

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

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 49 OF 2021

(Arising from Civil Appeal No. 91 of 2020 from District Court of Kinondoni at Kinondoni.
Originating from Kimara Primary Court at Kimara in Matrimonial Cause No. 106/2020)

JULIUS W. AKYOO.....APPELLANT

VERSUS

VENOSA GERALD MASSAWE.....RESPONDENT

Date of Last order: 12/08/2021

Date of Judgment: 2/11/2021

JUDGMENT

N.R. MWASEBA, J.

The respondent instituted before Kimara primary court the matrimonial cause No. 106 of 2020 against the appellant herein claiming for divorce, distribution of matrimonial assets and maintenance of their children. After full trial the trial court granted an order for divorce, ordered maintenance of children to be upon the appellant and regarding the distribution of matrimonial assets the respondent was given 40% of the house located at Kibanda cha Mkaa- Mbezi.

The appellant was aggrieved by the said decision and appealed to the District Court where his appeal was not fruitful, hence this appeal with the grounds listed hereunder:

- 1. That the District Court failed to examine the grounds raised by the Appellant since the proceeding, judgment and decree before the trial Court was not given under a fair hearing as it has been bias.*
- 2. That the District Court failed to analyse on purported admitted evidence if at all existed before the trial court that said documents never examined by the appellant as the law requires.*
- 3. That without prejudice to the second ground of appeal, the district court erred in law and facts by entertaining the Msigani ward conciliation board certificate annexed to the respondent`s submission before the district court without precaution on whether was or was not tendered before the trial court.*
- 4. That the District Court erred in law and facts by entertaining the respondent`s submission even after the recognition of the relationship of the respondent and her counsel who is the close relative that did not declare conflict of interest for the sake of justice.*
- 5. That the magistrate erred in law and fact for failure to re-examines matrimonial assets which were jointly acquired and excluding other matrimonial assets without reasonable grounds.*

In this court, both parties were represented in which Ms Aziza Shabaan learned counsel appeared for the appellant while Mr Thomas Massawe learned counsel represented the respondent. The appeal was disposed of orally.

Upon perusal of the record, I have seen that the claim which was tabled before the trial court was an order for divorce, maintenance of children and distribution of matrimonial assets. Going through the grounds of appeal and the submissions by both counsels, I see the grievance is based on the issue of distribution of matrimonial assets on which the appellant challenges the procedure during trial whereby he claims that there was no fair hearing. Thus, the main issues to be determined before this court are:

1. Whether the finding of the trial court was reached without any procedural irregularities
2. Whether the matrimonial assets were fairly distributed.

Starting with the first issue as to whether the finding of the trial court was reached without any procedural irregularities, the appellant on his third ground of the appeal challenges the certificate issued by the Msigani Conciliation Board that it was annexed to the respondent's written submission at the district court while it was not tendered before the trial court. I have glanced at the trial court record and found the certificate was well filed during the institution of the case. This is a legal requirement as provided under **Section 101 of the Law of Marriage Act, Cap 29 R.E 2019** which says:

"No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties"

This requirement was well complied with by the respondent as it is revealed in the record. The counsel for the appellant says it was attached during submission in the district court. The record reveals that this was done when the respondent was replying to the first ground of appeal to prove that the matter started at the conciliation board as per legal requirement. Thus, this ground has no merit.

In his fourth ground of appeal, the counsel for the appellant declares that the counsel who represented the respondent herein before the district court is her uncle, thus there was a conflict of interest. In his submission he says he was told by his client that the counsel for the respondent is her relative. In his reply, Mr Massawe for the respondent said there is no proof as to this allegation and it is a mere hearsay evidence which is not admissible in court. He further stated that it is a new fact which was not raised before the district court so it cannot be raised at this stage. I have revisited the record and found that before the district court, the parties herein were represented by the same advocates who represent them before this court. However, this fact was not raised before the district court while the counsel for the respondent had been appearing in court and both parties were present. I concur with the counsel that this is a new fact which cannot be determined at this stage. This was well stated in the Court of Appeal decision in **FARIDA AND ANOTHER VS DOMINA KAGARUKI** CIVIL APPEAL NO. 136 OF 2006 cited with approval in **KIZUWA KIBWANA 4**

VS GIBSON BAINGAYE. Misc Land Appeal No. 35 of 2017 where it was held that:-

"It is general principle that the Appellate Court cannot consider or deal with issues that were not conversed or pleaded or raised at the lower court."

That being the legal position this ground lacks merit and thus the fact that the counsel for the respondent is her uncle cannot be entertained at this stage as seems to be an afterthought.

