THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

(PC) CIVIL APPEAL No.6 OF 2019

(Arising from the District Court of Muleba at Muleba in Civil Appeal No. 7 of 2018 & Original Nshamba Primary Court in Civil Case No. 27 of 2017)

SIMEO RUSHUKU KABALE ---------- APPELANT

Versus

ATHONIA SIMEO KABALE ---------- RESPONDENT

JUDGMENT

24/09/2020 & 01/10/2020

Mtulya, J.:

An appeal was lodged in this court on 24th June 2019 by Mr. Simeo Rushuku Kabale (the Appellant) in Civil Appeal No. 27 of 2017 disputing decision of the District Court of Muleba at Muleba (the District Court) in Civil Appeal No. 7 of 2018 which held that: ***the trial court reached good decision when dealing with the distribution in respect to the properties*** *and this court cannot disturb whatever the essence of distribution*. The trial court [Nshamba Primary Court in Civil Case No. 27 of 2017] in its decision, after hearing the parties in distribution of matrimonial properties following divorce of the parties, held that:

> *kwa kuzingatia maelezo hayo Mahakama inatoa mgawanyo wa mali zao 50% kwa 50% kwa mdai na*

mdaiwa ... mdai achukue nyumba iliyojengwa na shamba la Lwambulala anakoishi. Mdaiwa achukue shamba la miti la Kashange-Kabale na shamba la miti la Biirabo ... kuhusu kiwanja cha Muleba Nyarwondo kithaminiwe na wagawane nusu kwa nusu, yaani 50% kila mmoja.

Apart from the two farms and houses mentioned, other minor assets were revealed and distributed by the court. However, it was unfortunate for the trial court, in its five typed pages, the parties were not given reasons in arriving such holding. Similarly, it was unlucky for the parties at first appellate court, the District Court. In its three typed pages judgment, the District Court after giving the background of the matter, concurred with the trial court. No reasons were registered by the District Court justifying that concurrence. As the Appellant could not comprehend the two decisions, he preferred the present appeal and registered four grounds briefly *viz*:

1. The lower courts erred in law and fact to distribute Kashonge-Kabale farm which is not part of matrimonial properties;
2. The lower courts erred in law and fact to distribute Biirabo farm which was already sold to Salomon Kakwezi;

3. The lower courts erred in law and fact to hold the Respondent is the first wife which led to unfair distribution of properties; and
4. The lower courts erred in law and fact to rely on fabricated evidences.

In replying the Petition of Appeal filed by the Appellant, Mrs. Anthonia Simeo Kabale (the Respondent) protested all grounds of appeal and stated that the Appellant has to prove his allegations, otherwise the appeal must be dismissed.

When the suit was scheduled for hearing on 24th September 2020, the parties appeared themselves without any legal representation. It is fortunate that the parties are acquainted with their dispute and properties involved in the distribution.

The Appellant on his part, submitted and argued all four grounds of appeal, albeit, in brief: In his first ground of appeal, he argued that the farmland in Kashonge-Kabale belongs to his son named Fortunatus Mambosasa who was born in 1975 and allocated the land by the Village Council in 1986. In replying this ground, the Respondent argued that the land in Kashonge-Kabale was initially a bush land (*Shamba Holela*) with no owners and they cleared the bush to acquire land for cultivation purposes in 1977. According to the

Respondent they planted eucalyptus and pine trees between 1977 and 1992.

The Respondent submitted further that part of the land was sold to Swalehe Kaungu and Sweet Butambala between 1984 and 2009, and in any case the said Fortunatus Mambosasa had only eleven (11) years when it was alleged that he was allocated the village land. To the Respondent, Fortunatus was a minor in 1986 and therefore could not be granted the village land. Rejoining the submission, the Appellant stated that they had not cleared any land in 1977 and that he registered the name of Fortunatus Mambosasa in the Land Request Form for his son and was granted village land at the age of eleven (11) years.

