

IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MATRIMONIAL APPEAL NO. 3 OF 2020

(Arising from decision of Matrimonial cause No. 13 of 2018 in the District Court of Dodoma at Dodoma)

SALIMA ALLY OMARYAPPELLANT

VERSUS

TAJI BAKARIRESPONDENT

25/11/2020 & 30/11/2020

JUDGMENT

MASAJU, J

The Appellant, Salima Ally Omary Petitioned for divorce and distribution of Matrimonial properties between herself and the Respondent, Taji Bakari in the District Court for Dodoma at Dodoma. Divorce was granted and matrimonial properties distributed accordingly. Aggrieved with the distribution of matrimonial properties, the Appellant has come to the Court by way of an Appeal. The Appellant's Petition of Appeal is made up of three (3) grounds of appeal.

When the appeal was heard in the Court on the 22nd day of October, 2020 both parties were represented. The Appellant was represented by

Ally Nkhangaa, the learned counsel while the Respondent was in service of Mr. Emmanuel Bwire, learned counsel.

Submitting in support of the appeal, the Appellant prayed to drop 3rd ground of appeal and maintained the 1st and 2nd grounds of appeal accordingly. The Appellant went on submitting that the parties were married for 28 years with three issues thereof. That, the properties acquired during subsistence of their marriage included houses on Plot No. 49B Tambuka Reli, Dodoma City and Plot No. 30 Block "J" Ipagala South, two vehicles, Toyota Mark II Registration No. T. 792 AJR and Mazda Registration No. T 310 BQZ and House hold wares.

That, during the said period the Appellant was partly an employee and partly house wife. Her matrimonial domestic service was her contribution to the acquisition of the said property as per section 114 of the Law of Marriage Act, [Cap 29] and **Bi Hawa Mohamed V. Ally Seifu [1983] TLR 32 and Charles Manoo Kasare and Another V. Apolina Manoo Kasare [2003] TLR 427.** That, the trial Court erred in law and fact by holding that the Appellant did not prove her contribution to the properties especially on houses.

The Appellant submitted on the 2nd ground of appeal that, the trial Court erred in law and fact by deciding that the Appellant be given one motorvehicle (Mazda) and household wares only. That, the decision, contravenes section 114 (2) (b) of the Law of Marriage Act, [Cap 29] on reflection of equality of division.

The Appellant finalized her submissions by arguing that she deserves one of the two houses. The Appellant prayed the Court to allow the appeal with costs.

On his part, the Respondent contested the appeal by submitting that, the parties had a polygamous marriage. That, the Respondent's first wife was one Fatuma Mziwanda from the 28th day of August, 1968 up to 2018 when she passed away still married to the Respondent. That, their marriage was blessed with 4 issues. That being the case, the late Fatuma Mziwanda also had a contribution on the acquisition of the said matrimonial properties.

That, the houses on Plot No. 30 Block 'J' Ipagala South, there is evidence that the Plot was bought by the Respondent and his deceased wife on the 1st day of July, 1989, the construction thereof beginning immediately and completed in January, 1990 whilst the Appellant married the Respondent on the 30th day of December, 1990 when the house had been built.

On the 2nd ground of appeal, the Respondent submitted that the Respondent was a Railway employee since 1967 and living on the Railway's house on Plot No. 49 B Tambukareli, Dodoma. Then, the Respondent bought the said house by loan serviced through his monthly salary up to 2005 when the purchase price was fully paid.

The Respondent further submitted that, the trial Court considered section 114 of the Law of Marriage Act, [Cap 89] and **Limbu Ntalima V.**

Esther Kaoande (HC) PC Matrimonial Appeal No. 3 of 2019, Shinyanga Registry (Unreported) at Page 10 (the extent of the parties contribution on the acquisition of the matrimonial property). The Respondent also cited the case of **Alfred Kinunda V. Maria Kumburu (HC) Matrimonial Appeal No. 2 of 2019, Songea Registry (Unreported)** at page 7. The Respondent prayed the Court to dismiss the appeal for want of merit.

