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

PC MATRIMONIAL APPEAL NO. 11 OF 2021

(Arising from Matrimonial Appeal No. 60 of 2021 of Nyamagana District Court, Originated from Matrimonial Cause No. 86 of 2020 from Mwanza Urban Primary Court)

GERALD MANYILIZU DEUS ..... APPELLANT

VERSUS

ESTER MANG'ERO ..... RESPONDENT

JUDGMENT

Date of last Order: 24.06.2021

Date of Judgment: 25.06.2021

A Z. MGEYEKWA, J

At the first instance, the parties in 2020 successfully petitioned for a divorce and the same year the respondent had successfully lodged his complaints at Mwanza Urban 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 2007. During their marriage, they managed jointly to acquire several matrimonial properties. It appears they had a successful marriage 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 respondent decided to institute a case at Mwanza Urban Primary Court in Matrimonial Cause No. 86 of 2020. The trial court determined the case and dissolved the marriage and divided the matrimonial properties amongst the parties.

Dissatisfied, the appellant filed an appeal before Nyamagana District Court in Matrimonial Appeal No. 60 of 2021, where the 1st appellate court uphold the decision of the trial court. Undeterred, the appellant filed the instant appeal on the following ground:-

1. *That, the District Court of Nyamagana erred in law and fact by upholding the decision and order of Mwanza Urban Primary Court which ordered that the respondent is entitled to 40% as contribution in matrimonial properties.*

When the matter was called for hearing on 24th June, 2021, the appellant and the respondent appeared in persons, unrepresented.

The appellant was the first one to kick the ball rolling. He was very brief and straight to the point. The respondent claimed that he is dissatisfied with the first appellate court decision which upholds the decision of the trial court. He claimed that the respondent's contribution of 40 % in acquiring or developing the matrimonial assets was on the higher side. The respondent complained that he is the one who bought the plot and obtained the same with Victoria Wilfred and Veronica Kashamba and the first and second wives respectively. He added that the respondent who was the third wife did not contribute much. In his view, he claimed that the respondent deserves only 10 % shares of the matrimonial house located at Nyashana center.

Responding to the appeal, the respondent also was very brief and straight to the matter. She stated that lower courts were right to divide the matrimonial properties among the parties. She valiantly argued that she has never heard the names of Veronica and Victoria as the wives of the respondent. The appellant stated that she deserves a reasonable share because she made a contribution in acquiring the matrimonial properties house. She added that even 405 was not a fair amount but she admitted it.

On the strength of the above submission, the respondent beckoned upon this court to uphold the decisions of the lower and dismiss the appeal.

In her brief rejoinder, the appellant had nothing new to add. He reiterated his submission in chief. Insisting that the appellant left him for some time then later she went back to the respondent claiming for divorce and division of matrimonial properties. He also complained that he was not given any opportunity to call witnesses to testify in his favour

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.***

Addressing the ground of appeal, the appellant in his submission complained that the first appellate faulted itself to award the respondent 40% of the matrimonial shares. 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] TLR 32, and **Yesse Mrisho v Snia Abdul,** Civil Appeal No. 147 of 2016, Court of Appeal of Tanzania.

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 respondent'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 produce any documentary evidence such as certificate of title. The records show that none of the couples has proved that he acquired the matrimonial properties in exclusion of the other party.

The record reveals that the respondent testified to the effect that they acquired one guesthouse and nine shops together. The appellant tried to marshal his evidence to show that though the marriage was formalized in 2007, the respondent constructed the shops in exclusion of the appellant. Both parties testified without tendering any documentary evidence to prove their extent of contribution. None of them did show their financial contribution in constructing the said houses.

The conclusion, then, is clear that evidence presented at the trial court shows that both parties did not contribute to the construction of the guesthouse and shops. The parties are going fishing for information which

are not supporting their claims. As long as there is no dispute that each of the parties were owning a guesthouse and several shops, then, the same was required to be subjected for division among the parties. It is featured on record that the trial Magistrate took his precious time evaluating the reasons for the division of matrimonial properties. I am in accord with the respondent that, there was no reason for the first appellate court to fault the decision of the trial court in the division of matrimonial properties.

Before I pen off, I want to make it clear that the respondent in his submission claimed that the respondent was his third wife and that he was not given an opportunity to call witnesses to testify in his favour. I have perused both the handwritten and typed proceedings of the trial court there is nowhere shown that the appellant raised the said issue before the trial court, raising new ground and issue at the time of submission is not acceptable, as will only prejudice the respondent, who will be taken by surprise. In the case of **Juma v Manager PBZ Ltd and others** [2004] I EA 62 Court of Appeal Tanzania at Zanzibar, it was held that: -

> *"...the first appellate Judge, therefore, erred in deliberating and deciding upon an issue which was not pleaded in the first place".*

Guided by the above authority I have found that the appellant has introduced a new issue. Therefore, the same are afterthoughts. As a generally applicable rule, new issues cannot be raised on appeal. Therefore, the same is hereby disregarded.

In the circumstances and for the foregoing reasons, the appeal has no merit. Therefore I proceed to uphold the trial court and first appellate courts decisions. Appeal dismissed.

Order accordingly.

DATED at Mwanza this 25th June, 2021.

A.Z.MGEYEKWA

JUDGE

25.06.2021

Judgment delivered on 25th June, 2021, and both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

25.06.2021

Right to appeal is fully explained.