

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MATRIMONIAL APPEAL NO.30 OF 2020

(Arising from Ilemela District Court in Matrimonial Cause Civil No. 04 of 2018)

RAPHAEL NKWABI CROSS - APPELLANT

VERSUS

NAOMI LUCAS MBUKI CROSS - RESPONDENT

JUDGMENT

Date of last Order: 18.11.2020

Date of Judgment: 30.11.2020

A Z. MGEYEKWA, J

Raphel Nkwabi, the cross-appellant, and Naomi Mbuki, the cross - respondent respectively, were husband and wife. They were formally married in 2006. Out of that union, they owned some properties. It appears their marriage went on well all along until the year 2014 when

the relationship started to go sour after the alleged cross - respondent's adulterous behaviour. Feeling that he could not stomach unfaithful relationship any longer, the cross-appellant decided to file for petition for divorce before the District Court of Ilemela.

On 20th April, 2020 the cross - appellant successfully petitioned for separation in the District Court of Ilemela in which he prayed for the following orders:

- (a) An order granting a decree for divorce.
- (b) An order for distribution of matrimonial assets which the parties acquired jointly and equitable contribution.
- (c) Costs of this petition upon the cross-appellant.
- (d) Any other relief (s) or/and order(s) the Honourable Court will deem equitable to grant.

After hearing both parties, the District Court Magistrate (Sumari, RM) issued an order for separation and distributed the matrimonial properties among the parties. The cross-appellant was not happy with the distribution of the matrimonial assets he received. Hence he decided

to file a cross-appeal before this appeal in the Court. The cross-appeal is predicated on three grounds of grievance; namely:

1. *That, the trial court erred in law and facts by misdirecting itself on the division of matrimonial assets without properly evaluating each party's efforts and contribution to the acquisition of the same.*
2. *That, the trial court erred in law and facts by improperly analyzing the evidence and considering the two shops to be the major and only source of income in acquisition of matrimonial assets.*
3. *That, the trial court erred in law and facts by including some of the assets into matrimonial assets.*

The cross-appeal was argued before this court on 18th November, 2020 whereas, Mr. Erick Kahangwa, learned counsel, and Mr. John Edward, learned counsel, appeared for the cross-appellant and cross - respondent respectively.

It was Mr. Erick Kahangwa who started to kick the ball rolling. He opted to submit on the second and third cross grounds of appeal. On the second ground, the cross - appellant's counsel blamed the trial court for failure to analyse the evidence and consider the two shops to be the major and only source of income in the acquisition of matrimonial assets.

Mr. Erick Kahangwa went on to argue that the cross-appellant opened two shops at Bugalamala in 2013 and 2014 with a capital of Tshs. 10,000,000/= and he argued that the cross - appellant's evidence was not contested. He added that both parties admitted that there were shops but they were opened in different years.

It was Mr. Erick Kahangwa's further submission that the cross - respondent said that she had no evidence to prove that she took a loan or had capital and added that her mother gave her the said capital. He valiantly argued that the cross - respondent had no any evidence, that she acquired the shops before marriage. He lamented that the two started to run business in 2013 and as per Exh.D1 and Exh.D2 the

licence tendered was for the year 2019 therefore before 2019 there was not any business.

The learned counsel for the cross-appellant continued to argue that the cross - respondent failed to prove her income and did not tender any bank statements thus the trial court found that the cross - respondent had no evidence to justify the existence of the said shops in 2013.

Regarding the House located at Kakola, Mr. Erick Kahangwa argued that during cross-examination the cross-appellant testified that in 2001 he constructed the said house and tendered a sale agreement (Exh. P3). He added that PW3 and the cross - cross - respondent confirmed that the land was bought by the cross-appellant.

Submitting further, Mr. Kahangwa stated that the cross - respondent said that she took a loan and contributed 95% of her salary in constructing the house at Nyamhongolo. However, the learned counsel doubted whether a take-home salary of Tshs. 633,000/= could suffice to enable the cross - respondent to construct the said house. He

lamented that the cross-appellant was not able to justify her income while the cross - respondent bought the plot in 2005 and 2006 and received a letter of offer (Exh.P5) before the two were married.

Regarding the plots at Fulamagila, Mr. Erick Kahangwa argued that the cross - respondent used his pension money to buy the two plots. he lamented that the trial court misdirected itself by believing that the cross - respondent used his money to buy the said plots while the cross - respondent did not prove his contribution and income. Mr. Eric Kahangwa continued to argue that the cross - respondent is a school teacher but her testimonies in regard to her salaries differ.