On my part, I have gone through the record of this appeal and submissions made by the parties and found out that the Claim Form registered by the Respondent at trial court in the Civil Case No. 27 of 2017 has no record of the farmland registered in the name of Kashonge-Kabale. However, during proceedings conducted on 31st August 2017, record shows that the Respondent testified and mentioned the farmland in the following text:

...tuliweza kupata mali mbalimbali mashamba mawili ya migomba, moja tuliuziwa na baba yake na mdai mwaka

*1977 na kuunganisha shamba la ukoo...**tulinunua shamba la miti kutoka kwa Mzee John Kamaliko Kashonge-Kabale** ...mwaka 1999 tulinunua shamba la Skalioni Daudi liko Rwabiko-Kabale. Mwaka 2004 tulinunua shamba la miti la Evodius France lilioko Biilabo-Kitebele, tuna baiskeli mbili, ng'ombe ... na kiwanja Nyarwondo Muleba...Tuna nyumba mbili za kuishi tulijenga kwenye kiwanja/shamba tulilonunua kwa Skalioni...nyumba nyingine iko Kabale Centre haina shamba kwa sasa imezeeka ndipo ninaishi.*

In the above extract, there are mentions of various lands which belong to the parties, but there are no specific size, location and value as per requirement of the law in the precedents of **Rev. Francis Paul v. Bukoba Municipal Director & 17 Others**, Land Case No. 7 of 2014; **Aron Bimbona v. Alex Kamihanda**, Misc. Land Case Appeal No. 63 of 2018; **Ponsian Kadangu v. Muganyizi Samwel**, Misc. Land Case Appeal No. 41 of 2018 and, **Daniel D. Kaluga v. Masaka Ibeho & Four Others**, Land Appeal No. 26 of 2015.

On the other hand, the Appellant did not register any evidence in the trial court displaying the land belongs to his son Mr. Fortunatus

Mambosasa. In any case a child of tender age of eleven (11) years to be allocated customary right of occupancy by the Village Council is an incomprehensible allegation. To my understanding, village land is granted to villagers after following all necessary steps, including discussion and resolution of applicants' names in the Village Assembly. I am wondering on how possible the Village Assembly can allow a child of tender age be allocated village land. Again, there was neither Village Assembly Minutes nor Request Form tendered in the trial court to justify the statement. In short the statement that Fortunatus Mambosasa owned the land at the age of eleven (11) years in 1986 is just interpolation of facts emerged as an afterthought in this appeal. The uncertainty of the land in Kashonge-Kabale is not settled in terms of size, location and value.

The Appellant in the second ground submitted that the Biirabo Trees Farm was intended to help their children on school issues, including paying school fees and costs. However, due to difficulties in the family, on 16th February 2009 the family sat and agreed to sale the farm to Salomon Kakwezi in presence of the Respondent and she signed the sale agreement. The Respondent on her part conceded the fact on sale, but complained that the Appellant used all the monies alone without consulting the family members hence she

complained before the Ward Executive Officer. The officer ordered the farmland be reverted back to the family and during MKURABITA in 2011, the farmland was returned and registered in the family name. The Respondent submitted further that during the hearing at trial court, the Appellant was asked to summon Mr. Kakwezi to testify on the farmland, but declined to do the same.

The Respondent submitted further that the Appellant is still in the farmland and currently cultivating it for his proceeds. Rejoining the submission, the Appellant submitted that the farmland in Biirabo was initially sold to Mr. Kakwezi and due to immoral words of the Respondent towards Mr. Salomon Kakwezi, Mr. Kakwezi withdrew his offer and left the land in the hands of family members. According to the Appellant, in order to refund the money, the land was sold to another person and he is currently a caretaker of the land.

On my side I think this matter was registered and well determined by the trial court and I agree with the trial court. The Appellant declined to invite Mr. Kakwezi or the other person who bought the land and did not register any other evidence at the trial court to justify his statement. Mere words without evidence to substantiate the same are just allegations.

In ground three of the appeal, the Appellant submitted that the Respondent is not the first wife as she was proceeded with Christina married in 1969 and expired in 1976. According to the Appellant the Respondent was married in 1975 when some of the properties in Lwambulala were already acquired and some are clan farmlands. Identifying the clan lands, the Appellant stated that the two farmlands in Lwambulala are clan lands inherited from his father and cannot be part of the distribution of matrimonial properties.

