

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB – REGISTRY)**

ONE STOP JUDICIAL CENTRE

AT TEMEKE

CIVIL APPEAL NO 9 OF 2022

(Original Matrimonial cause NO 67/2019 of Resident Magistrates' Court of Dar es Salaam at Kinondoni/Kivukoni before Hon. HM Hudi – RM)

HILDA EUTCHUS MPITA.....APPELLANT

VERSUS

PAUL ATHANASTUS LUPATU.....RESPONDENT

JUDGMENT

25/05/2022 & 12/07/2022

I.C. MUGETA, J

Before I embark on considering the merits of this appeal, I wish to deliberate on one technical matter. It is about the propriety of the proceedings where the trial commenced without framing of issues as reflected on the trial court's record. This issue was neither raised in the appeal nor did I require the parties to address me on it. However, it matters to say a word about it in this judgment.

Despite his failure to frame issues before commencement of the trial, the trial magistrate in the judgment framed four issues for determination.

These are:



- i. Whether or not the marriage between the parties has broken down beyond repair.*
- ii. Whether or not there are matrimonial properties jointly acquired by the parties.*
- iii. To which extent each contributed entitled? (sic).*
- iv. To what reliefs are the parties entitled?*

I have considered the theme of these issues in the light of the pleadings, the evidence presented and the holding in **Tanzania Sand and Stones Quarries v. Omoni Ebi** [1972] H.C.D 219 that failure to frame issues is fatal when it leads to injustice, I hold a firm view that no party was prejudiced and no injustice was occasioned by failure to frame issues before commencing the trial. My assessment of the record is that both parties presented the requisite evidence to cover the important aspect of the dispute between them and the issues reflected in the judgment captured well the matters in contravene. Therefore, the proceedings of the trial court are valid. I now proceed to determine the appeal on merits.

The appellant and the respondent married in 2002 in Christian rites. From 1992 to when they officially married, they had a relationship which, in my view, amounted to a presumed marriage. Out of that relationship, they got

their first two issue in 1994 and 1997 respectively. The district court dissolved their marriage on 29/8/2020. It also found that they acquired jointly houses at Mbezi - Tangi bovu, Buguruni, Bunju and a plot at Kitunda.

The pleadings show that the parties listed a lot of properties which in their evidence failed either to prove their existence or that the same are matrimonial assets. The trial court was, therefore, right to hold that, in terms of immovable properties, the matrimonial assets are the ones listed above only.

By way of dividing the matrimonial assets, the trial court ordered the respondent to get the house at Mbezi - Tangi Bovu and the properties at Buguruni and Kitunda to be shared at 30% and 70% to the appellant and the respondent respectively. Inadvertently, I hope, the property at Buguruni was not divided. This failure constitutes the complaint in the second ground of appeal. That the same ought to have been divided too.

The first ground of appeal challenges granting solely to the respondent the house at Mbezi, Tangi Bovu while the complaint in the fourth ground is on



failure to hold that the motor vehicles listed in the petition are matrimonial assets. The third ground is problematic. It reads:

'The learned trial magistrate erred in law and fact by failing to hold that the 1st respondent was identifiable in the proceedings as the one who purportedly purchased the house at the auction without assigning reason whatsoever.'

In her written submissions, Lydia Susuma, learned advocate for the appellant did not address this ground of appeal. I presume that it has been abandoned for obscurity. The respondent is represented by Stocki Joachim, learned advocate.

From the above facts, the bone of contention is on how the properties were distributed. Other orders of the trial court are unchallenged.

On the first and second ground of appeal, counsel for the appellant submitted that since the appellant contributed in the acquisition of the properties by both domestic and direct financing, she is entitled to equal rights in the assets. Counsel for the respondent replied that the appellant did not perform her wife role towards her husband and contributed zero cash to finance acquisition of the houses, therefore, she is not entitled to equal shares in the properties.

In its judgment the trial court, rightly, found that the basis of any order for the division of matrimonial assets is each party's extent of contribution in their acquisition. However, as I shall demonstrate, this principle has its limitations. It also found, rightly so again, that the properties at Kitunda and Bunju are in Joint names of the parties. On the parties' contribution in the properties acquisition it held that the appellant contributed by performing domestic, providing direct finance as she was employed at Marie Stopes and income from her business after her employment was terminated. After considering these factors, the learned magistrate determined that all the appellant's domestic work and financial contribution combined does not entitle her to equal share in the assets (page 11 – 12 of the Judgment).

