

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

PC MATRIMONIAL APPEAL NO. 01 OF 2021

(Arising from Civil Appeal No. 12/2020 of Musoma District Court, original Civil Case No. 30 of 2016 of Musoma Urban Primary Court)

JAPHETI MTANI WANG'UBA APPELLANT

VERSUS

PELAGIA KOKUHIRWA HERMAN RESPONDENT

JUDGMENT

15th September & 27th October 2021

F. H. MAHIMBALI, J.:

The appellant is the divorced husband from the respondent who was his wife from 1968 until their marriage was officially dissolved by Musoma Urban Primary Court in 2015. During the subsistence of their marriage, they were blessed with nine issues and managed to get two residential houses: **the house situated at Nyakato** and the other situated at **Nyambui – Suguti**.

The genesis of this appeal can be traced way back from 2015. According to the court records, the respondent filed the divorce case which was registered as case no. 92 of 2015 in which divorce decree

was granted, but there was no division of matrimonial property ordered by the trial court.

Thereafter, through civil case no. 30 of 2016, the respondent filed an application for division of matrimonial properties jointly acquired during the subsistence of their marriage following the divorce proceedings in case no. 92 of 2015. In this application, the only property mentioned by the Respondent was the house at Majita – Suguti. In the course of hearing the said application, it was noted to be two houses jointly acquired and/ or developed during the subsistence of their marriage. These are houses at Nyakato and the one at Suguti. The trial court upon hearing the application on the evidence adduced in court, divided the same each one to get one house: the respondent herein was given the house at Nyakato whereas the appellant was given the house at Majita – Suguti (Nyambui). This division of matrimonial properties did not amuse the appellant, thus he appealed to the District Court via Civil Appeal no. 22 of 2016, where the said decision of the trial court was quashed and set aside for contravening the legal requirements provided under rule 3 of G.N 2 of 1988, The Magistrates' Courts (Primary Courts), (Judgment of Court), Rules. It was thus ordered that, there be retrial of the case before another magistrate with a different set of assessors. Following the verdict of the District Court in Civil Appeal no. 22 of 2016,

the Respondent wanted to appeal out of time before the High Court – Mwanza, where the same was dismissed for want of sufficient reasons. As what would be the way forward of the matter, the respondent ended up complaining to the offices of the Hon Judge In Charge, Government Executive offices without any final solution. As the order of the District Court in Civil Appeal no. 22 of 2016 stood not complied with, it was then directed by the same District Court via Matrimonial Revision no. 22 of 2019 that following the dismissal order by the High Court in the attempted appeal out of time, the District Court then directed that let the matter be tried de novo as ordered in Civil Appeal no. 22 of 2016. Thus, the primary court in its subsequent proceedings which commenced on 27th May, 2020 and ended on 7th October, 2020 did not please the appellant, thus he appealed to the District Court and later to High Court which is the basis of this decision.

Where as the divorce decree is not in contest, it is the division of matrimonial properties jointly acquired during their joint life in the happiness of their marriage which is in high contest. Whereas the respondent claims total and full ownership of the house at Nyakato and partial ownership of the house at Nyambui – Suguti, the appellant on the other hand alleges that the house at Nyambui – Suguti does not

belong to the matrimonial property but rather belongs to the clan as it belonged to his parents, but claims ownership of the house at Nyakato.

Upon hearing the case on division of the matrimonial properties, the trial court made an equal share division to both properties (Nyakato and Suguti). The trial court made this finding on the basis that there is evidence that the house at Nyakato was acquired during the happy moment of their joint marriage life thus it is a matrimonial home. Equally, the house at Suguti though the same was built by the appellant for his parents, there is evidence that the same was developed during the happy moments of their joint life and by using the funds contributed by both the appellant and the respondent. As the said parents are now deceased, automatically the ownership of the said house reverts to the family as the said parents died while in the subsistence of their marriage and that its division be in equal shares as well, ruled the trial court.

