

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

**AT DAR ES SALAAM**

**PC CIVIL APPEAL NO. 34 OF 2020**

**(Arising from the Judgment Ilala District Court in Civil Appeal  
No. 27 of 2019 dated 24<sup>th</sup> January, 2020 before Hon. G.E.  
NKWERA, RM – Original Matrimonial Cause No. 182 of 2019 –  
Ukonga Primary Court)**

**HALIMA ALLY ENZIMBALI ..... APPELLANT**

**VERSUS**

**ALLY SEFU MWANZI ..... RESPONDENT**

**JUDGMENT**

13<sup>th</sup> May & 29<sup>th</sup> May, 2020.

**E. E. KAKOLAKI J**

This is a second appeal in respect of the decision of Ilala District Court in Civil Appeal No. 27 of 2017 which was entered in favour of the respondent by dismissing the appellant's appeal. Discontented the appellant knocked doors of this court by way of appeal equipped with four grounds of appeal as registered hereunder:

1. That the trial magistrate erred in law and fact by granting the house of Tandale to the Respondent without considering the

contribution of the Appellant which was done by developing/improving the house.

2. That, the trial Magistrate erred in law and fact by not considering the evidence adduced by the Appellant when making its decision.
3. That, the trial Magistrate erred in law and fact by ordering the Appellant to get 20% of the house situated at Bangulo without considering her contribution,
4. That, the trial Magistrate erred in law and fact by ordering custody of the child to the respondent without considering the best interest of the child.

Briefly the facts leading to this appeal may be narrated as follows. The divorced parties had contracted marriage under Islamic rites in 2005 and blessed with two issues Seif Ally aged 10 years old and Ilham Ally aged 6 years old. Their sweet marriage lasted for (14) fourteen years as on the 27/06/2019 the respondent issued the appellant Islamic divorce following deterioration of their love after the respondent had accused the appellant of contracting sexual transmitted disease. The appellant opted to petition for divorce decree, division of matrimonial assets and maintenance of children in Matrimonial Cause No. 182 of 2019 at Ukonga Primary Court. After full trial a divorce decree was issued by the trial court on 18/09/2019, division of matrimonial assets and maintenance orders entered. The appellant was awarded 20% of the matrimonial house located at Bangulo – Pugu within Ilala District, Dar es salaam Region and custody of one child Ilhal Ally. The respondent remained with 80% of the house and custody of the remained issue one Seif Ally. One house allegedly jointly acquired by both parties situated at Tandale was declared the property of the respondent. That decision

aggrieved the appellant who unsuccessful appealed to the District Court of Ilala in Civil Appeal No. 27 of 2019 whose decision was pronounced on 24/01/2020 upholding the trial court's decision. She is now before this court by way of appeal registering her dissatisfaction in four grounds above cited.

The appellant appeared unrepresented when the matter was called for hearing on 2/04/2020 though she is enjoying legal aid for document drafting only through Tanzania Women Lawyers Association (TAWLA) whereas the respondent was represented by Mr. Abel Ngallaba learned advocate. It was agreed to dispose the appeal by way of written submission and the filling schedule order was issued.

The appellant in her submissions opted to argue the first and fourth grounds separately while the second and third grounds were argued collectively. It is important to note also that the appellant in her grounds of appeal seem to be faulting the trial court instead of the appellate court which decision I believe she is appealing against. It is her lamentation in the first ground that the trial court was at fault when failed to exercise its powers of division of matrimonial assets provided under section 114 of the Law of Marriage Act, [Cap. 29 R.E 2002]. That she was supposed to be awarded some shares of the Tandale house which she contributed towards its acquisition. She quoted the passage in the trial court judgment stating that;

"... na kwa kuwa nyumba hiyo ilikuwa imekamilika kasoro haikuwa na mlango wa mbele barazani tu."

Citing also the case of **Levin N. Kavishe Vs. Anasieta Killian Kigwelemisi**, Civil Appeal No. 231 of 2016 and section 114(3) of the

Law of Marriage Act, she was of the contention that assets during marriage includes the ones owned before the marriage by one party but substantially improved by the other party or by their joint efforts. That she contributed to the finishing of that house and therefore she deserves shares therefrom.

