

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

CIVIL APPEAL NO. 32 OF 2017

(Originating from Matrimonial Cause No. 36 of 2017 at Temeke District Court)

BETWEEN

HASSANAL SALEH LADHA..... APPELLANT

Versus

MUNIRA ALLY SALIM..... RESPONDENT

29/6/2018 & 7/6/2018

JUDGMENT

B.K Phillip, J

The appellant and respondent in this appeal celebrated their Islamic marriage in 1996. In 2016 their marriage was declared irreparably broken down by the District Court of Temeke, where the respondent had lodged a petition against the appellant praying for judgment and decree as follows:-

- i. A declaration that the marriage between the Petitioner and respondent is broken beyond repair.
- ii. That the Decree for divorce be granted.
- iii. An order for equal division of matrimonial properties.
- iv. The respondent be ordered to provide maintenance for spouse and children to a tune of 50,000,000/=.
- v. Costs of the petition.

In its decision, the District Court of Temeke, declared the marriage irreparably broken and proceeded to grant the decree for divorce as

prayed by both parties and ordered the matrimonial house situated at Temeke Mikoroshini to be evaluated and the petitioner who is the respondent in this appeal, be given 30% of the value the house. The remaining 70% was granted to the respondent, the appellant in this appeal. The custody of the three issues of marriage was placed under the petitioner (respondent in this appeal) and the appellant was ordered to pay maintenance of the issues of marriage to a tune of Tshs. 300,000/= per month to cover their education and health costs.

The appellant being aggrieved by the aforesaid decision of the District Court of Temeke, has lodged his appeal in this Court with three grounds of appeal to wit;

- i. That the trial Magistrate erred in law and fact for failure to distribute the house located at Temeke Mikoroshini at the rate of 85% to the appellant and 15% to the respondent.
- ii. That the trial Magistrate erred in law and fact for failure to take into consideration the income of the appellant when she ordered the appellant to pay maintenance to the children of marriage to a tune of Tshs. 300,000/= per month.
- iii. That the trial Magistrate erred in law and fact for failure to consider the weight of the evidence adduced by the appellant and his witnesses during the hearing.

At the hearing of this appeal the appellant was represented by the learned Advocate Sindilo while the learned Advocate Yasin Maka represented the respondent.

On the first ground of appeal the learned Advocate Sindilo Lyimo submitted that, the house in dispute in this appeal is not a matrimonial house in terms of Section 114(1) of the Law of Marriage Act Cap 29 (R.E 2002). He argued that in the case at hand the house in dispute was acquired by the appellant through inheritance from his late grandmother; however he admitted that the respondent made some contributions during the renovation of the house. His major concern was that the trial Magistrate did not show the extent of the respondent's contribution to the house in dispute. It was his contention that, respondent's contribution to the house was small, hence not proportional to the percentage of the share of the value of the house granted by the lower Court to the respondent. To cement his argument he referred this Court to the case of **MARIAM TUMBO VRS. HAROLD TUMBO 1983 TLR 293**.

On the second ground of appeal, the learned Advocate argued that, the trial Court failed to consider the appellant's income before making decision on the amount to be paid by the appellant for the maintenance of the issues of marriage. He referred this Court to the case of **JEROME CHILUBA VR. AMINA ADAM 1989 TLR 117**. He invited this Court to reduce the amounting of money for maintenance from Tshs. 300,000/= to Tshs. 150,000/=.

On the third ground of appeal, the learned Advocate Sindilo Lyimo submitted that, the trial Magistrate did not put into consideration the evidence adduced by the appellant and his witnesses which shows that the house in dispute was inherited by the appellant from his late

grandmother. He submitted further that, the Court failed to hold an inquiry on the means of income of the parties. He referred this Court to the case of **FESTINA KIBUTU VR. MBAYA NGAJIMBA 1985 TLR 44.**

In response to the appellant's submission, the learned Advocate Yasin Maka, started by conceding to the appellant's prayer for reduction of the amount of maintenance from Tshs. 300,000/= to Tshs. 150,000/=.

On the first ground of appeal, the learned Advocate, for the respondent submitted that the appellant is an irresponsible father who seeks to avoid his responsibilities. He has abandoned his three children who are currently staying with the respondent in a rented house and the rent for the house is paid by Jama at Khan Society.

The learned Advocate submitted further that, the house in dispute is a Matrimonial property and the respondent contributed towards the acquisition and renovation of the same for the 20 years of the subsistence of the marriage. The contribution of the respondent was both in terms of money and services she rendered to the family as a wife of the appellant. The learned Advocate invited this Court to make an order for the equal distribution of the house in dispute, that is, each party be granted 50% of the value of the house. He referred this Court to the case of **CHARLES MANOO KASARE & ANOTHER VRS. APOLINA MANOO KASARE 2003 TLR 425.** The learned Advocate invited this Court to make an order for the sale of the house in dispute so that the proceeds from the sale of the house can be easily divided equally between the appellant and

respondent; however in the alternative, he prayed that the ownership of the house in dispute be transferred into the three issues of marriage who will have joint ownership of the same. lastly, he prayed the appeal to be dismissed with costs.

