

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC: MATRIMONIAL APPEAL NO. 10 OF 2020

*(Arising from Matrimonial Appeal No.08 of 2019 Originating from Mkuyuni
Primary Court in Civil Case No. 48 of 2017)*

MWANAIIDI MABURA STEPHANO APPELLANT

VERSUS

RAMADHANI SAID RESPONDENT

JUDGMENT

Last Order: 30.06.2020

Judgment date: 16.07.2020

A.Z.MGEYEKWA, J

The appellant Mwanaidi Mabura Stephano has lodged this appeal to challenge the decision of the Nyamagana District Court delivered on 22nd November, 2019 in Matrimonial Appeal No.08 of 2019.

For purposes of understanding the gist of this appeal, it is necessary to give the following background. The appellant and respondent contracted a customary marriage and blessed with four issues. The record reveals that the appellant and respondent marriage dispute arose in 2017, when misunderstandings between them started. The main reason for their misunderstanding is because the respondent was unfaithful and started a new relationship with another woman and the appellant was evicted from the matrimonial house. The appellant decided to file an appeal after realizing that the marriage is not working.

The appellant decided to file a Petition for Divorce before the Mkuyuni Primary Court after a full trial the trial court was of the view that the marriage between the appellant and the respondent had irreparably broken down and granted a divorce thereto. The trial court further ordered a Plot No. 1090 located at Nyegezi to be in the hands of the respondent and the appellant received a Plot No. 1123, Block B located at Nyegezi. Dissatisfied, the appellant filed an appeal at Nyamagana District Court and the first appellant court decided in favour of the respondent and dismissed the appeal.

Aggrieved, the appellant filed his second appeal before this court and has raised four grounds of appeal as follows:-

- 1. That the first appellant court erred in law and fact for failure to consider four infant children into the division of matrimonial properties.*
- 2. That the first appellant Court erred in law and fact in holding that the trial court correctly ordered vacuum house to the appellant.*
- 3. That the first appellate court erred in law and facts for contradicting himself on issues raised its findings an on the prayers of the appellant.*
- 4. That the first appellate court erred in law and fact in holding that the trial court fairly distributed Matrimonial properties under the circumstances of this matter.*

The hearing was done by way of written submission whereas, the applicants filed the written submission as early as 9th June, 2020 and the respondent filed a reply as early as 16th June, 2020. Both parties filed their submission within time.

Ms. Christina, the learned counsel, opted to abandon the first and third grounds of appeal. Arguing for the second ground of appeal, the

learned counsel submitted that the first appellate court erred in law and in fact in holding that the trial court correctly ordered vacuum house to the appellant. She went on to submit that the trial court gave the appellant Plot No. 1123 Block B at Nyegezi and the respondent was given Plot No. 1090 Block B Nyegezi and the plots had houses but the appellant demolished the house which was constructed on Plot No. 1123 Block B at Nyegezi and constructed a small house. Ms. Christina urged this court to allocate the appellant the Plot No. 1090 Block B at Nyegezi and allocate Plot No. 1123 Block B at Nyegezi to the respondent.

Arguing for the fourth ground of appeal, Ms. Christina argued that the division of matrimonial properties was unfair. To support her submission she referred this court to section 114 of the Law of Marriage Act, Cap.29 [R.E 2019], and the case of **Bi. Hawa Mohamed v Ally Sefu** (1983) TLR 32 whereas, the Court of Appeal of Tanzania gave a wider interpretation of acquisition of matrimonial properties by including domestic efforts. The appellant's Advocate went on to submit that the assets acquired during the marriage include those owned before marriage by one spouse but have been

substantially improved during the marriage by the other party or their joint efforts.

It was the appellant's counsel further submitted that the record reveals that there are more matrimonial properties that were acquired during the subsistence of marriage. She referred this court to page 6 of the Primary Court Judgment and argued that the respondent claimed that the other properties were owned by the Company to whom the respondent had a share. Ms. Christina added that the house in which they were residing the respondent complained that it belongs to Said Shabani Mlyomi.

She further argued that the respondent conceals matrimonial properties in the umbrella of the Company. She added that the respondent admitted to having houses and motor vehicles but the court only divided the two plots. The learned counsel for the appellant urged this court to divide the properties between the spouses.

In conclusion, the learned counsel for the appellant urged this court to allow this appeal with costs.

Responding, Mr. Godfrey Martin, learned counsel for the respondent opted to start with the second ground of appeal, he argued that this ground of appeal was not raised at the first appellate court, therefore, the same cannot be raised at the second appellate court. Mr. Godfrey Martin fortified his submission by referring this court to the case of **Simon Godson Macha v Mark Kimambo**, Civil Appeal No. 393 of 2019, whereas the Court of Appeal of Tanzania held that:-

"As the second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court ... The Court has repeatedly held that matters not raised at the first appellate court cannot be raised in a second appellate court."

