

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA**

CONSOLIDATED MATRIMONIAL APPEAL No. 16 & 17 OF 2021

*(Arising from Matrimonial Appeal No. 03 of 2021 Ilemela District Court, Originating
from Matrimonial Cause No. 119 of 2020 at Ilemela Primary Court)*

MARTHA DEUSI APPELLANT

VERSUS

FUNDIKIRA KISHOSHA RESPONDENT

JUDGMENT

23/2/2022 & 8/4/2022

ROBERT, J:-

This Court consolidated Matrimonial Appeals No. 16 and 17 of 2021 as both of them originated from Matrimonial Appeal No. 3 of 2021 at the District Court of Ilemela where the appellant, Martha Deus, had appealed against the decision of the Primary Court of Ilemela in Matrimonial Cause No. 119/2020. Aggrieved, both appellant and respondent herein preferred an appeal to this court against the decision of the District Court in Matrimonial Appeals No. 16 and 17 of 2021 respectively.

At the primary court, the appellant herein had filed an action against the respondent herein seeking dissolution of marriage, custody of children, division of matrimonial assets and maintenance of children. She alleged that her customary marriage with the respondent which

started in the year 2010 and blessed with three children had gone sour and was no longer reparable. The primary Court decision culminated into a decree of divorce, custody of children in favour of the appellant herein, an order for maintenance of children against the respondent at a tune of TZS 120,000/= per month and division of matrimonial assets.

With regards to the division of matrimonial assets, the trial court gave the appellant one unfinished house located at Magaka- kahama, Ilemela district and 40% of the proceeds of sale of a plot of land located at Igoma area as well as home utensils. On the other hand, the respondent was given a commercial and residential house located at Buswelu area which is known as an investment area and 60% of the sale proceeds of the plot of land at Igoma area. Dissatisfied with the relief granted, the appellant appealed to the District Court which decided to the effect that:- The Nyegezi Plot is excluded from the matrimonial properties having been returned to the seller due to respondent's failure to pay the remaining purchase price; the Buswelu house and Magaka- kahama house to be evaluated by the Government valuer; the appellant herein to be awarded 40% of the Buswelu house and respondent to be awarded 60% thereof; and the appellant to be awarded 30% and the respondent 70% of the Magaka-kahama house. Further to this, the District Court ordered that, the guest houses located at Nkome area,

Geita District are awarded to the respondent herein as he still has the duty to maintain the children. Dissatisfied by the decision of the District Court both appellant and respondent herein preferred an appeal to this Court.

In Matrimonial Appeal No. 16 of 2021 the appellant herein faulted the decision of the District Court on six grounds which I take the liberty to reproduce as follows:

- 1. That, since the trial court (Ilemela primary court) made division of the matrimonial assets and awarded the appellant the unfinished house (Boma) located at Magaka – Kahama Ilemela Municipality for use (as residential house) by the appellant and the children of the parties (issues of marriage) and since the appellant was satisfied and never specifically appealed against that division and also since the respondent also accepted that division both the lower court and at the appellate court the appellate magistrate erred in law and in fact in varying the decision of the primary court regarding this division which had no contest/dispute between the parties herein.*
- 2. Alternatively to ground No. 1 above, the appellant raises that, appellate magistrate erred in law and in fact in ordering sale and division of the unfinished house (Boma) located at Magaka – Kahama Ilemela Municipality by 30% shares to the appellant without judiciously considering the well-being and the welfare of the children as to the future residential premises after sale of the house which was granted to the Appellant herein.*
- 3. That, since the appellate magistrate acknowledged that the two hotels/guests located at Nkome – Geita are matrimonial assets*

acquired by the joint efforts of the parties herein and that the Appellate took part in development of the same then the appellate magistrate erred in law and in fact in not awarding share the appellant herein.

- 4. The appellant raised further that, since at the trial court (primary Court) the appellant produced documentary evidence of the jointly acquired landed properties which include but not limited to 3 acre at Nkome Nyamalele Geita vide the contract dated 20/01/2012, a shamba and a house at Butimba "A" Nyaburogoya street vide a contract dated the 28/09/2013, a shamba and a house at Butimba "A" Nyaborogoya street vide a contract dated 21/12/2010, plot/shamba at Buswelu vide a contract of sale dated the 23/03/2016 and another plot at Buswelu and since the appellant raised this concern generally at the appellate court to be evaluated and delt with accordingly, then the appellate magistrate was at error in not discussing and evaluating evidence on the submitted documentary evidence thus failing to divide them between the parties herein to the detriment of the appellant's interests.*
- 5. That, the appellate magistrate erred in law and in fact in not dividing the Matrimonial House/Plot located at Nyegezi corner street based on the document whose beneficiary was never called to testify the allegation of the handling over before the primary court.*
- 6. The appellant further raises that, both the lower courts erred in fact in ordering maintenance to the tune Tshs 120,000/= per month to cover three children who suffer from Psychosis as that is not enough to cater for food (nutritious food), clothing, shelter, electricity bills and water bills.*