He valiantly argued that the cross - respondent was not able to construct a house at Nyamahongolo with a value of Tshs. 10,000,000/= and to buy a land parcel in Nyamagila which costed Tshs. 5,000,000/= and a land parcel at Ikigijo for Tshs. 500,000/= by using her salary. For those reasons, it was Mr. Erick Kahangwa submission that the cross - appellant justified his income and bought the said land parcel which is registered by his name.

Submitting on the first ground, Mr. Erick Kahangwa argued the trial court did not consider parties' joint efforts in the acquisition of property as stated in section 114 (1) of the Law of Marriage Act. He went on to state that the court is empowered to divide the properties by basing on equal contributions in terms of money, property, or work. The learned counsel for the cross-appellant argued that it is uncontested that both parties are working and were married in December, 2006 and at that time the cross-appellant already had constructed a house at Kakola (Exh.P3) in 2001.

He added that the cross-appellant was given a loan by the Barrick Gold Mine, whereas Barrick deducting the cross-appellant loan from his salaries. He added that the same justifies that the cross-appellant in 2004 constructed a house at Bugalama. Thus, the house at Bugalama was constructed by the cross - respondent contribution. He insisted that the cross-appellant among the assets he acquired before marriage included the house at Bugalama.

Regarding, Nyamhongolo house, Mr. Erick Kahangwa stated that the cross-appellant in 2005 bought the said house, an offer was issued in 2006 (Exhibit P5). He added that he acquired the plot before marriage and constructed a house from the year 2006 to the year 2011. He forcefully argued that the cross - appellant's evidence was heavier than the cross - respondent's evidence.

He continued to argue that the cross-appellant has decided to dispute the division of properties because the court awarded the cross - respondent a huge amount compared to the cross-appellant. To support his argumentation he cited the case of **Gabriel Nimrod Kurwijila v Theresia Malango**, Civil Appeal No. 102 of 2018, and argued that the extent of contribution is of utmost importance to be determined when the court is faced with a predicament of a division of matrimonial properties.

Arguing for the third ground, Mr. Erick Kahangwa strongly argued that some of the properties such as the house located at Kakola and other assets were termed as a matrimonial house while the same was

not matrimonial assets because the cross - appellant acquired the said house in 2001, five years before he met the cross - respondent. On his view, he thinks that the cross - appellant deserves at least a 70% share of the matrimonial assets.

On the strength of the above, Mr. Erick Kahangwa beckoned this court to allow the appeal with costs.

Resisting the cross-appeal, the learned counsel started his onslaught by attacking the first, second, and third ground of appeal which challenges the trial court for failure to distribute the matrimonial assets equally. Mr. John Edward valiantly argued that the division was not in accordance with the law and did not base on equal share as a result the cross-appellant was given a huge share without justifiable reasons. Mr. John Edward argued that PW1 and DW1 testified that the cross-appellant (DW1) was running a business; a shop and she explained how she generated income out of the said business.

The learned counsel for the cross-appellant continued to argue that the cross-appellant house was servicing the loan which he took and

constructed the house at Bugalama. He added that PW1 and DW1 both confirmed that they planned to leave in the house located at Nyamhongolo. Mr. John Edward avers that the cross - respondent proved her contribution, she invested her income in the construction of the matrimonial house located at Nyamhongolo. Therefore, it was his considered view that it was not fair for the trial Magistrate to place the said house to the cross-appellant because the cross-appellant is the one who initiated the divorce without any reason.

He continued to state that the trial court divided the land parcels located at Ikigijo and Fumagila to the cross - appellant while the land parcel at Fumagila was cared for by both parties. He added that it is a big landed property and they planted trees. Mr. John Edward referred this court to section 114 (2) (d) of the Law of Marriage Act, Cap.29, and argued that in the division of property, the court is required to divide the properties equally. He added that in accordance with our customs and tradition the cross - respondent considered the assets to bear the cross - appellant's names He faulted the trial court for failure to consider the evidence of the cross-appellant.

In relation to the division of shops, he argued that the shops were operated by the cross-respondent and when he was cross-examined, he agreed that the business licence is in the name of cross - respondent. He insisted that the cross-respondent started to operate the said business before marriage thus, the court mistakenly included the said properties in the division of matrimonial properties.

On the strength of the above argumentation, Mr. John Edward urged this court to quash the trial court decision and allow the appeal.

I have dispassionately considered the grounds of appeal in the light of the submissions of both learned counsels. Having stated the above, I should now be in a position to confront the issues of contention in this cross-appeal.

In determining the first ground, I wish to consider the most crucial issue whether the division of matrimonial properties was fair or not. The cross-appellant is complaining that the trial court erred in law and facts by misdirecting itself on the division of matrimonial assets without properly evaluating each party's efforts and contribution to the

acquisition of the same. It is clear that in the instant appeal the disputed issue revolves around the division of matrimonial assets. The Law of Marriage Act, Cap.29 [R.E 2019] guides the Court in the division of matrimonial properties, specifically, section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 114 (1) of the Act clearly states that 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 division between the parties of the proceeds of the sale.

