

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

CIVIL APPEAL NO. 269 OF 2020

(From Matrimonial Cause No. 37 before the Court of the Residents Magistrate at Kivukoni)

RASHIDA AZIZ MGAYAAPPELLANT

VERSUS

HASSAN RUNJERESPONDENT

JUDGMENT

Date of Last Order 20/4/2021

Date of Judgment: 25/5/2021

MASABO J, L

The appellant and the respondent's love life had a beautiful beginning on 30th April, 2016 when they contracted an Islamic marriage. They were blessed with one issue and jointly acquired a house at Matosa, Goba area in Dar es Salaam and two moto vehicles make Toyota RAV 4 with registration No. T 379 and Toyota Wish with Reg. No. T. 709 DPK. Their beautiful love story turned sour and the appellant successfully petitioned for the divorce before the District Court of Kinondoni in Matrimonial Cause No 37 of 2019. Subsequent to divorce, the court ruled that the motor vehicle make Toyota Wish with Reg. No. T. 709 DPK was a matrimonial asset and ordered that it be sold and the proceeds be divided in equal halves. As for the house at Matosa Goba and vehicle make Toyota RAV 4 with registration No. T 379 it decided that they were not matrimonial asset hence not subject to distribution.

The Appellant was not happy. She has filed this appeal armed with two grounds, that, the trial court erred in both law and fact for disregarding the appellant's efforts in acquisition of the house and for including the motor vehicle with Reg. No. T. 709 DPK in the list of matrimonial assets.

During the hearing which proceeded in writing, both parties had representation. Mr. Joseph Mafie, Advocate represented the appellant while Mr. Yuda Ogonyi, Advocate appeared for the Respondent.

Submitting in support of the appeal Mr. Mafie cited section 114 (1) & (3) of the Law of Marriage Act Cap 29 RE 2019 and argued that there was sufficient evidence that the appellant contributed to the acquisition of the assets as she was working as a Human Resource Officer. Thus, the exclusion of the house and the motor vehicle make **Toyota Rav 4** from the list of matrimonial assets does not hold water. In fortifying his submission as to the exclusion of the house he submitted that, the fact that the respondents sister was the one supervising the construction does not suffice to deprive the appellant her share because, as held in **Salehe Seleman vs Maua Mohamed** PC Civil Appeal No. 49 of 2007 (HC) and **Reginald Danda vs Felichika Wikesi** Civil Appeal No. 265 of 2018 CAT (unreported), there was nothing wrong with what the relatives willingly assist in constructing the matrimonial home of the appellant. But, the said assistance by relatives was meant for the entire home and not the appellant as an individual.

Therefore, whereas it is true that the plot for construction of the house was acquired before the marriage, the house was substantially improved

during the marriage by the joint efforts of both spouses. Therefore, it was wrong to exclude the house at Goba and the vehicle make Toyota Rav 4 with No. T379 BYM.

On his part, the respondent's counsel ardently submitted that the appellant and the respondent did not stay under the same roof and had no jointly acquired assets. He argued that, although during examination in chief the appellant alleged that she contributed to the construction of the house and acquisition of motor vehicle, he rendered no evidence in proof. She even failed to say the number of rooms of the said house, the number of the windows, the name the street in which it is located and even the names of the neighbours which indicates she had no contribution whatsoever to the construction of the house. Besides, the mason whom she allegedly supervised controverted her evidence as he testified that the respondent was the one paying him.

Regarding the vehicle make Toyota Rav4, it was argued that although the appellant asserted that it was acquired during the subsistence of the marriage, she rendered no proof of how it was obtained, let alone her respective contribution. It was argued further that, since the car registration card bears the name of the respondent's father it cannot be included in the matrimonial assets. Reliance was placed upon the provision of section 114 of the Law of Marriage Act, Cap 29 RE 2019 as illustrated in **Nelson Machibya vs Pendo Lukomanya** Matrimonial Appeal No.5 of 2018 where it was held that where the parties allege existence of matrimonial asset but neither of them produces evidence as to the existence of the matrimonial asset, the court should refrain from

ordering division of the same. The case of **Yesse Mriho v Sania Abdul**, Civil Appeal No. 147 of 2016, (CAT) unreported was also cited in further fortification and it was argued that the principle as to burden of proof apply in matrimonial cases. Thus, a part asserting existence of matrimonial assets should substantiate such assertion by providing proof as to the existence and ownerships.

I have read and considered both parties submissions and the lower court's record, the main issue for determination before me is whether the trial court was justified in excluding the house located at Matosa Goba area. As for the motor vehicle make Toyota Rav 4 with registration number 379, I will refrain from making any finding as it was not among the grounds of appeal listed in the memorandum of appeal filed by the appellant. The second ground of appeal referred to a motor vehicle with registration No. T 709 DPK, to which the lower court order for sale and distribution of proceeds on equal halves apply.