In Rejoinder, the Appellant maintained the submissions in chief and added that, it is true that the Respondent was also married to Fatuma Mziwanda but the existence of the said marriage does not do away with the Appellant's contribution to the matrimonial property.

The Appellant prayed the Court to allow the appeal and order fair distribution of the matrimonial property accordingly. That is what was shared by the parties in the Court.

There is no dispute that the Appellant got married to the Respondent on the 30th day of December, 1990. And that, their marriage lasted up to November, 2019 when the trial Court granted divorce to the parties, thus 28 years of marriage. The Respondent had been married to one, Fatuma Mziwanda (late) since 1968, meaning the parties had a polygamous marriage according to Islamic rites. The Appellant alleged in the trial Court to have acquired two plots with the Respondent, one with two houses on it, that is Plot No. 30 Block J, Ipagala South and one with one house, Plot No. 47 B Tambukareli. That, they also acquired two cars jointly and household wares.

The Respondent alleged to have acquired Plot No. 30 Block J, in 1989 with the first wife prior to his marriage with the Appellant. That, the Appellant did not contribute in any how on construction of the two house on the Plot. That, the houses were completed in February, 1990. The Respondent also alleged plot No. 47 "B" Tambukareli to be his personal property since he bought it from his employer, TRC.

The record of the trial Court does not show that, the parties' marriage was celebrated prior to the acquiring of the Plot No. 3 Block "J" Ipagala South. The Appellant's allegations that she assisted in watering bricks and supervision of construction cannot stand since there was no evidence that the parties lived together prior to their contracting the marriage. The Appellant herself alleged to have been living at Airport Dodoma with her maternal aunt from 1990 when she was married to the year 1992 when she vacated to Railway quarters to live with the Respondent. Therefore, it is very evident that the Appellant did not contribute on the property in Plot No. 3 Block "J" Ipagala South since she was not yet married when the property was acquired.

Coming to Plot No. 47 B Tambukareli, the property was bought through loan advanced to the Respondent in 2004. The house had one room and a sitting room. There is no dispute that the house was later extended to six (6) rooms during the subsistence of the parties marriage. The fact that the house was bought by the Respondent from the loan serviced through his monthly salary cannot deprive the Appellant's right over the property since the property was bought during their marriage, the

parties were living in the same house and the house was later extended to six (6) rooms. The Appellant who was also an employee had her contribution in maintaining the family as well as her contribution in doing domestic chores, raising the three issues and taking care of her then husband, the Respondent. All that being part of her contribution on the property. The Appellant's work must be regarded joint effort and contribution in acquisition of the said matrimonial property as so provided by section 114 (1) (2) (b) of the Law of Marriage Act, [Cap 89] and pursuant to **Bi Hawa Mohamed V Silly Seifu [1983] TLR 32**. After all, the Respondent declared his son with the Appellant, Bakari Taji as one of his next of kin in the Sale Agreement regarding the said land.

The contractual prohibition to the Respondent to dispose the property he bought from the Employer pending the expiry of 25 years ever since he bought it does not affect the statutory interest or right of ownership, if any, by the spouse in the said landed property pursuant to the Law of Marriage Act, [Cap 29] and the Land Act, [Cap 113 R.E 2019] or the Probate and Administration of Estate Act, [Cap 352] etc. provided that the said spouse or beneficiary of the estate shall maintain the contractual obligation not to dispose the landed property to a third party pending the expiry of the contractual twenty five (25) years term.

That said, the appeal is hereby allowed. The House No. 49B, Tambukareli, Dodoma is therefore hereby distributed to the Appellant in addition to the motor vehicle with Registration No. T 310 BQZ Mazda and

household wares. The parties shall bear their own costs accordingly.




GEORGE M. MASAJU

JUDGE

30/11/2020