On his part, the respondent herein lodged Matrimonial Appeal No. 17 of 2021 armed with three grounds of appeal which reads as follows:-

- 1. That the first appellate court erred in law and in fact on its findings that the respondent was the legal wife of the appellant hence confirming the order for divorce issued by the trial court while there was no any proof a lawful marriage in accordance to the law.*
- 2. That the appellate court erred in law and in fact for failure to properly analysis and consider that there were miss evidence/exhibit in the record of the trial court contrary to the number of exhibits that were tendered by both parties during the conduct of the trial.*
- 3. That first appellate court erred in law and in fact for failure to properly analyse the evidence adduced before the trial court and apply the principle of extent of contribution of each party in money, property and work under section 114(2) (b) of the law of marriage Act, Cap 29 R: E 2019 towards the division of assets alleged to be acquired by joint efforts.*

The two appeals were consolidated and argued together whereby the appellant herein was represented by Mr. Charles Kiteja, Learned Counsel whereas the Respondent enjoyed the services of Mr. Erick Kahangwa, learned counsel.

Highlighting on the grounds of appeal in respect of Matrimonial Appeal No. 16 of 2021, Mr Kiteja merged the 1st and 2nd grounds of

appeal and argued them together. He also merged and argued together the 3rd, 4th and 5th grounds while the 6th ground was argued separately.

Submitting on the 1st and 2nd grounds, Mr. Kiteja faulted the District Court for deciding that the property described as semi-finished house located at Magaka – Kahama, Ilemela Municipality be sold and divided between parties by giving the appellant 30% and respondent 70%. He noted that, the trial Court had decided at page 7 of its judgment that the property in question was to be used by the appellant and the children for residential purposes because the appellant was given sole custody of the children. He maintained that, the primary court decision in respect of the said property was agreed by both parties and that decision was never challenged at the District Court. Therefore, there was no need for the District Court to decide in respect of the said property.

Coming to the 3rd, 4th, and 5th grounds, Mr. Kiteja submitted that, the District court decision did not divide some of the matrimonial properties to the appellant. He informed the Court that the said properties are listed in the 3rd to 5th grounds of appeal. They are the guest house at Nkome – Geita, three acres of farmland located at Nkome - Nyamalele Geita, farmland and a house located at Butimba 'A'

Nyaburogoa street bought through an agreement dated 28/9/2013, farmland and house located at Butimba 'A' Nyaburogoa street through sale agreement dated 21/12/2010, farmland/plot at Buswelu bought through an agreement dated 23/2/2016 and one plot located at Nyegezi Kona Mwanza.

He clarified that, the guest house located at Nkome area was not divided between parties despite the fact that the appellant had produced tenancy agreement dated 20/5/2015 to establish that it was acquired during subsistence of marriage. He argued further that, the other properties listed at the fourth ground of appeal were simply not deliberated on and divided by the lower court. He argued that there was no evidence to establish that the plot of land located at Nyegezi kona area which is mentioned at the fifth ground of appeal was returned to the person who sold it by the respondent as decided by the District Court.

Submitting on the sixth ground, Mr. Kiteja argued that, the amount of money granted for maintenance of children is not sufficient given that all of the three children are suffering from sickle cell and they need constant medical attention. He reiterated the prayer made by the

appellant at the District Court for the appellant to be given at least TZS 300,000/= (three hundred thousands) for maintenance.

On the basis of the foregoing, he prayed for the appeal to be allowed with costs.

In response, Mr. Kahangwa opted to argue the 1st to 5th grounds together and submit on the 6th ground separately.

Submitting on the 1st to 5th grounds, Mr. Kahangwa maintained that the 1st to 5th grounds of appeal are based on division of matrimonial assets. He agreed with the decision of the District Court on the division of the house at Magaka-Kahama area. He argued that, section 114(1) and (2) of the Law of Marriage Act guides the court on the factors to be considered when dealing with division of matrimonial assets. He explained that, the semi-finished house at Magaka-Kahama is a matrimonial property bought in 2016 and constructed in 2018. He maintained that, the sale agreement indicates that the respondent bought the said property and the testimony of DW4 at the trial court indicates that, as a technician, he was engaged by the respondent in the construction of the said house. Thus, evidence shows that the respondent contributed towards acquisition of the said property.