The power of the court to divide matrimonial assets is derived from section 114 (1) and (3) of the Law of Marriage Act Cap 89 RE 2019 which reads;

"the court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale."

As pointed in **Yesse Mrisho vs Sania Abdul**, Civil Appeal No 147 of 2016 the CAT (unreported), when determining distribution of matrimonial assets, the court must scrutinize the contribution or efforts of each party

to the acquisition of matrimonial assets. In the instant case, starting with the house, as argued by both parties, the record reveal with no doubt that the plot within which the house is situated was acquired well before the parties contracted the marriage. At page 16 of the typed proceedings, the appellant while adducing her evidence stated that, the respondent obtained the plot from his father by way of a gift but she contributed in the construction. The evidence rhymes well with that of the respondent who, while testifying as DW1, told the court that the house is situated in a plot owned by his father. It is equally uncontroverted that construction started in 2014 prior to the marriage.

Thus, there is presumption that the asset belongs to the respondent unless the presumption is rebutted under section 114(3) of the Law of the Marriage Act which recognizes as matrimonial assets those assets which was owned a party before the marriage but substantially improved during the marriage by the other party or by their joint efforts. The burden to rebut the presumption rested upon the appellant by producing evidence that the house was substantially improved during the subsistence of marriage and that she contributed to the improvement. Pursuant to section 114(2)(b) of the Law of Marriage Act and the case of **Bi Hawa Mohamed vs Ally Seif** [1983] TLR 32, contribution in the acquisition of the asset, or in this case, the construction of the house need not be assessed based exclusively on financial and material terms. Labour, house work as well as love and affection also count as meaningful consideration.

The records vividly reveal that, although construction commenced in 2014 it continued during the subsistence of the marriage. What

remains to be determined is whether the appellant contributed to the construction and the extent of such contribution. According to the original record, in rebutting the presumption as to the ownership of the house, the appellant testified that she contributed in the finishing stage by supervising the masons and contributed to pay commission to the masons, skimming and installation of electricity. She also contributed by buying tiles except for master bedroom and other unnamed building materials. However, as submitted by the respondent she rendered no receipts or invoices to substantiate her financial contribution to the construction. Thus, there was nothing for the court to enter a positive verdict as regards financial contribution.

The second form of contribution asserted, was in form of labour, to wit, supervision of masons. Although the testimony by the respondent that construction was done by his late sister was not controverted in cross examination, the testimony of PW2, shows that, the appellant had a contribution, albeit minimal. According to this witness, it was the appellant who procured his service as he was known to her and through her, a contact between respondent and PW2 who fixed the windows and gates, was established.

A further scrutiny of the records shows that the trial court did not direct its mind to the third aspect of contribution, to wit, house work, love and affection which the appellant extended during the existence of marriage. On this, I find the respondent's argument that the appellant deserves no share as the parties did not live under one roof, devoid of merit as it is inconsistent with the current realities where,

owing to employment and other economic and social reasons, the families increasingly live apart under separate roofs.

One would agree with me that the phenomenon of "long-distance marriages", is no longer alien in our jurisdiction. Different from the past when the couples invariably lived under one roof, a sizeable number of couples live apart in different cities, mainly for work purposes. Just like in the present case, one of the couples may be working outside the home while the other remains home as the primary child care provider. Such arrangement does not, in my considered view, undermine the status/the role of either of the couples nor does it deprive any of them the rights arising from the matrimony. Since in the instant case we were not told that the appellant was to blame for the 'long distance marriage', it is presumed that the arrangement was consensual. Under the premise, it would certainly be wrong to trivialize the wifely roles of the appellant or deprive her of the right she would otherwise enjoy had the parties lived under one roof.

I have noted the respondent's argument that, her late sister was the one assisting in the supervision of the construction. As held in **Reginald Danda vs Felichika Wikesi (supra)**, such an assistance is presumed to be an assistance to the entire home and not the appellant as an individual. Thus, it does not affect the rights of the parties.

That said, since it is undisputed that there was a substantial improvement of the house during the subsistence of the marriage during which the appellant performed her wifely duties including caring of the issue of marriage, I have come to the conclusion that, the disputed house passes the test and qualifies to be termed a matrimonial asset. Guided by the provision of section 114(2)(b) and 114(3) of the Law of Marriage Act and the principle in **Bi Hawa Mohamed vs Ally Seif** (supra), I subsequently subject it to distribution at a ratio of 15% for the appellant covering her wifely duties and her minimal role in the supervision of the masons and 85% to the respondent.

Regarding the motor vehicle make Toyota Wish with Registration No. T.709 DPK, I find no reason to alter the trial court's findings that it be sold at the market value and the proceeds be divided equally between the parties.

For the above stated reasons, the appeal is partially allowed with no order for cost.

DATED at DAR ES SALAAM this 25th day of May 2021



A handwritten signature in blue ink, appearing to be "J.L. MASABO".

J.L. MASABO
JUDGE