**IN THE HIGH COURT OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL APPEAL No. 138 OF 2020**

(Arising from the judgement and decree of the District Court of Kinondoni in Matrimonial Appeal No. 10 of 2020)

**DANIEL GEORGE BWANALI.....APPELLANT**

**VERSUS**

**OKULY ELIUFOO MURO.....RESPONDENT**

## JUDGEMENT

30th September & 26th November 2020

**ACK. Rwizile, J**

In 2019, parties to this appeal had a Matrimonial cause filed by the respondent at Kawe Primary Court. The matter was heard and decided, a decree of divorce was granted. The trial court did neither make orders as to division of matrimonial properties nor for maintenance of the children of marriage. Dissatisfied with the decision, the respondent appealed to the District Court of Kinondoni. After the appeal was heard, the learned resident magistrate ordered for division of matrimonial properties and maintenance of the issues of marriage. The appellant was aggrieved, hence this appeal in the following grounds;

1. *That, the appellate magistrate erred in law and facts by holding that the appellant's property at Madale was a matrimonial property without evidence on record to support it.*
2. *The appellate magistrate erred in law and in fact in finding that the house at Madale was a matrimonial property basing on exhibit O-2 whose admissibility was unprocedural*
3. *That, the appellate magistrate erred in law and fact in ordering the appellant to pay maintenance at the rate of Tshs. 400,000/= per month without considering the evidence on record of the appellant's income and means to afford paying the same.*
4. *That, the trial magistrate erred in law and fact in failing to consider the evidence of DW1 and DW2 and the tendered exhibits thereby ruling that the house situated at Madale is a matrimonial asset subject to distribution.*
5. *That the appellate magistrate erred in law and fact by making a finding basing on section 59(1) of the Law of Marriage Act without first satisfying that the property was indeed the matrimonial property.*
6. *That the appellate magistrate erred in law and fact in ordering that the respondent is entitled to half of the value of the house that did not form part of the matrimonial properties.*

At the hearing, the appellant was represented by Mr. Godfrey learned advocate while for the respondent was Mr.Kizuguto learned advocate. The appeal was argued orally. Mr. Godfrey abandon ground number five, but argued together grounds 1, 2 and 4, while ground 3 and 6 were argued separately.

Supporting the appeal, the learned advocate argued that, the Law of Marriage under section 114 (1) gives powers to the court to order division of the matrimonial properties. He added that the law does not state the meaning of matrimonial asset but the same is defined in case laws. He referred the cases of **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32 and **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** Civil Appeal No. 102 of 2018.

He asserted that, assets do not automatically become matrimonial assets, rather there must be evidence to prove the same. He said, even the contribution towards acquisition of the same should be proved, as under section 110 of the Evidence Act. He argued that, there was no evidence to prove the said is a matrimonial asset and how the respondent contributed towards acquiring the same. It was his opinion that, the house was in appellant's name, therefore not a matrimonial asset. It was his submission that, there was no evidence proving the alleged contribution of 8,000,000/=. To him, this was an error that led to the decision that the same was a matrimonial property. He stated further that parties got married in 2007 and the house was sold in 2008. He said, the evidence was not weighed and compared as it should be, he referred to the case of **Yesse Mrisho vs Sania Abdul** Civil Appeal No. 147 of 2016.

The learned advocate argued further that, it is in dispute that exhibit O-2 proved ownership. He added, the exhibit was relied upon by the appellate court while the trial court did not. His argument was that, it is a trite law that an exhibit has to be tendered by the author.

He therefore submitted that, exhibit O-2 was tendered by an incompetent person. It should not have been relied upon.

Advancing arguments on ground three, the learned advocate opined that the trial court erred in making and order for maintenance without considering the financial position of the appellant. Mr Godfrey went on submitting that, ordering payment of 400,000/=per month for maintenance was unreasonable. He argued further that section 129 of the Law of Marriage Act has to be read with section 44 of the Law of the Child.