Therefore, the respondent is qualified for the distribution of the said property.

To support his argument, he made reference to the Court of Appeal decision in the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo, Civil Appeal No. 102 of 2018** (unreported) where the Court of Appeal decided that a party claiming division of matrimonial property is expected to adduce evidence showing his extent of contribution on each and every property. Responding to the argument that division of the Magaka-kahama house was not challenged at the District Court, he argued that, it is not necessary for the party in a matrimonial dispute to agree or contest the division of matrimonial property in order for the Court to divide the property as required by law.

With regards to the guest house at Nkome, Mr. Kahangwa submitted that, it is not true that the property was acquired in 2014. He argued that the said property was acquired before the marriage of parties in 2004. He maintained that evidence adduced by PW4 who was engaged in the construction of the said property speaks to that effect. He maintained further that, since the said property was acquired before marriage even if it was partly developed during marriage the division of

that property cannot be the same between parties because the extent of contribution is not the same.

In respect of the other properties listed by the appellant, Mr. Kahangwa argued that, the respondent is not aware of the said properties and he does not own them.

On the property located at nyegezi kona, he submitted that there is a letter dated 5/2/2015 in the record of the trial Court which shows that the respondent failed to pay the outstanding purchase price and therefore the contract was terminated. He argued that since the appellant is the one who alleged that the said contract is in existence she is the one required to establish that the said property is still in existence.

Lastly, on the 6th ground, Mr. Kahangwa submitted that, he agrees with the 1st appellate court that the amount of TZS 120,000/= ordered for maintenance of children is sufficient because the said amount is for subsistence only as the respondent is still taking care of other costs for the children such as education and hospital bills. Further to that, the respondent has other children to take care of as shown in the records and his financial status is that of a regular person.

In conclusion, Mr. Kahangwa prayed for the appeal to be dismissed with costs for want of merit.

In a brief rejoinder, Mr. Kiteja, reacting on the response to the first to fifth grounds of appeal, reiterated that, for the house located at Magaka-kahama, the respondent do not deserve any share since the appeal lodged at the District Court didn't raise any ground in relation to the said property. He maintained that, the cited case of **Gabriel Nimrod Kurwijila** (Supra) is distinguishable from this case because the respondent did not appeal in relation to the division of the said property.

With respect to the guest house located at Nkome, he argued that the respondent did not object that it was a matrimonial property. Since it was developed during the subsistence of marriage, he prayed that the court should consider the amount of share which the appellant ought to be given in respect of that property.

On the house located at Nyegezi, he submitted that, it is not disputed that the house was purchased by the respondent during the subsistence of marriage. However, he maintained that the appellant's concern is that the material witness who is the seller of the property was supposed to testify in respect of the said property.

In respect of other properties which the respondent maintained that he is not aware of, he submitted that, the said houses are mentioned at page 1 of the trial Court decision and page 4 of the District Court judgment as well as page 2 of the District Court proceedings and the exhibits tendered by both parties, thus if the court is satisfied that the said properties are in existence and they are matrimonial assets they should be divided between parties.

Coming to Matrimonial Appeal No. 17 of 2021, the appeal was filed by the respondent herein, Fundikira Kishosha. At the hearing, he was represented by Mr. Kahangwa, learned counsel who argued the third ground of appeal only and dropped the other grounds of appeal.

Submitting on the last ground, he faulted the District Court for dividing the house located at Buswelu by awarding Mr. Fundikira 60% only. He noted that the District Court was informed that the construction of the said building was done by borrowing of construction materials at a tune of TZS 60,000,000/= and he also paid for acquisition of the plot.

He further faulted the District Court for deciding that he did not produce evidence to show that the respondent herein borrowed construction materials at a tune of TZS 60,000,000/ for construction of the said building. He maintained that, the proceedings of the primary

court indicate that the respondent herein had tendered 13 exhibits but during the appeal at the District Court the exhibits tendered to establish borrowing of the construction material was not taken into consideration. The District Court would have noted that Mr. Fundikira's contribution was bigger in the acquisition of the property in question, he also had a debt to repay for the borrowed construction materials. Thus, he prayed for the court to consider the extent of contribution of each party in dividing the said property. He referred the Court to the case of **Gabriel Nimrod Kuruwijila** (Supra) to support his argument.

