

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

**CIVIL APPEAL NO. 101 OF 2019**

*(Originated in the Resident Magistrate's Court of Morogoro in Matrimonial  
Cause No. 7 of 2018 before Hon. E. J. Nyembele - SRM)*

**MARIAM MAHANYU HOZA ..... APPELLANT**  
***VERSUS***

**GODFREY LWITIKO MWAKIFUNA ..... RESPONDENT**

*Date of last Order: 6/12/2019  
Date of Judgment: 27/03/2020*

**J U D G M E N T**

**MGONYA, J.**

The Appellant herein **MARIAM MAHANYU HOZA** being aggrieved by the Judgment and Decree of the Resident Magistrate's Court of Morogoro in original **Matrimonial Cause No. 7 of 2018**, before Honorable E. J. Nyembele - SRM, hereby appeals against part of the said Judgment and Decree on the following grounds:

***(1) That, the trial Court erred in law and in facts by failing to order that the house located at Makasini***

***Street in Mbeya City was not part of Matrimonial properties jointly acquired by the parties.***

***(2) That, the trial Court erred in law and in facts by including personal property of the Appellant Plot No. 477 Block 'A' located at Longido Urban Centre in Arusha City in list of Matrimonial properties.***

From the above grounds, the Appellant prays for the following orders:

- (a) That, this Honorable Court be pleased to quash and set aside part of the judgment and decree of the Trial Court dated on 15<sup>th</sup> day of April, 2019 regarding division of Matrimonial properties.***
- (b) That, this appeal be allowed with costs.***
- (c) That, this Honorable Court be pleased to declare that the house located at Makasini Street in Mbeya City is not a Matrimonial property of the parties.***
- (d) That, this Honorable Court be pleased to declare that Plot NO. 477 Block 'A' located at Longido Urban Centre in Arusha City is a personal property of the Appellant hence to be excluded from Matrimonial properties jointly acquired by the parties.***

- (e) That, this Honourable Court be pleased to declare that the house in Plot No. 472 Block 'KLK' located at Barabara ya Tatu, Bongora Street, Kilakala Area in Morogoro Municipality is the only immovable matrimonial property jointly acquired hence to be equal division between the parties thereto.***
- (f) Any other reliefs Honourable Court may be pleased to grant.***

Submitting on the 1<sup>st</sup> ground of appeal, the Appellant's Counsel submitted that, the record of the trial court reveals that there is no doubt that the house located at Makasini Street in Mbeya City (un-surveyed) is not a matrimonial property jointly acquired by the parties during subsistence of the marriage. The counsel further averred that on the facts established in the trial court by the Appellant, it is evident that the house is not a matrimonial property and the same was not acquired during the marriage by their joint efforts. Further the same was bought for residential purposes in the Appellant's name on behalf of her father upon separation with her step mother. Given the fact that the evidence adduced before the trial court by the Respondent acknowledged that the house was bought in the name of the Appellant, the trial court had no option in ordering the said house

to be part of the matrimonial properties jointly acquired by the parties.

Further on the 2<sup>nd</sup> ground of appeal, the Appellant's Counsel submitted that the trial court erred in law and in facts by including personal property **Plot No. 477 Block 'A'** located at Longido Urban Centre in Arusha City in a list of matrimonial properties. He averred that, it is trite law that ownership of non-marital property vests with the person who acquired the property in his or her name at the exclusion of his or her spouse. Yet, that the law introduces another aspect as far as ownership of property by a wife or husband is concerned that is to the aspect of separate properties since the law recognizes the possibility for a husband or wife to own certain properties at the exclusion of his or her spouse.

Submitting further, it is the Appellant's counsel contention that, for property to qualify as a matrimonial property, it ought to be jointly acquired during the subsistence of the marriage between the parties. However, in the trial court proceedings the Respondent acknowledged the Plot No. 477 Block 'A' located at Longido Urban Centre in Arusha City to have been acquired in the name of the Appellant at his exclusion. This acknowledgement is termed by the Appellant's Counsel that is the *prima facie* evidence that the property in dispute is not a

matrimonial property but rather non marital property. It is the Appellant's view under the circumstances that, this being the case, the trial court erred in law and facts by including and dividing it as part of matrimonial properties notwithstanding that the same was not jointly acquired by the parties during subsistence of the marriage but does not form part of matrimonial properties.

In the vent therefore, the Appellant prayed the court to allow the instant grounds of Appeal as they are meritorious.

