I find the

said court before reaching its decision considered the adduced evidence from both sides. For the benefit of the appellant, it is trite law that the party whose evidence is heavier than the other must win the case. This position was cemented and reiterated in the case of **Hemed Saldi Versus Mohamed Mbilu [1984] T.L.R 113**

In the instant appeal, having considered the findings of grounds of appeal No. 1, 3 and 4, I am of the settled view the evidence of the appellant's side is weaker compared to that of the respondent. Hence the 2nd ground of appeal also fails. Consequently I hereby dismiss the same.

In the final analysis, the appeal is found to lack merits and is dismissed with no order to costs because, the parties herein were people in a close relationship.

It is so ordered.


B.R. MUTUNGI

JUDGE

18/4/2018

Right of Appeal Explained.


B.R. MUTUNGI

JUDGE

18/4/2018

Read this day of 18/4/2018 in the presence of the
respondent and in absence of the respondent.


B.R. MUTUNGI

JUDGE

18/4/2018