In response, Mr Kiteja submitted that, the decision of the District Court in division of the property in question is proper. He argued that, the respondent herein is the one who obtained a larger share in that property. The appellant's extent of contribution is manifested in the management of various businesses such as the running of the guest house and the selling of the crops as well as paying of bank loan where the property in question was placed as security for the loan. He prayed for this Court to uphold the division of assets done by District Court in respect of the property in question.

In a brief rejoinder, Mr. Kahangwa reiterated the arguments in his submissions in chief and urged the court to consider the evidence on record to make a determination of this matter.

Having considered the rival arguments both in support of and against the two appeals, I will now make a determination on the merit of the two appeals in the light of the grounds of appeal and submissions of both parties.

Starting with the first and second grounds of appeal in respect of Matrimonial Appeal No. 16 of 2021, the question for determination is whether the division of the house located at magaka – kahama by the trial Court was challenged by appeal at the first appellate Court and whether the first appellate court was correct in ordering sale and division of the said house.

It is not disputed that, the trial court judgment had declared the house located at magaka-kahama to be a matrimonial asset and divided it to the appellant, Martha Deus who was given full custody of the children as indicated at page 7 of the trial Court judgment. The respondent herein did not appeal against the decision of the trial Court and it is unlikely that the appellant, Martha Deus challenged that decision at the first appellate Court. Having examined the petition of

appeal filed by the appellant at the District Court of Ilemela and the proceedings of the said appeal, it is apparent that the first appellate Court was not specifically invited to decide on the division of magaka – kahama house and parties did not address the court in respect of that property. Therefore, the decision by the District Court to vary the trial Court decision in respect of that house and order for sale of the said house and division of the proceeds thereof between parties was both uncalled for and untenable. That said, I hereby set aside the decision of the District Court in respect of division of the Magaka – kahama house and substitute it with the decision of the trial Court.

I will now look at the third, fourth and fifth grounds of appeal. These grounds invite the Court to make a determination on a number of issues related to division of specific properties alleged to be matrimonial assets. One of the issues relates to the guest houses located at Nkome – Geita. The appellant faulted the District Court for failure to divide the guest houses to the parties after deciding that they are matrimonial properties and the appellant took part in the development of the same. This Court is in agreement with the findings of the District Court at page 13 of the impugned judgment that the guest houses at Nkome are matrimonial assets and further that the trial Court did not divide them to anyone and therefore left their ownership hanging. However, this Court

finds that the division of the guest houses to the respondent on a mere ground that he still has a duty of maintenance to the children has a disparaging effect to the extent of contributions made by the appellant in the acquisition or development of the said assets considering that the respondent was only ordered to pay TZS 120,000/= per month for maintenance of children.

Counsel for the respondent submitted that, since the guest houses were acquired before marriage of parties, even if they were partly developed during marriage the division of the said properties cannot be the same between parties because the extent of contributions is not the same. When looking at the extent of contributions, the District Court made reference to the records of the trial Court and noted the plot at Nkome was bought in 2003 which is before marriage of parties. Modifications and extensions of the houses was done during subsistence of marriage from 2012 and the guest houses were opened in 2014. Thus, the guest houses were substantially improved by the parties' joint efforts. Considering the extent of contributions made by the appellant in the modifications and extension of the said guest houses, this Court sets aside the decision of the District Court in respect of the division of the guest houses at Nkome and extends an order of evaluation by the Government Valuer to the two guest houses at Nkome, Geita. The

appellant is hereby awarded 20% of the guest houses at Nkome whereas the respondent is awarded 80% of the same.

Another issue in the third, fourth and fifth grounds is whether the District Court failed to divide other matrimonial assets as a result of its failure to evaluate evidence submitted by the appellant to establish that the properties were jointly acquired. The appellant made reference to properties listed at the fourth ground of the petition of appeal which include, the landed properties described as 3 acres at Nkome, Nyamalele – Geita which was bought vide the contract dated 20/1/2012, a shamba and a house at Butimba "A" Nyaburogoa street which was bought vide a contract dated 28/9/2013, another shamba and a house at the same area bought vide a contract dated 21/12/2010, plot/shamba at Buswelu bought vide a contract dated 23/2/2016 and another plot at Buswelu.