Responding to the grounds of Appeal collectively, it is the Respondent humble submission that all properties listed before the lower trial court and some of which are subject to this appeal were acquired during the life span of the parties' marriage from one source of income which was a shop based in Morogoro Municipality. It is further the Respondent's Counsel concern and submission that, during the subsistence of the parties' marriage, the Respondent trusted the Appellant to sale and supervise the shop and even to purchase different matrimonial properties in her name as he was busy travelling in course of their businesses.

In accordance to distribution of the matrimonial properties, it the Respondent's averment and observation that the parties' testimonies before the court were taken into consideration and from the same, the lower court equally and fairly distributed the

matrimonial assets as it was stated in the case of ***SALUM BUZU V. MARIAM KIBWANA Civil appeal No. 29 of 1992*** which was quoted and fully used by Hon. Mutungi Judge in the case of ***BARAKA YASINI MBAGA and another V. ANCILLA M. HULILO CIVIL APPEAL NO. 74 OF 2014 at page 14***, where it was held that:

***"Where there is evidence properly adduced that each party made substantial contribution towards the acquisition of matrimonial assets, justice requires equal division of the matrimonial assets in question"***

From the above submission, the Respondent's counsel prayed the entire appeal be dismissed with costs as it has no merits.

I have carefully read both parties' respective submissions for and against the grounds of appeal. In determining the said grounds, I will determine the two grounds of appeal collectively as they are all referring to the Appellant's unsatisfied division of matrimonial properties. Further, as the Appellant has also prayed that the house at Morogoro be sold and divided to parties, I will also determine the same in accordance with the said grounds of appeal.

To start with, let me say that I am well aware of ***Section 114 (1) of the Law of Marriage Act Cap. 29 [R.E. 2002]*** in

regard the division of matrimonial properties. The same provides:

***"...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".***

It is the requirement of the law that the matrimonial properties acquired in a marriage by joint efforts of the Spouses be **divided between the parties of any assets acquired by them during the marriage by joint efforts. As seen above,** this is the proper wording of the statute as per ***Section 114 (1) of the law of Marriage Act*** quoted above.

The position of law on division of Matrimonial properties was well observed in the case of ***SCOLASTICA SPENDI VS ULIMBAKISYA AMBOKILE SIPENDI & ANOTHER, MATRIMONIAL CAUSE No. 2 of 2012 TZ HC 72 (Unreported) at page 22*** where it state that:

***".... Upon reading the provisions of the law the Court has found it has power under that provision of the law to order the matrimonial property to be divided***

***or sold and proceeds obtained thereof to be divided to the parties.....”***

In the cause of determining this appeal, I had an opportunity of going through the entire lower court's record and Judgment thereto. From the same, it came to my knowledge that both parties were and still earning their daily bread through business. On one part, the Respondent herein being a businessman whom after he contracted marriage with the Appellant, and after the Appellant being a house wife for sometimes, she was elevated to the business through the Respondent's shop at Mbeya and later raised to a businesswoman working parallel with his ex-husband, the Respondent herein. This assertion is from the trial court's proceeding at page 8 where during cross examination, the Respondent had this to say:

***"Mariam was a housewife when I married her. He has been a house wife for one year. From there I put her to run a shop which I had before marriage. The shop is not there. Now we have a shop at home, I don't know what she is doing now. It has the value of 2M I think. We have a worker at the shop. I employed the worker.....”***



From the above I am of the considered opinion that during their marriage, and from the shop that the Respondent had before the marriage, it was the root of the Appellant's business which eventually shifted to Morogoro after their transfer from Mbeya to that effect working parallel with the Respondent in their business activities, though separately, However, under the circumstances, they had a joint efforts in acquiring the matrimonial properties of which currently are at issue. In that respect, there is no dispute that all these properties were acquired jointly during the subsistence of the marriage; the source being the Respondent's businesses through managed separately by parties herein.

