

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM REGISTRY
AT DAR ES SALAAM
PC CIVIL APPEAL NO. 161 OF 2020**

ESTHER PATRICK MAKONGORO.....APPELLANT

VERSUS

PATRICK MAKONGORO.....DEFENDANT

Date of last order: 01/12/2020

Date of Ruling: 12/05/2021

J U D G M E N T

MGONYA, J.

In the instant Appeal, the Appellant after being aggrieved by the decision of the first Appellate Court has file before this Honourable Court two (2) **grounds** of appeal the effect that:

- 1. That the Magistrate erred in law and in fact by failing to consider that the Appellant was never served with reply written submission hence denied right to submit rejoinder submission.***
- 2. That, the Magistrate erred in law and in fact by affirming trial Court decision by failing to consider that the Respondent never shared the proceed of sale with Appellant in a matrimonial property known as Block A Plot 370 located in Morogoro as there was no any tangible proof.***

On the **1/12/2020** the matter being in a special session was scheduled to be heard by way of written submissions and

after the compliance by the parties in completion of filing the submission this matter is hereby determined.

The Appellant on the **1st ground** of appeal submits that the first Appellant Court erred by not considering that the Appellant was not served with the Reply to the Appellant's submission in support of the Appeal. Hence denied the Appellant the Right to file a rejoinder which is the same as denying the Appellant the right to be heard.

It was the Appellant's contention that the Court orders ought to be obeyed and failure to do so consequences must follow the event. A number of cases that support the above principle were cited to support the Appellant's contention.

In reply, the Respondent claimed that, the submission by the Appellant that the Honourable Magistrate ordered that modality of service is for each party had to deliver or serve a party was a lie. The truth is that the Honourable Magistrate ordered that each party is to pick his or her copy from the Court Registry. Further, the Appellant on that material date when the order was given was absent hence not conversant with the actual order that was given.

With regards to the **2nd ground** of appeal the Appellant state that the Court erred to have affirmed its decision without considering that the Respondent never shared the proceeds of sale of their house at Morogoro which is said to be a

matrimonial property nor did he involve the Appellant so that she may consent into selling the same.

Moreover, the lower Court also based its decision on the contention that the Appellant's failure to have crossed examine the Respondent is an admission of the facts deponed by the Respondent. The Appellant strongly resists such contention of the Court as relied upon. The Court has in various occasion at hearing seen that the Respondent admits to have sold the house and provided the Appellant with 10% of the proceeds, of which is not true for it was so. The Appellant states that she would not have complained before the Court.

In reply to the 2nd ground of appeal, the Respondent averred that, the Respondent agreed to sale matrimonial house as wrongly and illogically stated by the Appellant Counsel submission. The Respondent agreed to have purchased the said Block A Plot 370 in Morogoro way back in 1986 and later sold in 1999 of which the Appellant did not state her contribution on the same.

It is the Respondent's submission that, he is the one who purchased and built the houses in question as properly stated before the trial Court and reasonably submitted in the submission. Further, the Respondent averred that, the law allows a spouse to individually acquire assets during the subsistence of a marriage and prohibits the properties dully

acquired by either party before marriage to be included as matrimonial property.

Having gone through the submissions by the parties before this Honourable Court, the grounds of appeal will be tackled as they appear in the Memorandum of Appeal.

In the **1st ground** of appeal on service of the Reply to written submission by the Respondent, the Appellant state that she had not been served with the Reply to the Appeal. Hence such an act grabbed her of the right to be heard since the same caused the Appellant to fail file a rejoinder. And whereas the Respondent states that mode of service as ordered by the Court was for each party to pick their copy from the registry after being filed.

From the above submissions of the parties the same urged this Court to revisit the proceedings of the first appellate Court on the above averments by the parties. From the records of the first Appellate Court, it is in the proceedings as of **05/06/2020** where the Court ordered that:

- "ORDER:** 1) *The Appellant to file written submission on or before **19/06/2020**,*
- 2) *The Respondent to file the Reply on or before **03/07/2020**,*
- 3) *Rejoinder if any on or before **10/7/2020**,*
- 4) *Mention on **13/7/2020***

Signed
05/7/2020"

It is from the above that this Court finds that the Respondent was ordered to file the Reply on or before **03/07/2020**. Going through the records this Court finds that the Reply was filed by the Respondent on the **03/07/2020**. However, the same records of the first Appellate Court bare in them a Rejoinder filed by the Appellant on the **10/07/2020**. This proves that the Court's order was complied with effectively.

The Appellant's contention that the Respondent did not serve her barely does not hold water since there was a duty to due diligence where the Appellant would not be harmed if at all she had made follow up to the Court at the Registry to see if there was a Reply filed to obtain a copy.

Nevertheless, the Appellant would have also addressed such fact before the Court on the mention date (**13/07/2020**) so the Court would have given any necessary orders. The same was however not prayed for and yet a Rejoinder was filed hence this Court finds that the assertion that the right to be heard does not hold water in this case.

I am fully aware of the cases cited pondering on the principle that Court order have to be obeyed apart from that it would cause chaos and cause each person to act as they wish. Indeed, the Appellant not being served by the Respondent and yet a Rejoinder was still filed in Court and is in records proves that in one way or the other still the Reply reached the

Appellant and hence she managed to prepare a rejoinder. **I find this ground of appeal holds no water and is therefore meritless.**

On the **2nd ground** of appeal, the Appellant challenged the decision of the Court with regards to the Court's decision on the proceeds of Block A Plot 370 at Morogoro. This ground is argued for that the said property is a matrimonial property since it was acquired during the subsistence of their marriage. The Respondent arguing against the said fact stated that the said house was bought in **1999** before the two were married and was later on sold.

It is trite law that a matrimonial property is property that has been acquired by joint efforts and during the subsistence of a marriage. Each party is required to prove his/her contribution to the property acquired. Failure to do so, bars for the division of the said property. It is settled principle as enshrined by the case of ***BI. HAWA MOHAMED VS ALLY SEFU [1983] TLR.***

In the circumstance of this case, I have seen in the records that same was bought before the parties were married. And even if the same was otherwise the Appellant ought to have sought for her rights to challenge the sale by that time it was sold and not now as the same is already taken by events. **I find that this ground too devoid of merits.**

It is from the above that this Honourable Court finds that this appeal is meritless and is hereby dismissed.


No orders as to costs.

Right of Appeal Explained.



**L. E. MGONYA
JUDGE
12/05/2021**

Court: Judgment delivered before Hon. C. Magesa, Deputy Registrar in chambers in the presence of Ms. Vaileth Robert, Advocate for the Appellant, Mr. Omary Kilwanga, Advocate for the Respondent and Ms. Msuya RMA, this 12th day of May, 2021.



**L. E. MGONYA
JUDGE
12/05/2021**