Expounding the requirement of section 114 of the Act, I find that there are some exceptions to section 114 (1) of the Law of Marriage Act, Cap.29 [R.E 2019]. Section 114 (3) provides that:-

*"114 (3) 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.**" [Emphasis added].*

From the above provision of law, it is clear that a property acquired during the subsistence of the marriage is presumed to be owned by both spouses equally until proven otherwise. For property registered in the name of one spouse acquired during the subsistence of the marriage, the law presumes that it is held in trust for the other spouse. As for property held in their joint names, the presumption is that each of the spouses has an equal beneficial interest to the property.

In the division of such properties, each party has to prove his/her level of contribution, whether monetary or non-monetary. When these properties are substantially improved during the subsistence of marriage by the joint efforts of the spouse, they become liable for distribution as stated in the case of **Anna Kanungha v Andrea Kanungha** 1996 TLR 195 HC.

Based on the above provision of law and the cited authority, the issue for determination is whether the cross - appellant contributed towards the acquisition or developing the house located at Nyamhongolo. The records reveal that the cross – respondent testified to the effect that she and her husband constructed a house located at

Nyamhongolo. She testified that they acquired Plot No. 99 Block 3 at Nyamhongolo while they were engaged in 2006. The cross - appellant testify that they acquired a building permit in 2010 (Exh.P6) and started to develop the said plot in 2011.

The cross-respondent testified that he bought a plot located at Nyamhongolo area and constructed a house at Nyamhongolo. The evidence on record bears it out that, despite the fact that the cross-appellant asserted that he bought the plot at Nyamhongolo and constructed a house therein, he equally testified that they constructed the said house together. I shall demonstrate.

When PW1 testifying on page 13 of the typed proceedings, the cross - respondent is recorded as saying:-

"Nyamhogolo house is the house we had constructed our plan was to live in Mwanza in future. I do live in Bugalama, however, whenever am in Mwanza I live at Nyamhongolo."

[Emphasis added].

When PW1 was cross-examined by the defendant's Advocate at page 22 of typed trial proceedings, he went on:

*"... I bought the plot at Nyamhongolo at a price around Tshs. 400,000/=, I do not know the exact figure in my head. My target was to transfer in Mwanza **that is why we constructed the house.**" [Emphasis added]*

The above evidence reveals that the cross-appellant and the cross - respondent constructed together the house located at Nyamhongolo together. There is no evidence to show that the cross-appellant constructed the said house in exclusion of the cross - respondent. The letter of offer (Exh.P5) was issued on 21st September, 2006 when the parties were in a relationship, and the building permit was issued in 2010 when the parties were married.

The law clearly states that the property developed by both parties during their marriage is subjected to division among the parties. Therefore, it was not correct for the learned counsel for the cross-appellant to insist that the house located at Nyamhongolo belongs to

the cross-appellant in exclusion of the cross - respondent. Also, the cross-appellant evidence that he started to construct the house in 2006 before marriage is not true because he was required to abide by the statutory requirement to obtain a building permit before starting to construct the said house. Regulation 124 (1) (c) of the Local Government (Urban Authorities) (Development Control) Regulations, provides that:-

" 124 (1) No person shall erect or begin to erect any building until he has –

*(c) **obtained from the Authority a written permit to be called a 'building permit'.**" [Emphasis added].*

Guided by the above provision of law, the cross - appellant's testimony that he started to construct the said house in 2006 before marriage and the building permit was issued in 2010 is unfounded.

Now the issue for consideration here is to what extent the parties made their contribution in constructing the house located at Nyamhongolo. The records reveal that the cross - respondent testified

that she made a contribution in constructing the house by using her salary and she took a loan. She also tendered a business licence issued in 2019. In my considered view, as long as there is proof that the cross - respondent was employed, I can say that at least she proved that she has obtained the money from her salary.

The cross - appellant's Advocate valiantly argued that the cross - respondent's salary did not suffice to enable her to construct the said house by herself. In my view, this is a minor flaw as long as it was not disputed that the cross - respondent was employed and she received a salary, the same means that she was paid.

On the other side, the cross-appellant did not convince the trial court how exactly he earned his income, saying that he was paid pension was not enough, he was required to prove how the said pension was used in constructing the house and to prove the existence of other business and prove the same by tendering respective receipts or documents. Therefore, in the end, I have considered the parties' testimonies and I am satisfied that both parties made an equal contribution in constructing the house located at Nyamhongolo.

