

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

MATRIMONIAL APPEAL NO. 2 OF 2020

(Originating from Matrimonial case No. 10 of 2019 in the District Court of Mbinga at Mbinga)

KELVIN AMBROS KOMBA.....APPEALANT

Versus

ELIANORA NORBERTH TILIA..... RESPONDENT

JUDGEMENT

Date of Last Order: 11/03/2021.

Date of Judgment: 06/04/2021.

BEFORE: S.C. MOSHI, J

The respondent successfully lodged her complaint at the District court of Mbinga at Mbinga claiming for marriage dissolution, division of matrimonial properties, custody of the children and order of maintenance of the children. Dissatisfied by the decision, the appellant filed the instant appeal on the following grounds: -

- 1. That the Honourable trial court grossly erred in law and fact in entertaining and deciding on the matter relating to the ownership of the disputed house on plot No. 605 Block A Tangi la Maji, Mbinga district while it had no any jurisdiction to adjudicate on land matters. Since there was dispute over ownership of the said house, the trial court ought to advice parties to take it to proper forum.*

- 2. That the Honorable trial court erred in law and in fact for failure to properly evaluate evidence adduced by appellant which established conclusively that the disputed house on Plot No. 605 Bock A Tangi la Maji within Mbinga district belongs to DW2 and not to parties.*
- 3. That the Honourable trial court erred in law and fact to for respondent to 60% of business machine and house while appellant to get 40% of the said properties without any proof and justification of contribution of each party. That respondent failed to proof contribution in acquisition of the properties but she proved to get bank loan which was irrelevant to the matter in issue*
- 4. That the Honorable trial out erred in law and in fact to hold that motor vehicle one Toyota Runx gold on colour Reg No T 537 DCT belongs to disputants while the evidence adduced shows the motor vehicle is owned by one Mr. Ramadhan Nassoro Omary.*
- 5. That the Honorable trial court grossly erred in law and fact for failure to take into accounts the weight of evidence adduced by the appellant side.*

The appellant enjoyed the services of Mr. Gaudence Ndomba, advocate whereas the respondent was represented by Mr. Innocent Mbunda, advocate.

At the hearing of the appeal, Mr. Ndomba abandoned the fifth ground of appeal, hence he submitted on four grounds.

Starting with the first ground, Mr. Ndomba submitted that the case which was before the trial court involved a matrimonial dispute, therefore it had power to make declaration on divorce, distribution of matrimonial properties, orders on custody but was not empowered to determine ownership of the house located on plot No. 605 Block "A" TANGI LA MAJI Mbinga. He said that the respondent claimed that the house was matrimonial property, the land was acquired from the District council and they ultimately built a house whereas the appellant testified that the property belongs to his guardian Mr. Maurus Pokela who testified as DW2. Therefore, the court ought to halt and advice the parties to pursue a land dispute per section 4(1) of the Land Disputes Courts Act, R.E 2019 which provides that courts established under the Magistrate Courts' Act have no jurisdiction to determine the land disputes.

He said that the issue of jurisdiction is crucial, he cited the case of **Ms. Tanzania China friendship Textile Co. Ltd v. our lady of the Usambara Sisters** (2006) TLR No. 70 where it was held that the issue of jurisdiction can be raised at any stage and it goes to the very root

of the court to make decision. Therefore, whatever is done by the court which has no jurisdiction is void and null.

Submitting on the second ground, he stated that the respondent said that the house belongs to Maurus Pokela who allowed the respondent to live in that house even before marrying the respondent. Pokela testified as DW2 and confirmed that he had allowed the respondent to live in that house.

He submitted further that, the respondent didn't tender any document to support that they were given a plot and paid premium of Tshs. 327,000/= and that a certificate of right of occupancy issued pursuant to section 29 (1) (c) of the Land Act, Act No. 4 of 1999 R.E 2019.

He argued that the respondent tendered Exhibit P.2, P.3, P.4. and P.6 being salary slips and loan from various financial institutions. He said that these proved that she had been receiving salaries and loans but not that the same were injected for construction of the house. He argued that, she had a duty to prove what she alleged, as per section 110 (1) and (2) of the Law of Evidence Act. Also the fact that the appellant moved out with the document, were mere words.

