

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

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 17 OF 2020

**(Arising from Ilala District Court decision in Matrimonial Appeal
No. 23 of 2019, Original Matrimonial Cause No. 151 of 2019 –
Ukonga Primary Court)**

THABIT JUMA MAX APPELLANT

VERSUS

MWANTUMU SEFU KARUTA RESPONDENT

JUDGMENT

18th March & 8th May, 2020.

E. E. KAKOLAKI J

This is a second appeal arising from the decision of Ilala District Court in Matrimonial Appeal No. 23 of 2019 which was resolved in respondent's favour. In the first appeal the respondent had challenged the decision of Ukonga Primary Court in Matrimonial Cause No. 151 of 2019 that awarded her 15% of the value of the matrimonial house amongst other properties as part of her share for contribution made towards acquisition of matrimonial properties leaving the appellant with 85%. After hearing of the appeal the District court of Ilala being the first appellate court varied the trial court's decision by awarding the respondent 40% leaving the appellant with 60% of the matrimonial house. Further to that it ordered each party

to get one plot amongst the two plots acquired by the respondent during subsistence of their marriage which plots before were both awarded to the respondent by the trial court. Disgruntled the appellant file this appeal canvassed with two grounds of appeal echoed hereunder:

1. That, the trial Court erred in law and fact by awarding the appellant 60% of the matrimonial assets and 40% to the respondent without evaluating the evidence adduced on contribution made by each party.
2. The trial Magistrate erred in law and fact by not considering reasons adduced by appellant.

The appeal has been opposed by the respondent. When the same was called for hearing before me on 18/03/2020 respondent appeared unrepresented though she informed the court to be enjoying the services of legal aid by Tanzania Women Lawyers Association (TAWLA) whereas the appellant had the services of Mr. Jonson Laiton Ulaya learned advocate. Both parties agreed to have the appeal disposed by way of written submissions. Following that agreement a filing schedule of submission was entered by the court in which submissions were to be filed in the following order. Submission in chief in support of the ground of appeal by the appellant to be filed on or before 25/03/2020, reply submission by the respondent on or before 08/04/2020 and rejoinder submission if any by the appellant on or before 17/04/2020. Both parties complied with the court order by filing them in time.

What is discerned from submissions by both parties is that the appellant seem to have been discontented with the 1st appellate court's decision of

awarding the respondent 40% of the value of the house which is part of the matrimonial properties acquired during existence of their marriage whereas the respondent seems to be contented. As per the decision of the 1st appellate court which in addition awarded one plot of land amongst two plots acquired by the respondent and awarded to her by the trial court, the division of the matrimonial properties was in the following order:

1. The appellant is entitled to 60% of the value of the matrimonial house located at Ulongoni, one plot of land, sewing accessories shop and 50% of household properties.
2. The respondent is entitled to 40% of the value of the matrimonial house located at Ulongoni, one plot of land, water well, all sewing machines, solar power and its accessories and 50% of household properties.

Submitting on the first ground of appeal Mr. Ulaya contended that the first appellate court erred in law and fact to award the appellant 60% and the respondent 40% of the matrimonial assets without evaluating the evidence adduced on contribution made by each party. That the 1st appellate court ought to have evaluated the evidence of each of the witness, assess their credibility and make finding on the contested facts in issue. To buttress his point he cited the case of **Stanslaus Rubaga Kasusura & Attorney General Vs. Phares Kabuye** (1982) TLR 338.

On the second ground of appeal he contended that the 1st appellate court did not consider the reasons of respondent's embezzlement, squandering and benefitting from matrimonial properties despite of evidence adduced by the appellant proving those facts through exhibits S1,S2 and S3 which

should have been used to find out that the respondent was not entitled to benefit from her misconducts and claim further share of matrimonial properties. He cited the case of **Bi Hawa Mohamed V. Ally Sefu** (1983) TLR 32 (CAT) to support that argument. He was therefore of the prayer that this appeal be allowed by quashing the 1st appellate Court decision, the costs of this appeal be paid for and any other relief as the court may deem appropriate to grant.