In the second and third grounds she submitted that having engaged in business of selling juice which even the respondent admits she had a hand in purchase of the plot and large contribution towards construction of the Bangulo house thus she deserved 50% shares of the house. She wronged the trial court's decision for awarding the respondent 80% despite of her strong evidence produced corroborated by her witnesses evidence on the contributions she made during construction of the said house.

On the fourth ground she attacked the trial court's decision of placing custody of the child one Seif Ally to the respondent without paying due regard to the best interest of the child and in violation of section 125(2)(b) of Law Marriage Act which requires the court to pay due regard to the wishes of the child before deciding on his/her custody. That court can do so where the child's age allows him/her to offer independent opinion which she submitted Seif Ally has. She therefore prayed the court to allow the appeal.

In opposition Mr. Ngallaba for the respondent resisted the appeal by stating from the outset that the appeal is devoid of merit hence deserves dismissal with costs. On the first ground it was his submission that the trial court after considering the evidence adduced by parties was satisfied with each party's contribution and came to the ratio of

80:20% shares. That the passage of the trial court judgment quoted by the appellant is not a proof of contribution in acquisition of matrimonial assets by the appellant as she wants this court to believe. However, it is not disputed that domestic duties amount to contribution towards acquisition but does not necessary mean by 50%, he submitted.

On the second and third ground he responded that under section 110(1) of the Evidence Act, [Cap. 6 R.E 2002], he who alleges that certain facts or legal rights exist must prove that they actually exist. He is of the contention that there is nowhere during the trial court the appellant adduced evidence to prove that she contributed towards acquisition or construction of Bangulo house. She therefore deserves no share on that house as well.

With regard to the compliance with section 125(2)(b) of the Law of Marriage Act by the trial court on the fourth and last ground Mr. Ngallaba responded that the trial court complied with it as when it ordered the parties to leave the court the first, the child was called back and asked to choose where and to whom he wants to leave with. That he chose the respondent. In totality he urged the court to dismiss the appeal for want of merit with costs.

Having registered briefly both parties' submissions I now turn to consider and determine them seriatim. As stated earlier the appellant's grounds of appeal and submissions were focussed on faulting the trial court and not the appellate court. I would have dismissed the appeal on that ground. However, considering the interest of justice I find no gain in so doing as disposing of the appeal will be in the best interest of both parties aiming at ending litigation than holding otherwise.

Having so stated in principle the appellant's complaints generally are in three folds. One is the division or shares of the house situated at Tandale, secondly shares in terms of percentage of Bangule house and thirdly on the custody of the child one Seif Ally.

On the first ground which refers to the house of Tandale the appellant's contention is that she contributed to its finishing as per the requirement of section 114(3) of Law of Marriage Act, therefore she is entitled to its share. Mr. Ngallaba for the respondent stated that the appellant adduced no evidence to prove that fact, therefore she does not deserve any share. While I am appreciative of the position of the law that any substantial improvement made by either party in marriage deserves consideration during division of matrimonial properties, I hold the view that in this matter there is no enough evidence to support appellant's claim. The appellant apart from quoting the passage in the trial court's judgment which I agree with Mr. Ngallaba that it does not support her claim as she presented no evidence to prove her participation in the improvement of the said house of Tandale to entitle her any right over the house. The defence evidence by the respondent corroborated by that of Dw2 and Dw3 proved on the balance of probabilities that when married the appellant the said house was already in existence. That the only unfinished part of the house was the front door which was fixed when the newly married couple started living therein. I therefore find no justification in faulting both appellate and trial court's findings on that.

On the second and third ground that centred on faulting the trial court's failure to consider the appellant's evidence towards acquisition of the Bangulo house as she deserves 50% shares, the respondent advocate was of the view that the evidence to prove that claim was also lacking.

She therefore failed to comply with the provisions of section 110(1) of the Evidence Act, [Cap. 6 R.E 2002]. I am not in agreement with Mr. Ngallaba's contention that the appellant contributed nothing. It is trite law that the extent of contribution made by each party in marriage is not restricted only to material contribution such as monetary contribution; it can extend to either matrimonial obligations or work or 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. See cases of **Bi. Hawa Mohamed V. Ally Sefu** (1983) T.R.L 23 and **Chakupewa Vs. Mpenzi and Another**, EALR (1999) 1 EA 32. In **Bi Hawa Mohamed** (supra) the Court of Appeal held that the welfare of the family is an essential component of the economic activities of a family man or woman and that it is proper for the Court to consider contribution of a spouse to the welfare of the family as contribution towards acquisition of the matrimonial property of family assets.

