

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

CONSOLIDATED PC CIVIL APPEAL NO. 15 and 16 OF 2019

(Arising from the Judgment of District Court of Kigamboni in Civil Appeal No. 14 of 2018, date on 11th of day of December, 2018 before Hon. S. B. Fimbo **SRM**, Original Matrimonial cause No. 41 of 2018 Kigamboni Primary Court)

KIBIBI YUSUFU MAKAME APPELLANT

VERSUS

MKERENGE HORERA RASHID RESPONDENT

JUDGMENT

11th March & 08th May, 2020

E. E. Kakolaki, J

This is a second appeal originating from the decision of the Kigamboni District Court in Civil Appeal No. 14 of 2018 the decision which aggrieved both parties as a result two appeals were filed in this court bearing different appeal case numbers. The first appeal was preferred by the present appellant as PC Civil appeal No. 15 of 2019 whereas the second appeal was lodged by the respondent as PC Civil Appeal No. 16 of 2019. On 06/05/2019 before my sister B.R. Mutungi, J, who was presiding over both appeals entered a consolidation order and directed proceedings of both appeals to be conducted in PC Civil Appeal No. 15 of 2019 case file. In between before hearing of the appeal the learned Honourable Judge was transferred to another duty station as a result the matter was re-assigned to me to proceed with.

Briefly the background story that gave rise to these two appeals goes as hereunder. Way back in 1996 parties contracted their marriage under Islamic rites and blessed with two issues. The appellant (wife) in PC Civil Appeal No. 15 of 2019 who is also the respondent in PC Civil Appeal No. 16 of 2019 filed a petition Matrimonial Cause No. 14 of 2018 in Kigamboni Primary Court against the respondent (husband) and appellant in PC. Civil Appeal No. 16 of 2019 for divorce, custody of the children and division of matrimonial assets. After hearing the trial court granted the divorce decree, custody of children to the respondent (father) and proceeded to divide matrimonial assets. It ordered among other assets the appellant (wife) in PC Civil Appeal No. 15 of 2019 to part with the house she was residing in at Kigamboni and the rest of the assets being plots at Tabata Kisukuru, House at Magomeni Mapipa, four cars (semi-trailers) and another small car make Toyota Verossa to be retained by the respondent and the appellant in PC Civil Appeal No. 16 of 2019. Being dissatisfied with the division of assets by the trial court the respondent herein above and appellant in PC Civil Appeal No. 16 of 2019 appealed to the district court challenging the trial court's decision of awarding the appellant (wife) in PC Civil Appeal No. 15 of 2019 a house which he claimed was not entitled to as her contribution towards acquisition of those assets was to be reduced down to a mere house wife whose duties were bearing and rearing children and cooking only. The District Court allowed his appeal and varied the trial court decision by reducing shares of the value of the house awarded to the appellant (wife) from 100% to 70% while the respondent (husband) and appellant in PC Civil Appeal No. 16 of 2019 getting 30% and the rest of the assets that were in his hands except the plot located at Ulongoni within Kigamboni whose fate was yet to be determined for being pending in

Court over ownership dispute. This time both parties were discontented with that decision as a result lodged their appeals in this court. The appellant in PC Civil Appeal No. 15 of 2019 is canvassed with (6) six grounds of appeal whereas the appellant in PC Civil Appeal No. 16 of 2019 has (3) three grounds of appeal.

When the matter came for hearing on 11/03/2020 by consent both parties agreed to proceed disposing their appeals by way of written submissions. A filing schedule of submission was entered by the court and complied with. The appellant in PC Civil Appeal No. 15 of 2019 one **Kibibi Yusufu Makame** was represented by Ms. **Judith Patrick Kyamba** learned advocate and the one in PC Civil Appeal No. 16 of 2019 **Mkerenge Horera Rashid** had the services of Mr. **Peter Nyangi** learned advocate.

As stated earlier the appellant in PC Civil Appeal No. 15 of 2019 filed (6) six grounds of appeal going as follows:

- (1) That, the first appellate court grossly erred in law and facts by limiting the appellant contributions to one property while it was clear that the parties had acquired other properties during subsistence of their marriage.
- (2) That, the first appellate court grossly erred in law and facts by holding that the debts were joint liability while it was not established if the loans and debts were of joint benefits.
- (3) That, the first appellate court grossly erred in law and facts when it excluded from division the properties which were acquired after the Respondent (husband) had contracted second marriage while the first marriage still existed.