On ground number three, he submitted that the house was not theirs and that the respondent did not contribute in acquisition of the

machine. The respondent failed to show her contribution. He argued that the trial court ordered the respondent to be given 60% of the value of machine, without giving reasons for that order, he prayed the distribution order to be reversed.

On ground number four on distribution of motor vehicle with registration number 537 DCT, he stated that, the appellant said that the car is not their property but belonged to one Ramadhan (DW3).

He submitted that the respondent failed to bring sale agreement or a registration card in her name. Therefore, the presumption is that the owner is the one whose name is indicated in the registration card and the respondent did not rebut the same.

In reply, Mr. Mbunda stated that the case was a divorce case where the court is empowered among other things to order distribution of properties. The respondent testified that they have a house at Tangi la maji, the appellant did not deny in his pleadings nor did he plead that it was 3rd party's house. He said that this fact came as an afterthought during hearing. On the other hand the respondent testified how they jointly acquired the plot, how they jointly constructed the house, this was done after being already married.

He said that no third party came up to claim that his or her house was included in matrimonial proceedings. The claim came as an

afterthought after the respondent closed her case. DW2 testified that the house belongs to him but there was no evidence to support the allegation. Mr. Mbunda agreed that the court had no jurisdiction on land matters but the court was satisfied that the house was jointly acquired by the parties. The respondent stated how she asked loans from different banks using her salary. She told the court that her income was bigger than her husband's, as he was a driver whereas the respondent was a secondary school teacher. Therefore, the trial court considered these facts during the division of the properties.

He argued further that, the appellant didn't give any testimony relating to the acquisition of the house. Despite the fact that he didn't show his contribution the court gave him 40% which is much bigger sum. However, the petitioner was satisfied.

On second ground, he argued that the house is matrimonial property not a third party property. The third party waited to testify in defence instead of filing an objection proceeding. Worse still there is no document showing that he is the owner of a surveyed land. He argued that, even if it got lost, he would have made a follow up. Had he pleaded this fact, the petitioner would have made an official search.

On the third ground which relates to a milling machine, he submitted that the proceeding shows that the respondent acquired the milling

machine whose value is Tshs. 5,500,000/= and it is installed at Mbambi street Mbinga. The respondent said that she got four million from "upatu" of the co women teachers and handed the money to technician who came to Songea at Sido to collect it, the money wasn't enough hence she sold her motor cycle at Tshs. 1.4 million and topped up Tshs 100,000/= from her salary, so total cash was Tshs. 5,500,000/= whereas her husband (appellant) contributed Tshs. 400,000/= for connecting electricity. The appellant went to Tanesco for electricity connection processes.

On fourth point regarding the motor vehicle, he argued that the evidence shows how the respondent bought the car. She acquired a loan from a Bank, that is Tshs. 12 million. She gave her husband (appellant) Tshs. 7.5 million who went to Dar es salaam to buy the car. The car was bought, she even sent him Tshs. 250,000/= for fueling it. It was a family property she used the car to drive to work. The parties were supposed to transfer it but before they did that misunderstanding arose. A man posed as Ramadhan Nassoro Omary appeared and stated that he is previous owner of the car but he disappeared when the court ordered him to prove his identity. He stated that the court correctly decided that the petitioner was the owner of the car.

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

Having gone through the trial record, judgement, grounds of appeal and the rival submissions, the issue for determination is whether this appeal is meritorious.

Starting with the first ground of appeal, the position of law is that before a court orders division of any property in terms of section 114 of the Law of Marriage Act Cap 29 R.E 2019, it must first be established that the said property is actually a matrimonial asset and the court should among others, inquire on the extent of contribution of each party in its acquisition. In the case of **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016, the court of Appeal of Tanzania sitting at Mwanza, observed the following: -

"from the stated provision and the cases cited above, it is clear that, proof of marriage is not the only factor for consideration in determining contribution to acquisition of matrimonial assets as propounded by the second appellate court. There is no doubt that a court when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."

The issue is whether the house on plot no. 605 Block A Tangi la Maji Mbinga district was a matrimonial property. I would like to state

at the outset that the court did not determine on land ownership rather it determined parties contribution in acquisition of a house as stated by the respondent's counsel. The appellant in his pleading did not deny the fact the house is a matrimonial property. Furthermore, there was no third party proceeding for claim of ownership of the house.

