

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

CIVIL APPEAL NO. 334 OF 2021

*(Appeal from the decision of the Resident Court of Kibaha at Kibaha in Matrimonial
Cause No. 1 of 2021, delivered by Hon. J.J. Mkhoi, SRM on 27th August 2021)*

EDITHA RWE GASIRA.....APPELLANT

VERSUS

DIONITZ RUY YEGE MAHONNA.....RESPONDENT

JUDGMENT

Date of last order: - 19/4/2022
Date of judgment: - 10/06/2022

OPIYO, J.

The appellant herein aggrieved by the decision of the Magistrate Court of Kibaha, at Kibaha vide Matrimonial Cause No. 1 of 2021, delivered by Hon. J.J. Mkhoi on 27th August 2021 appeals to this court on the following grounds; -

1. That, the trial magistrate erred in law and in fact for giving weight to evidence tainted with false testimony to award the petitioner a



greater percentage of a property (the house situated at Picha ya Ndenge, Kibaha, Coast Region) while parties themselves chose to abandon the property in the contents of their pleadings regardless of whether the parties acquired the property jointly or not.

2. That, the trial magistrate erred in law and in fact generally in evaluating all the evidence adduced by the parties to the suit as a result ended up with a biased conclusion on issues.
3. That, the trial magistrate erred in law and facts for failure to consider material evidence adduced by the respondent's witness as a result failed to consider the contribution by the respondent in the acquisition and development of the said properties allowing the then respondent a lower percentage rate of ownership as against the petitioner.
4. That, the judgment failed to cite any rights of appeal to the aggrieved party as it is supposed to be in each case.
5. That the judgment of the trial magistrate is problematic and incapable of legal support.

The parties preferred this appeal to be disposed of by the way of written submission. Both parties complied with court orders and filed their respective submission timely.

Arguing for the appeal on the first ground the appellant divided the said ground into two aspects. The first aspect is that the trial magistrate

erred in dividing the house which is located at Kibaha, Picha ya Ndege while it was not pleaded in a suit. For that he argued that it is a principle of law that, parties are bound by their own pleadings. The respondent in his petition for divorce at paragraph seven(7) had prayed for the division of the following properties; area of business (Kibanda) located at ferry, Posta, Dar es Salaam, a farm located at Picha ya Ndege, near Shirika la Eimu Kibaha (Pwani) which the respondent sold without appellants knowledge and on the prayers to the trial court by the petitioner was to the effect of equal division of the matrimonial assets. That, the trial magistrates admitted that, the property which was situated at Picha ya Ndege was not pleaded by the parties (*page 10 of the typed judgment*) but proceeded to divide the said house at the rate of 55% to 45%. She cited the case of **Peter Ng'homango v The Attorney General, Civil Appeal No. 114 of 2011, The Court of Appeal of Tanzania, at Mwanza** to substantiate her argument.

Furthermore, the appellant submitted that the trial magistrate failed to prove the reasons why he divided the unpleaded house into the ratio of 55% to 45%. The records show that, despite the parties' efforts, there is an improvement that was done by DW2 who is the first born of the appellant and referred to *pages 31 to 41 of the typed proceedings*, but the trial magistrate abandoned stating that there is no tangible evidence to support DW2 evidence as the witness stated clearly that he did not record the evidence because his parents were living at peace.

The appellant prayed to consolidate the 2nd and 3rd grounds of appeal as they are both based on the evidence adduced by the parties and their



witnesses and relate to the distribution of the properties which they jointly acquired and had been given by their relatives. The evidence of DW1 and DW2 was very clear on the development of the properties. With regards to the ownership of the motor vehicle with registration number T 164 DJV, it was stated that it was purchased by DW2 in 2017 and gave it to his parents as a gift, but this evidence was rejected because he failed to adduced documentary evidence to support the claim same as the respondent who also failed to adduce the evidence regarding the same, but was given it all.

She added that there is an existence of the motorcycle which was acquired during their cohabitation through their joint efforts. The appellant testified on how they acquired the same as it is reflected at pages 26 to 31 of the typed proceedings, and pages 9 to 10 of the judgment which establishes the contribution of the appellant. But the appellant was denied right to distribution contrary to guidelines under the provision of section 114 of the Law of Marriage Act. She argued that denying her contribution was an error on part of the trial court after she proved her contribution. She referred to the case of **Mbegu Mohamed v Mariam Ramadhani, Pc Civil Appeal No. 22 of 2021, HC, DSM Registry** to support her argument. In this case it was held that:-

"it should be noted that division of matrimonial property is not a matter of equal share as claimed by the appellant's learned counsel but entirely on the extent of contribution in terms of work, money, and property. the same must be properly assessed and determined"



Regarding the fourth ground of appeal, she argue that the trial magistrate failed to cite any right of appeal to the aggrieved party as it should be in each case. That, instead of explaining right of appeal in the judgment he explained it in the proceedings as reflected on page 47 of the typed proceedings.