In reply, the Respondent submitted that the farmlands in Lwambulala are part of the matrimonial assets. Giving reasons of the submission, the Respondent claimed that part of the land was donated to them by the Appellant's father as wife and husband after their marriage ceremony in 1975 and the other part was sold to them by the same Appellant's father in 1976. According to the Respondent, the Lwambulala farmlands were initially clan lands, but later donated and sold to the parties and therefore not part of the clan lands. This submission was resisted by the Appellant who contended that there were no any farmlands given to them during or after their marriage ceremony.

After considering all available evidences in the dispute, the trial court decided that: *Mdai achukue nyumba iliojengwa 1982 na*

shamba lote la Lwambulala anapoishi Mdai. It is this holding which is complained by the Appellant in this court. On my part, I have perused the Claim Form, proceedings and judgment of the trial court in Civil Case No. 27 of 2017, and submission of the parties in this appeal during the hearing, I think there is a confusion that need to be settled. The Form is silent of any farmlands in the name of Lwambulala attached to it. In the proceedings conducted on 31st August 2017 at the trial court, the Respondent submitted that:

> *Mdaiwa alikuwa kondakta. Mimi alinipa fedha za kununua karanga. Namenya halafu nazileta Bukoba kwanza. Ndipo tulinunua shamba kwa mzee na kuliunganisha na shamba la ukoo kwa shilingi mia tisa sabini.*

This testimony did not receive any protest from the Appellant in the trial court as well as in the District Court. However, the record of the trial court is silent on location, size and value. Again, there is a question before this court on whether the farmland stated in the testimony of the Respondent is the same land complained by the Appellant located at Lwambulala. This question was supposed to be settled at the trial court, but remained undetermined.

The Respondent during the appeal hearing in this court, she started that they bought Lwambulala clan land which was next to clan land in 1976 after the sale of Radio Cassette. Again, when mentioning size of the land, the Respondent stated that the land is sized human steps between eighteen (18) and thirty (30) whereas the Appellant submitted there are two clan farmlands one sized two point five (2.5) acres and the other three point five (3.5) acres. The Appellant also claimed that currently the Respondent is in occupation of four (4) farmlands whereas he possessed only one (1) farmland which is unequal distribution of matrimonial properties.

In the circumstances like the present one where parties are not in agreement of the number, size and location of the farmlands and not certain on whether the lands are clan lands or matrimonial real properties, and both courts below did not trouble to assess the matter in distributing the properties, it was unsafe to distribute the properties. The only question which was left untouched is whether in absence of certainty in the properties, is it possible to distribute them equally between the parties. These uncertainties cannot be resolved at second appellate level.

Finally, the Appellant complained on the evidences registered at the trial court stating that were fabricated and the Respondent failed

to summon individuals who drafted sale agreements to testify on contents of the agreements in support of her allegations. In reply of the submission, the Respondent stated that she invited Clan Secretary called Mr. Semistocles Fweza who was part in settling family disputes between them.

On my part, I think it is a settled law of contract that when there is consent given at free will attached with consideration as evidenced in land sale agreements registered in the trial court, it cannot be said that the agreements were fabricated, unless there is contrary proof of handwritten experts (see: section 10 & 13 of the Law of Contract and **Hashim Omari Likungwa v. Mohamedi Mtondo & Another**, Land Case Appeal No. 16 of 2018.

Having produced documentary evidence in trial court, the Respondent has also abided by section 61 of the Evidence Act [Cap. 6 R. E. 2019] and precedent in **Daniel Apael Urio v. Exim (T) Bank** (supra) which require documented agreements be proved by way of best evidence rule. At the trial court, the Appellant apart from submission of mere words that the evidences were fabricated, did not produce any documents to substantiate his claim or contradicted the Respondent's evidences.

I therefore set aside proceedings and quash decision of the District Court of Muleba at Muleba in Civil Appeal No. 7 of 2018 for lack of reasons and Nshamba Primary Court in Civil Case No. 27 of 2017 for inconsistencies in the Claim Form, proceedings and decision itself. As this is a matrimonial appeal and I have ordered trial *de novo*, I award no any costs. Each party to bear its own costs in this court and two courts below.

Ordered accordingly.

F. H. Mtulya

Judge

01/10/2020

This Judgment was delivered in Chambers under the seal of this court in the presence of the Appellant, Mr. Simeo Rushuku Kabale and in the presence of the Respondent Mrs. Athonia Simeo Kabale.

F. H. Mtulya

Judge

01/10/2020