Having examined records of this matter, it is clear that the appellant's counsel did not address the District Court specifically in respect of the properties mentioned in her fourth ground of appeal. Consequently, the District Court did not make a determination in respect of the said properties. Under the circumstances, it is safe to imply that the appellant was not aggrieved by the decision of the trial Court in respect of the mentioned properties. That said, the District Court cannot

be faulted for not deciding on what was not brought before it for determination. Therefore, this issue come to this second appeal as new issue yet to be resolved by the first appellate court.

In the case of **Simon Godson Macha vs Mary Kimambo**, Civil Appeal No. 393 of 2019 (unreported) the Court made reference to the case of **Juma Manjano v. Republic**, Criminal Appeal No. 211 of 2009 where it was held that: -

'As a second appellate court we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court.'

The Court in the case of **Simon Godson Macha** (Supra) added that:

*"The Court has repeatedly held that **matters not raised at the first appellate court cannot be raised in a second appellate court.**" [Emphasis added].*

I therefore find no merit in the argument made by the learned counsel for the appellant in respect of the properties mentioned in the fourth ground of appeal.

The last issue in the third to fifth grounds is whether the District Court got it wrong by deciding that the house located at Nyegezi Corner

Street is not a matrimonial property. Both the trial Court and the first appellate Court relied on the document admitted as exhibit 'D-VI' which established that the purchased property was surrendered to the vendor after the respondent's failure to pay the outstanding purchase price. However, the concern raised by the learned counsel for the appellant is that the person who sold the said plot to the respondent was not called to testify if the property was returned back. This Court finds no reason not to believe the position established by exhibit 'D-VI'. Further to that, this Court is in agreement with the argument raised by the learned counsel for the respondent that the onus of proving that the property in question is a matrimonial property belongs to the appellant who made the said allegation. Unfortunately, the appellant failed to discharge that obligation. Consequently, this Court finds and holds that there is no evidence to establish that the property located at Nyegezi Corner Street is a matrimonial property.

With regards to the last ground of appeal, the appellant maintained that the amount of TZS 120,000/= per month ordered by the trial Court and upheld by the District Court for maintenance of three children is not sufficient because the said children need constant medical attention as they are suffering from sickle cell. Thus, she prayed to be given at least TZS 300,000/= per month.

It is not clear how the trial court came up with the amount of TZS 120,000/- per month for maintenance of children. However, the only argument made by the learned counsel for the appellant in praying for an increment of maintenance is that, the children intended to be maintained are suffering from sickle cell and therefore there is a need for constant medical attention which requires more money. The same argument was made by the appellant at the District Court and the respondent submitted that he is providing maintenance, school fees, transport fare and the children have health insurance (NHIF). The appellant admitted that the respondent provides the said services and therefore the District Court did not find any reason to vary the decision of the trial Court. In the circumstances, this court is in agreement with the District Court that the reason given by the appellant for increment of maintenance is wanting in merit. Thus, I find no reason to disturb the amount of maintenance ordered by the two lower courts.

However, considering how the two lower courts have handled the issue of maintenance of children, this Court finds it significant to point out that, when considering any question relating to maintenance of an infant, courts are required to have regard to the advice of a welfare officer under section 136 of the Law of Marriage Act, Cap. 29 (R.E. 2019).

Moving to Matrimonial Appeal No. 17 of 2021, based on submissions made by parties, it is not disputed that the investment house with shopping stalls located at Buswelu is a matrimonial property. However, Mr. Fundikira who filed this appeal challenges the decision of the District Court which varied the award of 100% given to him by the trial Court to 60% only. The argument made by his advocate sought to establish that his extent of contributions towards acquisition of the said property is unmatched to that of the other party. He believes that the District Court did not take into consideration the fact that construction materials for that house were borrowed as indicated in the tendered exhibits. However, he did not suggest his preferred percentage of division if all factors are taken into consideration. Looking at the impugned decision of the District Court, this Court is satisfied that the District Court made a thorough consideration of this issue before reaching to a conclusion of giving him 60% of the said property. By doing that, the District Court had acknowledged that Mr. Fundikira's contribution in the acquisition of the said property is higher than that of Martha and further that he is required to pay for the construction materials. Hence, I have no any reason to interfere with the findings and decision of the District Court in respect of this matter.

In the end, this Court finds and holds that Matrimonial Appeal No. 16 of 2021 is partly allowed only to the extent of variations made herein. Apart from the said variations, the decision of the District Court is hereby upheld. The Court holds further that Matrimonial Appeal No. 17 of 2021 is found to be lacking in merit, as a consequence, it is hereby dismissed accordingly. Given the nature and circumstances of this matter, I make no orders for costs.

It is so ordered.




K.N. ROBERT
JUDGE
8/4/2022