- (4) That, the first appellate court grossly erred in law and facts for failure to consider Respondent's sole decision to sale matrimonial properties as one of the reasons to reduce his shares in the remaining matrimonial assets.
- (5) That, the first appellate court grossly erred in fact and law when it considered the 2nd marriage as basis of denying the appellant other properties which we acquired during second marriage while there was ample evidence that they were acquired while her marriage was still subsisting.
- (6) That, the first appellate court erred in law and facts for holding that the trial court erred in including the properties acquired after the second marriage during the division of the matrimonial assets.

On the other hand the appellant in PC Civil Appeal No. 16 of 2019 had three grounds of appeal stated as follows:

- (1) That, the trial District Court Magistrate erred in law and if fact for failure to assess and analyse the evidence tendered and adduced testimony by the witness consequently arriving to an erroneous decision.
- (2) That, the trial District Court Magistrate erred in law and in fact for failure to appreciate the extent of contribution and joint efforts made by each party toward the acquisition of matrimonial assets consequently arriving to an erroneous decision.
- (3) That, the trial District Court Magistrate erred in law and in fact for failure to take into consideration pending debts incurred by

spouses during existence of their marriage for joint benefits consequently arriving to an erroneous decision.

Having explained both parties' grounds of appeal let me now turn to briefly reduce down their submissions. In appeal PC Civil Appeal No. 15 of 2019 Ms. Kyamba when submitting abandoned the second ground of appeal and submitted on ground No. 1 and 4 separately while grounds No. 3, 5 and 6 were jointly submitted on.

Submitting on the first ground Ms. Kyamba complained that the first appellate court grossly erred in law and facts by limiting the appellant contributions to one property while it was clear that the parties had acquired other properties during subsistence of their marriage. That it limited itself to one property when deciding on division of assets contrary to section 114 of the Law of Marriage Act, [Cap. 29 R.E. 2002] herein referred to as LMA which empowers it to divide any assets acquired by the parties during their marriage by joint efforts. Citing cases of **Bi. Hawa Mohamed V. Ally Sefu** (1983) T.R.L 23 and **Chakupewa Vs. Mpenzi and Another**, EALR (1999) 1 EA 32 she was of the view that it is proper for the court to consider contribution by the spouse on the welfare of the family as contribution towards acquisition of matrimonial assets. And further that contribution is not restricted only to material contribution as it includes also intangible considerations such as the love, comfort and consolation of wife to her husband, the peace of mind the husband gets from a loving wife and the food she prepares for him. She was of the submission therefore that the appellant contributed much towards acquisition of all assets obtained from 1996 when they got married up to 2013 when they divorced. This ground was vehemently opposed by the respondent's advocate by submitting that

the appellant contributed nothing towards acquisition of the alleged matrimonial properties.

On the 3rd and 6th grounds of appeal Ms. Kyamba faulted both trial and appellate courts for exclusion of other acquired assets during existence of the second marriage in the division of matrimonial properties as she also contributed to their acquisition. And on the 6th ground, she contended that the second marriage was considered as basis for denying the appellant other properties despite of ample evidence that they were acquired while her marriage was still existing. Ms. Kyamba averred that as the marriage between the parties was a polygamous one as defined under section 9(3) of the LMA, the law requires equal treatment of wives under section 57 of the LMA such as enjoyment of equal rights, liabilities and equal status in law. That the second marriage did not end up the first marriage nor did it bar contribution of the appellant towards acquisition of assets during its existence thus she has a right to enjoy them as well. And that she was denied that right by both trial court and appellate court, Ms. Kyamba lamented. She was of the submission therefore that both lower courts erred in law for not making properties and assets obtained after the 2nd marriage assets subject of division. In his response Mr. Nyangi for the respondent was of the view that the appellate court was right to exclude the assets acquired under the second marriage as the second wife is the one who has rights over the properties acquired jointly with the respondent since that was a polygamous marriage under Islamic marriage. And that it is not section 9(3) of the LMA which empowers the court to divide the matrimonial assets but rather section 114(1),(2) and (3) of the LMA. He urged the court to find the grounds unmeritorious.

