

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
PC CIVIL APPEAL NO. 41 OF 2020**

(Arising from Temeke District Court in Matrimonial Appeal No. 102 of 2019)
(Ayengo-Esq RM)

**SALMA MBARUKU KASSIM.....APPELLANT
VERSUS
SELEMANI JUMA OMARI..... RESPONDENT**

JUDGEMENT

17th November & 8th December 2020

A.K Rwizile, J

Parties to this appeal had once lived together as husband and wife under Islamic marriage celebrated in 1998. The same was a happy marriage blessed with four children. After 20 years of a happy marriage, it was in 2018 when misunderstandings between the two became unbearable to the extent that the respondent decided to issue a talak to the appellant. As a result, the appellant filed Matrimonial Cause No. 104 of 2019 at Mbagala Primary Court. The case was heard, a decree of divorce was granted, matrimonial properties distributed to the effect that, a matrimonial house was distributed equally between the parties, and the appellant was given 250,000/= as her share of the car.

Custody of the two younger children was placed to the appellant, while the respondent was ordered to pay 100,000/= as maintenance, and the right of access to his children. The respondent was aggrieved by the decision of the trial court. Among the ground of appeal, was on equal distribution of the house, he appealed to Temeke District Court. The same was reversed and the court distributed the house to the ration of 30% and 70% to appellant and respondent respectively. This decision aggrieved the appellant, and she is now before this court appealing on two grounds ;

- 1. That, the District Court erred in law and in fact for ordering the appellant to get 30% as her share of the matrimonial house located at Mbagala Tuangoma.*
- 2. That, the District Court erred in law and in fact for failing to uphold the decision of Mbagala Primary Court which ordered equal division of the matrimonial house.*

At the hearing, the appellant was offered legal aid by WLAC who prepared her submission, while the respondent enjoyed services of Mr. Massawe learned advocate. Parties argued this appeal by way of written submissions. Supporting the appeal, the appellant argued the two grounds of appeal together. It was clear to him that, the District court erred in law in giving 30% as her share in the matrimonial house. She added that, it is undisputed that properties acquired by spouses through their joint efforts are subject of distribution as it is under section 114(3) of Law of Marriage Act, [Cap 29 R.E 2019]

It was her submission that her contribution towards acquisition of the matrimonial assets was the same as the respondent. She went on submitting that if the first appellate court could have considered her contribution it could have arrived at the same finding as the trial court.

In the view of the appellant, principles which guide the court in determining shares of spouses in matrimonial properties are stipulated under Section 114(2) of the LMA. She then said, she had stated at the District Court the amount of her contribution in building the matrimonial house. She referred this court to page 28 and 29 of the trial court judgement. She added that, she was self-employed engaged in various small businesses where she obtained her income. She therefore argued that 30% was small compared to her contribution which she said she had proved as per section 111 and 112 of the Evidence Act [Cap 6 R.E 2019]. She also cited page 29 of the trial court judgement, and the case of **Eliester Philemon Lipangahela vs Daud Makuhuna**, Civil Appeal No. 139 of 2002, to cement her point that the District Court was wrong in awarding her 30%. She therefore prayed, this appeal be allowed with costs, quash and set aside the decision of the District court and uphold the primary court decision.

Contesting the appeal, the learned advocate argued that, the appellant in her submission was reproducing judgements of the lower courts instead of submitting on her grounds of appeal. He added that, what the appellant was awarded was equivalent to her contribution. Since it was the respondent who acquired and developed the said property. He referred this court to page 7 para 2 and page 13 of the primary court judgement.

It was his submission further that, the respondent paid for all that was necessary in building of the matrimonial house. He said, the appellant did not contribute anything. He referred this court to page 5 of the trial court judgement. Adding on the above, the respondent submitted that the appellant deserved 10% or 20%. According to him what she was awarded was bigger compared to her contribution. To support his argument, he cited the case of **Bibie Mauridi vs Mohamed Ibrahim** (1989) TLR 162. He therefore prayed for dismissal of this appeal with costs for lack of merit.

When rejoining, the appellant asked this court to uphold the decision of the trial court which awarded her 50% of the matrimonial house. She then submitted that, what she was awarded by the District court was not fair and it was based on wrong principles. She was vehement that, she contributed for development of the house as at page 28 and 29 of the trial court judgement.

