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

**MUSOMA SUB- REGISTRY**

**AT MUSOMA**

**CIVIL APPEAL NO. 20 OF 2021**

*(Arising from Musoma District Court at Musoma Civil Appeal No. 74 of 2020, originally at Musoma Urban Primary Court civil case no. 79 Of 2020)*

**ADVENTINA VALENTINA MASONYI**
**(Administratix of the estate of the late**
**Buhacha Bartazari Kichinda) ..... APPELLANT**

***VERSUS***

**LETICIA MTANI IHONDE ..... RESPONDENT**

**JUDGMENT**

7th September and 15th October,2021

**F. H. MAHIMBALI , J.:**

The respondent in this case had contracted a customary marriage with the deceased one Buhacha Bartazari Kichinda in the year 1989 and later a civil marriage in the year 1994 and they were blessed with five issues. They enjoyed their marriage until her ex. Late husband was transferred to Singida on work transfer where then their marriage turned sour and his late husband filed for a divorce and was granted by the court on 14/01/2016 through matrimonial cause no. 96 of 2015 at Musoma District Primary Court at Urban. However, through Matrimonial

cause no. 15 of 2016, the respondent filed review application against the verdict in matrimonial cause no. 96 of 2015 at Musoma District Primary Court at Urban challenging that she was not heard in that matrimonial application cause. Upon rehearing the parties through matrimonial cause no.15 of 2016 at Musoma District Primary Court at Urban, the trial court dismissed this suit as lacking any merit and divorce granted was maintained.

It was later discovered that his late husband who died during a car accident had contracted another marriage with the appellant who is also the administratrix of his estate. The respondent then after death of the deceased husband decided to institute a civil suit against the appellant so that the court could distribute the matrimonial properties, she allegedly had jointly acquired with her late ex. Husband.

At the trial court, the respondent alleged that during the subsistence of their marriage, they acquired two houses located at Ruhu village that were constructed in the year 1995, another house at Buhare that they bought the said plot in 26/01/2013, they started building in the year 2014. Other properties area a piece of land that they bought in the year 2009, a piece of land located at Mutex that was bought in the year 2005, a farm at Manyoni that is twenty acres, a piece of land at Singida ,

a car ( Vanguard T. 715 DMG) bought in 2015 .She claimed ownership of the properties because she contributed to the acquisition of the said matrimonial properties as she was the legal wife of the deceased. She tendered a marriage certificate (P1) and documents to show ownership of the lands (P2, P3 and P4).

On the other hand, the appellant alleged that she wascustomarily married to the ex.late husband of the respondent in the year 2012 and had formalized it by a civil marriage in the year 2019 as he was separated from the respondent since the year 2008. The court dissolved their marriage in the year 2016. They were blessed with three issues. As regard the properties, she claims to be the owner of them and that the respondent is not interested in any. That they used to live at Buhare in the year 2013 and she is the one who searched for that piece of land and they started constructing the house in the year 2014 and she participated in making the bricks used in the construction of the house and she has proof of the materials used during construction of the said house. Her late husband was transferred to Singida for work purposes, she later joined him after the house was complete. While at Singida she purchased another piece of land and her late husband was the witness and in the year 2018 they bought a car (Vanguard T 715 DMG) she

alleged she has the copy of the document showing ownership. She tendered her marriage certificate (D1), letter to show purchase of the land in Singida (D2), vehicle registration certificate (D3), copy of the judgment (D4), documents to prove she went to the village (D5), document to prove payment of construction materials (D6), (D7) letter of introduction (dowry), and water bills (D8). To support her testimony, one Masatu Kichinda stated that the appellant was the wife of the deceased and the respondent was given 23 cows and a house at Ruhu hence she is not entitled to the properties belonging to the appellant.

The trial court after hearing the parties ruled that the properties claimed by the respondent that they had been acquired jointly during the subsistence of their marriage do not belong to her as she did not prove on a balance of probabilities that they belong to her.

