IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MATRIMONIAL APPEAL NO. 1 OF 2020

(From Mpanda District Court Matr. Appeal No. 5 of 2019 Original Mpanda Urban Primary Court Matr. Case No. 47 of 2017)

PAULO S/O MASUKA..... APPELLANT

VERSUS

JULIANA D/O RUGASILA.....RESPONDENT

JUDGEMENT

16th September- 10th November 2020

MRANGO, J.

The parties herein are in stiff matrimonial battle against each other. The appellant, Paulo Masuka has brought this matrimonial appeal against the respondent after being aggrieved by the decision of the District Court of Mpanda in Matrimonial Appeal No. 5 of 2019 where the decision was partly in favour of the respondent.

Initially, the respondent petitioned for divorce, division for matrimonial properties and maintenance for the children at Mpanda Urban Primary Court (henceforth the trial court) in Matrimonial Cause No. 47 of 2017. After heard both parties, the trial court found the parties have no subsisting legal marriage (mere concubine), hence declined to grant a decree of divorce, however the trial court proceeded to order the division of the jointly acquired properties, that is a house and farm

to a tune of 70% for the appellant and 30% for the respondent to be realised after sale through public auction. The order for the custody of children was given to the appellant, all children being above seven years of age.

Aggrieved by such decision of the trial court, the appellant partly successfully appealed to the District Court of Mpanda (Hence forth the Appellate Court). The Appellate Court did not disturb the order of the trial court with regard to the division of a farm as well as the custody of the children, however It found that the respondent had no right to share with regard to the house for the reason that she did not contribute anything to its acquisition.

Dissatisfied with the outcome of the appeal, the appellant has lodged this appeal to this court with a petition of appeal containing three grounds which are reproduced hereunder;

1. That both the trial court and the appellate court erred in law and fact by ordering the farm on which the house is built and the same farm had been acquired by the appellant before he cohabited with the respondent.
2. That the appellant court erred in law and fact by holding that the farm in question is a Matrimonial asset acquired

with the parties' joint effort while in truth the appellant had acquired it before he got married to the respondent.

3. That the evidence adduced by the appellant key witness one Elias Manyole was curtailed by the trial court since part of his evidence is not in the record.

Having considered the appellant petition of appeal, reply to petition of appeal and the entire record of appeal the question to determine is whether the present appeal has merit.

Admittedly, one of the duty of the court of competent jurisdiction in matrimonial dispute after granting of a decree of separation or divorce is to order the division between the parties of any assets acquired by them during the marriage by their joint effort or to order the sale of any such asset and the division between the parties of the proceeds of sale. See **section 114 (1), (2) (3) of the Law of Marriage Act, Cap 29**.

However, the said section 114 which provides the legal base upon which matrimonial assets to be divided has limited the court to divide matrimonial assets. The law presupposes the existence of a valid marriage which must have been dissolved by a court of competent jurisdiction. There must be a decree of separation or divorce in the first

place. That is to say the division of matrimonial assets is done after the grant of the decree of separation or divorce.

Coming to this case, it is undisputed that the parties have lived together since 1995 without any valid marriage, that means they were mere concubine. If the court goes with the strict letters of the above cited provision of the law, it will handle down bad precedent and as well cause havoc to society. The observation was done by Mlacha, J in the case of this court of **Gladness Jackson Mujinja versus Sospeter Crispine Makene, HC Matrimonial Appeal No. 4 of 2014**, at Mwanza.

In the above cited case, confronted with similar situation like of this case, Mlacha, J was guided by substantial justice in ordering the division of jointly acquired assets to the concubine. The substantial justice relied upon by Hon Mlacha, J is as provided for under **article 107 A (1) (e) of the Constitution of the United Republic of Tanzania.**

If I go back to the grounds of appeal as contained in the petition of appeal, especially ground one and ground two it appears to this court that the main complaint by the appellant is that the trial court and the appellate court both erred in law and fact to consider the farm as a

matrimonial asset acquired together, thus wrongly subjected it to the division while in fact he strongly argued to have acquired it before he cohabited with the respondent.

My scrutiny of the trial court records show that the respondent testified that she and the appellant bought two acres of farm apart from other properties. However, the appellant strongly contested that piece of evidence. The appellant claimed to have bought a farm before living together with the respondent.

It is trite of the law that a party who alleges to have contributed towards the acquisition of matrimonial property the subject of division had a duty of proving by evidence that fact. The position was laid down in the case of **Regina d/o Pendo s/o Joseph (PC) Matrimonial Appeal No. 5 of 2012** where at page 8 the court (Makaramba J) had this to say;

> "The appellant therefore would have been benefited by the principle laid down by the Court of Appeal of Tanzania in the case of **Bi. Hawa Mohamed v. Ally Seif [1983] TLR 32**, if she had lead evidence establishing that the properties she claims to have a matrimonial interest were acquired during the subsistence of their marriage and that she contributed to their

acquisition. The appellant having alleged that she contributed towards the acquisition of matrimonial property the subject of division, had a duty of proving by evidence that fact, which duty she had failed to discharge. The appellant cannot therefore benefit of the principle laid down in the famous case of Bi. Hawa Mohamed..."

In line with the above position, the standard of proof in civil matters is on balance of probability. Looking at the testimony of the respondent at the trial court, the respondent did not prove to the requirement of the law in civil matter with regard to his jointly acquisition of the farm with the appellant. She ought to have proved by evidence put in mind the appellant had lived with more than two women before he met the respondent as the evidence on record show. Even the trial court finding that the respondent had a right of share to the farm without tangible evidence adduced to that effect is wrong with regard to the position of the law.

As regard the third complaint by the appellant, the argument was not raised at first appellate stage, thus may not be dealt at this stage of an appeal.

In the final analysis, this court found that the present appeal has merit, hence allowed with no order as to costs.

It is so ordered.

D. E. MRANGO

JUDGE

10.11.2020

Date	10.11.2020
Coram	Hon. D.E. Mrango – J.
Appellant	Both present in persons
Respondent	
B/C	Mr. A.K. Sichilima – SRMA

COURT: Judgment delivered today the 10th day of November, 2020 in presence both the parties in persons.

Right of appeal explained.

D.E. MRANGO

JUDGE

10.11.2020