On the 4th ground of appeal Ms. Kyamba was of the contention that the appellate court erred for its failure to consider the respondent's sole decision to sell matrimonial properties as one of the reasons to reduce his shares in the remaining matrimonial assets. That during trial the respondent (husband) testified that he sold some of the properties without consulting the appellant, thus benefitted alone. She added that, the said sale without spouse consent was illegal and renders such sell null and void ab initio. In strengthening her argument on nullification of sale she cited section 57 of LMA and section 161(3)(b) of the Land Act, [Cap. 113 R.E 2002] which puts a mandatory requirement for a party to obtain spouse consent prior to disposing matrimonial property. That by selling the matrimonial properties the respondent (husband) reduced his share of matrimonial assets. And that since he also secured loans without involving his spouse she submitted, that should be his sole responsibility as it cannot be shared. In the end she asked the court to allow the appeal by quashing and setting aside the decision of the District Court in Civil Appeal No. 14 of 2018 and Matrimonial Cause No. 41 of 2018 with costs. Opposing this ground Mr. Nyangi supported the appellate court's decision for not considering the respondent's decision to sell some of the properties as one of the reason to reduce his shares in the remaining matrimonial assets. That the petition instituted by the appellant in the trial court was for divorce decree and division of matrimonial properties and not for challenging sale of the said properties without the appellant's consent. That there is no evidence to prove that the appellant had ever instituted any suit challenging the said sale despite the fact that she had that right and opportunity. And further that this court has no jurisdiction to hear and determine suit concerning interests on land claimed to be sold as per section 62 of the Village Land

Act, [Cap. 114 R.E 2002]. He concluded by submitting that the appellate court was right to hear and determine the appeal on those lines basing on the evidence adduced during the trial. He therefore urged this court to dismiss the appeal with costs for want of merits.

On the appeal in PC Civil Appeal No. 16 of 2019 which has three grounds Mr. Nyangi learned advocate for the appellant (husband) sought leave of the court to argue them all together. Mr. Nyangi was of the contention that the appellate court erred in law and fact for failure to consider the fact that the appellant contributed more than the respondent (wife) in the acquisition of matrimonial properties in terms of money, property, works and debts for their joint benefits as provided under section 114(1)(2)(c) of the LMA, [Cap. 29 R.E 2002]. And that the said position is cemented by the case of **Gabriel Nimrod Kurwijila Vs. Hassan Malongo**, Civil Appeal No. 102 of 2018 (CAT-Unreported) which stressed that the extent of contribution by the party in matrimonial proceedings is a question of evidence. He was of the view that equality of division as envisaged under section 114(2) of LMA cannot arise where there is no evidence to prove such extent of contribution.

Mr. Nyange submitted further that the appellate court erred in awarding 70% of the house to the respondent (wife) and 30% to appellant on the ground that other properties have been in the hands of the appellant without any evidence from the respondent proving the existence of the said properties. That, the court was supposed to hear and determine the issue as to whether the said alleged properties existed or not before arriving to that conclusion of considering them in the division. And that the court also ought to have appreciated that in the acquisition of the

said properties the appellant incurred debts which were supposed to be considered as joint liabilities and therefore reduce the respondent's share as relying on the sold properties to reduce his share was not justified by evidence. He therefore invited this court to allow the appeal by quashing the decision of the Kigamboni District Court in terms of division of matrimonial properties with costs. In response to the appellant's submission Ms. Kyamba was in agreement with the appellant's submission in that the appellate court erred on the basis used to divide the matrimonial properties. However, she was quick to add that in that error it is the respondent (wife) and not the appellant who was prejudiced most by the said division. She was of the view that the court was supposed to be guided by the principles in **Bi. Hawa Mohamed** (supra) and **Chakupewa** (supra) cases which stressed on the contribution of a wife in the acquisition of matrimonial properties. That in this case house-keeping and other matrimonial obligation is considered as joint efforts towards the acquisition of all matrimonial assets and not in a mere single asset in exclusion of the rest. She was of the submission therefore that proof of contribution was made by the respondent (wife).

On the contention of court's failure to consider debts alleged incurred jointly by parties Ms. Kyamba stated that the appellant failed to prove that the said debts were jointly incurred as per the requirement of section 112 of Evidence Act, [Cap. 6 R.E 2002] which impose a burden of proof to the appellant. That, the appellant failed to prove how the said debts involved the respondent in absence of her consent or approval when incurred. And that since parties had separated from 2013 the appellant was legally bound to establish when the said loans were taken for the same to be considered jointly, the duty which he failed to

discharge. She finally submitted that it is the appellant only who benefited from those loans and thus has to suffer the pains alone. She urged this court to dismiss the appeal with costs for want of merit and subsequently quash and set aside the decision of the District Court in Civil Appeal No. 14 of 2018 and trial court in Matrimonial Cause No. 41 of 2018 in favour of the Respondent with costs.

