

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

**TABORA DISTRICT REGISTRY**

**AT TABORA**

**PC. CIVIL APPEAL NO. 3 OF 2020**

*(Arising from Tabora District Court in Matrimonial Appeal NO. 8 of 2019  
and Original Matrimonial Cause No. 6 of 2019 of Ilolangulu Primary  
Court)*

**ALLY ATHMANI -----APPELLANT**

**VERSUS**

**MAONEZI MAHAMUDU ----- RESPONDENT**

**JUDGEMENT**

*11/11 & 14/12/2020*

**BAHATI, J.**

This is the second appeal whereby the appellant **ALLY ATHMANI** is challenging the decision of the District Court of Tabora which upheld the decision made by Ilolangulu Primary Court.

The background of the matter as appearing in the record of the lower courts is to the effect that, the appellant, **ALLY ATHMANI** and the respondent **MAONEZI MAHAMUDU** were husband and wife contracted a marriage under Islamic writs.

In the year 2017, their marriage was hit by a deadly storm then the respondent approached the Primary Court seeking dissolution.

After a full hearing of the matter the trial court granted the parties decree of divorce sought by the respondent in Matrimonial Cause No. 20 of 2018 and later in a separate Matrimonial application No. 06 of 2019 the same court ordered the properties acquired during the subsistence of their marriage be divided equally save for small home utensils which were divided in courts wisdom.

Aggrieved with the decision of the Primary Court the appellant appealed to the District Court of Tabora vide Matrimonial Appeal No. 8 of 2019, the court upheld the decision of the trial Court. Still aggrieved the appellant lodged this second appeal basing on the following grounds:-

- 1. That, the Learned Magistrate erred in law in interpreting section 114 of the law of Marriage Act without considering the contribution and efforts done by the Appellant in their Matrimonial assets.*
- 2. That, the learned Magistrate erred in Law and facts when did not consider that the respondent did not refer the matrimonial dispute to the conciliation board and without a certificate from conciliation board.*
- 3. That, the Learned Magistrate erred in law and facts to distribute matrimonial assets without proof that the marriage broke down beyond repair.*

4. *That, the learned Magistrate erred in law and facts to distribute matrimonial assets for relying on divorce which issued from the different case that is Matrimonial Cause No.20/2018*
5. *That, the Learned Magistrate erred in law in holding that there were no conclusive evidence and documentary evidence that the Appellant managed to build the house.*
6. *That, the learned Magistrate erred in law and facts when it deliberately ignored the evidence adduced by the appellant from the trial Court.*
7. *That the learned Magistrate erred in law in holding that the respondent evidence had proved the case on the balance of probabilities.*

When the appeal was called on for hearing both parties appeared in person unrepresented. In support of his appeal, the appellant submitted that he is a driver for almost seven years and also he is a peasant growing cash crops such as tobacco, maize. In 2014 he started living with the respondent, at the time he had a TV, unfinished house, house utensils, and they are blessed with three issues during their marriage who are all under the age of majority. He added that he has already written a will regarding his children, however the trial magistrate erred in dividing matrimonial properties at equal ration without regarding that he lives with all issues.

As to the second ground of appeal, the appellant submitted that he was not given a copy of a divorce certificate which is his right.

On the third and fourth grounds, the appellant submitted that the District Court erred in law on the division of matrimonial assets without proof that marriage has broken down irreparably. Besides the magistrate never considered that he built the house by himself but ended up dividing the same to equal shares.

The Appellant further contended that the trial magistrate requested them to bring witnesses but he did not consider the evidence of one Mashaka and Mahela. He prayed to this court to allow the appeal.

In reply, the respondent submitted that the trial Court was correct in the division of the properties since all the properties were well identified by Ward Executive Officer and the appellant confirmed that all the properties were acquired collectively.

With regard to custody of children, the respondent submitted that they are blessed with three issues aged 4 years, 2 years and three months old. She went on to state that the appellant was ordered by the Social Welfare Office to pay the respondent TZS 20,000 every month for the maintenance of the infant child but the appellant never paid the said amount until when the respondent decided to take the infant child to the appellant.

The respondent concluded to submit that, when the appellant married her, he had no land, no children. She contributed to the properties when she got married in 2014.

