

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC CIVIL APPEAL NO. 73 OF 2020

*(Originating from the Civil Appeal No. 94/2019 of Kinondoni District Court
originating from Kinondoni Primary Court Matrimonial Cause No. 76/2019)*

**FATMA SHOKAT MUSTAPHA.....APPELLANT
VERSUS
IMRAN SAVIO ABDULRASAL..... RESPONDENT**

Date of last Order: 9/10/2020

Date of Ruling: 4/12/2020

J U D G E M E N T

MGONYA, J.

Aggrieved by the decision of **Kinondoni District Court** at Kinondoni in **Civil Appeal No. 94 of 2019**, the Appellant filed an appeal before this Honorable Court with four (4) grounds of appeal against the decision of Kinondoni District Court, as herein below:

- 1. That, the District Court erred in law and in fact for ordering the Appellant to get 30% as her share of the matrimonial house located at Mbagala, Mbagala Chamanzi area, Temeke District in Dar es Salaam a farm area in Dar es Salaam;***

- 2. That, the District Court erred in law and in fact for failing to uphold the decision of Kinondoni Primary Court which ordered the Appellant to get 55% share of the matrimonial house at Mbagala Chamanzi, 30% share of a farm of six acres located Bagamoyo area in Pwani Region and decoration business located at Chang'ombe area in Temeke District in Dar es Salaam Region;***
- 3. That, the District Court erred in law and in fact for stating that the Appellant was just a housewife without considering that she was self-employed engaging various businesses named beauty salon, make up studio and boutique during the subsistence of the marriage;***
- 4. That, the District Court erred in law and in fact for failing to consider that the Appellant and the Respondent were doing a joint business of selling video cameras and studio production equipment's during the subsistence of marriage;***

When the matter came for hearing, the Appeal was ordered to be disposed by way of written submissions as both parties were representing themselves.

In the Appellant's written submission, the Appellant avers that the **1st**, **2nd** and **3rd** grounds will be jointly submitted upon. Going through the Appellant's submission strongly submitted on the common savings between the spouses and that the house the Respondent claims to have built while already separated from her is a matrimonial asset for it was the common savings of the spouse that were used to build the house and therefore the same was liable for division.

Further, it is the Appellant's submission that the common savings that were made by the parties was for the purpose of constructing a house and that this fact is not a fabricated.

In line of this, the Appellant referred this court to pages **3** and **4** of the Trial Courts proceedings. And that it was the Respondent who was the custodian of such savings and does not state where the savings had gone.

Further, the Appellant asserted that she is an employee who derived all her salaries to support the family's welfare for four years when the Respondent was on studies abroad and that the Appellant had solicited with her parents to afford them with accommodation at that time. This contribution ought to have been too huge for the court to have disregarded it as part of the Appellant's contribution. Further, that apart from the

common savings the Court should have considered her contribution of taking care the family before and after construction of the house.

Concluding her submission, the Appellant prayed that this Court declares the decision of the Kinondoni District Court in Civil Appeal No. 94 of 2019 be quashed and set aside particularly on division of the matrimonial assets jointly acquired during the subsistence of the marriage. Further, that the court uphold the Judgment of Kinondoni Primary Court on Matrimonial Cause No. 76 of 2019.

In reply, the Respondent stated that the Kinondoni Appellate Courts did not error in holding that the Appellant is entitled to the 30% of the matrimonial properties as well stated in its appellate judgment.

In further submission the Respondent submitted that at the time of constructing the house, the Appellant had no any employment and he was the one who was a bread winner and also he supported the Appellant by establishing business of which he fully supported with the capital. It is from the above and other reasons of which don't see the need to reproduce the Respondent prayed the court to dismiss the Appeal with costs.

I have carefully considered the grounds and submission of both parties and lower courts records. I prefer to consolidate the grounds of appeal since the same are mainly based on contribution and division of matrimonial properties.

