

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA**

CIVIL APPEAL NO. 14 OF 2019

(Original from Babati District Court vide Matrimonial Cause No. 1 of 2017)

TARSILA MICHAELAPPELLANT

VERSUS

CHRISTOPHER ANTONI.....RESPONDENT

JUDGMENT

Last order..... 17/03/2020 &

Judgment delivered...07/05/2020

GWAE, J.

The appellant, **Tarsila Michael** is appealing against the decision of District Court of Babati at Babati (trial court) pronounced on 24th April 2019 where a decree absolute of divorce was accordingly issued and matrimonial assets were subsequently distributed to the parties.

According to the record, the parties started to cohabit since 1986 and their marriage was blessed with two issues, Judith and Joseph born in 1987 and 1991 respectively and that, subsequent to the parties' informal relationship, their marriage was officiated in 1989 through Christian rite at Roman Catholic Church.

Initially, the appellant filed a matrimonial cause praying for a divorce, division of matrimonial assets, general damages, past, present and future

maintenance in favour of the appellant at the rate of Tshs. **300,000/=** per month, Costs and any other relief (s) that may be deemed fit to grant by the trial court.

In her petition, the appellant enlisted the following properties alleging to be matrimonial assets and therefore subject to the division between the parties (spouses), a house located at Negamsi area (Plot. No. 18 Block 'v'), a house at Ngarenaro (Plot No.19 Block "N"), three acres at Harambee, two plots at miomboni area, three motor vehicles (T.493 ADL Mitusubish Canter, T. 165 ADG make Fuso and T. 615 BMT-Toyota Saloon), two motorcycles, welding and grinding machine, home utensils, 2 televisions with 18 and 21 inches, fridge sofa set, two beds and house rents.

The trial court heard both parties and their respective witnesses and in its final analysis of the evidence before it, it granted the divorce as prayed, the appellant /petitioner was given 1/3 share of the house located at Negamsi, grinding machine and welding machine, plot situated at Miomboni area Motorcycle (T. 458 BDR) one television, a sofa set and one bed whereas the respondent was given 2/3 share of the house at Negamsi area –Babati, Car make Mitsubish (T. 493 ADL), one television, one bed and a refrigerator.

Aggrieved by the District Court decision exercising its original jurisdiction, the appellant has knocked the doors of the court by presenting a petition of appeal comprised of four grounds of appeal, notably;

1. That, the trial court grossly erred in law and fact for failure to consider and evaluate evidence tendered by the appellant and

in so doing reached at erroneous decision depriving the appellant right of equal shares of the matrimonial properties jointly acquired

2. That, the trial court grossly erred in law and fact for failure to consider efforts made by the appellant in acquisition of matrimonial properties hence entered a biased decision which is not maintainable at law
3. That, the trial court erred in law and fact by concluding that the case was proved on the standard required by the law that is on the balance of probabilities
4. That, the trial court judgment is bad in law for lack of legal reasoning

On 17th March 2020 when this appeal was called on for hearing, the appellant was represented by **Mr. Joseph Masanja**, the learned advocate whilst the respondent appeared in person, unrepresented.

Arguing for this appeal, the appellant's advocate opted to abandon rest of the grounds of appeal save the first ground of appeal on the complaint on the failure to evaluate evidence leading to uneven division of matrimonial assets by the trial court. According to him, the properties were to be equally divided since the appellant being a wife to the respondent was not only taking care of her family but also dealing with business. Hence two houses and motor vehicles were to be equally divided. He added that the respondent did not prove otherwise to the acquisition of the motor vehicles. Stressing his reliance of his submission, the learned counsel for the appellant referred this court to the case of Anna **Kamunga v. Andrew Kamunga** (1996) TLR 195.

Resisting this appeal, the respondent seriously denied existence of plots by alleging that he used to buy plots and sell the same adding that the house at Ngarenaro is a family house and that motor vehicle make Fuso (T. 494 ADL) is not currently operating. He thus urged this court to be pleased to uphold the decision of the trial court as far as division of matrimonial properties is concern. In his rejoinder, the learned counsel for the appellant, reiterated that equal shares in this particular matter shall meet the ends of justice.

In determining this appeal, I am now legally bound to look at the evidence adduced by the parties during trial and decision appealed as well as oral submissions of the parties. I have to certainly hold that the issue of issuance of decree of divorce is not questionable as rightly abstained by the parties at this appeal stage not to be among issues determinable by this court.

According to section 114 of the Law of marriage Act, Cap 89 Revised Edition, 2002, the court presiding magistrate or judge over a matrimonial cause especially regarding a division of matrimonial properties must take into provisions of section 114 which read;

"114.-(1) 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.

(2) In exercising the power conferred by subsection (1), the court shall have regard-

- (a) To the custom of the community to which the parties belong;
- (b) To the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
- (c) To any debts owing by either party which were contracted for their joint benefit; and
- (d) To the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during a marriage includes, assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

In our present case, the parties had clearly made efforts to exhibit their extent of contributions towards acquisition of the matrimonial assets. In my firm view, the parties' extent of contributions towards acquisition of the matrimonial properties is almost equal since it is evidently clear that, the appellant was not a mere house wife taking care of the family but also she was business woman dealing with petty businesses such as retail shop and grocery as rightly submitted by the appellant's counsel. This piece of vital evidence relating to the appellant's acquisition of the matrimonial assets went unopposed by the respondent who was also a business man. This position of the law cited above was rightly stressed **Bibie Mauridi v. Mohamed Ibrahimu** (1989) TLR 162

"There must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets; performance of domestic duties amounts to contribution towards such acquisition but not necessarily 50%."