Having heard both parties, before discussing the grounds of appeal one by one, I find it pertinent that the following issues must be in the minds of the parties before I conclude.

After going through the records of the lower courts and carefully considered what is stated in the grounds of appeal filed in this court by the appellant and the rival submissions made to the court by the parties the court has noted that there are two case files both from Ilolangulu Primary Court. The first case was an application for divorce and the second case is for the division of matrimonial assets; this appeal is in respect of the second case which is on the division of matrimonial assets therefore ground 2 which on reference to the marriage conciliation board is irrelevant to this appeal, its proper forum could be an appeal against Matrimonial application No. 20 of 2018, not this one.

The law governing the division of matrimonial assets after the marriage being dissolved is section 114 (10 to (3) of the Law of Marriage Act, Cap 29 [R.E 2019]. This provision of the law gives the court power to order division of any asset acquired by the parties

during the marriage by their joint efforts and set out the factors which the court is required to take into consideration when exercising the said powers, it provides 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 assets and the division between the parties of the proceeds of the sale.”*

The trial court magistrate ruled out that, the parties acquired the properties in joint efforts that is why he ended up dividing the same into equal shares. I had ample time to go through the evidence adduced in the trial court, it is difficult to say who acquired what as the evidence shows that, the parties worked together in the acquisition of the assets. In any ordinary African family, anything acquired by the family members is placed into the hands of the head of the family (mostly fathers) and that property acquired is termed to be of a father.

When it comes to deciding the cases of this kind, the wisdom of the court is paramount as failure to deploy the principle of this Court in **Bi Hawa Mohamed's case** mostly women will go empty handed. Let it be known that contribution of a woman in the acquisition of matrimonial assets does not necessarily require contributing material

things, the efforts by a woman in raising the family in terms of cooking, raising, and couching younger ones amount to contribute to the acquisition of whatever is called a matrimonial asset. Having said so I find that the respondent deserves a share from the assets of her marriage, this also disposes of grounds 5, 6 and 7 as they are all based on the extent of contribution.

On the third ground that, the magistrate erred in law and fact to distribute matrimonial assets without proof that marriage broke down beyond repair, the issues were disposed to its clarity by the first appellate court, I quote a paragraph in a judgment that disposed of the matter:-

*"... I have come across a relevant copy of the divorce certificate bearing the title J/pcf/34exhibit "L" issued on 11.02.2019 by Hon. A. Mtenga in the Matrimonial cause No. 20/2018 at Ilolangulu primary court."*

The appellant's assertion that the court divided matrimonial assets without the existence of a decree of divorce is not true the same was disposed of by the District Court to its fullest.

As to the fourth ground, it is a well-known practice of this court that when the court grants divorce without an order for division of matrimonial assets, concerned parties may at any time apply for division and that will be on a separate case file and the case may be

heard before another magistrate other than the one who heard divorce application. It is on record that the case in which divorce was granted ended on 24/12/2012 hence a second application for division of matrimonial properties on 19/07/2019.

The question that the appellant's assertions are based on is how much share each party is entitled in the house. The court has found as it has been satisfied that the house was acquired in joint efforts by both appellant and respondent contributed to its acquisition.

Having heard both parties, it is my finding that the appellant deserved more share in the house than the respondent as he is living with the all issues.

In the light of all that I have stated above, the court has found that both the trial Court in dividing the assets into equal shares and the first appellate court erred in upholding the same, as it disregarded the fact that, the respondent is no longer living with any of the three children, they all live with the appellant, for that fact alone makes the appellant eligible for an extra share.

Having said so I find that some of the grounds of appeal filed by the appellant have merit and others have no merit. In this circumstance, the appeal is hereby partly allowed and the orders of the two courts below regarding division of matrimonial house are hereby set aside. This Court orders the appellant to get 60% of the value of the



matrimonial house and the respondent to get 40% of the value of the same. The division of the rest of the matrimonial properties is left as divided by the trial court.

It is so ordered.



**A.A BAHATI**

**JUDGE**

**15/12/2020**

Judgment delivered under my hand and seal of the court in the chamber, this 15<sup>th</sup> day December, 2020 in the presence of both parties.



**A. A. BAHATI**

**JUDGE**

**15/12/2020**

The right of appeal is explained.



**A. A. BAHATI**

**JUDGE**

**15/12/2020**