

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

PC CIVIL APPEAL NO. 95 OF 2020

(Arising from the Decree of Kinondoni District Court in Civil Appeal No. 53 of 2019,
original case Matrimonial cause No. 82 of 2018 at Kawe Primary Court)

NESTORY LUDOVICKAPPELLATE

VERSUS

MERINA MAHUNDI.....RESPONDENT

JUDGEMENT

Date of Last Order: 2/2/2021
Date of Judgement 24/2/2021

MASABO J,

This is a second appeal. The appellant was the respondent in Matrimonial cause No. 82 of 2018 at Kawe Primary Court in which the petitioner successfully applied for dissolution of marriage and distribution of matrimonial assets. She was awarded 15% share in the matrimonial house which is now under contestation. Unhappy with the share she appealed to Kinondoni district court where her share was elevated to 50%. It is this decision which has disgruntled the appellant.

The appeal is premised on five grounds, that is: the appellate court erred by failure to consider the decision of the trial court; the trial court failed to make

specific finding on issues as framed; the decision of the appellate court was based on new facts and evidence un procedurally rendered at appeal stage; the finding that both parties contributed to the acquisition of the matrimonial house was misguided; and lastly, the appeal was decided against the law.

At the hearing, both parties had representation. The appellant was represented by Mr. Hans Mwasakyeni, learned counsel where as Ms. Grace Daffa, learned counsel from Women Legal Aid Clinic (WLAC) extended gratis legal assistance to the respondents.

In support of the appeal Mr. Mwasakyeni submitted that the decision of the first appellate court was erroneous as it totally ignored the finding of the trial court and proceeded to decide based on new facts/statements made by the respondent while presenting her appeal. In particular, the court relied on the averment that the respondent's contribution to the construction of the house was in monetary form whereby she contributed some money earned from her business and employment, facts which were neither pleaded nor deposed at trial stage.

It was argued that, whereas assets acquired jointly or substantially improved during the subsistence of marriage are subject to distribution subsequent to divorce and separation, such distribution should be based on evidence rendered by the parties as to their actual/purported contribution to the acquisition of the assets. Mr. Mwasakyeni further contended that, by relying on new facts and averments not adduced in the trial court and which seems

to contradict the evidence on record, the first appellate court contravenes the requirement of Order XXXIX Rule 27, 28 and 29 of the Civil Procedure Code [Cap 33 RE 2019] which bars the parties from adducing new evidence on appeal.

For the Respondent, Ms. Daffa submitted that the decision of the 1st appellate court was well founded as it was based on evidence rendered by the parties. She argued that in elevating the respondent's share to 50% the court relied upon the evidence rendered by the respondent that she contributed to the construction of the house using monies obtained from own source, including business and employment. That, during the construction she gave the respondent monies to buy cement and she also contributed through labour. Therefore, as there is evidence that the respondent made equal contribution to construction of the house, she was therefore entitled to an equal share. In support of the respondent's case, she cited the case of **Nderetu v Nderetu** [1995-1999] 1 EA 235, at 237.

Ms. Daffa contended further that the decision of the first appellate court was not premised on new evidence. Rather it was premised on the evidence rendered by the parties during trial. Moreover, she cited the case of **Lawrence Mtefu v Germana Mtefu**, Civil Appeal No. 214 of 2014 (HC) in which the court while relying on Article 13(1) of the Constitution of the United Republic of Tanzania and Article 15 of the Convention on Elimination of All forms of Discrimination Against Women, 1979 held that women should not be discriminated simply because of being women. In rejoinder Mr.

Mwasakyeni reiterated that, it is a trite law that the judgment be based on evidence adduced during trial.

I have dispassionately considered the submissions made by the parties and the records from the two lower courts which I have thoroughly read. The grounds of appeal and the submission for and against revolve around the correctness or otherwise of the elevation of the respondent's share from 15% awarded by the trial court to 50% and the main contention is whether such elevation was premised on the evidence adduced during trial.

According to the record, while testifying in support of her petition in the trial court, the respondent informed the court that in addition to her wifely duties, her contribution to the construction of the disputed house was in the form of labour to wit, watering the bricks, a duty she performed between 1995 and 1998. Thereafter, she was sent to her brother's home and since then they never cohabited. At the time of separation in 1998, the house was at foundation stage. It is on the basis of this evidence the trial court awarded her a share of 15% percent of the plot a share which under the circumstances was found to be proportional.

A turn of event occurred at the appellate court. The respondent complained that the trial court record was inaccurate as it omitted a crucial testimony regarding her contribution to the acquisition of the disputed house. Page 2 of her submission in chief is replete with statement allegedly omitted by the trial court. In particular she asserted that, she too contributed financially to

the acquisition of the plot and construction of the house. She gave a certain amount to the appellant for buying building materials such as cement and in some occasions she did masonry work on the house. Page 5 of the judgment clearly demonstrate that the elevation of the respondent's share was solely based on this new evidence.