The division of matrimonial properties being a crucial aspect in Matrimonial Causes, invited me to go through the records of the trial Court and first Appellate Court to ascertain on the bases of the decision by both Courts to have arrived at their decisions in respect of matrimonial properties in this case.

It was the first appellate Court's decision that the division of matrimonial properties at the trial court was not reasonable as the Appellant herein was not the bread winner, hence awarding her the 55% of matrimonial house was irrational. In the end result, it was the appellate court decision that the matrimonial properties in terms of matrimonial house at Chamazi, six acres of farm at Bagamoyo and decoration business be valued and the Appellant herein be awarded **30%** of the total value.

It is from the said decision, the Appellant's concern is that the appellate court erred since the Appellant had an equal contribution towards the said matrimonial assets.

In determining this fact, as to the division of matrimonial property, I am aware of the law which is in control of this fragile issue of division of matrimonial property. ***Section 114 (1) of the Law of Marriage Act Cap 29 [R.E. 2002] provides:***

"...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".

It is the requirement of the law that the matrimonial properties acquired in a marriage by joint efforts of the Spouses is by law directed to be **divided between the parties of any assets acquired by them during the marriage by joint efforts.**

In determining this Appeal, I had privilege to go through the entire trial court decision and the decision of the appellate court. In the proceedings, it is in the record of the court and it came to my knowledge that, at the time the parties got married, the Appellant had just finished school as she had no any employment apart from being the house wife. However, further

the Respondent assisted the Appellant to open a business of which was equally sponsored by the Respondent herein.

Further, it came to my knowledge that the Appellant in 2016 decided to move from the matrimonial house as a result, the Respondent decided to close the said business as he was the one sponsoring the same. I have also noted from the Appellant's submission in this appeal that she claimed to have several businesses such as hair salon, boutique and makeup studio to justify her contribution to the matrimonial assets. I have to say that, the said allegation has emerged for the first time in this appeal and the same was not disclosed in the two lower courts. In that event, I cannot hesitate stating that at this time of appeal, the said assertion cannot be taken to board to justify the Appellant's contribution.

As the law commands, it is the duty of a party alleging a fact to prove that the fact exists. This is provided for under **section 110 (1) of the Evidence Act, Cap. 6 [R.E. 2002]**. In the event therefore, the Appellant was vested with this duty, of which from the records I find nowhere these businesses were mentioned to support her contribution. To me it appears that this is an afterthought which cannot be entertained as the same was not pleaded before.

In the case of ***BIBIE MAULID V. MOHAMED IBRAHIM*** [1989] TLR 162 it was stated that:

"Performance of domestic duties amounts to contribution towards such acquisition but not necessarily 50%. The amount to be awarded will normally depend on the extent of contribution made by each party. There must be evidence to show the extent of contribution made by each party towards the acquisition of the assets".

In the case at hand I have gone through the trial Court's record and I found there is no direct evidence tendered by the Appellant to show the extent of her contribution towards the acquisition of the matrimonial assets to warrant her claim of equal division in their matrimonial assets other than being a house wife doing domestic works and engaging in the business which was equally sponsored by the Respondent. There is neither exhibits nor witnesses to support her contention.

I have to remind the Parties that, in ordering the division of matrimonial assets, the Court is required to be guided by the principle of **equity** not of **equality** and this is what the Appellate Court of Kinondoni did. For that reason, I hold that the Appellant is not entitled to equal share in the matrimonial assets, neither to

the percentage granted by the trial court but rather the division that was declared by the Appellate court is a fair and justified under the circumstances of this matter of which I fully support.

Having said all what is stated herein above and the reasons therein, the court has found the Appellant has failed to prove her claims against the Respondent. In the event therefore, **this Appeal is dismissed.**

Each party to bear own costs.

Ordered accordingly.

Right of Appeal Explained.

L.E MGONYA

JUDGE

04/12/2020

Court: Judgment delivered in my chambers in the absence of both parties and Ms. Msuya RMA, this 04th day of December, 2020.

L. E. MGONYA

JUDGE

04/12/2020