

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL No. 46 of 2021

*(C/F Civil Appeal No. 1 of 2021 in the District Court of Arusha
originating Matrimonial Cause No. 120 of 2020 at Arusha Urban Primary
Court)*

RAJABU DAVID NYONI.....APPELLANT

VERSUS

SOPHIA ALOYCE FRIMINI.....RESPONDENT

JUDGMENT

Date of last Order: 29-6-2022

Date of Judgment: 28-7-2022

B.K.PHILLIP, J

Aggrieved by the decision of the District Court of Arusha at Arusha , in Civil Appeal No. 1 of 2021, the Appellant herein lodged this appeal on the following grounds;

- i) That, the 1st Appellate court erred in law and in fact by varying the decision of the trial court without considering the reasons of the trial Court on the division of the matrimonial properties toward the contribution of the Respondent herein in acquisition of such matrimonial properties.
- ii) That, the 1st Appellate Court erred in law and fact by reversing the decision of the trial Court without considering the evidence

adduced and exhibits tendered by the Appellant herein in trial Court concerning acquisition such matrimonial properties.

- iii) That, the 1st Appellate Court erred in law and in fact by reversing the decision of the trial Court by its failure to analyze the evidence adduced by the Respondent herein at the trial Court concerning acquisition of such matrimonial properties which were based on mere words.

A brief background to this appeal is as follows; That the Appellant and Respondent have been living together as husband and wife till 2020 when the Respondent petitioned for divorce and division of matrimonial properties before Arusha Urban Primary Court, (Henceforth " the Primary Court"). Upon receiving evidence from both sides, the Primary Court granted the order for divorce and ordered for the division of matrimonial properties. The Appellant was awarded a house located at Uswahilini street , Arusha whereas the Respondent was awarded a plot located in Kondoa District, a sum of Tshs 500,000/= and various home utensils including bed and mattress. Aggrieved by the decision of Arusha Urban Primary Court , the respondent lodged an appeal at the District Court of Arusha at Arusha, (Henceforce "the District Court"). The District Court allowed the respondent's appeal and ordered as follows; That the house situated at Uswahilini street , Arusha should be valuated and sold. The respondent should take 30% of the proceeds thereof and the appellant should take the remaining 70%.The plot located in Kondoa should be valuated and sold.The appellant should take 70% of the proceeds thereof.The remaining 30% should be taken by the

respondent. Aggrieved by the decision of the District Court the appellant lodged the instant appeal.

This appeal was argued by way of written submissions. The appellant was represented by the learned advocate Goodluck Michael whereas the respondent was represented by the learned Advocate Veneranda Joseph.

Submitting for the grounds of appeal, Mr. Michael argued that the District Court varied the decision of the Primary Court without any justification. The District Court's order in respect of the house at Uswahilini street, Arusha and the award of 30% of the proceeds of sale to the respondent and 70% to the appellant is erroneous because it has been made in disregard of the extent of contribution made by each party in the acquisition of the said matrimonial property. Likewise, the order in respect of the plot located in Kondoia is erroneous contended, Mr. Michael.

Furthermore, he submitted that, it is a legal requirement for the trial Court to assess the parties' contributions in acquisition of matrimonial properties before making an order for division of the same. He went on submitting that the Primary Court's orders for the distribution of the matrimonial properties were correct because it took into consideration the contribution towards the acquisition of the same. The Appellant and respondent got married in the year 2014. Previously the Appellant had been in relationship with another woman and were blessed with one issue in the year 2007. According to Exhibit D1, (The sale agreement) the plot on which the house at Uswahilini street in Arusha is situated was bought by the appellant in 2009. The money used in the

construction of the said house was borrowed by the Appellant from the Bank and he is still repaying the loan at the rate of Tshs 400,000/= per month.

With regard to the plot in Kondo, Mr. Michael submitted that the appellant tendered in Court exhibits D2 (a payment receipt) to prove that the respondent has not contributed to its acquisition.

In addition, Mr. Michael argued that there is no any tangible evidence tendered by the Respondent to prove the extent of her contribution in acquiring the house at Uswahilini , street , Arusha and the plot in Kondo. In her testimony before the trial Court, the Respondent told the Court that since 2017 she has not been in good terms with the appellant. Thus, they lived in harmony for only 4 years, that is from 2014 when they got married to 2020 when the Respondent filed the petition for divorce. He contended that, with the misunderstandings explained by the respondent herself, it was not be possible for the Respondent to contribute to the acquisition of matrimonial properties.

In rebuttal, the learned Advocate Veneranda Joseph submitted as follows; That the District Court considered the extent of contributions of each party in acquisition of the said matrimonial properties and its orders are not erroneous. All grounds of appeal raised by the Appellant have no merit since the respondent's efforts as a mother and wife placed both of them in a good financial position. The matrimonial properties in question were jointly acquired that's why the District Court gave the respondent 30% and appellant 70% of the value of the house located at Uswahilini street, Arusha. She cited the case **Bi**

Hawa Mohamed vs Ally Seif (1983) TLR 32, to cement his arguments.