Additionally, it is uncontested that the cross-appellant acquired the plot at Kakola and he constructed a house at Kakola in 2001 before he got married. To substantiate his testimony he tendered a sale agreement (Exh.P3). On her side, Naomi testified that she developed and renovated the said two houses, and the cross - respondent did not object.

The cross-appellant argued that the cross - respondent had no right to raise her claims over the house located at Bugalama because she did not contribute anything towards the acquisition of the same. The records reveal that the construction of a house at Bugalama is uncontested that the cross-appellant constructed the said house in 2004 after obtaining a loan from Barick Ulyankulu. He substantiated his testimony by tendering a certificate of occupancy (Exh.4). Both parties testified to the effect that Raphael constructed the said house. Therefore, with no colour of doubt I rule out that the house located at Bugalama belongs to the cross-appellant.

On the second ground that the trial court erred in law and facts by improperly analyzing the evidence and considered the two shops to be the major and only source of income in developing and acquiring the matrimonial assets. The evidence on record reveals that Raphael Nkwabi (PW1) testified to the effect that he opened two shops in Bugalama in 2013 and 2014 before he got married to Naomi Lucas Mbuki (DW1). It is uncontested that in the testimonies of both parties, they stated that he/she was running a shop business before marriage. However, their stories differ whereas each is claiming to own the same shops in exclusion of the other party.

The cross-appellant testified that the cross - respondent was only supervising the business but he is the one who invested his capital in a tune of Tshs. 10,000,000/=. While the cross - respondent testified that she used her salaries and her mother's pension benefits to boost her capital thus she managed to open two shops before she got married.

I have read the court records and found that none of the parties tendered evidence to prove that he/she owned the shops before they

were married. The cross-appellant had no any document to prove that he invested Tshs. 10,000,000/= in running the said shops. However, the cross - respondent tendered a business licence of two shops issued in 2019 which means at least the cross - respondent proved her ownership over the said shops. In my considered view, between the two parties, the cross - respondent was able to prove her ownership. Reading Section 114 (1) and (2) (b) of the Law of Marriage Act, Cap. 29 [R.E 2019] provides that:-

" 114 (1) 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 the sale. "

Section 114 (2) (b) provides further that:

" 114 (2) In exercising the power conferred by subsection (1) the court shall have regard-

(b) to the extent of the contributions made by each party in money, property or work toward the acquiring of the assets. "

With the above observations, I consider that since the shops were acquired during the subsistence of the marriage then the cross - appellant is entitled to a share from the contribution made by virtue of marriage.

Next for consideration is the third ground, the cross-appellant claimed that the court erred in law and facts by including some of the assets into matrimonial assets. As per his submission, the listed assets are the houses located at Kakola while the same were not matrimonial assets. In the record, the cross - respondent testified that the cross-appellant is the one who bought the said plot before their marriage. However, she renovated the said house by using her salaries and income of her business and they constructed another house with six bedrooms.

Therefore it is my findings that the cross - respondent developed the said houses. In accordance with section 114 (3) of the Law of Marriage Act, 29 [R.E 2019] it is stated that:-

"114 (3) 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." [Emphasis added].

Applying the above provision of law, it is clear that property acquired during the subsistence of the marriage is presumed to be owned by both spouses equally until proven otherwise. For property held in their joint names, the presumption is that each of the spouses has an equal beneficial interest to the property. Therefore, since the houses at Kakola were substantially improved during the subsistence of marriage by the joint efforts of the spouse, they become liable for distribution as stated in the case of **Anna Kanungha v Andrea Kanungha** 1996 TLR 195 HC.

In the circumstances and for the foregoing reasons I partly allow the appeal to the extent explained above and issue the following orders:-

1. The house located at Bugalama is placed to the cross-appellant.

2. The house located at Nyamhongolo 50% shares is divided to the cross-appellant and 50% to the cross - respondent.
3. One house of his choice at Kakola is given to the cross-appellant and the other house is placed to the cross - respondent.
4. The land parcel at Fumagila 70% shares is given to the cross-appellant and 30% to the cross - respondent.
5. The land parcel at Ikigijo 70% shares is given to the cross - respondent and 30% to the cross-appellant.
6. Two Shops (Items) the cross - respondent to be given 80% of items and 20% to the cross-appellant.
7. Fixed Deposit Account belongs to the cross-appellant.
8. I make no order as to costs, each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 30th November, 2020.


A.Z.MGEYEKWA

JUDGE

30.11.2020

Judgment delivered on 30th November, 2020 in the presence of Mr. Erick Kahangwa, learned counsel for the cross cross - appellant and the cross - respondent.




A.Z.MGEYEKWA

JUDGE

30.11.2020

Right to appeal fully explained.