Having gone through the submissions of the parties and the records of the lower courts, I will determine both grounds of appeal generally as argued. It should be noted that the crux of the two grounds is on the distribution of the matrimonial house at 30% and 70%. It has to be noted that, the house was a matrimonial property acquired by the parties during the subsistence of their marriage. This fact was never disputed by both parties at the trial. It was the trial court which ordered equal distribution of the house. The same decision was reversed by the District Court. The court reduced it to 30% and 70% to the appellant and the respondent respectively.

It is now a settled rule that, all properties jointly acquired by spouses or those which were acquired by one spouse but substantially developed during marriage are considered to be matrimonial properties subject of distribution. The same is found in the wording of section 114(1)(3) of the Law of Marriage Act. For ease of reference the same states as hereunder;

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 sale.

2) ...

(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.

The law stipulated conditions to be considered when distribution of the matrimonial properties to the spouses namely; **one;** the customs of the community to which parties belong, **two;** the extent of the contribution made by each party in money, property or work towards the acquiring of the assets, **three;** any debts owing by either party for their joint benefit and, **four;** the needs of the children of marriage as per section 114(2) of LMA.

In this appeal, the appellant testified that she contributed in building their matrimonial house. Her witness (Pw3) testified that he was paid by the appellant when he finished his work of plastering the house. It was unknown how much he was paid and the extent of the work. It was not in evidence as to the extent of work. The same was known to the appellant and her witness. It is my considered view that it was not proved that, the appellant contributed money in developing their house. The appellant testified that apart from domestic activities, she also engaged herself in small business of selling ice cream, tea and chapati. She testified that the income she got helped in maintaining her family. However, she did not tell the trial court how much she was earning from her business. I therefore agree with the fact that, the appellant being a house wife had so much to do to make sure the family peace and welfare is maintained. It goes without saying that, the same contributed to the acquisition of the matrimonial property.

It is settled that domestic work done by a house wife for family sustenance is to be considered of value in acquiring matrimonial properties. This was decided by the Court of Appeal in the case of **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32, and **Bibie Mauridi** (supra) that;

It is conceded that the duties performed by a wife to look after the house should be considered as her contribution towards the acquisition of matrimonial assets.

The question to be asked is, can domestic chores be valued or equated to 50% contribution in acquiring matrimonial property. The law is silent on this, however, in **Bibie Mauridi** (supra) this court had this to say;

*“...Among the factors to be considered in deciding how much parties should get from the matrimonial assets when the marriage is dissolved are the extent of the contribution by each party and debts owing as well as the customs of the community and needs of the infant children. There were no children to the marriage. **There was, however, clear evidence that the wife's contribution was by her performance of domestic duties. Under the circumstances, she could not get half of the matrimonial assets...**”*
[emphasis is added].

Since it was not in dispute that, the respondent bought land and provided for monies used during the whole process of building the house, it appears to me, that because the appellant also did other activities like small business on top of her domestic errands, her contribution cannot be underrated. I would rather hold that they relatively contributed nearly at the same footing.

It can be ruled out that apart from the contribution, which has been the main factor in allotting shares, there are customs of the parties, which is difficult to hold in the circumstances of the case. As far as evidence is concerned, there are not debts owing in respect of the house or the family. What therefore remains under consideration is the children of marriage.

There is an order for maintenance of the two children. The respondent has been directed to pay 100,000/= per month for their maintenance. In my considered view, the respondent deserves a little bigger share for he has a personal debt to pay, that is maintenance. As a matter of duty and responsibility it is in law and customs of this country that a man has a role of providing for the children.

For the foregoing reasons, I hold that equal distribution over the house was not fair to the respondent. The Temeke District court finding of 30% of the house to the appellant is founded. I dismiss this appeal for want of merit. Since the appeal arises from matrimonial proceedings, I make no order as to costs.

AK Rwizile
JUDGE
08.12.2020

Delivered in the presence of the appellant in person and Ms Agatha advocate for the respondent, this 8th day of December 2020.

AK Rwizile
JUDGE
08.12.2020


X

Signed by: A.K.R.W IZILE