The verdict of the trial court didn't amuse the appellant thus appealed to the District Court of Musoma on ground that the finding of the trial court that the Suguti house is a matrimonial home was erroneous as the said home solely belonged to the appellant's parents. In its appellate findings, the first appellate court made another order more unpleasant to the appellant that the house at Nyakato is solely

owned by the respondent and the house at Suguti is solely owned by the appellant but it being a family house his entitlement is limited to the usufructuary rights only without a right to its disposition considering the rights of other clan members and the children of the respondent. The first appellate court further ordered that the appellant as is residing at the adjacent house to the main house at Nyakato, he should vacate with immediate effect.

Dissatisfied with the findings and orders of the first appellate court, the appellant has knocked the doors of this court now challenging the decision of the first appellate court that it erred when it ordered firstly, that the respondent owns the house at Nyakato at a 100% share without considering the fact that the said house is a matrimonial house and secondly, when it ordered that the appellant is the owner of the house at Suguti – Majita despite the fact that the said house is not a matrimonial home but the clan property of the appellant.

During the hearing of this appeal, both parties appeared in persons, unrepresented. When invited to argue his appeal, the appellant briefly submitted that his grounds of appeal in his petition of appeal be adopted. He submitted that the first appellate Court erred in law in making such unknown division as per law. He thus prayed that the

appeal be allowed and that the orders of the first appellate court be varied as are unknown in the eyes of law.

In her reply, the respondent submitted that the house at Nyakato is personally hers as she used her own money in finding a plot and construction of the house despite the fact that the registration of the said house is erroneously in the name of the appellant. She submitted that the appellant had not been staying at home all the time. Thus, it was her own money, which she used to buy the plot at Nyakato and constructed the house she is living now. She insisted further that the appellant doesn't know how she got the money for the purchase of that place. It was her submission that the appellant is not having any share with the said house at Nyakato. As regards the house at Suguti, she submitted that it is the matrimonial property between her and the appellant and it is not the clan house as alleged by the appellant.

Upon hearing the appeal, it is now this court to determine the merit of the appeal.

I have traversed the trial court's records and considered the parties' submissions both at the first appellate court and this court, it is undisputed that the parties were couples since 1968 and officiated their marriage life in Christian virtue in 1973. Their marriage life had been in

joyful until 2015 when their relationship soured and the divorce proceedings filed in court after the settlement had proved futile. In essence from 1982, the parties' life had not been harmonious as it used to be in 1970s.

In digesting the parties' testimony and evidence in the case record regarding the properties jointly acquired during the lifetime of their marriage, two houses are notably seen. The one at Nyakato and the other at Suguti – Majita. Of the two houses, the one in much contention is the house at Nyakato. Whereas the trial court ruled that each party to get equal share of the both houses, the first appellate court differed significantly by granting full ownership to the respondent of 100% share of the house at Musoma – Nyakato. Regarding the house at Suguti, the appellant has just been awarded a usufructuary right of 100% but retaining the right to disposition to the respondent's children and other clan members of the appellant. Deeply digesting the first appellate court's findings looks more as land court in determining and declaring ownership. In my considered view, the duty of declaring ownership of landed properties is vested to land courts. This being a matrimonial cause, the extent power of the matrimonial court is restricted to division of matrimonial properties jointly acquired during their life time and not declaring ownership. The latter is purely the

domain of land courts which neither matrimonial nor probate courts do enjoy in respect of landed properties.

Considering the testimony of the respondent and the appellant at the trial court, gives the finding that both houses are matrimonial properties jointly acquired and developed during the best harmonious moments of the subsistence of their marriage. Though the house at Suguti was originally being used by the appellant's parents, however there is evidence that its acquisition and development was done by the joint efforts of the parties during their best harmonious moments of life (There is an exhibit letter by Mr. Naomi Daniel Yangwe who is owner of the said plot– certifying sale of the said plot in 1977 at a price of 15,000/= to both the appellant and his wife - Respondent).

As regards the house in Nyakato – Musoma, there is evidence that one Mwita Chacha on 22nd February, 1982 to have sold the said plot to the Respondent at a tune of TZS: 2,800/=. Also there is evidence (exhibit MD4, a letter from Maryknoll language School of P.O.Box 298 Musoma dated 31st Dec, 2000) that the respondent is indebted by the said school at a tune of TZS: 29,500,000/= for the construction of her residential house in which, she was then in default payment and that the house was in danger of being legally subjected to sale unless payment

was fully settled. However, there are some evidence in the said court record that the appellant used to paying some council levies in respect of property tax for Musoma Municipal Council (Collectively exhibit JW2 for years 2004, 2012, 2013, 2014 and 2016).

