

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO.104 OF 2017**

*(Originating from Matrimonial Appeal No.08/2016 of Kinondoni District  
Court before Hon. Lihamwike)*

**SALMA RAMADHANI LEASO..... APPELLANT**

**VERSUS**

**FELIX DEANATUS NYANGAI..... RESPONDENT**

***Date of last Order: 26/06/2019***

***Date of Judgment: 04/10/2019***

**J U D G M E N T**

**MGONYA, J.**

Appellant **SALMA RAMADHANI LEASO** on this appeal being aggrieved by the decision of Kinodoni District Court appealed before this court with two grounds of appeal being:

- 1. That, the District and Primary Court Magistrates erred in law and in fact for not**

An Appeal was filed before the Kinondoni District Court by the Respondent after being aggrieved by the decision of The Primary Court. And again the Appellant filed a cross Appeal in that aspect. When the matter was called for hearing the Respondent withdrew his Appeal and the cross appeal was left to be heard. The Appellant again being aggrieved by the District Court appealed before this Honorable Court.

It is averred by the Appellant that the Court at first instance did not exercise its judicial powers properly for not dividing the Matrimonial properties acquired at the subsistence of the marriage instead bequeathed the Matrimonial Home to the infants and the same was upheld at first Appeal.

The Appellant further added that the Court at first instance and the Appellate Court both agreed with the distribution of properties situated at Wazo, Morogoro, Kibamba, and Bagamoyo to be properties of the Respondents' Mother without sufficient proof. The Appellant quoted paragraph two of the primary Court judgement which stated:

***"....ndoa imevunjika. Wajibu wa kukaa na watoto ni wa Baba na watoto watabaki na Mama katika nyumba waliojenga na nyumba hiyo ni ya***

***watoto wao waliozaa ndani ya ndoa. Akitaka kuolewa itabidi aondoke kwenye nyumba ya watoto.....”.***

Again the District Court at its Appellate jurisdiction upheld the decision of Magomeni Primary Court, at page 3 paragraphs 6 held that:

***“..... The Court is of the observation that, since custody of the children was taken by the Appellant and the Appellant has been given the right to stay with the Children in the Matrimonial house, then it was right for the trial Court to consider the interest of the infants Children during the division of the matrimonial assets...”.***

The Appellant went further in quoting the definition of matrimonial property as defined in ***paragraph 1064 of the HAILSHAM’S HALSBURY’S LAW OF ENGLAND 4<sup>TH</sup> EDITION at page 491***, I do not intend to produce the same.

Submitting further the Appellant averred that, in our Family Law Jurisprudence, once the marriage has been dissolved by the competent Court having jurisdiction, three things are to be considered. One is the ***Matrimonial Property*** acquired during

the substance of the said marriage and its divisions, ***Custody of the infants*** if any and ***maintenance of the infants*** if any as per ***Section 114 (1) of the Law of Marriage [ Act Cap 29 R.E. 2002]***. It is from the above, the Appellant submits that the lower Courts skipped in adjudicating the matrimonial matter. The Court had no power to distribute the House to the Children as if it was a probate matter. The Children have the right to be maintained by either the father or the Mother as the case maybe. Children do not have the right to acquire properties acquire by their parents during a subsisting Marriage until by consent of the parents and agreement of the parents.

The Appellant went on citing the case of ***PULCHERIA PUNDUGU VS SAMWELI HUMA PUNDUGU 1985, TLR 7 (HC)***, where Hon. Mzava had this to say:

“it is now settled law after the decision by the Court of Appeal in Bi. Hawa’s case and the commentary by Professor Rwezaura in his paper- Division of Matrimonial Assets under the Tanzania Marriage Law, *that the principle underlying division of property is one compensation*, it does not make any difference whether what is being compensated is direct monetary contribution or domestic services.

The Appellant referred to the case of ***FIBRANCE VS FIBRANCE (1957) 1 ALL E.R 357 CA***, this case elaborated on matter of acquisition of matrimonial properties.