I now turn to consider and determine the grounds of appeal in in PC Civil Appeal No. 15 of 2019. In the first ground it is the appellant's lamentation that the division of matrimonial properties was limited to one property only despite the evidence that there were other properties jointly acquired by the parties to suit. And that the question of wife's contribution toward acquisition of those properties was widely discussed and settled in the cases of **Bi. Hawa Mohamed**(supra) and **Chakupewa** (supra). The respondent is opposing the ground in that the appellate court was right in tis decision as the appellant had not shown or proved her contribution towards acquisition of those properties. I am in agreement with Ms. Kyamba's submission that the issue of contribution of the spouse towards acquisition of matrimonial assts is now settled and well elaborated in the above cited cases. The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property; or work or even advice towards the acquiring of matrimonial property. See the case of **Gabriel Nimrod Kurwijila** (supra). The respondent's contention that the appellant (wife) contributed nothing basing on two cited cases is in my opinion is unfounded as her contribution can be counted on her love, the comfort and consolation she was giving to the respondent, peace of mind and the food she was preparing, rearing and bearing the children while the husband working for gain. I am only in disagreement with her

submission that this court has to consider and decide on the issue as to whether the appellate court was justified to base its findings on one property as the property eligible for division as claimed by the appellant. My humble opinion is that the issue of the trial court basing its decision on one property has never been appealed against by the appellant in the appellate court. The same cannot therefore be brought here through the backdoor as the appellant had an opportunity and right to do so but failed to exhaust it. In other words she was satisfied by the trial court decision basing its division of matrimonial properties to the house which was awarded to her. It follows therefore that this ground has no merit and it fails.

Turning to the 3rd, 5th and 6th grounds generally the appellant is lamenting on the exclusion in the division the assets acquired during existence of the second marriage and hers as she also contributed to their acquisition too. And that the second marriage was used by both trial and appellate courts as the basis for denying her the right of enjoying the division of the properties acquired under existence of the second marriage. The respondent is of the view that the appellant is not entitled to those assets instead is the second wife. As already found while dealing with the first ground the appellant never appealed and raised the alleged three grounds in the 1st appellate court to entitle her to further bring them as complaints in second appeal. If she was not satisfied with the consideration of the second marriage as basis for denying her right to division of properties allegedly contributed to its acquisition she ought to have appealed in the District Court which right she waived. It follows therefore that these grounds of appeal also suffer the same consequences suffered by the first ground and I find them to have no merits.

With regard to the fourth ground Ms. Kyamba for the appellant argued that the appellate court erred in law and facts for its failure to consider the respondent's sole decision to sell matrimonial properties as one of the reasons to reduce his shares in the remaining matrimonial assets. That the respondent, by selling some of the matrimonial properties such as the plot located at Tabata and Magomeni house without appellant's consent or approval the fact which is conceded by the respondent, the court ought to have reduced his share in the division of matrimonial assets. She added further that the said sale was null and void ab initio and ought to have been nullified under section 57 of LMA and section 161(3)(b) of the Land Act, [Cap. 113 R.E 2002]. Mr. Nyange for the respondent challenged that stance submitting that this court has no power to determine whether the sale was illegal or not as the appellant had to find another forum to address that issue which to his knowledge she has never attempted. He was therefore of the view that this ground lacks merit and urged this court to dismiss the appeal with costs.

While I am in agreement with Mr. Nyangi's submission that this is not a proper forum to address the issue of illegality or not of the sale of the said landed properties by the respondent (husband) without consent of the appellant. I only differ with his position that this ground is unmeritorious. There is no dispute that the alleged landed properties were acquired during existence of parties' marriage the period between 1996 and 2013. As I have determined before in the first ground the appellant having discharged her house work and other matrimonial obligations for that period contributed to acquisition of the two landed properties. I am therefore convinced and find that when determining the appellant's share in a single property awarded to her both trial and

appellate court ought to have considered her shares in the two sold landed properties. This ground has merit.

