

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

PC CIVIL APPEAL NO. 11 AND NO. 12 OF 2019  
(C/F Civil Appeal No. 05 of 2019 District Court of Moshi, Original Civil Case No. 16 of  
2019, Arusha Urban Primary Court)

**SALIMU JUMA KIVARA ..... APPELLANT**

**VERSUS**

**MWANAIKI JUMANNE MKWIZU ..... RESPONDENT**

*Date of last order 02/12/2019*

*Date of the ruling 23/03/2020*

**JUDGMENT**

**MKAPA, J:**

While composing this judgment, it came into my attention that this is a cross appeal against Civil Appeal No. 05 of 2017 (P.S. Massati, RM) delivered on 27/05/2019 by Moshi District Court (first appellate court). In PC Civil Appeal No. 12 of 2019 the respondent herein is the one who appealed against the same judgment. Both cases emanated from Civil Case No. 16 of 2019, Moshi Urban Primary Court (the trial court). In order to keep the record in a proper perspective, it seems to me justice demands

that the judgment be composed jointly as the main contentious issue in both appeals is the same namely, distribution of assets.

A brief history of the matter is that, the respondent was once married, but became a widow when his husband the late Juma Hamisi Msangi died in 2000. She was then re-married to the appellant under Islamic marriage in 2002. The couple wablessed with one baby girl called Marium. In 2007 their marriage broke down leading to a divorce which was granted before the Mwanga Primary Court in 'Shauri la Talaka No. 6 of 2007' in which the respondent was awarded custody of their child. Thereafter, matrimonial properties which they acquired during the subsistence of their marriage were undisputedly distributed.

From 2013 to 2018, they decided to cohabit as concubines. It is alleged that in 2014 they entered into a business partnership which enabled them to acquire a number of properties such as shop situated at Mbuyuni Moshi, house utensils, motor vehicle with registration No. 334 CVS, Make Toyota Noah and a house located at Majengo area Moshi. In 2018 when they parted ways, they resorted to court action regarding division of assets acquired during their cohabitation. The trial court ordered equal distribution of the shop and house utensils while the house and

motor vehicle were awarded to the respondent. The first appellate court uphold the decision except distribution of the motor vehicle, where it ordered equal distribution of the same. Aggrieved, the appellant preferred this appeal with only one ground namely unfair distribution of the house allegedly jointly acquired. In her cross appeal the respondent mainly challenged the division of a motor vehicle to the effect that the decision was made without considering the authenticity of the receipt in particular the source of money used to acquire the same.

In both appeals parties argued by filing written submissions. The appellant appeared in person unrepresented while the respondent was represented by Mr. Omary Gyunda, learned advocate.

Submitting in support of the appeal the appellant submitted that, when he decided to live together with the respondent for the second time, they started a joint business, a shop situated at Soko la Kati in Moshi. Their business was successful and they jointly managed to buy a house at Majengo area in Moshi and a motor vehicle Make Toyota Noah with registration No. T 334 CSV. The appellant contended that, he was the one who ordered and supervised the process of importing the said motor vehicle. The

appellant went on explaining that, he became sick and admitted in hospital for about seven months (24/01/2017 to 01/07/2017). A year after he discovered that the respondent had sold their motor vehicle and was trying to alter the sale agreement of their house, and the appellant referred the matter before primary court seeking for fair distribution of the properties jointly acquired as well as reporting the alleged forgery to the police for further investigation.

The appellant submitted further that, he was dissatisfied with the trial court's decision of granting the house and motor vehicle to the respondent while the same were jointly acquired. Appellant went on explaining that, the first appellate court held that parties lived jointly under presumption of marriage but erred in awarding the house to the respondent alone. Supporting his argument he cited the case of **Adriano Gerdam Kipalile V Ester Ignas Luambano** Civil Appeal No. 95 of 2011 CAT at Zanzibar. He finally prayed this court to allow the appeal and award the appellant the house since the respondent had already confiscated the motor vehicle and all the households.

Contesting the appeal, as well as submitting for respondent's cross appeal Mr. Gyunda argued that, in their previous marriage

and also in the present matter it has always been the appellant who initiated the distribution of assets with ill intention of benefiting from the respondent's effort as a widow. Mr. Gyunda relied on the provisions of **section 60 of the Law of Marriage Act, Cap 29 R.E 2002** (Law of Marriage Act) which provides;

*"Where during the subsistence of a marriage, any property is acquired-*

*(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;"*

It was Mr. Gyunda's further argument that, the appellant has failed to prove his contribution to the acquired house at Majengo. He further refuted appellant's submission in chief to the effect that he was a buyer as well as a witness to the sale agreement which raises doubts. He went on explaining that, for the shop business it was the respondent who contributed the capital amounting thirteen million Shillings (13,000,000/=) which is almost impossible for the same shop to realize a profit of fifteen million Shillings (15,000,000/=) after just two months and the

same amount be used to acquire a house. As the appellant contributed nothing he has nothing to claim.

