

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**PC. CIVIL APPEAL NO. 52 OF 2020**

**(C/F Civil Appeal No. 16 of 2020 in the District Court of Babati at Babati, Originating from  
Matrimonial Cause No. 06 of 2020 at Babati Primary Court.)**

**HUSNA A. MAHIMBO.....APPELLANT**

**VERSUS**

**VITALIS F. MAMWALA.....RESPONDENT**

**JUDGMENT**

**22/07/2021 & 30/09/2021**

**GWAE, J**

Before this court, is a second appeal preferred by the appellant after being dissatisfied with the decision of the District Court of Babati at Babati (1<sup>st</sup> appellate court) which reversed the decision of Babati Primary Court (trial court) with respect to the division of one matrimonial property to wit; a motor vehicle make Toyota Mark X with Registration Number T176 DKC.

The appeal has its origin from a Matrimonial Cause before the trial court where the appellant filed a petition for divorce against the respondent on reasons of cruelty and adultery. In proving her case the appellant summoned two witnesses

while the respondent testified on his behalf. After hearing of the parties, the trial court's findings were such that the marriage between the old couple had broken beyond repair and therefore proceeded to dissolve the marriage. On the issue of maintenance of the children, the respondent was ordered to maintain his two children by paying Tshs. 100,000/= per month. As to the division of matrimonial properties subject of this appeal, it was decided that the properties that the old couple had jointly acquired during their marriage were one motor vehicle Toyota Mark X and one unfinished house and therefore the two properties were to be divided equally.

Aggrieved by the division of the matrimonial properties specifically on the Motor vehicle, the respondent appealed to the 1<sup>st</sup> appellate court stating that the said motor vehicle was not their property as the same was placed to them as security for the loan of Tshs. 9,000,000/= given to the respondent's brother. The 1<sup>st</sup> appellate court having re-evaluated the evidence of the trial court eventually came up with the findings that the motor vehicle one Toyota Mark X did not belong to the old couple and therefore could not be subjected to the division of the matrimonial properties as was wrongly decided by the trial court. According to the 1<sup>st</sup> appellate court, the only property that was subject to the division is the unfinished house.

The respondent dissatisfied with the decision of the first appellate court has filed this appeal with a total of three grounds of appeal, namely;

- i. That, the appellate court erred in law and in fact by altering the trial court's decision which was just and in accordance with the law as per the evidence adduced by the parties during trial.
- ii. That, the appellate court erred in law and fact by wrongly reassessing the evidence by the parties during the trial and forthwith fail to justly decide on balance of probabilities as required by the law.
- iii. That, the appellate court erred in law and fact by altering the trial court's decision without according the appellant hereof the right to be heard as against the respondent's appeal before it.

On hearing of this appeal, the appellant was represented by the learned counsel Mr. Festo Simon Jackson while the respondent appeared in person unrepresented. With leave of the court the appeal was disposed of by way of written submission.

Submission on the first and second ground of appeal shall be summarized together; the appellant alleged that the 1<sup>st</sup> appellate court misdirected itself in varying the trial court's decision since It was properly decided by the trial court that the parties started living together in the year 2013 and therefore they jointly acquired the said properties that is the motor vehicle Toyota Mark X and the

unfinished house. Basing on the decision in the case of **Bi Hawa Mohamed vs. Ally Sefu** [1983] TLR 32, the appellant is of the view that she is entitled to the division of the matrimonial properties which she acquired together with the respondent during subsistence of their marriage. She further alleged that the fact that the said car was placed as a bond was not proven by the respondent and is a mere cooked story by the respondent as he failed to bring the person whom he alleged to have him (respondent) given a loan by placing the said car as security to testify in court nor did he tender any document to substantiate his assertion. The appellant insisted that this fact has no proof, she thus urged this court to take into consideration the decision in the case of **Tanzania Private Sector Foundation vs. Adolph Qambaita & another**, Civil Application No. 181 of 2016 which emphasized that a person who alleges is under duty to prove.

On the third ground of appeal the appellant argued that on appeal he was not give right to be heard as against the respondent nor is it indicated whether the appellant filed a reply to the respondent's petition of appeal.

Resisting the appellant's submission, the respondent was of the view that the 1<sup>st</sup> appellate court properly re-assessed the evidence of the trial court and finally rightly came into righteous conclusion that the motor vehicle subject to the sought division did not belong to the parties herein as the same was used as security following a loan secured by the respondent's brother. The respondent further

stated that in division of matrimonial properties the paramount consideration is not the fact that the assets were acquired jointly but the extent of contribution of each party towards the acquisition of the said assets. According to him the evidence sufficiently demonstrates that the respondent bought his car way back in October 2013 before he started living with the appellant. The respondent maintained that the 1<sup>st</sup> appellate court properly reevaluated the evidence adduced before the trial court.