On the 5th ground, the appellant stated that the judgment of the trial magistrate is problematic and incapable of legal support. The trial magistrate overruled the objection raised by the defence counsel that the petitioner did not comply with the requirements of the law which require documents, contract in this case to be genuine and stamped. The sale agreement of the property of Picha ya Ndege was allowed without being stamped. She prayed for appeal to be allowed.

The appeal was heavily resisted by the respondent. Regarding the first ground he stated that the document of the said house located at Picha ya Ndege which was divided by the court at the ratio of 45% and 55% was attached in the amended petition and during the hearing the respondent tendered the same and it was admitted as exhibit P2. That in narrating his sole contribution, the respondent made it clear that it was not part of the matrimonial asset and the appellant termed it as a matrimonial house thus, subject to division. On the second limb of the first ground he submitted that the plot on which the house is located was bought by the respondent and since they were cohabiting with the appellant and she was a businesswoman it was regarded that she



contributed therein in the long run. So, the trial magistrate was correct in ordering the division.

In regard to the consolidated grounds 2 and 3, the trial court failed to evaluate the evidence adduced by the parties as a result reached a biased conclusion. Regarding the testimony of DW1 and DW2 as stated earlier, there is no tangible evidence adduce in court to support their assertion, so there is no bias conclusion that was reached.

On the ground regarding the Motor vehicle with registration number T. 164 DJV, he argued that its registration card bears the name of the respondent as the owner and DW2 failed to produce a document to prove he gifted the same to his parents. With regards to the motorcycles, he stated that, the appellant attempted to state that she took a loan at Postal Bank and bought the same and referred to exhibit D5. Exhibit D5 shows that the loan was for school fees and not for buying motorcycles, thus there is no point in the appellant being involved in buying the motorcycles as she did not prove her contribution. He argued that, the law is very clear that for the person to be awarded shares must prove contribution and the appellant failed to discharge this duty of proving her contribution as explained above.

Regarding the fourth ground, the appellant submitted that it should be an error on the part of the typist not to state right of appeal in the judgement. However, it is undisputable that after the judgment was read the trial magistrate explained the right to appeal and the same is reflected at page 47 of the proceedings.



Lastly, on the 5th ground, the respondent submitted that the judgment of the court is not problematic and incapable of legal support as the appellant claims. The sale agreement was properly tendered and admitted as evidence and the appellant failed to explain which law was violated by so admitting. Thus, the decision of the trial court should be upheld with costs.

In rejoinder, the appellant stated that the respondent failed to grasp her submission and prayed to adopt her submission in chief, and for the avoidance of repetition, I won't reproduce the same.

I have painstakingly gone through the submission of both sides and the records of the trial court. The appellant has raised a total of 5 grounds of appeal. In the course of disposing this appeal, I will deal with the first ground separately and consolidate grounds 2 and 3, and lastly 4 and 5.

Starting with the first ground, the main issue was whether the parties abandoned the house situated at Picha ya Ndege, Kibaha Coastal Region in their pleadings and whether the division was proper. In her submission the appellant stated that, it is a principle of law that, parties are bound by their own pleadings, and that the respondent in his petition for divorce under paragraph seven (7) he prayed for the division of the following properties; area of business (Kibanda) located at ferry, and a farm located at Picha ya Ndege, near Shirika la Elimu Kibaha (Pwani). Thus, the house was not subjected to division by the parties, it was wrong for the court to have divided it. However, the respondent



resisted the assertion and submitted that the house in dispute was attached in the amended petition and during the hearing the petitioner therein, the respondent herein, tendered the same and it was admitted as exhibit P2.

Perusing the lower court file, it is seen that, on 19th April 2021, when the matter was coming for hearing advocate Hassan Salum who was holding brief for advocate Innocent Mwelelwa for the then respondent prayed to amend reply to the petition after realizing that some of the properties were not mentioned. Also going through the testimony of PW1 at the trial court he tendered exhibit P2 which is a sale agreement of the area that is at Picha ya Ndege. The above property was indeed not included in the amended petition as claimed by respondent. There was no amended petition that was filed, only amended reply to the petition which also did not mention it. It is observed that the respondent herein mentioned the house situated at Picha ya Ndege on his testimony as reflected on page 11 and page 17 of the proceedings whereby he claims to have bought the plot and later constructed a house. This evidence was supported by the evidence of PW2 (respondent's wife) as reflected on page 21 of the proceedings that, the said plot was bought in 1989 and the construction started on 1990 and finished 1993. The same house was mentioned by the appellant at page 26 of the proceedings where she claimed:-

"We were successful acquired a house at Picha ya Ndege through my joint effort between me and PW1" (sic)