Regarding the motor vehicle, Mr. Gyunda avered that, the same was purchased even before the parties entered into a joint business in 01/04/2014 and the respondent was the one who facilitated the appellant just to transport the motor vehicle from Dar es Salaam to Moshi. It was Mr. Gyunda's contention that, he contributed nothing and the first appellate court erred in awarding equal distribution to the said motor vehicle contrary to section 114 (2) (b) of Law of Marriage Act hence cannot be awarded equal share of the same.

Mr Gyunda further submitted that, the respondent being a business woman had her own house utensils and furniture when she started cohabiting with the appellant hence the division of house utensils has to be reversed by this court, and further that, the appellant has failed to prove the extent of his contribution to the house utensils worth to be awarded half of the same. To support his argument he cited the case of **Africarries V Millenium Logistics Ltd**, Commercial Case No. 131/2017 HC Commercial Division at Dar es Salaam (unreported) when the court held inter alia that;

*"...whoever desires any court to give judgment as to any legal right or liability dependent of existence of facts ... must prove that those facts exists"*

He finally prayed that, appellant's appeal be dismissed with costs and respondent's rights be considered as prayed.

Having considered either party submission and lower courts' records, the only issue for determination is whether the distribution of assets acquired during their five (5) years of cohabitation namely, a shop located at Soko la Kati, Moshi a house located at Majengo, Moshi, a motor vehicle Make Toyota Noah T.334 CVC, and house utensils and furniture were equitably distributed.

It is noteworthy pointing out that, this is a second appeal in which there are concurrent findings on some of the facts by the two lower courts on the said assets. The trial court ordered equal division of the shop and house utensils but granted the respondent a house and motor vehicle while the first appellate court upheld the decision but ordered equal division of the motor vehicle. Thus, in determining this appeal, the court shall take into consideration the principle set out in **Amratlal Damodar and**

**Another V A.H. Jariwalla** [1980] T.L.R. 31 where it was held that;

*"Where there are concurrent findings of the facts by the two courts, the court of appeal as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

At this juncture, I found it paramount to go through legal requirement under the Law of Marriage Act. **First**, it is undisputed that the parties were living under the presumption of marriage because all the requirements under section 160(1) of the Law of Marriage Act were met. That, although they did not live together under one roof from 2013 to 2018 as husband and wife, but they had an on and off relationship and lived together sometime between 2014 and 2018 when they officially parted ways. This is evident by testimony of both parties and their witnesses. Thus, although the trial court did not explicitly exhaust this fact, the first appellate court had no reason to fault the trial court's decision.

**Second**, since it is sufficiently established that the parties lived under the presumption of marriage, the court of law is duty bound to assist the parties in the division of properties obtained by their joint efforts during their cohabitation. I find it important to point out that in order to fulfil the obligation stipulated under section 114 (2) (b) of the Law of Marriage Act, there had to be sufficient evidence of each party's contribution to the alleged matrimonial assets subject to division. My analysis will therefore base on this fact, efforts of each party's contribution on the properties jointly acquired during cohabitation.

Now turning to the appeal at hand, it is undisputed that, when they started to cohabit for the second time, appellant and respondent entered into a business partnership agreement dated 14/04/2014 with the aim of conducting business jointly. They opened a shop called SAMWA acronym for Salim and Mwanaidi with a capital of Tshs. 13,000,000/= contributed by the respondent. Thus the shop was a joint effort of both parties and both courts accordingly ordered equal division of the same. This court leaves the shop division order undisturbed.

The same applies to the house utensils, furniture and clothes since when the respondent decided to leave the appellant she left with everything leaving the house empty. At the trial court

when asked on the issue, she conceded to have taken the house utensils, appellant's clothes and furniture and she was ready for the division. She however raised a claim in this appeal that the order for division has to be reversed as it came into her mind that it was not fair. However, when cross-examined regarding at page 23 of the typed proceedings respondent had this to say;

*"Vyombo nilivichukua nivipeleke nyumbani kwake Mwanga ambako yupo mke wake ... vyombo nimevihifadhi nyumbani kwangu ... niliona nanyanyasika kwenye nyumba yangu ndio maana niliona niondoke nifunge niwapelekee vitu vyao kwenye nyumba yao"*

From the foregoing it is evidence that the respondent possesses the said house utensils and furniture to date thus she cannot appeal against her own admission. The principle of estoppel bars her to deny facts which she voluntarily admitted during the trial. The order regarding equal division of house utensils and furniture is therefore upheld.