The appellant, as eluded earlier, was not only a house wife but also business woman, she is therefore entitled to more share than the trial court awarded her in the house at Negamsi area, I would also wish to subscribe the emphasis in this regard made in the case of **Bi Hawa** (1983) TLR where welfare of the family was accordingly considered to be an essential component (See also **Muthembwa v. Muthembwa** [2002] 1 EA 186-CAK).

As was the case before the trial court, the appellant and respondent had undisputedly and certainly testified that, the house at **Negamsi** area was jointly acquired by the joint efforts of both spouses and that the motor vehicle make Mitsubish (supra) despite the fact that the same is said not to be in operation is matrimonial property as well as domestic utensils. Thus subject of division to the parties.

I have also considered the testimonies of both sides during trial of the petition and noted that the house at Ngarenaro was previously owned by the respondent's late father one Antony Shemahonge however the same was demolished to pave way for expansion of the public road and the deceased was compensated. Seemingly, part of the plot on which the respondent's late father was compensated remained and subsequently, the respondent reconstructed a new house which is now in contentious. In order to be safe side when determining as to the ownership of the house at Ngarenaro area and if it is found in affirmative, extent of contribution, it is therefore apposite to have parts of the witnesses from both sides reproduced herein under;

PW1:

"Another house is at Ngarenaro Plot No.19 Block "N"...He allowed us to leave (sic) there and on 2009 the TANROAD did demolish that house.....We constructed a new house with 11 rooms in that plot

xx-The house belongs to my father in law who is your father. He was paid compensation for the demolished house"

PW3:

"The town council demolished the house and they remained three room at the back. Then their father was compensated ... father went back to lushoto.....they were living happily. Reconstructed the house in that area again

PW4.

"I recollect was the property of the father of Christopher though due to expansion of the road was demolished and this curple (sic) re-constructed it in 2009"

DWI

XX-Properties are; a house at Ngarenaro, home utilities mentioned

DW2 (Timotheo Antony)

"The house they had to shift is our deceased father house .and I have two rooms therein. One Christina two rooms, one brother has two rooms and Laurent has two rooms and Christopher three rooms"

XX at the time the letter was issued Talsila was leaving (sic) with Christopher and is their belonging"

According to the evidenced adduced by the parties and partly quoted herein above and their respective witnesses, it is glaringly clear that the appellant and her ex-husband had re-constructed the house after the former house was demolished, the original owner of the certificate of title being the respondent's late father. The appellant is also entitled to share in

this property even if the title would have been in the name of the deceased father of the respondent as both spouses had jointly contributed towards re-construction of the house located at Nagarenaro area and this is by virtues of section 114 (3) of Cap 89.

It is in the light of the above re-evaluation of evidence adduced before the trial court, I find myself compelled to hold that the trial court decision should not be left undisturbed particularly in respect of the 1/3 shares given to the appellant in the house at Negamsi area and total denial of the shares in the house plot No. 19 Block "N" located at Ngarenaro area was nothing but a total misdirection on the part of the trial magistrate since it clearly established that the appellant had plainly contributed to its acquisition.

As the appellant's dissatisfaction on the trial court's division is more particular centers in the houses aforementioned and taking into account that the appellant's evidence regarding the parties' acquisition of the motor vehicle T.493 ADL make Mitusubishi Canter, plots at Harambee and T. 615 BMT-Toyota Saloon) as rightly found by the trial court is not clearly challenged by the respondent for instance by bringing material witnesses whom he contended to be the owners (Fuso and Toyota saloon). I hereby fault the trial court distribution to certain extent by distributing the matrimonial assets named above as follows:

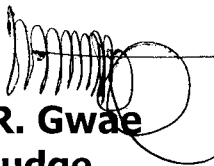
The appellant is now given a full (100 % shares in the house located on Plot No. 18 Block "V" at Negamsi area, one motor vehicle (Mitisubish Canter) a sofa set, one refrigerator, two plots at miomboni, one television

18 inches, ½ of the domestic utensils one motor cycle (MC.458 BDR) and one bed.

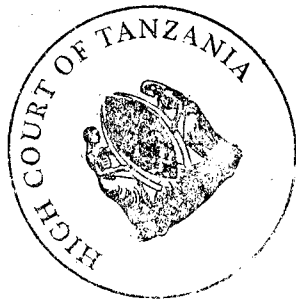
Whereas the respondent is given a house or whatever right /share that both parties were entitled in the house plot No. on Plot No.19 Block "N" Ngarenaro, area, three acres at Harambee area, two motor vehicles (TT. 615 BMT Toyota Saloon and T. 165 ADG make Fuso), and motorcycle (Yamaha) grinding machine and welding machine, one television 21 inches, one bed as well as ½ domestic utensils.

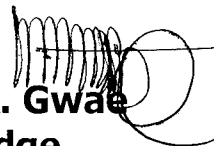
That told, the appellant's appeal is partly allowed to the above extent. The decision of the District Court is faulted and upheld to the above extent. The parties are now entitled to the matrimonial assets acquired during subsistence of their marriage as herein above. In the nature of the relationship that exists between the parties, I am not justified to order costs of this appeal and those at the trial court as was correctly ordered by the learned trial magistrate.

It is accordingly ordered.


M. R. Gwae
Judge
07/05/2019

Right of appeal fully explained




M. R. Gwae
Judge
07/05/2020