

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CIVIL APPEAL NO.57 OF 2021

(Original Matrimonial Cause No.08/2020 of Kigamboni District Court before Hon. K.I Josiah)

SALIM MNYOLI AGWANDA-----APPELLANT

VERSUS

NORAH AGWANDA-----RESPONDENT

JUDGMENT

16/8 /2021 & 22/9/2021

I.C MUGETA, J.

The facts leading to this appeal as found in the records of the trial court are that in September 2020, respondent herein petitioned for decree of divorce and distribution of matrimonial properties. The evidence is to the effect that the parties started cohabiting as husband and wife since 1997 until 2015 when they contracted a civil marriage. Misunderstanding between them started when the appellant decided to marry another woman. Respondent claimed to have been beaten and threatened to be killed by the appellant who later deserted her. These facts were disputed by the appellant who said the respondent refused to recognise his second wife and denied him his conjugal right. After a full trial, the trial court dissolved the marriage by granting a decree of divorce, ordered for the sale of the matrimonial house and proceeds of the same be divided equally between the parties. As for the household utensils, the trial court ordered for the same to be divided equally. Aggrieved by these orders, appellant preferred this appeal. In the memorandum of appeal he has advanced four grounds as hereunder reproduced: -

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- 1. That, the trial court erred in law and facts in concluding that, there are three houses at the matrimonial home acquired during subsistence of marriage, when actually the houses are four as per evidence.*
- 2. That the trial court erred in law and fact in ordering sale of the said houses and divide equally the sale proceeds when actually the distribution of the said houses is possible by setting boundaries on each one's share.*
- 3. That, the trial court did not properly analyse and evaluate the evidence on record and thus failed to appreciate that it's the appellant who struggled a lot with sole efforts in building those houses and thus equal division is unfair.*
- 4. That the trial magistrate in ordering sale and or equal division of the properties, had failed to take into consideration the circumstances surrounding the appellant.*

At the hearing of the appeal, parties appeared in person unrepresented. They prayed to argue the appeal by way of written submissions. The prayer was granted. The appellant's filed submissions are drafted by Mr. Alexander Kyaruzi, learned advocate, while for the respondent Ms Grace Daffa from Women's Legal Aid Centre (WLAC) prepared the same.

The argument of the appellant in ground one is that besides the pleading indicating that the houses at Kibada forming their matrimonial home are three, the parties' evidence is clear that they are four in total. Therefore, the trial court erred to hold against the evidence. On ground two he challenged the order to sell the matrimonial home and divide the proceeds equally while the houses which are detached from each other can be given to each party and he who desires to leave the place be free to sell his share of the houses. That sale of the property shall render the appellant homeless as he has retired from employment and he has a wife and a child to look after. The learned advocate challenged the division of the assets in ground three by submitting that equal division is unfair because as a teacher he contributed more towards acquisition of the assets.

Lastly, on ground four the learned advocate submitted that, selling the houses can prejudice the appellant who has a family to take care of. He said, since appellant is retired, he is in no position to build another house even if he gets the proceeds of

sale. He concluded that, selling of the said houses will greatly disturb the appellant than the respondent who is living alone.

In reply, counsel for the respondent argued on ground one that the trial court rightly concluded that the plot has three houses after considering the testimonies of both parties. As for ground two Ms Daffa asserted that the order of sale by the trial court is in accordance with section 114(1) of the Law of Marriage Act [Cap 29 R.E 2002]. She submitted that, appellant failed to produce any evidence at the trial proving he is retired, therefore, he should not complain about the sale as ordered. On the equal division of the assets the learned counsel is of the view that the trial court considered the contribution of each party.

In rejoinder counsel for the appellant reiterated his submission in chief.

I shall dispose of the appeal one ground after the other starting with ground one.

I have read the records of the trial court it is true that the parties testified that they had acquired four houses built on one plot. I, therefore, set aside the order of the trial court that the houses are three and substitute it with an order that the houses are four.

Grounds two and three can be conveniently considered jointly. They revolve on the issue of equal division of the assets disregarding the contribution of each part in the acquisition of the assets. This is what the appellant said at page 12 of the typed proceedings regarding his contribution on the acquisition of the four houses: -

"From the income I got from my job as a teacher I managed to build four houses at Kibada. She has never contributed any cent to the construction of the houses..."

On her part, this is what the respondent said: -

"During the subsistence of our marriage, we acquired four houses all located at Kibada. On the same piece of land. I built one house we bought the blocks together with the respondent, I used the money I had..."

While the appellant argued that as a teacher his salary was used in building the said houses and therefore contributed more, the respondent said she contributed by

income from her small businesses of selling food and milk. The appellant brought one Queenbert Ndimbo (DW2) who said he is a mason who built the three houses. He testified that, he was paid and provided with building materials by the appellant. The respondent said she contributed in building the same but she did not specifically state to what extent she contributed. She also said she was doing small businesses but failed to prove how much she was earning and channelled it to building the three houses. Further, she claimed to have built one house with two room and appellant contributed in buying the blocks. Consequently, in view of the foregoing, it is clear that the extent of contribution between the parties was not equal.

The court of appeal sitting in Tanga in the case of **Gabriel Nimrod Kurwijira vs Theresia Hassani Malongo**, Civil appeal No. 102/2018 when explaining how to prove the extent of contribution in determining the division of matrimonial properties, had this to say at page 11-12;

"In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution....."

The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property.

On the foregoing I hold that appellant contributed more. I award him 60% of the assets and the respondent 40%.

The complaint in the fourth ground is that in ordering the sale of the house the appellant shall be inconvenienced because he has another wife, a little child and retired from service. This the complaint, I hold, is unjustified because the law does not enjoin the court to consider the children of marriage, if any, when ordering for division of matrimonial properties. The complaint has no merits.

Consequently, this appeal succeeds to the extent that the appellant gets 60% of the shares in the assets and the respondent 40%. The houses can be valued and the appellant may decide to buy out the respondent's shares, failure of which the same shall be sold and the proceeds divided to the parties as above described. The

suggestion by the appellant that the houses be divided to the parties instead of sale does not provide a viable solution to this dispute. I give no orders as to costs.



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MUGETA, J.

22/9/2021

Court: - Judgement delivered in chambers in the presence of both parties.

Sgd I. C. MUGETA, J.

22/9/2021