

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

PC MATRIMONIAL APPEAL No. 01 OF 2020

*(Arising from Matrimonial Appeal No. 02 of 2019 of the District Court of Ukerewe
Originated from Matrimonial Cause No. 1 of 2019 from Ilangala Primary Court)*

ANNA ALOYCE APPELLANT

VERSUS

ZACHARIA ZEBEDAYO MGETA RESPONDENT

JUDGMENT

Last Order: 22/04/2020

Judgment: 30/04/2020

A Z. MGEYEKWA, J

At the first instance, the appellant had successfully lodged his complaints at the Primary Court of Ilangala claiming for marriage dissolution and division of property, the trial court decided in favour of the appellant. The respondent being dissatisfied by the said decision appealed

to the District Court of Ukerewe in Matrimonial Appeal No. 02 of 2019, where the 1st appellate court partly faulted the decision of the trial court. Dissatisfied the appellant filed the instant appeal on the following grounds:-

- 1. That the first appellate court erred both in law and fact by quashing the order as to the division of ten rooms house located at Kakuru and holding that the same was not matrimonial property despite there being ample evidence on record suggesting that the same was jointly acquired by and belongs to the parties.*
- 2. That the 1st appellate court wrongly excluded the house at Kakuru from parties' matrimonial assets while the appellant had fully justified the variation in the names between the one on the sale agreement and parties' names and she was in possession of the documents.*
- 3. That, the 1st appellate court wrongly varied and distributed the fifty-fifty division of matrimonial properties by the trial court without assigning any reason for such a decision.*
- 4. That the 1st appellate court distributed the assets without taking into consideration the extent of contribution by each party, bearing in mind the*

fact that with the evidence on record the appellant had even contributed much than the respondent if not equal in the acquisition of matrimonial properties.

5. That the 1st appellate court wrongly left out of the account of all the important considerations set by law in making an order for the division of matrimonial properties.

6. That the first appellate court erred in law and fact by deciding the appeal without considering the evidence on record and the fact on the balance of probabilities the appellant had proved the claim and she deserves what she was given by the trial court.

7. That the 1st appellate court omitted to frame issues as required by law thereby leading to a wrong, unreasoned and unjust decision prejudicing the appellant.

In prosecuting this appeal, the Appellant afforded the service of Ms. Naomi., learned counsel whereas the respondent appeared in person.

Prosecuting the appeal, in his submissions, Mr. Ditrick prays to combine and argue the 1st and 2nd grounds of appeal together. He also opted to combine the 3rd and 4th grounds of appeal and argue them

together and likewise, he combined and argued the 5th, 6th, and 7th grounds of appeal together.

Starting with the 1st and 2nd grounds of appeal, Mr. Ditrick submitted that the 1st appellate court misdirected itself for deciding that the house located at Kakuru was not part of the division. He avers that the appellant proved before the trial court that the house was a joint effort of parties. Mr. Ditrick submitted that the appellant was able to tender an original certificate of sale concerning the house bearing the name of another person. He continued to submit that in case the disputed house was owned by another person, he could have filed objection proceedings against but that was not done.

Submitting on the 3rd and 4th grounds of appeal, the learned counsel for the appellant stated that the 1st appellate court misdirected itself altering the 50-50 division basis without any justification. Mr. Ditrick fortified his submission by referring this court to page 12 of the 1st appellate court judgment, he argued that the 1st appellate court knew that the properties were jointly acquired since it acknowledged that the appellant's evidence was heavier than respondent's evidence but still the

District Court proceed to fault the decision of the trial court. He went on that, the trial court was right to base its decision on the principle stated in the case of **Bi. Hawa Mohamed v Ally Seif** [1983] TLR 32.

In relation to the 5th, 6th and 7th grounds of appeal, Mr. Ditrick submitted that the appellant proved the case and the evidence adduced was heavy enough to enable the court to divide the assets equally.

In conclusion, Mr. Ditrick urged this court to uphold the trial court decision and allow the appeal with costs.

Responding to the appeal, the respondent objected to the extent that the 1st appellate court was right to fault the decision of the trial court. He submitted that the house situated at Kakuru does not form part of matrimonial properties. The respondent faulted the division of matrimonial properties that it was not supposed to be equal since he was employed and the appellant was not employed.

He continued to submit that, the appellant failed to prove her contribution to the properties acquired during the subsistence of the marriage. He asserts that they were only tenants and the certificate bears

the name of another person, therefore, the same was not required to be tendered in court to justify that the disputed house is among the matrimonial properties. The respondent distinguished the cited case of **Bi Hawa Mohamed** (supra) by stating that is is not relevant to the instant case because the appellant failed to prove her contribution to the properties acquired when they were together. Therefore, he faulted the trial court decision which awarded the parties equally shares. He finally prays this court to uphold the 1st appellate court decision and dismissed the appeal.