I agree with the learned magistrate on his finding about the manner the appellant contributed in acquisition, of the matrimonial property. However, I do not agree with him on how he factored that contribution in his reasoning and conclusion on dividing the assets. The following are my reasons:

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The appellant testified about her role in the acquisition of the house at Mbezi - Tangi Bovu and the plot at Kitunda. Both are unregistered even if the Kitunda property has a "leseni ya makazi" (exhibit P6). That she is the one who identified them and brought the idea to buy the areas. Regarding the house at Bunju, she said she paid half and the respondent also paid half of the purchase price. This evidence is undisputed. The land at Bunju is registered and the parties are joint occupiers. The title deed was tendered as exhibit P.7.

The evidence of the respondent is general that he is the one who paid for all their properties. He admitted that the house at Bunju and the plot at Kitunda are jointly owned. In that case, I hold, the parties are joint occupiers. It is my view that except on death, tenants registered as joint occupiers are deemed to have equal shares regardless of who contributed more in the acquisition of the property in issue. The principle on the extent of contribution applies to unregistered land and where the property is in the name of one spouse only. In that regard, the properties where the extent of contribution of each party ought to be considered is the houses at Mbezi - Tangi Bovu and Buguruni.

In determining the parties extent of contribution in the said properties I shall take into account a very important aspect of the parties life style which escaped the attention of the learned magistrate. It is on record that the parties had both individual and community ownership of properties. For example, in paragraph 7 of the answer to the petition the respondent states that the house at Goba kwa Awadh listed in paragraph 5(v) of the petition, even though acquired during subsistence of their marriage, is his personal property. Despite alleging in the reply to the answer to the petition that the same is matrimonial property, the appellant did not tender, during her testimony, evidence of her contribution in its acquisition. The same applies to the house No. 1033 at Kilimahewa Juu, Wazo hill. The appellant at paragraph 3(iv) of the answer to the petition said it is her personal property and the respondent in his evidence did not prove the contrary. It follows, therefore, that if the appellant had the ability to own individual properties, her contribution in the welfare of the family ought not to be underrated

Further, the appellant proved by evidence that while the respondent provided for the family she is the one who took care of the family until the first two children attained the age of majority. She further testified that she

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still lived with the youngest child. She also proved that that when they lived under the presumption of marriage, she worked at Married Stopes and earned income for the family as established by exhibit P4. The respondent's evidence did not prove that the appellants income was not put to family use. His evidence that she was just a domestic wife is true if considered on the line of when they officiated their marriage otherwise it is completely false evidence. Indeed, at this moment her employment had ceased. Even then, her evidence that she did business and supported the family is undisputed. Under the circumstances, it is my view that the parties deserve equal division of the matrimonial assets in the houses at Mbezi Tangi Bovu and Buguruni.

On division of the properties since they are immovable, I see no reason to divide them by shares which might entail selling them and distributing the proceeds to the parties. Considering the age of the parties (both are above 50 years), it is prudent to divide between them the actual properties unless that course of action is impossible which is not the case here.

In her evidence, the appellant testified and the respondent did not dispute that the two houses at Mbezi -Tangi Bovu and Bunju are one storey each.

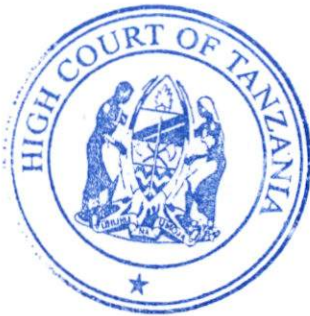
Since the appellant resides in the house at Mbezi - Tangi Bovu, I give it to her and the plot at Kitunda. The houses at Bunju and Buguruni goes to the respondent. The furniture and domestic utensils shall remain in each house for use by the one allocated that particular the house.

I move to the fourth ground of appeal. The motor vehicles. Unfortunately, the trial court did not discuss or make any finding as to whether the listed motor vehicles exists and are matrimonial assets. In his evidence the respondent testified that he had sold the listed motor vehicles. I have no reason to doubt his evidence because the appellant did not produce evidence to the contrary. The only evidence she had is the insurance policy for the car T.980 ACF, Toyota Hilux which was issued on 3/9/2010. She tendered it as exhibit P8 which, in my view, does not prove that the car still exists. I find that there is no evidence to prove that the listed motor vehicles exist as properties of the parties to this case.

In the end, the appeal succeeds to the extent that the matrimonial assets ought to been shared equally. The appellant gets the house at Mbezi - Tangi Bovu and a plot at Kitunda. The responded is given the houses at

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Bunju and Buguruni. The decision of the trial court is varied to the stated extent. I give no orders as to costs.




I.C. MUGETA

JUDGE

12/07/2022

Court: - Judgment delivered in chambers in the presence of Stocki Joachim, holding brief for Lydia Susuma, advocate for the appellant and Stocki Joachim advocate for the respondent.

Sgd: I.C. MUGETA

JUDGE

12/07/2022