As the evidence relied upon by the first appellate court was not tendered before trial court, I will be guided by the principles governing reception of fresh evidence on appeal as stated by the Court of Appeal in **Ismail Rashid v. Mariam Msati**, Civil Appeal No. 75 of 2015. At page 5 of this judgment, the Court cited with approval the decision of the Court of Appeal for Eastern Africa in **Tarmohamed and Another v. Lakhani and Co** (3) (1958) EA 567 that:

To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled; **first**, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; **second**, such that if given would probably have an important influence on the result of a case, although it need not be decisive; **third**, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

The question that follows is whether there was compliance to these three principles. The appellant has submitted that these principles were not observed and has further cited the provision of Order XXXIX Order 27, 28 and 29 of the Civil Procedure Code [Cap 33 RE 2019] in fortification of his

argument and, on this account, he has invited me to quash the decision of the first appellate court. The Respondent's counsel, has tactically avoided this point and has confined her submission to the burden of proof.

When the balance is tilted, it leans heavily against the respondent. No plausible cause was shown to the satisfaction of the principles above cited. It is also to be noted that the averment complained of were not only new but inconsistent with the evidence on record. For instance, with regard to the plot, when questioned by the court, she testified that "*kiwanja alinunua mdaiwa mwenyewe. Mimi nasema tumenunua wote kwani mimi ni mke*". Placing reliance on such new and inconsistent record to vary the shares awarded by the trial court was inconsistent with the law and prejudicial to the appellant.

I am aware that, in the course of submission in chief, the respondent casually impeached the trial court record, the respondent attacked the trial court record of inaccuracy. Without rendering any proof or explanation she causally submitted that the record omitted some material evidence in support of her case. The reasons for such omission if any, was not rendered. Without making any finding on this allegation, the first appellate magistrate ignored the evidence on record and proceeded to rely on the new evidence which impliedly suggests that he accepted the allegation in wholesale. This was a lucid misdirection on the party on court as it conflicts with trite principle with regard to impeachment of court record.

It is a trite principle of law that, court record being a serious document should not be lightly impeached as there is always a presumption that a court records represents accurately what happened (**Halfani Sudi Vs. Abieza Chichi** (1998) TLR 527 at page 529). Allowing the impeachment of court record on flimsy grounds, as in the instant case, would lead to anarchy and disorderly in the administration of justice and ultimately prevent dispensation of justice.

I have taken note of the invitation to apply the principle of non-discrimination as embodied in our constitution and the international and regional instruments ratified by Tanzania. I am fully aware of the principle of equality of spouses in all matters related to marriage and family as embodied under Article 16 (1) (a) and (c) of the UN Convention on the Elimination of All forms of Discrimination against Women, 1979 States Parties which obliges the member states to eliminate discrimination against women and promote the equality of men and women in all matters relating to marriage and family and especially enjoyment of the same rights and responsibilities during the subsistence of marriage and during its dissolution. I am equally aware of the corresponding provision under The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (The Maputo Protocol) which under Article 7(d) provides as follows:

States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:

(d) 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.

Needless to say, the principle of equality as embodied in these instruments do not blindly apply irrespective of the circumstances of the marriage. In our country, this principle is domesticated under section 114(2) of the Law of Marriage Act, Cap 29 RE 2019 which states that while exercising its powers in distribution of matrimonial assets courts shall have due regard to the extent of the contributions made by each party in the form of money, property or work and this includes the wifely duties performed by women during subsistence of the marriage as per **Bi Hawa Mohamed v Ally Sefu** (1983) TLR 32. The application of the principle of equality, therefore, apply in that context.

In my firm view it was wrong for the first appellate court to fault the the finding of the trial court which was based on the correct position of law and a sound analysis of the evidence on record. Whereas the share of 15% of the plot is so minimal and trivializes the value of wifely duties in the acquisition of matrimonial assets, rising the share to 50% of the house was certainly wrong as it does not correspond with the respondent's contribution to the construction of the house. As correctly held by the trail court since the respondent did not contribute to the construction of the house, she has no

claim over it save for her contribution in making the bricks whose number and value was not established during trial.

To that extent, I quash and set aside the judgment and orders of the first appellate court. Further I invoke the revisional powers vested in this court by Section 44(1) of the Magistrate Court Act [Cap 11 RE 2019] and upgrade the respondents share to 30% of the current value of the Plot. This percentage is inclusive of the respondent's contribution in making of bricks whose number was not established by either part.

DATED at **DAR ES SALAAM** this 24th day of February, 2021



J. L. MASABO
JUDGE

