

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

PC MATRIMONIAL APPEAL NO. 06 OF 2021

*(Arising from Matrimonial Appeal No. 03 of 2020 of Chato District Court, Originated
from Matrimonial Cause No. 1 of 2020 from Nyamirembe Primary Court)*

PERUS LUCAS APPELLANT

VERSUS

SHOMARI BAHABI RESPONDENT

JUDGMENT

Date of last Order: 17.05.2021

Date of Judgment: 19.05.2021

A Z. MGEYEKWA, J

At the first instance, the parties in 2019 successfully petitioned for a divorce. In 2020, the appellant had successfully lodged his complaints at Nyamirembe Primary Court claiming for division of properties. Before I go into the determination of the appeal in earnest, I find it apt to briefly narrate the relevant factual background of the instant appeal. It goes thus: the respondent and appellant were married in 2010. During their marriage they

managed jointly to acquire several matrimonial properties. It appears they had a successful until the year 2018 when the relationship started to go sour after an endless quarrel among them. Feeling that he could not stomach the bitter relationship any longer, the appellant decided to institute a case at Nyamirembe Primary Court in Matrimonial Cause No. 01 of 2020. The trial court determined the case and dissolved the marriage, divided the matrimonial properties amongst the parties.

Dissatisfied, the respondent filed an appeal before Chato District Court in Matrimonial Appeal No. 03 of 2020, where the 1st appellate court partly faulted the decision of the trial court. Undeterred, the appellant filed the instant appeal on the following three grounds:-

- 1. That, the Honourable magistrate of Chato district erred in law and in fact for not considering the appellant's preliminary objection that the Respondent's petition of appeal was incompetent for lack the name of the Advocate whom prepared the Respondent's petition of appeal.*
- 2. That, the appellant erred in law and facts for not upholding the judgement of Nyamirembe Primary court which distributed all matrimonial properties which were acquired jointly during marriage between the Appellant and Respondent.*
- 3. That, the appellant magistrate erred in law and fact for admitting that the appellant was awarded other properties which were not acquired jointly*

without any documentary evidence from the Respondent to prove the said arguments.

In prosecuting this appeal, the hearing was conducted through audio teleconference whereas the appellant and the respondent appeared in persons, unrepresented.

The appellant was the first one to kick the ball rolling. On the first ground, she complained that the respondent filed his appeal at the District Court without stating the name of his Advocate who prepared the document contrary to section 44 (1) of the Advocates Act, Cap. 341 [R.E 2019].

Submitting on the second ground, the appellant complained that the District Court erred in law for failure to upload the trial court decision. She argued that the trial court issued an order of division of properties that were acquired and developed by parties joined efforts.

On the last ground, the appellant argued that the respondent did not tender any document at the trial court to prove that he obtained the matrimonial properties before marriage. She faulted the first appellate court for reversing the trial court decision without referring to any document which she has tendered at the trial court.

In conclusion, the appellant 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 first appellate court was right to fault the decision of the trial court. On the first ground, he submitted that his advocate prepared the document and appended an advocate stamp. He urged this court to consider that the documents are stamped.

As to the second ground, the respondent stated that the District Court reached its decision after referred the decision and the proceedings of the trial court. He avers that the first appellate court perused the testimonies of witnesses; the village chairman and others witnessed when he purchased the plot at Nyamungambo. The respondent claimed that the trial court misdirected itself by stating that the couple bought the said plot together.

It was the respondent's further submission that he was supervising the construction of her sister's house and her sister testified that the respondent played supervisor role only. He added that he tendered documents to prove his claims while the appellant did not tender any document. The respondent further stated that the trial court visited *locus in quo* and the tenants testified

that the respondent is the owner. He claimed that the cashew nuts plantation belongs to him.

The respondent did not end there, he argued that the couple acquired one house, a plot containing trees and they build a house foundation together. He went on to state that he sold the said plot for Tshs. 3,000,000/= and paid school fees.

On the third ground, the respondent insisted that the first appellate court based its decision on evidence and exhibits which were tendered in court. He lamented that the trial court did not do justice.

On the strength of above submission, the respondent beckoned upon this court to uphold the decision of the District Court and allow parties to proceed with division of properties.

In her brief rejoinder, the appellant had nothing new to add. She reiterated her submission in chief. Insisting that the couple acquired all matrimonial properties together. She urged this court to uphold the trial court decision.

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

In my determination, I will consolidate the second and third grounds because they are intertwined. Except for the first ground which will be argued separately.

Starting with the first ground, which relates to the Advocate's signature. I have perused the first appellate court proceedings and found that Shamori Bahari, the respondent filed a petition of appeal and he signed it. The Benchmarck Attorneys Advocates and Legal Consultants drew the petition and they appended their office stamp. In my view, there was no any defect since the respondent signed the said petition of appeal even without appending the signature and name of the Advocate would suffice. In other words, it is an option for the Advocate to write his name append his signature as long as the respondent signed the petition of appeal. Therefore this ground is demerit.