It is from the same proceedings I have noted in several occasions upon Appellant being asked about the source of income which enable her to acquire different properties in her name, her answer was that the same came from sell of burns and crisps. On the contrary, it is the Respondent's assertion that he is working as a businessman importing food stuff from outside Tanzania and distribute the same to the supermarkets. It is from this contrast, I take it the income that is coming from both the Respondent's business and that of the Appellant was used for the welfare of their family but also in acquiring the matrimonial properties. In comparison, it can't get in one's head that the normal shop as well said by the Appellant herself in page 14 of

the proceedings that she is selling "**soda, unga, viazi, majani and toys**" can afford buying houses, plots and cars all alone from the said shop excluding the Respondent's business in contributing towards acquisition of the matrimonial properties. As no one among the parties expected this destination of division of properties, I have decided under the circumstances to believe and give the benefit of doubt the Respondent that in a cause of buying those properties, she believed his wife in doing so. That is why most of the properties bears the Appellant's name. I have to say at this juncture that, under the given circumstances, bearing a name in a property, does not mean that the same was fully acquired by that person and that does not mean that the property in question is not jointly owned. That is a simple and cheap reasoning. From the above explanation, it is my firm view that both properties as indicated in the above grounds of Appeal indeed are matrimonial properties.

The definition of the matrimonial property I have considered is not far from what this Court stated in the famous case of **Bi. Hawa Mohamed V. Ally Sefu [1983] TLR 32** when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. The Court stated:

"The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view, the term "*matrimonial assets*" means the same thing as what is otherwise described as "*family assets*". **Under paragraph 1064 of Lord Hailsham's HULBURY'S LAWS OF ENGLAND, 4<sup>TH</sup> Edition, p. 491, it is stated:**

*"It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole."*

The position in India, which we take inspiration, is quite similar to that in our jurisdiction when it comes to interpret the phrase "*matrimonial assets*" which in our view is similar to the phrase "*family assets*" used in the Indian Act. They refers to those property acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives.

The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent

of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution.

Before I conclude this point, let me talk about the Mbeya house of which the Appellant herein is referring to be owned by her father despite the same having her name. I have carefully gone through the record regarding this issue. I have to say that, it is not making sense that the house which belonged to Appellant's father of which was divided and the step mother given half the price of the said house, making the Appellant's father remain with the house, but still the Appellant who assisted him only **One Million Tshs.** out of **Six Million Tshs.** buy the said house and write her name in terms of Ownership. From the above situation and explanation, there can be only one explanation that the house was bought by the Appellant herein as even his ex-husband acknowledge the fact that the said house is matrimonial property though bears the Appellant's name.

On this I have to make reference to page 7 of the lower court's proceedings, when the Respondent was submitting on some matrimonial asserts. He had this to say:

***"... PW1 Continues: We have a house at Mbeya, unsurveyed area, Mwasote Street, Itezi Area, the name reads Mariam Mahanyu Hoza. I pray to tender the documents used to buy the said house as exhibit.***

***Mr. Azizi for Respondent: No objection***

***Court: Admit the document proving ownership of a house at Mbeya as exhibit and mark it as "P4"***

***Sgd: E. Nyembeie - SRM***

***08/02/2019"***

On the serious note, if the said house does not concern the Respondent at all, how comes the documents to that house was with Respondent. Under the circumstances, I expected the said documents to be under the custody of the owner of the house, the Appellant's father DW2; However, that was not the case.

About the Kilakala house, it is my firm view that the trial Magistrate was very fair in distributing the matrimonial properties taking into consideration the Respondent whom from the evidence during trial he is the one with his mother who are taking care and staying with the children. On the other part, it is not in dispute that the Respondent herein suffers from Sicocell. Further, at the end of the trial, he was fully awarded with the custodian of the children against the Appellant herein. Taking into consideration all the above factors, the idea or rather the Appellant's request for the Kilakala house to be sold and the proceeds be divided to the parties herein is not tenable. I say so since the welfare of the children need to be looked at by them having stable shelter with their parent guardian Respondent

herein who is also having health problems. This point therefore is considered hopeless and baseless, and therefore rejected from the above given reasons.

From the above explanation, it is my considered view that **both grounds of appeal are meritless and hereby fails accordingly.**

In considering all that I have narrated above and taking into consideration the parties testimonies at the trial court, it is my concern that the learned Magistrate wisely decided the matter and came out with a very reasonable division of matrimonial properties under the circumstances.

In the event therefore, having seen that all grounds of appeal have failed, I proceed to **DISMISS the entire Appeal for the same being meritless; and uphold the RM'S Court at Morogoro decision respectively.**

**I make no orders to costs.**

It is so ordered.

Right of Appeal Explained.



**L. E. MGONYA**  
**JUDGE**  
**27/03/2020**

**COURT:** Judgment delivered in the presence of the Appellant in person, Mr. Tairo, Advocate for the Respondent, and Ms. Janet, RMA in my chamber today 27<sup>th</sup> March, 2020.



**L. E. MGONYA**  
**JUDGE**  
**27/03/2020**