The decision of the trial court did not amuse the respondent, she successfully appealed to the district court where the decision of the trial court was totally reversed. This decision aggrieved the appellant; hence she filed a petition of appeal to this court containing four grounds of appeal. The grounds of appeal as contained in the petition of appeal are as follows;

1. That, the decision of the 1st Appellate court is bad at law for a failure to properly re-evaluate evidence adduced by the appellant at the stage of trial thereby arriving at a wrong decision in the face of the law.

2. That, the decision of the 1st Appellate court is bad at law as the principle of natural justice was not observed on the part of the appellant hence arriving at a wrong decision.

3. That, the 1st Appellate court erred in law and facts when it held that, the respondent has a right of the division of the severance allowance while during the death of the late Buhacha Bartazari Kichinda , the respondent had already been divorced by the deceased person since 2016.

4. That, decision of the 1st Appellate court is bad in law for lack of legal reasoning.

When this matter came up for hearing, the appellant was represented by Mr. Paschal Peter, learned advocate while the respondent enjoyed the legal services of Mr. Ostack Mligo, learned advocate.

Submitting in support of the appeal Mr. Paschal stated that this appeal traces it origin from the decree of Musoma District court. He dropped the fourth ground of appeal and hence submitted on the remaining three grounds of appeal.

On the first ground of appeal, he stated that first appellate court erred in law for failure to re- evaluate the evidence. In essence, the trial court made a proper evaluation of the evidence on record on how the matrimonial properties were acquired, the appellate court on the other hand erred in re-evaluating the evidence. The order of division of matrimonial property located at Buhare was not a matrimonial property as the time it was acquired the respondent had already been separated and the trial court records are clear on this. It was his humble opinion that that the appellate court erred in law ordering division of the matrimonial properties equally and he referred the court to the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Makongo** , Civil Appeal No. 102 of 2018 CAT at Tanga at page 12 and 13 is very clear on this, I quote

> *It is clear therefore that extent of contribution by a party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise also where there is no evidence to prove extent of contribution.*

In line with this CAT's decision, the 1st appellate court erred in law reaching that decision without there being any proof of the said contribution as per the law.

In the third ground of appeal that the first appellate court erred when it held that, the respondent has a right of the division of the severance allowance while during the death of the late Buhacha Bartazari Kichinda , the respondent had already been divorced by the deceased person since 2016. With this issue of severance pay, it has been submitted that it was not deliberated at the trial court and if she was entitled to, it ought to have been raised at the trial court. This issue was raised by the first appellate court on its own and there is no evidence that the respondent contributed anything to the employment of the deceased. As she was divorced since2016, she cannot be the legal heir of the deceased through this suit. He prayed that the decree of the first appellate court be quashed and set aside and, in its place, the decision of the trial court be restored. He also prayed that the appeal be allowed with costs.

Countering the appeal, Mr. Mligo submitted that the appeal is bankrupt of merits. On the first ground of appeal, he countered that the first appellate court did not evaluate the evidence and it reached a

wrong decision, instead it was the trial that erred in reaching that decision. What the first appellate court did was to re- evaluate the evidence of the trial court (see page 5-6) and it was guided by the principle in the case of **Paulo Ngwandu Lucas vs Thomas Jeja** (Land Appeal no. 88 of 2018 HC- Shinyanga). He stated further that the trial court did not consider the time of the marriage between the respondent and the deceased (1989 to 2016), and it did not consider the 27 years they were together and the contribution of the respondent in acquiring the said property (buhare house) but only between 2014- 2016. To him, the first appellate court complied with the CAT's decision in the case of **Deemay Daati and 2 others Vs. Rep** (2005) TLR 132 where the Court of Appeal held that the appellate court can look at the evidence and make its own findings of facts when there is misdirection and non-direction on the lower courts. In this case the first appellate court identified the misdirection and misapprehension of the facts especially on the Buhare house as the same was built when the marriage was in subsistence (2014- 2016) and they participated in their contribution, and as the marriage subsisted for 27 years, there is no way the house cannot be part of the matrimonial house liable for division as ordered. He went further to state that the argument that the said house was not part of the matrimonial property on mere allegations of names is not valid as it

is a trite law, that in marriage issues, ownership of properties is not per seestablished by registration of names. In the case of **Daniel George Bwanali vs Okuly Eliufoo Muro** , Civil Appeal No. 138 of 2020 HC Dsm at page 7 where Hon. Rwizile , J ruled