The learned counsel for the respondent continued to state that this court has no jurisdiction to entertain the said issue since it was not raised before the Nyamagana District Court. Mr. Godfrey Martin went on to argue that even if the second ground of appeal would have been

determined the same lacks merit because the incidence of demolishing the house on Plot No. 1123 Block B by the respondent was not reported anywhere and the same is a criminal offence as per section 326 (1) of the Penal Code Cap.16 [R.E 2019]. He added that the appellant's allegations are an afterthought the same be disregarded.

Submitting on the fourth ground of appeal, Mr. Martin Godfrey submitted that the appellant's Advocate submission is misconceived as to what amount to family assets and separate property of the husband and wife. He referred this court to the Book of Lord Hailsham Halsbury' Law of England 4th Edition at page 491 and argued that Lord Hailsham among others stated that the family assets can be divided into two parts; first; those which are of capital nature such as the matrimonial home and the furniture in it, second; those which are of a revenue producing nature such as the earning power of husband and wife.

I have thoroughly gone through the grounds of appeal raised by the appellant and the submissions of both learned counsels, and I am of the opinion that the crux of the appellant centers on the

following issue, ***whether or not the present appeal is meritorious.***

Addressing the second ground of appeal that the first appellant Court erred in law and fact in holding that the trial court correctly ordered vacuum house to the appellant. I have perused the trial court record and found and I am in accord with the learned counsel for the respondent that this is new ground for having not been raised and decided by the first appellate court. The same was observed in the case of **Godfrey Wilson v The Republic**, Criminal Appeal No. 168 of 2018, Court of Appeal of Tanzania (unreported) [TANZLII 6th May, 2019], it was held that:-

" We think that those grounds being new grounds for having not been raised and decided by the first appellate court, we cannot look at them, In their words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate court went wrong or right. Hence, we refrain ourselves from considering them."

Guided by the above authority, I cannot entertain the second ground of appeal for the reason that it is new ground. Therefore, this ground is answered in negative.

Concerning the fourth ground of appeal, I have perused the court records and found that the appellant is claiming for a division of properties on a property which bears a different name of one Said Shabani Mlyomi, the property was not transferred to the name of Ramadhani Said. The alleged matrimonial house bears the name of the respondent's father and the founder of MLYOMI Resources Co. Ltd.

It should be known that a distinction must be drawn between assets acquired by the joint efforts of both husband and wife and those of one party as a shareholder which bears a different name. The records reveal that the respondent was a shareholder and the same does not form part of matrimonial properties thus are not subjected to division of matrimonial properties.

Likewise, the said vehicles bears a Company name and the respondent tendered a vehicle registration card and a revenue receipt

(Exh. D3) to prove that the property belongs to one Said Shabani Mlomyi. Therefore, the said properties cannot be subjected to division of matrimonial properties because it was not the respondent's property. The appellant was required to prove her claims by tendering documentary evidence but that was not the case. The principles of proof of claims are equally applicable, that he who alleges must prove as provided under section 110 and 112 of the Evidence Act, Cap.6 [R.E 2019] that:-

" 110 -(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Similarly, in the case of **Lamshore Limited and J. S. Kinyanjui V Bazanje K. U. D. K** [1999] TLR 330 it was held that:-

" He who alleges a fact has the duty to prove it"

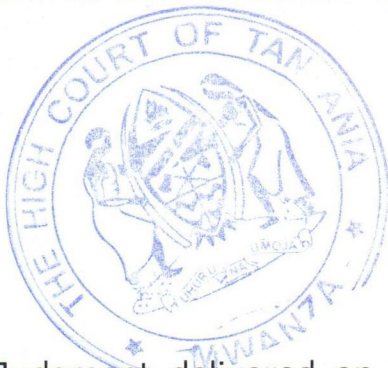
Borrowing a leave from the above authorities, I find that the appellant (original plaintiff) is the one who alleged, therefore she was required to prove her claims by oral and documentary evidence. Failure

to that her claim is baseless. Therefore, this ground is answered in negative.

In the upshot and for the foregoing reasons, the decision of the District Court of Nyamagana is uphold thus, I proceed to dismiss the appeal without costs.

Order accordingly.

DATED at Mwanza this 16th July, 2020.




A.Z.MGEYEKWA

JUDGE

16.07.2020

Judgment delivered on this 16th July, 2020, and both parties were remotely present.


A.Z.MGEYEKWA

JUDGE

16.07.2020

Right to appeal is fully explained.