Finally the Appellant avers that where a marriage has been dissolved, parties have a right to be independent. The Courts order that imposed a condition for the Appellant to stay in the Matrimonial home and at her departure she has to leave the Matrimonial property for the infants was ***improper***.

The Appellant further prayed for this Court to direct and order for division of property acquired during subsistence of the marriage between the parties. As provided for under ***Section 129 (1) of the Law of Marriage Act [Cap 29 R.E. 2002]***.

After the submission of the Appellant, the Respondents neither filed a reply to the grounds of appeal nor the submission. This court has in records several orders requiring the Respondent to file the replies, where orders were not adhered to and the Court finds it proper to proceed since the record upon which an appeal is sought are within the Court file. It is trite law that when a party is ordered to file written submission and does not file the same it is as good as the party has failed to defend his/her case.

In consideration of the Appellants submission above, where the Appellants states not being satisfied with the decision of the lower Court in exercising its judicial powers on division of matrimonial properties being given to the issues of the marriage that has been dissolved. ***Section 114 (1) of the Law of Marriage Act Cap [29 R.E. 2002] provides:***

***"...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 sale".***

It is the requirement of the law that the matrimonial properties acquired in a marriage by joint efforts of the Spouses is by law directed to be ***divided between the parties of any assets acquired by them during the marriage by joint efforts***, this is as to the wording of the statute as per ***Section 114(1) of the law of Marriage Act [Cap 29 R.E. 2002]***.

I am well aware of the decision of the Primary Court as it was upheld by the District Court and hence this appeal. It is nowhere in records that the issues to the dissolved marriage contributed to the acquisition of matrimonial properties. The position of law on division of Matrimonial properties was observed in the case of ***SCOLASTICA SPENDI VS ULIMBAKISYA AMBOKILE SIPENDI & ANOTHER, MATRIMONIAL CAUSE No. 2 of 2012 TZHC 72 at page 22*** it state that;

***".... Upon reading the provisions of the law the Court has found it has power under that provision of the law to order the matrimonial property to be divided or sold and proceeds obtained thereof to be divided to the parties....."***

The Court has in knowledge that the Appellant and Respondent did admit before the Court that the matrimonial home was acquired in their subsisting marriage but the same should be divided to the Issues of the marriage. This is stated in the judgment of the Primary Court.

From the above I am of the opinion that the law is what directs as to how matters are to be determined and handled. I therefore find the law was not adhered to by the decision of both

lower Courts. ***It is from the above that I find the ground of appeal as it was consolidated with merit.***

In the record before this Court the Petition at the Court of first instance also contravened the requirements of the law in determining the matter. In the proceedings, I found no legal ground that qualified to be referred to as that from such ground the marriage is irreparably broken beyond repair. Grounds for divorce are lined up under ***Section 107 (2) (a) – (i) of law of Marriage Act (Supra)***. In the records I have not seen any ground as required to be evidence so as the Court reaches its just decision on pronouncing that the Marriage is irreparably broken beyond repair.

***Section 107 (1) of the of marriage Act, provided that:***

***"In deciding whether or not a marriage has broken down, the Court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties...."***

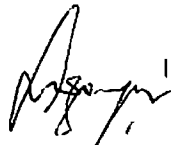
In the records the above has not been adhered to, there is no evidence as required but rather an agreement between the parties that the marriage is broken down. From this irregularity as evidenced in the record of the Court, I find that this appeal was



misconceived. In the event therefore, I proceed to quash all the proceedings of the District and Primary Court, and set aside tboth decisions thereto. ***This matter is to be tried denovo before a Court and Magistrate with competent Jurisdiction.***

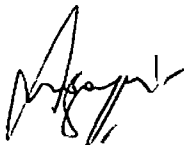
**I make no orders to costs**

It is so ordered.



**L. E. MGONYA  
JUDGE  
04/10/2019**

**COURT:** Judgment delivered in the presence of Asenga, Advocate for the Appellant and Ms. Emma, RMA in my chamber today 04<sup>th</sup> October, 2019.



**L. E. MGONYA  
JUDGE  
04/10/2019**