Mr. Godfrey submitted on ground six that, the respondent did not deserve 50% share of the alleged matrimonial asset because her contribution of 8,000,000/= was not proved. To cement his argument, he cited the case of **Bibie Maulid vs Mohamed Ibrahim** [1989] TLR 162. The learned advocate therefore asked this court to allow this appeal.

Opposing the appeal, Mr. Kizuguto learned advocate argued that, the attack on admissibility of the evidence not raised during trial court, cannot be done at this stage. The appellant, he submitted, is estopped from impeaching the admissibility of the same under section 123 of Evidence Act. He argued further that, there was ample evidence to prove that the house was a matrimonial property. He stated that marriage was in 2007 and the said property was acquired in 2008-2010. He added that, the property was acquired between the subsistence of marriage. He argued that during the marriage parties were working and had income. The respondent, apart from working, she also contributed 8,000,000/=.

He concluded, she deserves a fair share of the house the fact he did not prove as per **Bi Hawa Mohamed (supra).** He added that the buyer was not called to testify and the agreement was not stamped. No stamp duty was therefore paid. According to the learned counsel failure to call an important witness draws an inference against the appellant. He cited the case of **Hemed Said vs Mohamed Ally** [1984] TLR 113 to support his argument. The learned advocate argued, the house was not sold nor mortgaged since there was no evidence to prove so. He referred the case **Marmo Montage konsult vs Game** Civil Appeal No. 86 of 2001 and section 9 of the Magistrates Court Act. He then prayed for equal division of the same. He stated that, the respondent was working and paid 8,000,000/= as her contrinution. She had given the appellant some money to start business, and it was said by the appellant himself that he sold some of the matrimonial properties. To cement his argument, he cited the case of **Bi Hawa Mohamed (supra).** It was his further submission that, since the appellant is a businessman, he is capable of maintaining his children since he affords paying his lawyer.

Rejoining, Mr. Godfrey maintained what his submitted in chief, that the exhibit was admitted but it was called on record on another date. He stated that, there was a contract showing transfer of the house. He added by saying, DW1 and DW2 testified in court about the sale and the mortgage. He argued that varying distribution of the assets and maintenance is for parties, since the children are beneficiaries. Furthermore, the appellant has to have a bigger share since that property was not a matrimonial asset.

Having heard submissions of the learned counsel for the parties and gone through the records of the lower courts. I will determine ground 1,2,4 and 6 together which are challenging a court finding on the house at Madale as a matrimonial property and subject to division and whether exhibit O-2 was unprocedural admitted in court. therefore ground 3 will be determined separately.

I think I have to start saying that, it is a trite law that when or subsequent to the grant of a decree of divorce, the court has powers to order division of matrimonial assets acquired by spouses during their marriage. The same is provided under section 114 (1) of the Law of Marriage Act, as hereunder ;

> *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.*

The law did not define what is a matrimonial asset, but the meaning of the same was provided in the celebrated case of **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32, the Court of Appeal held that;

> *"Matrimonial asset has been described as family assets, which refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children*

*during their joint lives, and used for the benefit of the family as a whole".*

It is clear that, matrimonial properties/assets must have been acquired during or in subsistence of marriage or acquired before but substantially improved during the marriage. Coming to the issue at hand, whether a house at Madale was a matrimonial property. The appellant argued that the house was not a matrimonial property since the same was registered in his name. So, he owns it in exclusion of the respondent. He asserted that the house is no longer in his possession since he sold it. It is in record that the parties married in 2007 as per exhibit O-1, and that they had started erecting a house which was not finished at Madale. It is a rebuttable presumption that a property which is acquired by a wife or husband belongs to the wife or husband in exclusion of the other as per section 60 (a) of Law of Marriage Act. Proof of ownership of the property is by way of right of occupancy or certificate of occupancy of plot No. 285 at Madale, acquired in 2015. It might be true that the appellant was the owner of the said plot even before, but the same was developed by building a house during the existence of their marriage. For that reason, the house which was built during marriage was a matrimonial property. The same position is stated under section 114 (3) which provides that;

*For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.*

With due respect, it is my considered view that the house at Madale is a matrimonial property and therefore subject of division between the spouses.