Coming to the first and second grounds of appeal the appellant says there was no fair trial. He refers this court to the time during the admission of exhibit that he was not given an opportunity to respond to its admission. Moreover, those documents were admitted generally as exhibit "M1" collectively without naming each document separately. Mr Massawe learned counsel for the respondent says the appellant was given an opportunity to be heard whereby after admission of the said documents the appellant was given an opportunity to cross examine the respondent.

I have revisited the record and noticed a number of irregularities on admission of those documents. The respondent gave her sworn evidence on 16/07/2020. Then she notified the court that she would bring the exhibits. On 29/07/2020 when the respondent came to testify, she did not take oath, or being warned to be under her previous oath. She tendered the exhibits and the courts received them without availing the appellant an opportunity to object the admission of documents in case he wishes. This procedure of admitting exhibit is fatal and therefore I proceed to expunge it from the record. **(See the court of Appeal decision in FALE SHIJA**

@ MIGUNGUMALO V. REPUBLIC, CRIMINAL APPEAL NO. 555 OF 2020 Seating at Dodoma). However, the evidence of the respondent remains. Thus, the first and second grounds of appeal have merit and so the first issue is answered in affirmative.

The second issue is whether the matrimonial assets were fairly distributed. In the fifth ground of appeal, the appellant is challenging on the issue of examining the matrimonial assets which were jointly acquired. The appellant says during the subsistence of their marriage they acquired two houses one at Mbezi Kibanda cha Mkaa and the second one is at Gogoni area. The respondent says they only acquired one house located at Mbezi Kibanda cha Mkaa. This has been the main controverse specifically on the house at Gogoni. The appellant says he bought it and he decided to write the name of the respondent. His evidence was supported by the ten-cell leader who witnessed the sale.

I wish to reproduce the provision addressing distribution of matrimonial property, that is, **section 114 of the Law of Marriage Act, Cap 29 R.E 2019** which states: -

*"114 (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of **any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.** (emphasis added)*

(2) In exercising the power conferred by subsection (1), the court shall have regard-

(a) to the customs of the community to which the parties belong;

(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (emphasis is mine)

(c) to any debts owing by either party which were contracted for their joint benefit; and

(d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts"

The essence of this provision is that when the court is determining the issue of distribution of matrimonial assets it must first understand what constitutes a matrimonial property, second be assured as to the extent of contribution of each party to the acquisition of matrimonial assets. The respondent referred this court to **Section 60 (a) of the Law of Marriage Act** which specifies that there are matrimonial assets and individual assets.

Section 60 of the Law of Marriage Act, Cap. 29 R.E 2019 states that where during the subsistence of a marriage, any property is acquired-

"(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs

absolutely to that person, to the exclusion of his or her spouse;

or

*(b) in the names of the husband and wife jointly, there shall be a **rebuttable presumption** that their beneficial interests therein are equal.” (emphasis added)*

This provision refers to Presumptions as to property acquired during marriage. The matrimonial assets appearing in the name of one spouse or both it is presumed that it belongs to a particular person. The word Presume is simply defined by **the Black’s Law Dictionary, 8th Edition** that:

“to assume beforehand; to supposed to be true in the absence of proof.

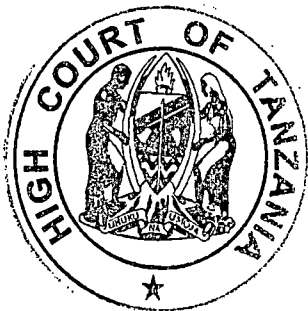
From this meaning, there must be a proof as to what are matrimonial assets and then ascertain the distribution according to the law. The respondent says in 1994 she was given a plot at Gogoni by her father. She started to built a house thereon in 2010 up to September, 2016. Her father testified in court that he gave her daughter a plot at Mbezi Temboni then she sold it and bought a plot at Gogoni. Her forth witness told the trial court that the respondent sold the plot given by her father and spent the said money to built the house at Gogoni. The respondent’s evidence was full of contradictions. She said her father gave her a plot at Gogoni while her father says she gave her a plot at Mbezi Temboni (See page 6 of the primary court typed proceedings). The appellant told the court that he bought the plot at Gogoni and built a house there. His evidence corroborated with the evidence of a ten cell leader also testified that he

was present when the appellant bought the plot at Gogoni. This makes me to believe that the house at Gogoni is a matrimonial asset and thus subject for division. Having so observed, the second issue is answered in negative as the house at Gogoni was declares to be owned by the respondent separately.

From the foregoing the two houses are declared as matrimonial assets. I upheld the decision reached by the lower court regarding the house at Mbezi Kibanda cha Mkaa for the respondent to get 40%. Regarding the house at Gogoni it should be equally divided.

It is so ordered.

DATED at DAR ES SALAAM this 2nd day of November, 2021.




N.R. MWASEBA

JUDGE

2/11/2021