Addressing the second and third grounds, that the first appellate court faulted itself by reversing the trial court decision which distributed all the properties acquired jointly by both parties during their marriage. The appellant complained that the first appellate faulted itself to award the appellant other properties which were not acquired jointly without proofing by any documentary evidence. The law clearly states under section 114 (2), (b) of the Law of Marriage Act, Cap. 29 [R.E 2019]. In exercising the power

conferred by the law on the division of matrimonial properties, the court shall regard the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets. The same was held in the case of **Bi. Hawa Mohamed v Ally Seif** [1993] LR 32, and **Yesse Mrisho v Snia Abdul**, Civil Appeal No. 147 of 2016, Court of Appeal of Tanzania.

I have perused the court records and found that both parties testified at the trial court whereby the appellant claimed that she wanted the trial court to award him a matrimonial house, a 1 ½ acre plot, and a plot of 20 acres which the respondent planted trees. The appellant did not tender any documentary evidence to prove her claims.

On his side, the respondent testified that they have constructed one house together they bought plots and planted trees therein. The respondent testified to the effect that after their misunderstanding, he did not involve the appellant thus he informed his second wife and they decided to sell a plot for Tshs. 3,000,000/= in order to pay school fees. He tendered a receipt of Tshs. 3,000,000/=.

The record reveals that the appellant was not involved in the sale agreement (Exh.B3). Since the property was jointly acquired properties, I find that it was necessary for the respondent to involve the appellant to witness

the sale of their property instead the respondent placed other two witnesses. In case the respondent could have proved that the plot belonged to him in exclusion of the appellant that could suffice otherwise the sale was *void abinitio* from the beginning.

The respondent claimed that after the sale he paid school fee in a tune of Tshs. 1,000,000/= out of Tshs. 3,000,000/= the respondent did not receive a single cent. There is no evidence that the respondent bought the said plots before the two were married. One Lameck Kajili testified that the respondent bought the plot on 18th April, 2015 on this material date the two were already married. Therefore he did not acquire the plot before marriage. SU6, the respondent's sister testified to the effect that the plot located at Mkuyuni belongs to both parties and when the respondent bought the said plot he was not married to the appellant.

In my view, none of the couples has proved that he owned the matrimonial properties in exclusion of the other party. The receipt tendered in court by the respondent proved that he entered a sale agreement to sell the plot which belonged to both parties. The receipt of school fees proves that he paid school fees to the tune of Tshs. 1,000,000/=. However, the respondent did not receive a share from the appellant.

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 that, there was no reason adduced by the first appellate court to fault the equal shares in the division of matrimonial properties as done by the trial court.

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 worth noting 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 there was no any justification to rule out that some of the matrimonial properties were acquired by the respondent before marriage while he did not prove by any documentary evidence such as certificate of title. His witnesses; SU1 testified that the respondent is the one who bought the plot in 2010 and the appellant and respondent build a house, which means they developed the plot together. SU6, the respondent's sister testified that the parties had a house located at Mkuyuni. *Mkuyuni Mpakani barabara ya NMB* house; none of the couple tendered any document to prove that the house belonged to him/her in exclusion of the other party. Therefore, it is difficult for this court to list it in the distribution.

SU3 testified that on 18th April, 2015 the respondent bought a 10 acre plot in exclusion of the appellant. The appellant did not prove otherwise but also the respondent did not tender the sale agreement to prove that the said plot of 10 acres belongs to him. There are no any existing documents in regard to this plot. Therefore as long as it exists, the same be subjected to division among the parties.

In my view, in determining the extent of the contributions made by each party I find that the respondent has already sold the plot which contained trees without giving the appellant any cent while the appellant sued all her efforts and energy to develop the matrimonial properties, justice demands that all parties should be awarded and entitled to the division of the matrimonial assets. In my firm view, the first 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 the affirmative.

In the circumstances and for the foregoing reasons, the appeal is partly allowed. I proceed to quash the decision of the first appellate court and partly uphold the trial court decision. The house located at Mkuyuni – Mpakani is not subjected to division. I order the following division:-

1. The matrimonial house with 4 rooms and *boma* (2) with 8 rooms be sold and the respondent to receive a 50% shares of the house and the appellant 50% shares.
2. The plot (sold to the appellant's aunt) is placed in the hands of the appellant.
3. The plot of 10 acres is divided equally among the parties.
4. I make no order to costs each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 19th May, 2021.




A.Z.MGEYEKWA
JUDGE
19.05.2020

Judgment delivered on 19th May, 2021, and both parties were remotely present.


A.Z.MGEYEKWA
JUDGE
19.05.2020

Right to appeal is fully explained.