IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL No. 77 OF 2020

ALIKO THOMAS MWAKAMELE.....APPLICANT

VERSUS

DEVOTA SIMONI MGAJI..... .....RESPONDENT

(Appeal from the decision of the District Court of Ilala at Kinyerezi)

(Mpaze- Esq, RM.)

Dated 28th January, 2020

in

Matrimonial Appeal No. 12 of 2019

JUDGEMENT

13th October & 10th December 2020

AK Rwizile, J

Before marriage, the respondent lived in cohabitation with the appellant, until 2016, when they officially celebrated their civil marriage. The couple was living at Mtwara and their marriage was not blessed with a child. It was after one year, when their marriage started facing some matrimonial difficulties. In 2017 the appellant travelled to Dar es Salaam. He received a phone call from his neighbours asking him why he was leaving the place without a farewell notice to them.

He was surprised since he had left the respondent at home. When he went back home, he was greeted with a silent home. The respondent had left the premises with some house utensils and some stationary equipment. The respondent never came back. In 2019 the appellant appeared in Matrimonial Cause No. 22 of 2019 at Ukonga Primary Court. His claim was for a decree of divorce and division of the matrimonial assets. The case was heard, a divorce decree was issued and matrimonial properties were divided. The appellant was given the unfinished house, while the respondent was given all utensils allegedly, she left her matrimonial home with. The respondent was aggrieved by the ruling. She successfully appealed to the Ilala District Court. The District Court distributed the matrimonial property at 30% and 70% to the respondent and the appellant respectively. The same aggrieved the appellant who is now before this court appealing on the following grounds;

1. *That, the learned trial magistrate erred in law and fact by deciding the division of the matrimonial properties without considering the properties taken by the respondent.*
2. *That, the learned trial magistrate erred in law and fact by disregarding competent evidence adduced by the appellant*.

The appellant was represented by Mr. George learned advocate, while the respondent enjoyed services of Mr. Emmanuel learned advocate. This appeal was argued orally. In support of the appeal, Mr George submitted on the first ground that, the decision of the District Court was not reasoned. He clearly told this court that, the appellant proved that properties like beds and other things were proved taken by the respondent but the court did not consider such evidence.

It was his submission on the second ground that, the appellant had testified that, they never acquired status of a husband and wife before 2016. He added that, before 2016 the parties were just friends. He pointed out that, before marriage they bought a piece of land. The respondent, it was submitted was a witness when the same was being purchased. According to him, the owner of the land was the appellant. It was his assertion that, the house was not a matrimonial property. The respondent did not contribute anything instead, she squandered the properties.

He added further that, there was evidence that the parties had a presumption of marriage before they acquired a house. The appellant was of the prayer that this appeal be allowed, the decision of the trial court be restored, while the decision of the District Court be quashed and orders be set aside.

Contesting the appeal, Mr. Emmanuel for the respondent argued that, the appellant is challenging the decision of the trial magistrate. He said the same is not subject of appeal before this court. According to him, since the appellant never appealed against the decision of trial court, he is now time barred. He argued, the judgement of the District Court was clear as to why it distributed the matrimonial properties at 30% and 70%. He said, the court relied on the case of **Bi. Hawa Mohamed vs Ally Seif** [1983] TLR 32, because there was no evidence that the properties were misappropriated by the respondent.

Replying on the second ground, the learned advocate argued that, the record was clear on matrimonial properties to include one house, house utensils and stationaries. It was his submission further that, the appellant did not say the house was not a matrimonial property.

He said, he never challenged the same at the first appellate court. He referred this court to page 5 and 6 of the trial court judgement. He added that even the issue of contribution was not raised at the District court, he said there were no evidence to that effect. He therefore prayed for this appeal to be dismissed.

Mr George learned advocate re-joined by submitting that, the appeal is against the decision of the District Court. He said therefore that, the merits of the appeal be considered. He submitted further that, division of 30% and 70% was wrong since parties were not married at that time. He went on saying that, the properties were solely owned by the appellant. He therefore said division was unfair.

After going through the records of the courts below and mused the submissions of the learned counsel for the parties, I propose to determine all grounds of appeal together. It was argued by the appellant that, the house was his property. The respondent left with some house utensils which could be shared at 30% and 70% because they were matrimonial properties. It was testified by the appellant at the trial that he was told by his neighbour when the respondent was leaving with the properties. He mentioned those properties to include sofa set, gas cooker, beds, printers, photocopy machine, 700,000/= as per page 2 of primary court judgement.

The question to be determined is, was this fact proved at the trial. The appellant's first witness testified to have seen a vehicle (fuso) with a printer in it at the appellant's place. He did not testify to have seen other items mentioned being transported by the respondent. He did not testify to have seen as well, the respondent taking 700,000/=.

It is a settled rule that, whoever wants the court to give judgement on any legal right or liability, must prove all facts he/she asserts in court. This is the wording of section 110(1) of [Cap 6 RE 2019] which is state as here under;

> *Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

However, it is apparent on the records that the respondent had agreed to have taken some money to the tune of 160,000/= but she denied to have taken the alleged properties.

It was argued also that, the house was not matrimonial property, it solely belonged to the appellant, and so the same was unfairly divided. With respect, I share the different view, this is due to the fact that, it was undisputed that the plot was bought before the parties were married. It is in record that the piece of land was bought in March,2016, while the parties married in October,2016, as per exhibits 1 and 2 respectively. It is my considered view that, the house was built after they got married. There was no evidence proving otherwise. Pw4 testified to know when the house was built but he said he did not remember when the same was built.

It is in record that the parties had a stationary, which the respondent apart from performing her duties as a house wife, was also responsible for taking care of the stationary. It is a rule now settled that when dividing the matrimonial properties, the court should consider each party's contribution in acquiring the properties.

The court is bound to the dictates of section 114 of [Cap 29 RE 2019] which for easy reference it states;

> *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) In exercising the power conferred by subsection (1), the court shall have regard to –*
>
> *(a) the customs of the community to which the parties belong;*
>
> *(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
>
> *(c) any debts owing by either party which were contracted for their joint benefit; and*
>
> *(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.*
>
> *(3) For the purposes of this section, references to assets acquired during the marriage includes 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.*

This section was also considered in the case of **Bi Hawa Mohamed** (supra) where the Court of Appeal was of the view that, domestic chores done by the wife have to be considered as contribution upon acquiring matrimonial properties. It was the same case which the District Court based its findings. I must say, I agree with the District Court on the distribution for the following reasons, ***one***, it was not proved that the respondent had taken all those alleged properties and the sum of 700,000/=, ***two***, it was not in dispute that the house was built when the parties were already married. **Three**, there was no evidence that she was squandering the family income. Despite the fact that, the respondent had taken 160,000/=. This cannot be disregarded but also should not be used to take away her right in other properties including the house.

For the foregoing reasons, this appeal is dismissed. I make no order as to costs.

AK Rwizile
JUDGE
10.12.2020

Delivered in the presence of Mr. George for the appellant, the respondent is present in person

AK Rwizile
JUDGE
10.12.2020