On the third ground of appeal the respondent submitted that the records are so clear that on 22/06/2020 both parties appeared before the 1<sup>st</sup> appellate court magistrate when the matter was scheduled for hearing, therefore it is not true that the appellant was not afforded the right to be heard.

Having considered the submission by the parties together with the records of both the trial court and 1<sup>st</sup> appellate court, I am of the view that this court is bound to resolve two issues; **firstly**, whether the 1<sup>st</sup> appellate was justified in holding that the motor vehicle make Mark X with registration number T 176 DKC is not a matrimonial property and **secondly**, whether the appellant was accorded right to be heard.

On the **1<sup>st</sup> and 2<sup>nd</sup> ground**, the trial court's records are such that the appellant testified that they jointly acquired two motor vehicles Mark X and Toyota Mark II. On the other hand, the respondent when testifying alleged that he bought

his first car in the year 2013 and sold it in the year 2014 where he bought another car Nadia. Again, in the year 2016 he sold the said car and bought another one make Toyota alteza and in the year 2018 the said car was sold and the money obtained was lent to his brother who in returned placed his car one Mark X which is the subject of this appeal as a security. The amount that was borrowed was Tshs. 9,000,000/=. Thus, the respondent contended that the said car which the trial court subjected it to division was not a matrimonial property. Together with this testimony the respondent tendered a number of documentary evidence to prove the transactions on the motor vehicles including the sale agreements. More so, the respondent also tendered a loan agreement between him and one Philcon Mwanakusha Kaembi, which for the purpose of this appeal, part of the agreements is hereby quoted;

"Mimi ndugu Philcon Mwanakusha Kaembi mwenye passport hio hapo juu nimemwachia ndugu Vitaris Festo Namwala ambae ni mdogo wangu tumeshea mama na yeye – nimemkabidhi gari aina ya Toyota Mark X yenye namba za usajili T 176 DKC rangi nyeupe. Pia ndogo wangu ameniazima kiasi cha shilingi Milioni Tisa 9,000,000/= - nakwenda safarini nje ya nchi nikiludi nitarejesha pesa yake na yeye atanirejeshea gari yangu."

From oral testimony of the respondent together with the documentary evidence on record which is partly quoted above, I feel constrained to uphold the

decision of the 1<sup>st</sup> appellate court with effect that the respondent was able to prove his case on the balance of probability as against that of the appellant. It follows therefore, the motor vehicle in question did not belong to the parties herein and therefore was not subject to matrimonial division.

In line with the above, I am of the view that it is also crucial to take into consideration as to whether the first car that is alleged to be bought by the respondent was jointly owned by the parties or it was the personal property of the respondent.

The appellant herein when testifying stated that she started living with the respondent in the year 2013 whereas the respondent on cross examination stated that he started to live with the appellant from December 2013. Looking at the sale agreement it appears that the first car make ECHO was bought on 11/10/2013 which is before the parties' marriage. In terms of section 60 of the Law of Marriage Act Cap 29 R.E 2019 it is apparent that the car was bought before the parties started living together and therefore it is presumed that it is the personal property of the respondent unless the presumption is rebutted by the appellant.

On the **third ground** of appeal, the appellant is alleging that he was not accorded the right to be heard. As correctly submitted by the respondent, the appellant herein is trying to mislead this court as the 1<sup>st</sup> appellate court's record in particularly at page 2 of the typed proceedings is lucidly clear that on 22/06/2020

the parties appeared before the 1<sup>st</sup> appellate court magistrate and both were given an opportunity to address on the grounds of appeal. Both orally argued the appeal. As it is evidently clear from the records that, the right to be heard was exercised by both parties. Similarly, it should be known that, in appeals, the law Magistrates' Courts' Act Cap Revised Edition, 2019 does not mandate respondents to file replies to the petitions of appeal. Equally, this court is of the view that this ground of appeal is baseless as it lacks merits.

Having discussed above, this court finds that the appeal before this court is baseless and therefore it is therefore dismissed. Given the relationship that existed between the parties, I shall refrain from making an order as to costs of this appeal and those incurred in the courts below.

It is so ordered.



  
**M.R. GWAE**  
**JUDGE**

**30/09/2021**