> *"matrimonial properties/assets must have been acquired during or in subsistence of marriage or acquired before but substantially improved during marriage ,...the house that was built or developed during marriage is a matrimonial property ".*

Thus, when it comes to matrimonial properties, registration of names is immaterial. And it was his opinion that the case of Nimrod Kurwijila, it must be used in favour of the respondent and not otherwise. As to the extent of contribution, the famous case of **Bi Hawa Mohamed** is of good precedent. Hence the first ground of appeal lacks merits.

As regards the second ground of appeal, it is his submission that it was not argued and he is comfortable that the principle of natural justice was well observed in the hearing of the case both at the trial court and at the first appellate court.

On the third ground of appeal, that the appellate court raised the issue of severance pay suo motto. At page 7 of the appellate court's

judgment it s clear that when the deceased was studying at Mzumbe University, the respondent contributed to the studies of the deceased. Hence upon his demise the respondent is entitled to severance pay. He asked this court to be persuaded by what was decided by the court in the case of **Amoni Benedictor Buchwa vs Aisha Shabani Hamis**, PC. Matrimonial Appeal No. 11 of 2019 at page 9, that contribution of a spouse can either be direct or monetary. Considering that one contribution is not less important than the other, the first appellate court rightly invoked this principle. Even if it was raised suo motto, he stated that it can be expunged from the award by the first appellate court. He prayed that this appeal be dismissed with costs.

Rejoining, Mr. Paschal reiterated his earlier submission in respect of the house at Buhare as when it was being constructed the respondent and the deceased were separated, and a separated spouse cannot contribute to the acquisition of matrimonial property since the deceased was in another relationship with the appellant. The third ground was raised suo motto by the first appellate court, he conceded for the same to be expunged. He prayed the appeal to be allowed and the decision of the trial court to be restored.

Having heard the rival submissions and gone through the court's records, this court will now determine if this appeal is meritorious.

The first complaint of the appellant is that the first appellate court erred in law and fact for failure to re- evaluate the evidence. On the other hand, the respondent claims that the first appellate court did not error as it re – evaluated the evidence properly. The law is settled that appellate court has mandate to re-evaluate evidence of the trial court. This case is mostly based on the distribution of matrimonial properties. The respondent argued the trial court did not grant the respondent any property because she failed to show how contribution to the acquisition of the said properties. On the other hand, when the matter was before the first appellate court, the appellate magistrate did not show which evidence assisted her to reverse the decision of the trial court. The law is well established on the factors to consider in distribution of matrimonial property (See, section 114 of the Law of Marriage Act, **Gabriel Nimrod Kurwijila vs Theresia Hassan Makongo, Amoni Benedictor Buchwa vs Aisha Shabani Hamis**, PC. Matrimonial Appeal No. 11 of 2019). The first appellate court has not shown how it reversed the trial's court decision as the respondent at the trial court stated that she was entitled to the matrimonial properties as she was the wife of the

deceased. Reading the trial court's records, the appellant has not shown how she was interested with these claimed properties. In consideration of D4 exhibit of the trial court (Judgment of Matrimonial Cause no. 15 of 2016), it is clear that on the 29th February 2016, the Respondent was legally divorced in inter partes proceedings. Any dissatisfaction with that verdict, she ought to have accordingly appealed against it as per law. This court is at one with the appellant that the first appellate court misevaluated the evidence and thus reached to an erroneous decision. Hence this ground of appeal has merit and it is allowed.