I have perused through the trial court records, at page 7 the respondent testified at length, she explained how the house was acquired. For clarity, I reproduce the respondent piece of evidence as hereunder: -

" initially we used to live in a rented house since 2011-2012. Later on in 2012 we bought the land at Uzunguni but since it was an open space Municipality gave us land at Mjimwema. We paid Tshs. 327,000/=.....we started to build the house in 2012. We all paid for the money to buy that land. My husband was a driver. The money a gave him came from the money I got as my school allowance as I was studying. I remember to have bought the timber for. I asked for help from my uncle who had trees. He gave me two trees and my husband took the office car which carried the timbers were made from those two trees.....i contribute by buying union sheets which we put in that house as in 2012 I was selected for sensa exercise where I was paid Tshs. 720,000/= added my salary slip

until it reached 1,000,000/= and something. I bought the iron sheets. The other contribution is on the doors and windows. I got the money from CMB Bank where I took the loan of Tshs. 700,000/= I used the money to make some of the doors and windows. It was 2013. My salary slip shows that.....It took another loan from MCB and CRDB so that we do the finishing of the house by putting tiles and the house colouring and paying the masons. At MCB I took loan of Tshs 1,500,000/= I used to put floors in the rooms and finishing other doors”.

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 judgement 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 better position to determine the acquisition of the house located at Plot No. 605 Block A, Tangi la Maji, Mbinga. In my view, the respondent was able to satisfy the court and gave detailed explanation showing how the house was acquired through their joint efforts. The appellant on his part stated that the said house belonged to his guardian who testified as DW2. It is obvious that his evidence was an afterthought as the same was not pleaded in the pleadings nor was it stated in the appellant’s testimony. This fact was raised during

cross examination. Despite the fact that DW2 showed a loss report which indicated that his certificate of right of occupancy in respect to the disputed house was lost but it is questionable because it was processed on 18/12/2019 after this case was in court.

Determining the second ground of appeal, it was appellant's claim that the trial court erred in law in not considering the evidence adduced by the appellant which established that the disputed house belongs to DW2 and not the parties. As indicated earlier, this fact was not pleaded and DW2 did not file a third party proceedings. It is my view that the claim is just an afterthought. Besides, as stated above, the purported loss report report of the document in relation to the same was processed when the case was already in court. I again subscribe to the respondent's counsel argument that it was an afterthought.

In respect of the third ground, in considering this ground I am persuaded and guided by the principles enunciated by the Court of Appeal in the case of **Bi Hawa Mohamedi v. Ally Seif** (1983) TLR 32 and the case of **Bibie Maulid v. Mohamed Ibrahim** (1989) TLR 162. That in determining contribution towards the acquisition of matrimonial properties every case must be decided in accordance with its peculiar facts and circumstance. Furthermore, in the case of

Victoria Sigala vs. Nolasco Kilasi Pc Matrimonial Appeal No. 1 of 2012 Hc Iringa (Unreported). It was held thus: -

"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 substance 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".

Guided by the above decisions and the record of the trial court especially pages 19, 20 and 21 of the judgement, it is apparent that the trial Magistrate gave reasons for ordering the division of matrimonial properties at the proportion of 60% to 40% to the respondent and appellant respectively. She reasoned that the respondent contributed more in acquisition of the properties in terms of money as she is a teacher, got loans from different financial institutions; the money was used in acquisition of the matrimonial properties. On the other hand the appellant did not explain his contribution to enable the trial court to assess the extent of his contribution.

On the fourth ground, I also find it has no basis as the record is very clear. The appellant alleged that the said motor vehicle belonged to

Mr. Ramadhani Nassoro Omary who testified as DW3, a person whose identity was doubted by the respondent's counsel. The court ordered him to prove his identity however he did not do that and never came back to court to prove the same. On the other hand, I find as the trial court found that the respondent gave plausible explanation on how the motor vehicle was acquired. She obtained a loan from a bank and gave money to her husband to buy it from Dar es salaam. However, evidence shows that the transfer of name from the initial owner Ramadhan Nassoro Omary hadn't yet been effected.

That said, this appeal lacks merits, the decision of the trial court is upheld and consequently the appeal is hereby dismissed.

Considering that this appeal arises from a matrimonial dispute, I order each party to bear its own costs. Order accordingly.

Right of appeal fully explained


S.C.MOSHI

JUDGE

23/03/2021