

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 49 OF 2019

*(Arising from the judgment and decree of the District Court of Ilala in
Matrimonial Cause no. 41 of 2017)*

ANTONY MAZIKU..... APPELLANT

VERSUS

ELIZABETH MAZIKU.....RESPONDENT

JUDGEMENT

04th March, 2021 – 28th May, 2021

EBRAHIM,J;

This appeal emanates from the decision by the District Court of Ilala in Matrimonial cause No. 41 of 2017. The background of the matter as can be deduced from the records is that the appellant and the respondent solemnized their civil marriage in the year 1981. Later on they contracted a Christian marriage at Kigoma Roman Catholic Church. The two were blessed with three issues namely Regina Maziku born in 1982, Petronela Maziku born in 1985 and Athanas Maziku born in 1990.

Their marriage went on well until when the appellant started beating the respondent, denying her conjugal rights, using strong abusive words towards her in presence of other people and malicious destruction of respondent's properties. It was also alleged that the appellant involved himself in

extramarital affairs with other women of which a child was born out of wedlock namely Adelina Maziku in the year 2009.

Due to the supposed appellant's acts, the relationship went sour and eventually the respondent decided to leave the matrimonial home in early January 2017. Later on the respondent successfully petitioned before the District Court of Ilala seeking for orders to dissolve the marriage, decree for divorce, equal division of matrimonial properties jointly acquired and costs of the petition.

Aggrieved by the decision of the trial court, the appellant preferred the instant appeal raising four (4) grounds of appeal as reproduced hereunder;

- 1. That the Honourable trial court erred both in law and fact in declaring that the marriage between the parties has broken down irreparably without sufficient proof of the allegations raised by the petitioner.**
- 2. That the Honourable trial magistrate erred both in law and fact in dividing properties alleged to be matrimonial assets without proof of their existence.**
- 3. That the honourable trial magistrate erred both in law and fact in granting the respondent equal distribution of the matrimonial assets without proof of her contribution in acquisition of the same.**
- 4. That honourable trial magistrate erred both in law and fact in holding that the house which is located at Kigoma is a matrimonial asset in total disregard to the fact that the said house was acquired by the appellant through his own personal efforts.**

In this appeal, the appellant was represented by Mr. Mashiku J. Sabasaba learned advocate while Mr. Godfrey Kizito Chambi learned advocate appeared for the respondent. This appeal was argued by way of written submission. The parties filed their submissions in support and in opposition to the appeal.

Mr. Sabasaba prayed to abandon the first ground of appeal and submitted on the remained grounds of appeal. To support the second ground of appeal, counsel for the appellant submitted that the respondent produced a long list of movable and immovable properties however she did not give any evidence to prove their existence. It was the contention of the learned counsel for the appellant that ever since the appellant confirmed on the existence of the few assets from the list, she was then obliged to prove on existence of the rest of the assets. To supplement his argument he cited **section 111(1), (2) and 112 of the Evidence Act, Cap 6. RE 2019** He listed which assets being the apartment at Pugu, a house and shamba at Ilungusha Ifakara, a plot at Pugu Kichangani, a plot near Pugu Primary School, a plot at Chanzi area, a plot at Chanika Primary School, a plot at Kahama, a farm at Chanika Mwanzo Mgumu, a farm at Muguruwe Chanika, motorcycle and moto vehicle other than Suzuki Escudo No. T392 ATH.

It was further argued by Mr. Sabasaba that the respondent did not leave any chicken or cow as the records reveals from the appellant's testimony that poultry and dairy keeping was closed long before the respondent left their matrimonial home. He then

concluded that the division of the matrimonial asset was incompetent and bad in law.

On the third ground of appeal; Mr. Sabasaba contended that it was only the appellant who demonstrated by evidence on how he acquired and managed each property. He stiffly argued that the respondent did not give any tangible evidence to prove the extent of her contribution in money or otherwise towards acquisition of the matrimonial assets. To support his argument, he invited the court to make reference to **section 114 (2) (b) of the Law of Marriage Act, Cap 29. RE 2019.**

It was further expounded by Mr. Sabasaba that the distribution by the trial magistrate was irregular since he wrongly considered the respective assets to have equal value as he divided them to the parties in numbers and without even having a valuation report. He prayed for the distribution order to be quashed.

On the fourth ground of appeal; the appellant's counsel submitted that the house located at Kigoma ought not to have been treated as matrimonial asset since it was the appellant's private property which was acquired through his personal loan from his brother. He supported his argument by citing **section 58 of the Law of Marriage Act** (Supra) which allows spouses to own separate properties. The counsel then prayed that orders in respect of division of matrimonial assets be quashed and set aside.

The Respondent, in countering the arguments; replied on the second ground of appeal that she effectively proved the

existence of all the assets she listed through tendering of annexure EM-3 which was a list of the matrimonial properties jointly acquired, and through her testimony as well as the testimony of her son who was her witness. She further contended that the appellant's denial on the existence of some of the listed properties is purposely intending to mislead.

On the third ground of appeal, it was argued that the respondent did contribute towards acquisition of matrimonial properties as testified in both monetary form as she was a medical doctor so the income she generated was used to purchase properties such as plots, cows and other listed ones. It was further argued that the respondent contribution was also through the domestic efforts and work at home hence she was entitled to 50% shares of all the properties. To support her contention, she cited the case of **Sophia Mgala vs. Adolph Amian, High Court of Tanzania at Dar es Salaam, Pc Civil Appeal No. 33 of 2005 (unreported)** and the case of **BI HAWA MOHAMED vs. ALLY SEFU [1983] TLR 32 (CA)**.

In her rejoinder, Mr. Sabasaba persistently emphasised on what he had submitted in his submission in chief and he then supplemented that the respondent did not give any tangible evidence to prove her contribution in monetary terms towards acquisition of the properties.