In his rejoinder the appellant's Advocate submitted that the appellant is not an irresponsible father. The three issues of marriage were staying with their aunt. It is the respondent who decided to take them. The respondent denies the appellant access to his children, but he is very willing to give any assistance to them. The first issue of marriage is above the age of majority and is employed. It is only the 2nd and 3rd born who are below the age of majority and are at Primary School level. The learned Advocate insisted that, the house in dispute is not a matrimonial property and the respondent is not entitled to half of the value of the house, however he agreed with the respondent's alternative prayer that the ownership of the house in dispute be transferred into the three issues of marriage, but he submitted further that the house should be under the care of the appellant. The appellant should be the overseer of the house.

Having analyzed the submissions from both parties, this Court finds that since the respondent has conceded to the second ground of appeal and agreed with the appellant's prayer for reduction of the amount for maintenance from Tshs. 300,000/= to Tshs. 150,000/= per month, the only issue in controversy in this appeal is the distribution of the house located at Temeke Mikoroshini.

Before I dwell on the above mentioned issue in controversy, I want to make it clear that ,as correctly submitted by the learned Advocate Sindilo and as it was held by this Court in the case of **JEROME CHILUBA VR. AMINA ADAM (Supra)**,in a case for maintenance, it is important for a trial Court to find out the income of the person sued in order to be able to decide the amount to be paid. In the appeal at hand, the respondent's act of conceding to the appellant's prayer for reduction of the amount for maintenance from Tshs. 300,000/= to Tshs. 150,000/= shows that the amount of Tshs. 300,000/= that was granted by the trial Court is higher than the appellant's capacity to pay the same. I believe the respondent knows the appellant's income than this Court. Therefore there is no any reason to vary the amount, agreed by the parties, that is Tshs. 150,000/=.

With regard to the distribution of the house at Temeke Mikoroshini the appellant's argument, that the house at Temeke Mikoroshini is not a matrimonial property has no merit. The Courts proceedings shows that the said house was acquired during the subsistence of the marriage. The testimony of both the appellant and respondent reveal that the house in dispute was built during the subsistence of the marriage through joint efforts of both parties, hence it is matrimonial property.

Coming to the issue of division of the said house, I have noted that during the hearing of this appeal the respondent's advocate, in addition to his prayer that the house in dispute should be divided equally between the

parties, he made an alternative prayer that the ownership of the house should be transferred to the three issues of marriage. In response , the appellant's advocate was in agreement with the respondent's alternative prayer, only that he wanted the appellant to be the over seer of the house. The appellant made the same prayer during the trial of the case at the lower Court, that is, the ownership of the house should be transferred to the issues of marriage.

In my considered opinion, I find that the prayer to transfer the ownership of the said matrimonial house into the issues of marriage is legally untenable and will create more conflicts since each party wants to be the overseer of the house. S. 114 (1) of the law of marriage Act (Cap 29 R.E 2002) provides clearly that upon grant of a decree of separation or divorce the Court has powers to order 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 assets and the division between the parties of the proceed. Therefore in case a decree of divorce or separation is granted, the law requires matrimonial properties to be divided between the parties as it was held by this Court in the case of **ELIZABETH A. KOMAKOMA VR. ZEPHANIA M. ANDENDEKISYE** Civil appeal No. 171 of 2005 (unreported) where his lordship Shangwa J. (as he then was) said.

"...The trial Magistrate erred in law by giving the matrimonial house at Kimara Kilungule to the three issues of the marriage. The trial Magistrate had no legal powers to do so, what the trial Magistrate

was supposed to do in respect of the said Matrimonial house was to order that it should be divided between the parties or be sold so that the proceeds of its sale be divided between them. That would be in line with section 114 (1) of the law of marriage Act (cap 29 R.E 2002) which confers power to the Court to order division of Matrimonial property ...”

As correctly submitted by both learned Advocates according to S. 114 (2) (b) of the law of Marriage Act [Cap 29, R.E 2002], the Court is required, in exercising its powers of division of assets to have regard to the extent of contribution made by each party in money, property or work towards the acquiring of the assets. In this case the respondent and appellant stayed together as husband and wife for twenty (20) years. The evidence shows that during the subsistence of their marriage there was a time the respondent was employed, hence she was earning income. In the case of **BI. HAWA MOHAMED VR. ALLY SEIFU** 1983 TLR 32 (CA), the Court of Appeal of Tanzania held that 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.

Having in mind the decision of the Court of Appeal in the above cited case of **BI. HAWA MOHAMED VR. ALLY SEIFU**(supra), it is my considered opinion that the appellant contributed towards the acquisition of the house at Mikoroshini, Temeke in monetary terms and by the domestic works for the twenty (20) years of marriage, hence deserves to be granted forty percent (40%) of the value of the matrimonial house at Temeke

Mikoroshini and sixty percent (60%) of the same should be taken of the appellant.

In view of what I have stated in this Judgment I allow this appeal on the second ground of appeal only by reducing the amounts of money for maintenance payable by the appellant to Tanzanian Shillings one hundred fifty thousand only per month (Tshs. 150,000/=).

I order that the Matrimonial house situated at Temeke Mikoroshini be sold and the proceeds of sale be divided between the parties at the rate of sixty percent (60%) for the appellant and forty percent (40%) for the respondent. Each party should bear its own costs.

Dated at Dar es Salaam this 29th day of June, 2018



B.K. Phillip

JUDGE

29/06/2018