Opposing the appeal the respondent supported the 1st appellate court decision for appreciating that her contribution towards construction of the disputed house was in terms of supervision when the appellant was outside the country. That while there he was sending some amount of money and the respondent adding her own for construction. And that while the appellant was in Mozambique (Msumbiji) it is the respondent who was in-charge of all matrimonial properties and responsibilities including taking care of children something which gave the appellant peace of mind to continue working there while knowing that the respondent was in full control of every responsibilities. She cited the case of **Elister Philemon Lipangahela Vs. Daudi Makuhana**, Civil Appeal No. 139 of 2002 to support her stance. She added that the appellant did not tender any evidence or exhibit to prove his contribution towards construction of that house. On the allegation of embezzlement the respondent said it was wrong for the appellant to claim so as he is the one who introduced her to the bank manager to access the money for the betterment of the family. She therefore prayed for dismissal of the appeal for want of merits.

Having narrated both parties submissions I now turn to consider the appellant's two grounds of appeal which in essence is one complaining of 1st appellate court's failure to consider the appellant's evidence on the allegation of the respondent's embezzlement, squandering and benefitting from matrimonial properties despite of evidence adduced by him proving those facts through exhibits S1,S2 and S3. The respondent is disputing that fact by submitting that it was the appellant who introduced her to the bank manager and allow her to assess the said money Tshs. 3,000,000/= for the betterment of the family. The issue for determination is whether the said evidence was not considered by the 1st appellate court and if not, whether if considered by this court can affect the 1st appellate court's decision. As per the trial court's record exhibit S1 is the sale agreement of the plot measuring 25 to 18 and 18 to 25 steps worth Tshs. 1,750,000/= to the respondent located at Mvuleni within Ilala District dated 02/04/2015. Exhibit S2 is a pay in slip exhibiting money transfer of 902 USD equivalents to Tshs. 1,221,144.00 by Western Union services from Thabit Max Otto of Mozambique to Mwantum Seleman Karuta of Tanzania. And exhibit S3 is the sale agreement of the plot measuring 20 by 20 steps worth Tshs. 70,000/= to the respondent located at Vibula – Kwembe within Kinondoni District dated 31/07/2011.

Having revisited the 1st appellate court's judgment when considering the appellant's main complaint on non-consideration of the evidence and exhibits mentioned above I have found that the same were considered. Starting with the issue of appellant sending money to the respondent as exhibited by exhibit S2 the 1st appellate magistrate considered it and made a finding on it. In page 4 of the judgement the appellate magistrate said:

"When giving testimony before the trial court the appellant did not hide anything. She said the respondent was sending money for building but was not enough thus she was adding her money to make sure the building process continues, the fact which was not challenged by the respondent. The assertion by the respondent that the appellant did not contribute much on the construction of the house are unwarranted."

Basing on the 1st appellate court findings there is no dispute that the appellant was sending money to the respondent for her to continue with construction or finishing process of the house in dispute and that the respondent was adding her money as contribution the fact which the court found also to be uncontroverted by the appellant. Like the appellate, I am of the same finding court that the respondent contributed towards construction of the disputed house. As to what extent was her contribution in my opinion it was to the large extent though not by 50%. She used to supervise the construction as well as finishing of the house. There is also uncontroverted evidence that as a tailor she had personal earnings which undoubtedly part of it was injected in the development and finishing of the said house leave alone performing her matrimonial duties of bearing and rearing the issues which are the products of their marriage.

On the issue of squandering and embezzlement of money I am also of the finding that the 1st appellate court addressed it fully. At page 5 of the judgment the court said:

"The respondent claimed that the appellant squandered the money he left. I wonder why the respondent is saying the

respondent squandered while is the one who introduced the appellant to the Bank manager so that she can access the money. When testifying at the trial court the respondent stated that,

“nilimpeleka kwa meneja wa bank nilipoweka Tshs.3,000,000/=, ili akikwama apewe.”

The appellant had responsibilities to accomplish supervising the construction of the house, taking care of the family. All those responsibilities needed money. ... the trial court was supposed to consider that the contribution toward the acquisition of the matrimonial house was in terms of work of the house chores, bearing and rearing the child and the appellant was self-employed as tailor.”