Thus, as the appellant correctly stated, the house located at Picha ya Ndege was not mentioned in the pleadings. However, in the course of the hearing the same house was brought in by both sides and even the appellant termed it as matrimonial property, meaning that the parties jointly acquired the house in dispute when they were cohabiting. Thus, although they did not mention this property in their pleadings, but they did so during the hearing. In the proceedings the appellant had a chance to estop the respondent from bringing new fact but she did not and she supported the same by calling it a matrimonial house as observed in page 26 of the proceedings. More so, cross examination was conducted by both parties in respect of the same house the appellant claims the court indulged in its own facts to order its division. In my view, the realities of discussing this house at length during trial by both sides proving their contribution in its acquisition makes this ground an afterthought. Both sides intended the division, not that the court divided the same out of its own creation as the appellant makes it sound. This being a petition for divorce, not dividing what the parties put forward as matrimonial property would be absurd. I therefore, find inclusion of the house in division matrimonial property proper.

Coming to the second limbs which is the extent of contribution, the court is empowered to order the division of the matrimonial property during divorce petition and the test is on the customs of the community, extent of contribution, debts and needs of infant children as provided under section 114(2)(a) to (d) of the Law of Marriage Act, Cap 29, R.E 2019. In the instant case the test falls under the extent of contribution although the parties were not married, herein both parties worked as



the appellant was a business woman and the respondent was employed and he is the one who bought the plot prior to their cohabitation. I thus find the reasoning of the trial court of division of 55% and 45% to be proper considering each party's contribution. From the testimonies of both sides, respondent proved to have contributed more being the purchaser of the property in the first place. This limb of the ground is also dismissed.

On the 2nd and 3rd grounds which are based on the assertion that, the trial magistrate erred in law and fact in analysing evidence which ended up in wrong conclusion which led to unfair distribution of the assets. In the case of **Mwanahawa Iddy Mtili v Omary Rajabu Muambo, Pc. Civil Appeal No. 59 of 2019, High Court, at Dar es Salaam (unreported)** Kulita, J. stated at page 7, second paragraph that principle of law requires the one who alleges any fact to prove it.

This also reflects the burden of proof initiated by the **law of Evidence Act, Cap. 6, R.E. 2019** in **section 110 (1) and (2)** which provides that;

"110. (1) whoever desires any Court to give Judgment as to any legal rights or liability defendant on the existence of facts which he asserts must prove those facts exist
(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"



From perusal of the lower court file, I find no evidence that was adduced before the court to back up the claims of ownership of the motor vehicle with registration number T 164 DJV. It was only stated that it was purchased by DW2 in 2017 and given as gift to his parents. This assertion was not supported by any tangible evidence. It remained a mere allegation not supported by any convincing evidence. The documentation relating to motorcycles also in exhibit D3 bears the name of respondent and no tangible evidence to show joint ownership just like those for motor vehicle in exhibit D4. Thus, as there was no evidence of joint contribution towards acquisition of these properties, this court finds no justification varying the trial court findings. That appellant set to prove the purchase of the motor vehicle by DW2, but she failed to discharge her obligation to prove so on balance of probability. These grounds of appeal also collapse.

Lastly on ground 4 and 5 where it is claimed that the trial magistrate failed to cite right of appeal and the judgment is problematic and not enforced. It is true the right of appeal is not referred to in the judgment, but it is reflected on the proceedings (see page 47 of the typed proceedings). I find this not to be fatal as explaining right of appeal is not one of the ingredients of the judgement. What is important is that the right was fully explained to parties and the same be reflected in the proceedings. After all with the coming into force of the oxygen principle such trivial issues ceased to have any bearing. Cases are now decided basing on substantive justice as it was ruled in the case of **Yakobo Magoiga Gichere v Peninah Yusuph, Civil Appeal No.55 of 2017, Court of Appeal of Tanzania at Mwanza (unreported)** that,

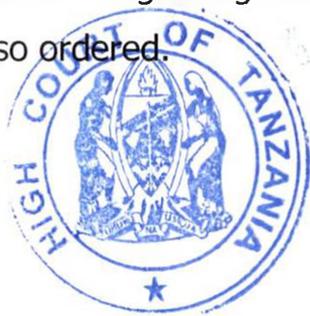


"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice"

In the case above courts of law are encourage to deal with substantive justice and avoid legal technicalities impairing meritorious determination of cases. With this in mind, I rightly, believing so, have dealt will with the matter on merit by analysing the grounds of appeal substantively affecting the matter, rather than dismissing the case basing on the technicalities like right of appeal not explained in the judgement, while the same is reflected in the proceedings, meaning that the right was well explained.

Having said so, I find all grounds of appeal not to have merit and I find no need to disturb the lower court judgement. This appeal is therefore dismissed. Regarding the relationship of the parties, I order no costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "M. P. OPIYO".

**M. P. OPIYO,
JUDGE
10/06/2022**

A handwritten signature in blue ink, appearing to read "M. P. OPIYO".