Considering the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurwijila V. Theresia Hassani Malongo, Civil Appeal No. 102 of 2018**, clearly stated that the LMA has not specifically defined the term "matrimonial assets" comparing with other jurisdictions like India, the term "matrimonial assets" is defined in section 4(1) of the Matrimonial Property Act, Chapter 275 of the Revised Statutes, 1989 as hereunder:-

"In this Act. "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exceptions of (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children; (b) an award or settlement of damages in court in favour of one spouse; (c) money paid or payable to one spouse under an insurance policy; (d) reasonable personal effects of one spouse; (e) business assets; (f) property exempted under a marriage contract or separation agreement; (g) real and personal

property acquired after separation unless the spouses resume cohabitation. "

The definition given is not far from what the Court of Appeal stated in the famous case of **Bi Hawa Mohamed v. Ally Sefu [1983] TLR 32** when trying to search for a proper definition of what constitutes matrimonial assets in line with section 114 of the LMA. The Court stated:-

"The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view, the term "matrimonial assets" means the same thing as what is otherwise described as "family assets": Under paragraph 1064 of Lord Hailshams HALBURY'S LAWS OF ENGLAND, ,fifth Edition, p. 491, it is stated, "The phrase "family assets" has been described as a convenient way of expressing an important concept: it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and the furniture in it (2) those which are of a revenue nature - producing nature such as the earning power of husband and wife".

The Court of Appeal in this case elaborated that, the position in India, which was inspirational, is quite similar to that in our jurisdiction

when it comes to interpret the phrase "**matrimonial assets**", which the phrase "family assets" used in the Indian Act, refers to those properties acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives.

The important question posed now is whether the houses at Suguti and Nyakato are matrimonial houses. As per evidence in record, I firmly rule so.

When ordering the division of matrimonial assets or properties, the extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution. What can be observed in the proceedings before the Primary Court is that, the respondent did testify extensively regarding the extent of contribution in acquiring the matrimonial properties at Nyakato. On the other hand the appellant dwelt deeply in leading evidence for proving divorce. It was expected for him to adduce evidence showing his extent of contribution but ended up showing payment of property tax receipts. The issue of extent of contribution

made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property. In **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (unreported) the Court of Appeal stated that,

"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets".

The Court of Appeal in the case of **Gabriel Nimrod Kurwijila (supra)** emphasized more that:

"that extent of contribution by a party in a matrimonial proceeding is a question of evidence.... 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".

Once there is no evidence adduced to that effect, a party cannot blame the Court for the outcome of the said appeal. He who alleges must prove (section 110 and 111 of the Tanzania Evidence Act Cap 6, R. E. 2019) Having reasoned that much, in digest to the case at hand and extent of analysis of evidence done, it is clear that the appellant has no much material contribution in the house at Nyakato, but the respondent has. In the same vein, the Respondent has no much

material contribution in the house at Suguti despite there being some proof in its purchase in the year 1977 and minor developments but no further proof of her active role in material contribution of its current position. In that vein, in making division of the matrimonial properties in this matter, I hereby order that the house at Nyakato falling into the hands of the respondent at 2/3 percent share and the respondent at 1/3 percent share and the house at Suguti the appellant enjoys 2/3 percent share and the respondent gets 1/3 percent share. The division criteria has taken into account the extent of each party's contribution to the acquisition of the said matrimonial properties as per evidence in record.

That said, the appeal is allowed to the extent of above clarification. Each party is at liberty to buy out the other so long as his or her percentage is concerned. Considering the fact that this is a matrimonial dispute involving spouses, each party shall bear own costs.

It is so ordered.

DATED at MUSOMA this 27th day of October, 2021.



F. H. Mahimbali

JUDGE

27/10/2021

Court: Judgment delivered this 27th day of October, 2021 in the presence of Appellant, Mr. Gidion Mugo and respondent being absent.

Right of appeal is explained.



F. H. Mahimbali

JUDGE

27/10/2021