The appellant argued that the house was sold, the fact which was disputed by the respondent who brought exhibit O-2 to verify that the same was not true as per the contents of the said letter. It has to be noted that in law such properties whether jointly acquired or otherwise, cannot be simply disposed of, spouse have to consult each other before that is done, this is provided for under section 59 (1) of the Law of Marriage Act

> *Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds*

In the eyes of the law, the spouses cannot dispose of properties assumed owned by them without consent of each other. Even if it could have been proved that the appellant was the sole owner of the said house, which he did not, he was supposed to have the respondent's consent before he sold the house in question. It is held therefore that the same is a matrimonial property subject of division. If it was sold, indeed, the sale was illegal.

The question to be asked is, does the respondent deserve half of the value of the house? The answer is in the affirmative since it is in record that the parties were both working. Neither the appellant nor the respondent proved contributed more than the other. That therefore entitles each other an equal share in the absence of the evidence to the contrary. Another reason is the fact that the appellant testified that he sold some of matrimonial properties such as the cars. Reasonably, the properties that remained have to be distributed equally.

Another point is, whether exhibit O-2 was unprocedural tendered in court. The learned advocate for the appellant argued that exhibit O-2 was not tendered by a competent person. Counsel for the respondent argued that, the appellant could have objected admissibility of the same at the trial not at this stage. I agree with the counsel for the appellant that the respondent was not a competent person to tender the same since she was not an author or possessor or addressee of the said information. As was held in the case of **Yohana Paulo vs The Republic,** Criminal Appeal No. 281 of 2012 at page 12, when the Court of Appeal stated the guidelines as to who is a competent witness to tender exhibits in court;

> *"A person who at one point in time possesses anything, a subject matter of trial| as we said in Kristina case, is not only a competent witness to testify but could also tender the same... The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly. So, a possessor or custodian or an actual owner or alike are*

*legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."*

The competent witnesses ought to have been called to testify. Therefore, exhibit O-2 ought not to have been admitted, or upon admission, not to be considered. The same is expunged from the record.

As to ground three, the appellant contended that it was unreasonable for the trial court to order payment of Tsh. 400,000/= as maintenance of the children of marriage without examining financial position of the appellant, among other matters. It goes without saying that for the court to make an order for maintenance, it has to firstly inquire on the financial status of the parties. Section 44 of the Law of the Child, provides;

*A court shall consider the following matters when making a maintenance order-*

*a) The income and wealth of both parents of the child or of the person legally liable to maintain the child;*
*b) Any impairment of the earning capacity of the person with a duty to maintain the child;*
*c) The financial responsibility of the person with respect to the maintenance of other children;*
*d) The cost of living in the area where the child is resident; and*
*e) The rights of the child under this Act.*

The conditions stated above were not followed by the courts below. I therefore agree with the counsel for the appellant that payment of Tsh. 400,000/= was unreasonable and I do not think maintenance can be paid in arears unless it turns into compensation. It is not in dispute that the appellant is jobless and cannot manage to pay the same.

Finally, it is held that, this appeal has no merit, it is dismissed except that the order for maintenance is varied and reduce to Tsh. 100,000/= per month. The house at Madale is a matrimonial house subject to equal share between the spouses. Since the appeal arises out of the matrimonial cause, I therefore make no orders as to costs.

**AK. Rwizile**
**Judge**
**26.11.2020**

Delivered in the presence of the parties, this 26th day of November 2020

**AK. Rwizile**
**Judge**
**26.11.2020**

Recoverable Signature

X

Signed by: A.K.RWIZILE

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DAR ES SALAAM DISTRICT REGISTRY