As to the motor vehicle make Toyota Noah with registration No. T 334 CVS, the appellant claimed to have purchased the same from the joint business profit hence deserves equal share, while

the respondent refuted to the effect that, she did acquire the same before the business partnership. Supporting her argument she explained that even the registration card is in her name and the role of the appellant was to transport the motor vehicle from Dar es Salaam to Moshi. Exhibit P2 admitted by the trial court revealed that the said motor vehicle was paid for by the appellant during 13 & 14/02/2014 respectively before their partnership started on 01/04/2014. Thus it is sufficiently established that the motor vehicle was not acquired from the profit accrued from their joint business. Although the authenticity of the said receipts is questionable, the fact that the appellant admitted to have paid for the same on the material dates, supports respondent's testimony to the effect that she just sent the appellant to bring the vehicle from Dar es Salaam to Moshi.

As it is a requirement in civil cases to prove the case on the balance of probability, I find that respondent's argument regarding the motor vehicle is watertight than that of the appellant. I therefore quash and set aside first appellate court's decision regarding motor vehicle and uphold the trial court's decision on the same.

Regarding the house located at Majengo, at the trial court, the respondent testified to have bought a house subject to division

by using the money obtained from her late husband's probate proceeds. She proved through a sale agreement and the bank account statement which was tendered and admitted as exhibit D2 showing the day she withdrew the money tallies with the day she bought the house, while the appellant disputed this fact by claiming that, the said house is a product of their joint efforts. Also claimed that, the sale agreement was forged. However, I am unable to agree with his claims for the following reasons;

**One**, As the old legal adage says; "he who comes to equity must come with clean hands". It is on record that the partnership agreement was entered on 01/04/2014 with a capital of Shillings 13,000,000/= and the house was bought on 13/06/2014 for Shillings 15,000,000/= just two months after their business kick off. There was no proof tendered at the trial court by the appellant that their business had generated such amount of profit over such a short period of time that would have enabled them to purchase the house subject to division. **Two**, the appellant claimed that the sale agreement was forged yet he failed to prove his allegations. The Court of Appeal of Tanzania in the case of **Omari Yusufu V. Rahma Ahmed Abdulkadr**, [1987] TLR 169 (CA) held that;

*"When the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on higher degree of probability than that which is required in ordinary civil cases"*

Also in the case of **Hidaya Ilanga V. Manyama Manyoka** [1961] EA 705, it was held that;

*"...for the proposition that in all cases where an allegation is made in civil cases akin to a crime such as fraud, proof must be more than mere balance of probabilities"*

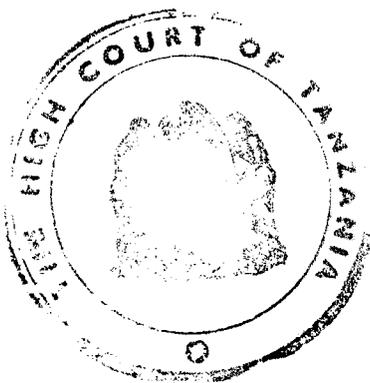
Subjecting the above mentioned legal position to the claim of forgery raised by the appellant, the onus of proving the same is much higher than it should be in civil cases. It is therefore my considered view that, a mere allegation by the appellant to the effect that the sale agreement was forged without proving the same is a misconception which this court cannot rely upon.

Conclusively, the appellant claimed to have equal share of the assets just because the same were acquired when they were cohabiting. However, section 114 (2) (b) of Law of Marriage Act as affirmed in the case of **Bihawa Mohamed V Ally Seif** (1983) TLR 32 explicitly provides that, the extent of distribution

determines the amount of division. In these two properties, the appellant has failed to prove his contribution in acquiring them. It is also noteworthy that, a spouse can acquire properties separately as per section 60 (1) of Law of Marriage Act even when in marriage or cohabitation. In the circumstances I am of the considered view that the respondent had obtained the motor vehicle and a house separately from business partnership with the appellant as the same were obtained from the proceeds of her late husband's probate to wit three houses, two shops and Tsh 5,000,000/= cash.

For the reasons discussed the appeal is partly allowed to the extent explained above. Due to the nature of the case I give no order as to costs.

Dated and Delivered at Moshi this 23<sup>rd</sup> March 2020.



*S.B. Mkapa*  
**S.B. MKAPA**

**Judge**

**23/03/2020**