

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

PC CIVIL APPEAL NO. 82 OF 2017

(Arising from the decision of the Ilala District Court at Samora Avenue in Civil Appeal No. 39 of 2012. Originating from the decision of Ilala Primary Court in Matrimonial Cause No. 16 of 2012)

RASHID ALLY CHIKUNJE ----- APPELLANT

VERSUS

ARAFI MOHAMED ----- RESPONDENT

JUDGMENT

MUTUNGI, J.

Originally before the Ilala District Court in Matrimonial Cause No. 16 of 2012 the respondent successfully petitioned for divorce against the appellant. Aggrieved by the said decision, the appellant unsuccessfully appealed to the District Court of Ilala at Samora in Civil Appeal No. 39 of 2012.

The appellant still aggrieved, has come through the window of appeal on a second bite to this court. Hence this appeal. The appellant has raised three grounds of appeal as follows: -

1. *That the Resident Magistrate erred in both law and fact by holding that the house at Lindi Vijijini was a matrimonial property whilst it was not.*
2. *That the Resident Magistrate erred both in law and fact for failure to consider the evidence of the key appellant's witnesses on deciding the distribution of matrimonial assets.*
3. *That the trial Resident Magistrate erred in law and fact for failure to consider the main issue in dispute that was equal distribution of matrimonial property which is House No. ILA/KWN/MZF 7/90.*

The facts leading to the appeal are as hereunder: -

The trial court record reveals the respondent alleged to have celebrated an Islamic marriage with the appellant on 18/12/1976. During the said marriage, they were blessed with eight children. The respondent alleged the problems started in 2010 when the appellant abandoned her and started living with another woman. The respondent went further by alleging, the appellant did so because the

respondent was in many occasions suffering from BP. Thereafter the appellant issued her a “talak” as per Exhibit A.

The respondent further alleged that, during the subsistence of the marriage they managed to acquire among other properties three houses, one situated at Kiwalani in Dar es Salaam where the appellant is residing with another woman. Nevertheless, she has been allocated some of the rooms in the said house. The other two houses are situated in Lindi Region but one of which has already been sold out.

On the appellant’s side, the record reveals that, he was in support of the divorce and this is why he had earlier issued the respondent a “talak”. However, he disputed the division of the alleged matrimonial assets as alleged by the respondent. He alleged that, he had already given the respondent three rooms in the house situated at Kiwalani, one plot at Mlandizi area and 11 iron sheets. He further alleged the house at Lindi does not belong to them but is owned by his mother.

The trial court in its decision ordered the Kiwalani house be given to the respondent and the Lindi House to the

appellant. The appellant was further given ½ out of 3 acres in the farm whereas the remaining portion be given to the children.

The appellant was aggrieved by above division and appealed to the District Court (first appellate court). The said court did confirm the decision of the trial court but it went further by declaring the house situated at Lindi a matrimonial property. He is now disputing that the Lindi House is not one of the properties acquired jointly during the substance of their marriage.

Submitting on the grounds of appeal, the appellant explained at length of how the house at Lindi (Village) was acquired (the subject matter of the appeal). He averred that the house belongs to his step mother and was originally a mud house. The same existed long before he married the respondent. After their marriage he had decided to renovate the said house by using bricks and iron sheets. He did this solely for his mother.

Considering the above, the appellant faulted the decisions of the District Court in declaring this house (at Lindi)

a matrimonial property. He explained further that, the two had jointly built a house at Kiwalani which is the only matrimonial house is they have. By granting the Kiwalani house to the respondent leaves him with nothing.

The respondent strongly submitted that, the house at Lindi (Village) is one of the properties they acquired during the subsistence of the marriage. The same was a mud house but they latter renovated it to a modern house. She is the one who supervised the construction of this house. The appellant's step mother is just house warming the said house. In view thereof, considering the contribution and efforts she had put in this marriage, the District Court was right to divide these two houses (at Kiwalani and Lindi Village) the way it did.

Having summarized the respective submissions, I will answer the grounds of appeal generally. I have considered the evidence in both the lower courts' files and found both courts had concluded that, the appellant as much as he was employed but the respondent was the one during the running up and done to sustain the marriage. There was ample evidence that the respondent is the one who

supervised the construction of the matrimonial houses both at Lindi (in the village) and the one at Kiwalani. The respondent had also engaged herself in petty business and farming activities at Ruvu in Dar es Salaam.

The allegation that the house at Lindi is the property of the appellant's step mother, this leaves a lot to be desired. The lower courts found no evidence at all from all the witnesses who gave evidence including their own children, that the house belonged to the appellant's mother. Having so elaborated, the lower courts went ahead and divided the alleged properties equally with the respondent taking up the Kiwalani house and the respondent the house at Lindi Village.

This court has gone through the criteria used by the first appellate court in apportioning and dividing the said houses. Properly so done, the lower courts were to apply the principle found in **section 114 (2) of the Law of Marriage Act, 1971** that 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 monetary, property or efforts put in towards acquiring the assets disputed. The lower courts did consider

the domestic activities carried out by the respondent and found she deserved an equal share in the two houses.

As already pointed out, it is difficult to believe the appellant's version of story that the Lindi (Village) house belonged to his step mother in absence of any proof. It is a well known and widely quoted maxim that **"he who alleges must prove"**. This court is left with a question as to why the appellant did not call his step mother in evidence to corroborate such a crucial aspect in this dispute.

In this regard the court is subjected to draw an adverse inference against the appellant that, he had something to hide. The court is guided by the holding found in the recent decision of the highest court of this land in the case of **MAGAMBO J. MASALO AND 3 OTHERS VERSUS AMOS BALAYA AND 2 OTHERS, CIVIL APPEAL NO. 119 OF 2016 (CAT-MWZ) (UNREPORTED)** at page 17 citing the case of **HEMEDI SAID VERSUS MOHAMED MBILU [1984] T.L.R 113** that: -

"where for undisclosed reasons, any party fails to call a material witness on his side, the court is entitled to draw an inference that if the

witness were called they would have given evidence contrary to the party's interest".

The first appellate court did go further by elaborating that the appellant was given the house at Lindi on the reason that the same is in the appellant's home village hence it would be unfair to award the respondent the said house.

In light of the foregoing analysis, I find the lower courts had properly evaluated the evidence on record and came to a right and just decision. The couple having acquired two matrimonial houses and considering each individual's contribution, the first appellate court was right to award the appellant the house at Lindi (Village) and the respondent the house at Kiwalani.

All said, the appeal is found to have no merits and the lower courts' decisions are upheld and the appeal dismissed accordingly. I make no order for costs considering the nature of the appeal.


B. R. Mutungi

JUDGE

17/05/2018


Right of appeal explained.


B. R. Mutungi

JUDGE

17/05/2018

Read this day of 17/5/2018 in the presence of the appellant and respondent in person.


B. R. Mutungi

JUDGE

17/05/2018