

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL No. 107 OF 2018

(Originating from District Court of Temeke in the Civil Appeal No. 109 of
2017)

HALIMA HATIBU.....APPELLANT

VERSUS

MUHODINI OMARY.....RESPONDENT

JUDGMENT

31st October, 2019 – 27th February, - 5th March, 2020.

J. A. DE-MELLO J;

This is an **Appeal**, from **District Court of Temeke** by the Appellant who claims to be denied to equal distribution as her share of the matrimonial properties. Aggrieved, the Appellant, fending for herself, likely with legal aid presumably from **Women Legal Aid Center (WILAC)**, has lodged **two (2)** grounds of Appeal which basically challenge the distribution of the matrimonial properties, with the following grounds;

That, the Trial Court erred both in law and fact by failing to put in records, consider and analyse the evidence tendered in Court by the appellant hence arrived to unjust decision.

1. That, the Trial Court erred in law and fact by failing to order an equal distribution of matrimonial properties.

2. That, the Trial Court erred in law and fact by failing to order an equal distribution of matrimonial properties.

Both Parties agreed to dispose this Appeal by way of written submissions, with the **Respondent** represented by **Counsel Kikule**, whereas the Appellant appear in person but, of course with legal aid from **Tanzania Women Legal Association(TAWLA)**. The scheduling order of filing the Written submission was set in the course where by the Appellant had to file her submission or on before the **21st November, 2019**, the reply by the Respondent on **12th December,2019** and the **rejoinder** on **6th January ,2020** . However, it is only the Appellant who had complied with the Court order and, filled her submissions, with defiance from the Respondent. None filling of the Respondent's submissions tantamounts to non-appearance and with no notice. The legal principle underlying this, has been subscribed to by this Court as drawn from numerous decisions of the Court of Appeal and, to mention a few are the, **Director of Public Prosecution vs. Said Saleh Ali, Criminal Appeal No. 476 of 2017, National Insurance Corporation of (T) Ltd. & Another vs. Shengena Ltd. Civil Application No. 20 of 2007, Patson Matonya vs. The Registrar Industrial Court of Tanzania & Another, Civil Application No, 90 of 2011** and, **Godfrey Kimbe vs. Peter Ngonyani, Civil Appeal No. 41 of 2014** (both Unreported). In all, the Court of Appeal held that; **failure by a party to lodge written submissions after the Court has ordered a hearing by written submissions tantamount to being**

absent without notice on the date of hearing. In **Godfrey Kimbe's** case (supra) , the Court of Appeal, with Approval the case of **National Insurance Corporation of (T) Ltd.** case cited above in which it was held that;

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party party's inaction. It had to act ...it is a trite law that failure to file submissions is a tantamount to failure to prosecute one's case."

It is with this position that, I hereby proceed determining this matter **Exparte.**

Submitting on the first ground of Appeal, the Appellant stated that, the Trial Court opted not to consider that, she commenced cohabiting with the Respondent since **1996** and, officiated the married in **2005**. That, during cohabitation the two, jointly acquired the matrimonial properties. Apart from this, she contributed both mentally and, physically in taking care of her husband when he was constructing the houses at **Mtoni Kijichi** in **Mbagala**, another one in **Makangarawe Buza, Mgeninani in Mbagala Kuu** and the other at **Mjimwema Kigamboni**. Such contribution was exhibited through carrying of blocks and sometimes supervising construction, as the Respondent focused on his job at work at **Mawingu Studio**, now known as **Clouds F.M**. With regard to the 2nd ground, she further argued that, while referring to **section 114 (1)** of the **Law of Marriage Act Cap. 29 R.E 2002** supported with celebrated case of **Bi Hawa Mohamed** to bring home the concept of **equal distribution of matrimonial properties**, acquired pre and, post their marriage. The

contribution, she further contends, was both monetary form while physically was by providing manpower through watering the house under construction, carrying the blocks and cooking for the contractors. To stress her argument, she referred to **section 56** of the **Law of Marriage Act Cap. 29 R.E 2002**, which provides for **equal right between a married man and woman in acquisition of properties both movable and immovable**. In the alternative, she prayed for this Court to quash and, set aside the Judgement and, Decree of the Trial Court, thereby order equal distribution of matrimonial properties, custody of the children be placed to the Appellant and Respondent be ordered to provide arrears for maintenance to the tune of **TShs. 100,000/=** per month and cost of this Appeal be provided.

Now starting with 1st ground of Appeal, it is well known principle that, the **Appellate Court cannot receive new issues or evidence unless the same was tendered in the Trial Court** and, the later **rejected to admit**. It is her concern that, the 1stAppellate Court did not record, analyse and, evaluate the evidence tendered in Court as evidence in that regard and, which lead the Court to arrive to unjust decision. However, there was no evidence tendered by the Appellant in the 1stAppellate Court that, had to be put in record which the Trial Court ought to take into account. Records from **Temeke District Court**, speak loud of itself as seen from **pages 4 to 6** of the judgement of the **1stAppellate Court, The Court did** analyze the evidence of the Appellant within its scope before making its findings. Therefore the 1st ground of Appeal is baseless, and hereby

fails. On the second ground, I find it too wanting as there was no evidence in the Trial Court to justify that, the property mentioned by the Appellant was subject to be equal distribution acquired by their joint efforts. Hence the citing of section **114 (1)** of the **Law of Marriage Act, Cap. 29 R.E 2002** before or after their contracting their marriage on 2005 is inapplicable and, thus misconceived. None of the Appellant's witnesses at the Trial did testify to that effect, to have seen the Appellant neither in participating in the acquisition nor in construction of one or all of the claimed, matrimonial properties. And it is the **cardinal principle of the law of evidence in Civil matters** that; **"he who alleges must prove** as stipulated under **section 110** of the evidence **Act Cap. 6 R.E 2002** which provides that and, I quote;

"110 (1) Who-ever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

Failure by the Appellant to prove, at the Trial Court, lead the Trial Court, and, similarly the 1st Appellate Court to arrive in the impugned findings. It is from the above reasoning that this Court finds no basis to alter the findings of the two lower Courts, upholding the decisions. Therefore this Appeal has no merits and is dismissed in its entirety.

No orders as to costs, considering the matter arises from spouses.


J. A. DE- MELLO

JUDGE

5/03/2020