The appellant's second grief is that the principle of natural justice was not observed, while the respondent alleged it was observed. Unfortunately, this ground of appeal was not deliberated by the appellant's counsel during the hearing of the appeal. I will thus not discuss it as well.

The last complaint of the appellant is that the respondent is entitled to severance pay. This was an issue raised by the court suo motto and the parties had no chance to state on it. This was an irregularity. After all, it was an irrelevant matter in the circumstances of this case. The introduction of this issue seems not to be backed up by any court proceedings at the trial court. As it was not one of the issues

for deliberation at the trial court, it could not have a room for discussion at appeal level to be considered by the first appellate court. In the case of Lucas **Venance @ Bwandu and Another v. The Republic**, Criminal Appeal No. 392 of 2018 CAT at Mbeyapage 11 held;

> *"...In those cases, we warned trial courts against including in their judgments facts which are not reflected in the recorded evidence in the proceedings. In* ***shija s/o Sosoma*** *(supra), we followed our earlier decision in* ***Athanas Julias v. Republic*** *, Criminal Appeal No. 498 of 2015 (unreported) where we held the act of the trial resident magistrate to include in his judgment facts which are not reflected in the record is an incurable irregularity on the following reasoning:*
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> *"The implication here is that, either, in his judgment, the trial resident magistrate did include extraneous matters which did not completely feature in the evidence of the witnesses who were called to testify, or, the trial resident magistrate did omit to record a number of facts that were said by the witnesses in their testimonies. In either case, we are inclined to join hands with the contention of the learned counsel for both sides that, the irregularity occasioned is fatal and did vitiate the entire proceeding of the trial court"*

Therefore, the third ground of appeal is also allowed. The error/omission being done by the appellate court, the result of it is to

expunge it from the court record the extraneous matters considered by the first appellate magistrate in the first appeal before her.

In fine this court considers this appeal as meritorious. In my considered view, the right cause by the respondent after the verdict of *inter partes* proceedings in Matrimonial Cause no. 15 of 2016, was to appeal against that decision if at all she was dissatisfied by it. Otherwise, she ought to have raised her concern in the probate court if she really had interests in any of the alleged properties owned by the deceased but now believed in the hands of the appellant. For her to claim the division of matrimonial properties against the co-spouse (wife) after the demise of her ex-husband in a civil suit can be a misplaced proceeding and unjustified. A co-wife cannot in law enter into the shoes of the deceased husband and be held accountable for division of matrimonial properties jointly acquired between the respondent and the deceased husband in a normal civil suit. By the way, where had been the respondent all the time between 2016 and 2020 (upon determination of the *interpartes* proceedings in a subsequent matrimonial suit) to seek for division of matrimonial properties jointly acquired between her and the deceased husband if at all she was denied and if they are any until when he died. All in all, there was no any convincing evidence by the respondent at the

trial court to make her entitled of any ownership of the alleged properties. The legal position is "*who alleges must prove*"(s.110 and 111 of the Tanzanian Evidence Act, Cap 6, R.E 2019). This being a civil case, the standard of proof is on balance of probabilities (Section 3(2)(b) of The Tanzania Evidence Act, Cap 6, R.E 2019). The Respondent failed to establish her claim in legal standard required to make her entitled to any of the shares therefrom. Instead, the appellant did all and even exceeding the legal standard on balance of probability.

All said and done, the appeal is meritorious. The decision of the first appellate court is quashed and set aside by considering extraneous and irrelevant matters which were not part of the trial court proceedings. The decision of the trial court is hereby restored as the respondent failed to establish ownership/interest of the claimed properties as against the appellant. Costs of the appeal be borne by the respondent.

It is so ordered.

DATED at MUSOMA this 15th day of October, 2021.


F. H. Mahimbali

JUDGE

15/10/2021

**Court:** Judgment delivered in this 15th day of October, 2021 in the presence of the Paschal Peter, advocate for the applicant, Mr. Mligo, advocate for the respondent and Neema P. Likuga – RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE

15/10/2021