From that excerpt of the judgment I am satisfied that the appellate court evaluated the evidence on allegation of squandered money as there was no more evidence to rely on adduced by the appellant for it to find otherwise. What was left unaddressed in my opinion was the issue of the respondent acquiring two plots during subsistence of marriage without involving the appellant something which raised suspicion to the appellant who believes that the money used to buy the said plot in Exhibit S1 and S3 is part of the alleged squandered money. As the 1st appellate court found out there is no evidence to prove that the respondent squandered the alleged money left in the bank for it was not stated in evidence during trial when the uncompleted house was completed to avail the higher court an opportunity to evaluate and analyse evidence on the claim of

embezzlement and squandering of money. It might be that some of the money was injected in the finishing of the said house. Since there is no clear evidence to prove that fact, it cannot be concluded that it is the said money left in bank which was used to purchase the said two plots as one was bought in 2011 and the other 2015 while the money in bank was left in 2010. All that said be it as it may the respondent acquired two plots without disclosing that fact from her husband. She cannot claim to be her personal properties since they were acquired during subsistence of their marriage and she failed to disclose the source of the money used to buy them. I therefore find them to be matrimonial assets and subjected to division amongst the parties. However, though not directly discussed their status I have note that, the 1st appellate court impliedly considered them to be matrimonial assets and proceeded to award the appellant one plot.

In both trial and 1st appellate court the respondent seems to have been awarded the water well located in the disputed matrimonial home. I wonder what consideration was taken to award her that well. As the evidence leads the same was constructed by the appellant who paid cash money. This comes from the respondent's evidence when cross examined by the appellant. She had this to say:

"Kisima ulitoa hela cash kutengeneza."

Since it is the appellant who paid cash money to construct the same I find that it was unfair to award it to the respondent given the appellant's evidence that the same was constructed to assist the respondent get income to sustain the family. On this I would vary both courts' decision and award the same to the appellant.

Lastly is on the awarded percentage of the value of the house without directing on how the same will be executed and without specifying who will be entitled to which plot. For avoidance of doubt during execution of the court's orders on the house valuation of the house should be conducted and either party may compensate the other in terms of money by percentage awarded to him/her. And with regard to the plots the appellant will be entitled to the plot located at Mvuleni within Ilala District and the respondent the one located at Vibula – Kwembe within Kinondoni District. Should it be found that the plot awarded to the appellant is already disposed of its value should be deducted from the percentage of the value of the house in dispute awarded to the respondent.

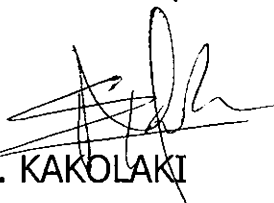
Having so considered and decided on the appellant's ground of appeal I would find that I see no reason to fault the 1st appellate court's decision save on the order for award of the water well to the respondent by both lower courts which is varied by awarding it to the appellant and the directives on how to execute the judgment. The awards now will be in the following orders:

1. The appellant is entitled to 60% of the value of the matrimonial house located at Ulongoni, one plot of land located at Mvuleni within Ilala District, water well, sewing accessories shop and 50% of household properties.
2. The respondent is entitled to 40% of the value of the matrimonial house located at Ulongoni, one plot of land located at Vibula – Kwembe within Kinondoni District, all sewing machines, solar power and its accessories and 50% of household properties.

In the circumstances and for the foregoing reasons the appeal is partly allowed to the extent of variation made on the division of matrimonial assets herein above. Being a Matrimonial Cause, I order no any costs.

It is so ordered.

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

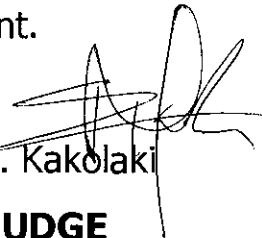


E. E. KAKOLAKI

JUDGE

08/05/2020

Delivered at Dar es Salaam this 08th day of May, 2020 in the presence of the appellant, **Mr. Johnson Laiton Ulaya** learned advocate for the appellant and the respondent.



E. E. Kakolaki

JUDGE

08/05/2020