I have dispassionately considered the grounds of appeal and the submissions of both parties. Having done so, the central issue for determination by this court is ***whether the decision of***

the trial court erred in ordering the distribution of the matrimonial assets.

Following the abandonment of the 1st ground of appeal, abandoned, I shall straight on begin with the second ground of Appeal to which the appellant contends that the respondent did not prove on the existence of some properties which he on his part denies them. It was the contention of the appellant's counsel that the respondent was duty bound to prove on their existence. Keenly from the records, the respondent listed matrimonial assets which are houses, apartments, farms, plots, motor vehicles, chicken and cows but the appellant just denied that some did not exist. The respondent testified on how they acquired the all-listed properties which she said was through selling cattle, loan from the bank which was deducted from her salary, income generated from her pharmacy, agriculture activities as well the contribution from the appellant. She had even elaborated as to how the properties are and how they manage those assets. For instance, on the alleged house at Kigoma, she testified to have been rented and the rent is collected by the respondent. The house at Pugu (matrimonial home) which she testified to have 4 apartments and each apartment has three rooms and sitting rooms self-contained and have tenants who pays rent after every six months. In respect of houses at Chanzi area she testified by describing the plot to have two houses; one has two frames and it is rented for business and the other was designed to be the guest house. She even accentuated that it needs minor repairs. She further described the premisc to have a Grocery rented and the tenant pays yearly. In respect of the

landed property at Kigogo Fresh she testified to have two houses, one is rented as a shop and the other is rented as a pharmacy and behind them there are rooms used for residential purposes which have been rented by the tenants. She narrated how the two acquired the two houses at Ifakara. On the other hand, the appellant, in a narrow manner denied the existence of some of the assets which the respondent listed.

Principally, in civil cases the burden of proof lies to a party who alleges anything in his favour. (see the case of **Antony M. Masanga v. (1) Penina (Mama Mgesi) (2) Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014, CAT (unreported). It is common knowledge that in civil proceedings the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. Again it is a trite law that both parties to suit cannot tie but the person whose evidence is heavier than that of the other must win as the English case of **Re B L[2008]UKHL 35**, the court made it clear that;

“if a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not.”

Basing on that position, measuring the testimonies given by the parties at the trial records, I find that the respondent's evidence is heavier compared to the mere denial on the existence of the said properties. Hence the second ground is dismissed in its entirety.

Coming to the third ground of appeal; the appellant's counsel contends that the respondent did not give any tangible evidence to prove her contribution towards acquisition of matrimonial properties hence she had failed to prove her contribution. With all due respect to the learned advocate, he misguided himself to believe that only tangible evidence could have proved an existence of a fact. The law recognises both testimonial and physical evidence in proving or disproving a fact in a case. As prior stated while disposing the second ground of appeal, the respondent had elaborated as how the two acquired the listed properties from her income she generated from her employment as well as other sources of income including her pharmacy business and agriculture. Again, her testimony was collaborated by the testimony of PW2 who was their son one Athanas Antony Maziku.

This was rightly considered by the trial magistrate as evidence and couldn't be denied lightly. Again, the appellant while cross examined at the trial court, admitted that the respondent was the one who was cooking food for him and buying home needs. It is prudent to state clearly that the respondent brought up a family and maintained a home and she was thereby supporting the appellant in his bread-winning activities by releasing him from family duties. This is actual contribution and quite plainly the fact that their marriage comes to an end; she had a right to claim upon the properties' shares basing on the vital contribution to the family life as it was made clear in the prominent case of **Bi hawa Mohamed vs. Ally Seif [1983] TLR 32.**

On the issue of distribution of properties by the trial court, I subscribe to the contention by Mr. Sabasaba that it was irregular since the trial magistrate wrongly considered the respective assets to have equal value as he divided them to the parties in numbers and without even having a consideration on their value. This was an erroneous approach attained by the trial magistrate as it is prospective to cause more chaos as each asset is likely to differ in value with the other.

To reach a fair and just distribution to the parties basing on their contribution the trial magistrate should have divided all the alleged matrimonial assets in a ratio of percentages on each party. The 3rd ground has merit to that extent.

On the fourth ground of Appeal; the appellant contends that the house located at Kigoma is his personal property which he constructed himself after borrowing some money. On the other hand, the respondent claims that the said property is the matrimonial property. I have gone through the testimonies of the parties and their witnesses and I have read exhibit D1 which is a loan agreement. I am convinced that the construction were made solely by the appellant however the appellant has failed to elaborate on how he solely acquired the plot which he constructed the said house. The respondent's testimony is to the effect that through agriculture, her employment as a doctor, pharmacy business and contribution made by the appellant the two acquired the said asset. I am alive with the provisions of **section 60 (a) of the Law of Marriage Act, Cap 29 RE: 2019** which allows spouses to have personal properties however the

appellant has failed to prove on the balance of probabilities that the house at Kigoma is his private property as there was no details explicated by him as to how he solely acquired the plot on which the construction was made. Hence the ground is devoid of merit is hereby dismissed.

Therefore, basing on the reasons which I have expounded, this appeal partly succeeds. Ever since the division of matrimonial asset was irregular, this court hereby faults and varies the order in respect of division of the listed matrimonial assets. In considering the contribution made by each party it is hereby ordered that the ratios of division of all the matrimonial properties will be 50% for the appellant and 50% to the respondent in reliant to valuation fallouts by a qualified valuer except for the house at Kigoma where the ratio attributed is 70% to the Appellant and 30% to the Respondent.

Taking into account the nature of this matter being matrimonial issue, each party to bear its own costs.

It is ordered accordingly.

 
R. A. Ebrahim
JUDGE

Dar Es Salaam

28/05/2021