Having so found I now move to determine appeal in PC Civil Appeal No. 16 of 2019 which appellant (husband) raised three grounds of appeal and prayed to argue them jointly. Mr. Nyangi for the appellant submitted that the appellate court erred in law and fact when dividing the sole considered matrimonial property by awarding 70% shares of the house to the respondent (wife) and the remaining 30% to the appellant despite of evidence of his higher percentage of contribution towards its acquisition and without paying due consideration to the debts allegedly incurred jointly. That if the said debts are to be taken into consideration then the respondent will have nothing remained as her shares in the said house. He supported his position by referring the court to the case of **Gabriel Nimrod Kurwijila** (supra), that the extent of contribution by the party in matrimonial proceedings is a question of evidence and that equality of division as envisaged under section 114(2) of LMA cannot arise where there is no evidence to prove extent of contribution which he submitted the respondent failed to advance during the trial of the matter. This position was vehemently challenged by Ms. Kyamba guided by the principles in **Bi. Hawa Mohamed** (supra) and **Chakupewa** (supra) cases which stressed on the contribution of a wife in the acquisition of matrimonial properties submitting that the respondent's contribution is premised on house-keeping and matrimonial obligations during existence of marriage. She was of the view that the respondent was entitled to higher shares than what she got during the appeal.

I am in agreement with the appellant's contention and the position in the case of **Gabriel Nimrod Kurwijila** (supra) that the extent of contribution by the party in matrimonial proceedings is a question of evidence, save for the contention that the respondent contributed nothing towards acquisition of the house which is the subject under consideration in this ground. As I have already found when considering ground number four in appeal PC Civil Appeal No. 15 of 2019, supported by the cases of **Bi. Hawa Mohamed** (supra) and **Chakupewa** (supra) I hold the view that the respondent in this appeal contributed towards acquisition of the house under consideration as well as the acquisition of two landed properties namely the plot at Tabata Kisukuru and house at Magomeni through her efforts in discharging house-keeping and matrimonial obligations as on the others material contribution there is no evidence to so prove. Whether the two landed properties have been disposed of or not, and if yes whether legally or not, those facts do not deny and affect the respondent's right to shares over the properties she is entitled to. There is undisputed evidence reduced from the evidence on record that the respondent started to live in the disputed house before its completion and that by that time the appellant had gone outside of Dar es salaam to earn some more money. At all this time until when he came back the respondent contributed to its finishing process as well as maintenance of the family and other matrimonial properties. In my opinion she deserves 50% of the share in that house. As to the other two landed properties of Tabata Kisukuru and Magomeni house whose value is not known I will also decide on its division basing on percentage of shares. Since the appellant alleges to have disposed of the said landed properties which this court has no power to question into legality of sale and since the same was done without apportioning

respondent's shares, I hold that she is entitled to 25% share for each of the two properties which in total makes 50% shares. Since the said 50% shares did not benefit or given to her by the appellant who benefitted alone, I am of the view that the said 50% of shares sold two landed properties plus 50% shares of the house in dispute the respondent is now entitled to a total of 100% shares. As she cannot find another forum to have her shares in the sold properties considered and determined in terms of value, this court deems it fit and just to consider them in the available property the consequences of which is to entitle her to 100% of the award of house in dispute as it was earlier determined by the trial court.

With regard to the debts allegedly incurred jointly between the parties there is undisputed evidence by the appellant that he obtained loans without involving the respondent. He cannot therefore be heard at this point claiming the same to be jointly incurred and shared. It follows therefore that the three grounds of appeal by the appellant have no merits.

That said, and for the foregoing reasons, I am inclined to hold that the appeal in PC Civil Appeal No. 16 of 2019 lacks merit and is hereby dismissed in its entirety. And that the appeal in PC Civil Appeal No. 15 of 2019 is allowed on the fourth ground by setting aside the decision of the appellate court in Civil Appeal No. 14 of 2018 which has the effect of restoring the trial court's decision though with different reasons as explained above by awarding the respondent the house she is living. The rest of trial court decision on division on assets is left undisturbed. This being a matrimonial matter, I order no costs.

It is so ordered.

DATED at DAR ES SALAAM this 08th day of May, 2020.




E. E. KAKOLAKI

JUDGE

08/05/2020

Delivered at Dar es Salaam today on 08/05/2020 in the presence of the Respondent and his advocate **Mr. Peter Nyangi** and **Ms. Lulu Msasi** Court clerk and in the absence of the appellant.



E. E. Kakolaki

JUDGE

08/05/2020