Furthermore, she submitted that according to exhibit A4 (2008-marriage certificate) and Exhibit A3 collectively (documents evidencing payments for transfer of the respondent from Mkungunero, Kondo to Arusha and affidavit on dependant) the appellant and respondent started living together as husband and wife in the year 2008. She contended that the appellant and respondent lived together for 15 years. She maintained that, the house at uswahilini street in Arusha, a plot in Kondo and one motorcycle forms part of matrimonial properties.

In rejoinder, Mr. Michael reiterated his submission in chief and went on submitting that it is not disputed that in the case of **Bi Hawa Mohamed vs Ally seif** (supra) it was held that joint efforts include domestic activities done by the wife. He contended that the Primary Court considered that and awarded the respondent a plot at Kondo and Tshs 500,000/= , mattress and other home utensils.

Having dispassionately considered the submissions made by the learned advocates, I have noted that all grounds of appeal are concern with analysis of the evidence adduced *vis a vis* the orders made by the lower Courts in respect to the distribution of the matrimonial properties.

It is a common ground that the guidance for the distribution of the matrimonial properties is provided in the provisions of section 114 of the Law of marriage Act,[cap 29 R: E 2019] which reads as follows;

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.*

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

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

(b) ***the extent of the contributions made by each party in money, property or work towards the acquiring of the assets***

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

(d) *the needs of the 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.***

(Emphasis is added).

Likewise, it is not in dispute that this Court has to abide by the principles laid down by the Court of Appeal in the case of **Hawa Bin Mohamed** (supra).

In order to determine the contribution of each party towards the acquisition of the matrimonial properties, it is important to establish the year the parties hereto got married. It is in record that the respondent alleged that she was married to the appellant in 2008 and tendered exhibit A4 (2008-certificate of Marriage) and A1 (2014-certificate of marriage). Both Exhibits A4 and A1 indicate that were issued by Bakwata. It is noteworthy that both marriage certificates cannot be genuine because under normal circumstances a couple cannot have two marriage certificates issued by the same institution. As between the two marriage certificates aforesaid I am of the opinion that the genuine marriage certificate is the one issued by Bakwata in 2014 because it bears the correct names of the respondent herein , that is *Sofia Aloyce Firmini*. The authenticity of the certificate issued in 2008 is questionable because it indicates the wife's name as *Sofia A. Nyoni*. By simple reasoning before being married to the appellant the respondent was using her family name. How come her name appears in the marriage certificate as "*Sofia A. Nyoni*". Therefore, it is the finding of this Court that the parties herein were married in 2014. It is noteworthy that Exhibits A3 collectively cannot be better documents in proving marriage between the parties herein than the marriage certificate.

Having ascertained the year in which the parties herein got married , let me proceed with the assessment of the contribution of each party in acquisition of the matrimonial properties.

According to exhibit D1 and the testimony of SU2, Mwanahija Ramadhani, the plot at Uswahilini street, Arusha was bought in 2009. At that time the appellant was cohabitating with another woman. The

appellant testified that he finished the construction of that house during the subsistence of his marriage with the respondent herein. He alleged that he took a Bank loan for construction of that house. He tendered his salary slip (exhibit D4) to prove that he is still repaying the bank loan. With regard to the plot in Kondo, Exhibit D2 shows that the same was bought in 2011.

On the other hand, the appellee alleged as follows; That she was a house wife and contributed Tshs 400,000/= for the purchase of the plot at Uswahilini street, Tshs 2,000,000/= for construction of the house and her mother contributed 30 bags of cement. She was doing business which generated income for the family since the appellant took a bank loan and his take-home was Tshs 150,000/= only which was not enough for all family needs. In addition, she testified that during the construction of the house at Uswahilini she used to prepare meals for workers at the site as well as supervise them.

From the evidence adduced I am of a settled opinion that the plot at Uswahilini street, Arusha was bought in 2009 as evidenced by Exhibit D1. The Respondent contributed to the construction of the house in Uswahilini street, Arusha. Her contribution was mainly in terms of the domestic works she performed as a wife since, there is no proof for the alleged contribution in terms of cash money or building materials. The respondent conceded that the appellant took a Bank loan for construction of the house and there is proof that he is still repaying that loan, (exhibit D4). Under the circumstances, I am of settled opinion that the appellant's contribution in the acquisition of the house at Uswahilini street is higher than the respondent's contribution.

With regard to the plot located in Kondo, the evidence (Exhibit D2) clearly shows that it was bought in 2011. Thus, the respondent did not contribute towards the acquisition of the same and cannot form part of the matrimonial properties because no development was effected thereon during the subsistence of their marriage.

From the foregoing I hereby set aside the orders of the lower Court and order as follows;

- i) The house at Uswahilini street, Arusha shall be valued. The appellant shall take 80% of the value of the house. The remaining 20% shall be taken by the respondent. Parties are allowed to compensate each other the amount of money equivalent to the shares indicated herein above and if they fail to exercise the right granted unto them herein, the house shall be auctioned and each party shall take his/ her share from the proceeds of the sale as indicated herein above.
- ii) The plot in Kondo shall remain under the ownership of the appellant.
- iii) The respondent shall take the bed and mattress.
- iv) Each party shall bear his/ her own costs.

Dated this 29th day July 2022




B.K.PHILLIP

JUDGE