IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

DC. CIVIL APPEAL NO. 14 OF 2021

(C/F Matrimonial Appeal No. 03 of 2021 in the District Court of Moshi, Originating from Himo Primary Court Civil Case No. 14 of 2019)

ERICK CHRISTOPHER MANJIRA..... APPELLANT

Versus

JAMES VUMILIA (Legal representative

of Oliver Joseph Mahoo) .....RESPONDENT

JUDGMENT

Last Order: 10th Feb 2022

Date of Judgment: 22nd Feb 2022

MWENEMPAZI, J.

The appellant, Erick Christopher Manjira and the respondent who is being represented by Mr. James Vumilia were once a married couple. Their marriage was dissolved in the year 2018. After the dissolution the respondent filed a claim at the Himo Primary Court with respect to the division of matrimonial properties through Shauri la Madai Na 14 la 2019.

Aggrieved by the decision of the primary court the appellant appealed to the district court. The district court made its determination on the appeal and once again divided the matrimonial assets amongst the parties. The appellant was once again aggrieved and thus preferred a second appeal before this court on the following grounds:

1. That the Honorable district magistrate erred in law and in fact entertaining the matter which had no jurisdiction to entertain.
2. That the person represented the respondent in honorable district court had no locus standi.
3. That the District Magistrate erred in law and facts to hold that the appellant be given 20% value of the house located at Ngarenaro while the same had been acquired on her absence and the evidence is very clear.
4. That the District Magistrate erred in law and fact to hold that the property of the four rooms located at Karanga be given whole to the respondent.
5. That the District Magistrate erred in law and in fact for failure to evaluate the evidence in record and came up to an unfair decision.

6. That the District Magistrate erred in law and fact by considering wrong appeal filed before her court.
7. That the respondent cannot benefit from her own wrongs.

At the hearing the appellant was represented by Ms. Glory Tairo learned advocate while Mr. Sylvester Kahunduka appeared for the respondent. It was agreed that the appeal be argued by filing written submissions. Parties were ordered to file their submissions as scheduled. The submissions were timely filed and the effort is highly appreciated.

Out of the 7 (seven) grounds, the appellant argued only five grounds and abandoned the first two. Submitting on the third ground regarding the 20% value of the house located at Ngarenaro which was to be given to the respondent, the appellant stated that the honorable magistrate misdirected herself by considering that the house at Ngarenaro was acquired before the parties separated. The learned counsel submitted that based on evidence on record the Ngarenaro house and Plot were acquired in 2006 and that parties voluntarily separated in 2001. It was therefore the view by the learned counsel that the said property was obtained and owned by the appellant himself.

With respect to the fourth ground of appeal Ms. Tairo averred that it was improper for the house located at Karanga to be given to the respondent because its in evidence that immediately after parties contracted their marriage in 25/09/1993 moved to the sand house built by the appellant himself on 26/09/1993. Ms. Tairo argued that the court is vested with power to order division of matrimonial properties based on a number of factors including the extent of contribution by each party in acquiring those properties. She cited the case of **Bibie Mauridi vs. Mohamed Ibrahimu** [1989] TLR 162 and section 114(1) and (2) of the **Law of Marriage Act, Cap 29 R.E 2019**. It was her further submission that the contribution done by the respondent was of domestic, conjugal, cooking and raising two issues with the appellant and no other contribution for the period of 7 years they were together. It was her views that the district magistrate ought to have keenly evaluated the effort of each party towards acquiring the said property before giving the whole share to the respondent.

On the fifth ground Ms. Tairo submitted that the honorable magistrate erred in law and in fat by failing to keenly evaluate the evidence on record so as to come up with just conclusion on the distribution of properties. She

was of the view that most of the properties were individual properties of the appellant.

Arguing the sixth ground Ms. Tairo submitted that the trial magistrate erred in law and in fact by considering a wrong appeal. she argued that since the matrimonial cause No.2 of 2018 was heard Ex-parte, it was wrong for the respondent to rush and open a civil case No. 14 of 2019 to claim for the distribution of matrimonial properties. It was Ms. Tairo's view that the respondent should have first applied for setting aside the ex-parte decision then parties could have been heard interparty.

Finally, on the seventh ground Ms. Tairo argued that the records reveal that it was the respondent who left the appellant and fled to Swaziland to marry another man even changing her original name to Eva Edward Nyanya. She contended that based on a common law principle that a person cannot benefit from her own wrong, it was therefore wrong for the respondent to benefit anything from the appellant since she was the one who left the appellant and married another man in another country. Based on that submission the learned counsel prayed for the appeal to be allowed.

Reacting to the submission, Mr. Kahunduka submitted with respect to the third ground of appeal that the house located in Ngarenaro was acquired by both parties before 2001 when they were living together and that there is ample evidence in the primary court typed proceeding to support the averment. Mr. Kahunduka also submitted that the appellant himself admitted in that the respondent's contribution was in raising their three children. He argued that based from the authority given in the case of **Bi Hawa Mohamed vs. Ally Sefu** (1982) TLR, supervising builders, raising children and taking care of them, conjugal rights, washing of clothes, cooking and many other activities do amount to contribution efforts towards acquisition of properties during existence of marriage. It was Mr. Kahunduka's submission that the first appellate court was justified in ordering the distribution of the Ngarenaro house as it did as there was enough evidence on the balance of probability that the respondent contributed towards the acquisition of the said house.