Rejoining, Mr. Ditrick reiterated his submission in chief and insisted that both parties all entitled to equal shares because the properties were jointly acquired. Referring to the house located at Kakuru, Mr. Ditrick argued that the appellant tendered original documents before the trial court and explained in length how the documents bear the names of another person. He avers that, if the respondent claims that the house does not belong to the parties, then this court to find that the house belongs to the appellant and in case any party will show interest in the disputed property then he/she can claim before the court. He went on to submit that, the evidence of the appellant revealed the extent of her

contribution thus the case of **Bi Hawa Mohamed** (supra) is relevant to this case. He prays this court to allow the appeal with costs.

Having gone through the trial court record, judgment, grounds of appeal, and their rival submissions, I find that the issue for determination is ***whether this appeal is meritorious.***

Starting with the 1st and 2nd grounds of appeal, the main issue sours on the house located at Kakuru which the trial court decided that it was a jointly owned property, the decision which was faulted by the 1st appellate court. I have perused the trial court records and found that the appellant testified in length on why the certificates bear the name of another person.

For clarity, I reproduce the appellant piece of evidence as shown on page 11 of the trial court proceedings:-

"... kiwanja cha nyumba tulinunua kutoka kwa mtu mwingine anaitwa Crispine mzee wa kanisa la sabato kwani wewe ulihofia kuwa hawawezi kukuuzia na ndio maana yanaonyesha majina mengine ya kina Lusato na Crispine. Baada ya hapo nilikuambia Crispine atupe maandishi ya kukabithi ila ulisema hakuna shida."

Similarly, section 110 (1) of the Law of Evidence Act 1967 places the burden of proof on the party alleging a fact. Section 110 (1) state that:-

" 110 (1) Whoever 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."

The trial court was in a better position to determine the acquisition of the house located in Kakuru and as a result, the trial court included the disputed house for division. In my view, the appellant has justified how she acquired the disputed house. As long as the appellant has fully contributed to the acquisition of the house located at Kakuru thus, it is wise to place the disputed house solely on the hands of the appellant. In case any third party would be interested then he/she is at liberty to come forward and claim ownership over the said disputed house.

Determining ground 3rd and 4th of the appeal, it was the counsel for the appellant claim that, the 1st appellate court misdirected itself altering equal division of matrimonial division without giving any reasons. It is featured on record that the trial Magistrate took his precious time

evaluating the reasons for the division of matrimonial properties. I agree with the appellant learned counsel that, there was no reason adduced by the first appellate court to fault the equal shares in the division of matrimonial properties.

In considering this matter, I am highly persuaded and guided by the principles enunciated by the Court of Appeal in **Bi Hawa Mohamedi v Ally Seif** (1983) TLR 32 (CA) and also the High Court in **Bibie Maulid v Mohamed Brahim** (1989) (HC) TLR 162. That in determining contribution towards the acquisition of matrimonial or family assets every case must be decided in accordance with its peculiar facts and circumstances. Furthermore, in **Victoria Sigala v Nolasco Kilasi** PC Matrimonial Appeal No. 1 of 2012 HC Iringa (unreported), Shangali, J stated at page 8 of the judgment and I quote:

" Indeed, there is no fast and hard rule in deciding on the amount of contribution and division of the matrimonial assets. Where the matrimonial assets were acquired during the happy days of subsistence of marriage and in the joint efforts of the spouses there is no need or requiring one spouse to give evidence to show the extent of her/his contribution. The distribution of such assets should automatically proceed in equal terms."

It is also prudent to note that, Tanzania has ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa² Article 7 of the *Maputo Protocol*, provides clearly that in case of separation, divorce or annulment of marriage, women, and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Considering the above precedents and decisions, I see the logic in the appellant's submission and as it has been featured on record that the appellant has fully contributed in the development of matrimonial assets, and used all her efforts and energy to acquire the said matrimonial properties, justice demands that all parties should be awarded and entitled to the division of the matrimonial assets. In my firm view, the 1st appellate court decision to fault the findings of the trial court without stating any reason was unjustifiable. Therefore, these grounds of appeal are answered in affirmative.

Having considered the above grounds of appeal, it is evident that the present appeal has merit, therefore, I find no any justifiable legal reasons to deal with the remaining grounds of appeal, as the same will would be an academic exercise.

In the circumstances and for the foregoing reasons, the appeal is partly allowed. I proceed to quash the decision of the 1st appellate court and partly uphold the 1st trial court decision and give the following orders:-

1. The division on equal shares be restored except for a house situated at Kakuru.
2. The disputed house located at Kakuru is solely left on the hands of the appellant.
3. I make no order to costs each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 30th April, 2020.


A.Z.MGEYEKWA

JUDGE

30.04.2020



Judgment delivered on 30th April, 2020, and both parties were remotely present.




A.Z.MGEYEKWA

JUDGE

30.04.2020

Right to appeal is fully explained.