Applying the above principles in this case, though there is no proof as to how much the appellant contributed out of the alleged juice business her contribution through house work and other matrimonial obligations such as bearing and rearing children, the love and peace of mind she was giving her husband in my view contributed much towards construction of the house at Bangulo. It is in respondent's evidence that the Bangulo's house was meant to be matrimonial house for the appellant's children and that of Tandale for the other two children from the first wife. So there is no dispute that the disputed house was meant to be matrimonial house and therefore a subject of division. As to what extent was her contribution towards acquisition of that house, having

considered all obligations she was discharging at home while the husband working for gain, I am of the opinion that she deserves 40% shares of the said house. It follows therefore that these two grounds have merit.

On the fourth ground of custody of the child she is of the submission that the trial court did not consider the best interest of the child and the child was not asked as whom he wanted to live with. Mr. Ngallaba submitted that the trial court did offer him that right and he chose the respondent. With respect to Mr. Ngallaba there is no evidence in record to support his contention. I agree with the appellant's submission that in deciding on the custody of the child court has to consider the best interest of the child. The law puts it mandatory under section 125(2) of the Law of Marriage Act that before deciding under whose custody should the child be placed to consider wishes of the child. The trial court as well as the appellate court did not consider wishes of the child or bother to investigate the circumstances surrounding the case for them to appreciate that the best interest of the child would be served at best before placing him into custody of the respondent. In this mandatory duty of the court which entails getting opinion of the child, I am persuaded by the opinion of my brother Mruma J when considering court's duty on determination of the best interest of the child in the case of **Neema Kulwa Mvanga Versus Samson Rubele Maira**, Civil Appeal No. 1 of 2018, where he had this to say:

*"Having this in mind courts should proceed to focus on the best interest of the Child and determine the suitable parent to give the custody. In doing this court has to investigate the circumstances around the case so as to establish whether*



*the child has suffered or is likely to suffer any harm if custody is given to mother or father. Court may also consider the age, gender, religious background of the child, parent-child relationship bond, parenting ability, each parent mental, physical and emotional child's health etc."*


How does the court get to know all those above mentioned facts, I am of the opinion that it has to conduct an inquiry that includes getting opinion of the child and social welfare officer as provided under section 125(2)(b) and 136(1) of the Law of Marriage Act, [Cap. 29 R.E 2019]. The social welfare officer after making inquiry of all the circumstances surrounding the child shall opine to court for the court to decide on whose custody should the child be placed to. Since in this case this important procedure was skipped by the trial court I hold the view that it affects part of its decision. This ground also has merit.

In the circumstances and for the foregoing reasons, I would allow the appeal on the second, third and fourth ground which I hereby do. And since there was an omission to comply with the law which affects part of the decision, I vary the decision of both appellate and trial court on the shares awarded to the appellant in respect of the house and custody order of the child on Seif Ally to the respondent. I order that the appellant is entitled and hereby awarded 40% of the market value of the Bangulo's house. With regard to custody of the child Seif Ally I order return of the case file to the trial court for compliance with section 125(2)(b) and 136(1) of the Law of Marriage Act, [Cap. 29 R.E 2019] before deciding on the custody of the child. I further direct that depending on the outcome of the inquiry the child's rights such as maintenance, education, shelter, health and his wellbeing in general

should be considered. The rest of the decision of the trial court remains undisturbed. That being a matrimonial cause I order no costs.

It is so ordered.

DATED at DAR ES SALAAM this 29<sup>th</sup> day of May, 2020.



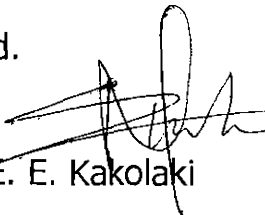
E.E. KAKOLAKI

**JUDGE**

29/05/2020

Delivered at Dar es Salaam this 29<sup>th</sup> day of May, 2020 in the presence appellant, Mr. **Cherudin Chuwa** advocate holding brief for Mr. **Abel Ngallaba** advocate for the respondent and Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.



E. E. Kakolaki

**JUDGE**

**29/05/2020**