Responding to the fourth ground of appeal Mr. Kahunduka submitted that based on evidence on record the respondent did have her share of contribution towards the acquisition and maintenance of the said matrimonial assets so she did deserve to get a share in the matrimonial

property. He added that since the respondent was not given any share in the matrimonial house at Marangu, it was justifiable that she be given a 4-bedroom house at Karanga. The learned counsel added that the record reveals that the respondent was working but it was the appellant who stopped her from working so she could take care of the family, it was therefore his views that the respondent dearly contributed to the upkeep of the family thus she deserved a share and for that reason the appellate court was justified in distributing the assets as it did.

On the fifth ground Mr. Kahunduka submitted that the first appellate court clearly evaluated the evidence and reached its decision based on the legal findings. He thus called up on this court to revisit pages 8 and 10 of the judgment of the district court for reference. It was thus his submission that the ground also lacks merit and should be dismissed.

With respect to the sixth ground the learned counsel replied that the submission of the learned counsel of the appellant on this ground was a misconception of the law and that the Counsel misdirected herself. Furthering his submission Mr. Kahunduka referred to **section 114(1) of the Law of Marriage Act [Cap 29 R.E 209]** and submitted that based on that provision of the law the court may order for division of matrimonial

property during grant of divorce or subsequent to that. He therefore argued that since the grant in the present case was subsequent to the grant of divorce then there was no need of setting aside the ex- parte grant of divorce.

Finally, it was Mr. Kahunduka's submission that the records show that the respondent was employed but the appellant forcefully caused her to resign and remained a house wife. Also, he added that there was an untold story of physical and moral abuse in which there were several meetings to settle the disputes between parties in vain. That the respondent had to separate from the appellant for her safety as matters were beyond her control. He refuted the claim that the respondent wanted to benefit from her own wrong. It was his views that the appellant was the one to be blamed for the breakdown of their marriage beyond repair he therefore has to pay for all that he caused. In light of his submission, the learned counsel prayed for the appeal to be dismissed for being frivolous and of no substance.

In a brief rejoinder, the appellant basically maintained his earlier submission that the principle of the extent of contribution by each party was not considered by the honorable district magistrate and that is to him a violation of the principle of law. He thus prayed for this court to dismiss

the order passed by the district court that the whole house at Karanga be given to the respondent and maintain the 30% that was given by the Primary court observing contribution of the respondent.

I have carefully gone through the records of proceedings, judgments and grounds of appeal as well as the submissions of both parties. This appeal is straight forward that the appellants main grievance was on distribution of two matrimonial properties which he argued were unfairly allocated to the respondent. The properties in question are the house located at Ngarenaro and another property located at Karanga.

Before I proceed expressing my position in this issue, let me refer to the law governing the distribution of matrimonial properties as provided for under **section 114(1) of the Law of Marriage Act** (supra);

> *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 sale of any such asset and the division between the parties of the proceeds of sale. (Emphasis added)*

The law is very clear on what should be considered by the court when dealing with division of matrimonial properties after parties have separated. The principle enunciated in this provision is underlined in the two words, the first is that for the properties to be subjected to division the same must have been acquired **during** the marriage and secondly is through **parties' joint efforts**. So, nothing should be subjected to division if it was not acquired during marriage and through parties' joint efforts. Also, it should be noted that proof that a property was acquired during marriage and that one has contribution is solidified when one brings a cogent proof but failure to do so leaves the statement as mere claim.

Now, moving to scenario in the present appeal the appellant is contesting the allocation of 20% share of the house located at Ngarenaro by arguing that the same was acquired by himself after they were already separated with the respondent. According to what is on record the property at Ngarenaro was acquired in the year 2006 as evidenced by exhibit D4 which is a deed of transfer from Mr. John Mwambo to the appellant. Based on that evidence the transfer was done on 9th February 2006 and later on 4th August, 2006 the appellant obtained a certificate of occupancy in his name.

Going by the above evidence it is clear that the property at Ngarenaro was obtained by the appellant himself without contribution of any kind from the respondent because as the evidence also suggest in the year 2006 parties were already separated.

With respect to the property located at Karanga the evidence on record is to the effect that the same was also acquired before the marriage. This is evidenced by "Kielelezo D6" an invitation card inviting guests to join the parties in celebrating their marriage and moving into the house. This evidence was tendered by the appellant and was not objected to by the respondent or countered anyhow. It is trite law that he who alleges must proof. This principle is enshrined under **section 110 of the Evidence Act** [**Cap 6 R.E 2019**] which states;

> ***110.****-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that 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.*

Now, as it is clearly explained in the above provision, the respondent who was the claimant at the trial court ought to have not only proved how the property at Karanga was acquired through joint efforts but also her contribution towards the acquisition of the same. Based on the evidence on record the appellant managed to prove that the property was acquired before marriage by evidence which was not contradicted by the respondent. That said, I am of the considered opinion that the house at Karanga was acquired by the appellant without any contribution from the respondent. I therefore find that the order by the first appellate court that the respondent be given the house located at Karanga was not justified. It is therefore set aside and the house is hereby given to the appellant.

Having discussed as above, I also find that the decision by the first appellate court to order 20% value of the house located at Ngarenaro to the respondent was erroneously arrived at. This is so because there is no evidence on record which support that the respondent had any contribution in the acquisition of the same. The honorable magistrate based her decision on the fact that parties were residing there but I noted from the evidence that when they were residing, they did not own it but they were just renting. It was until later in the year 2006 when the appellant decided

to purchase the property and by then they were already separated. In the circumstance I think it was not right to decide that the property was acquired during marriage. The evidence proves that the property was brought by the appellant after they were separated with the respondent so the respondent does not deserve anything with respect to the property.

In light of the above analysis, I find this appeal meritorious to the extent discussed above and hence proceed to allow it with no order as to cost.

Dated and delivered at Moshi this 18th day of February, 2022

T. MWENEMPAZI
JUDGE