

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

MATRIMONIAL APPEAL NO. 2 OF 2021

(Originating from Matrimonial Cause No. 2/2019 of the District Court of Tabora)

SALEHE KALYOI ----- APPELLANT

VERSUS

FATUMA SALEHE ----- RESPONDENT

JUDGMENT

Date: 27/04/2022 & 01/07/2022

BAHATI SALEMA, J.:

The appellant herein, **Salehe Kalyoi** filed a Matrimonial Cause No. 2/2019 in the District Court of Tabora against the respondent **Fatuma Salehe**, in which he sought for dissolution of the marriage by a decree of divorce. The parties proceeded to a hearing before the trial magistrate to determine the same. Upon full hearing, the Magistrate granted the divorce and proceeded to the distribution of assets to the parties.

In the petition documents and subsequent submissions, the appellant did not list any assets to be distributed upon a grant of divorce; rather, he told the Court that there are no matrimonial assets jointly acquired by the parties during the subsistence of their marriage. Therefore, the parties are only entitled to a decree of divorce.

On the other hand, the respondent subsequent to the dissolution of the marriage by a decree of divorce, listed the following assets, claiming to have been acquired jointly during the subsistence of marriage: -

1. *Matrimonial home, House Number 25 block K 501 Uhazili Street within Tabora Municipality.*
2. *Land, Plot number 260 Block X Lwanzari area within Tabora Municipality*
3. *Land a plot at Inala area block A within Tabora Municipality*
4. *Land a plot at Usule block C within Tabora Municipality*
5. *One House located at Mbugani area within Tabora Municipality*
6. *Two unfinished houses situated at Sikonge area within Tabora region*
7. *A farm (shamba) located at Ipole area in Sikonge District.*

8. *A farm (shamba) located at Tumbi area*

9. *Motor vehicle make Toyota Coaster*

10. *Motor vehicle make Toyota with registration number T414
DGD*

11. *Household utensils*

After hearing of both parties the trial Court distributed the listed assets on what it termed as half-half division; the house No. 25 Block K 501 at Uhazili Street, Plot at Usule Block C Tabora Municipality, A farm located at Tumbi Area and a Motor Vehicle make Toyota with registration number T414 DGD were vested to the respondent while Plot number 260 Block X Lwanzali area Tabora Municipality, one house located at Mbugani area Tabora Municipality, two unfinished houses located at Sikonge Area Tabora, a farm located at Ipole area in Sikonge District and a Motor vehicle Make Toyota Coaster were vested to the appellant.

Further, the appellant was ordered to maintain children who are below 18 years of age and those above 18 years of age but still in school; a duty that will be discharged when the said children finish school. The trial magistrate went on to order household utensils to be divided equally between the parties and for the children to remain in the custody of the respondent.

Being dissatisfied and aggrieved with the extent of distribution now, the appellant appeals to this Court on the following grounds; -

1. *That the trial court erred in law and facts by making uneven division of matrimonial properties against the weight of evidence and relying on extraneous matters.*
2. *That, the trial court erred in law in its division of matrimonial properties by failing to consider the evidence of the appellant.*
3. *That, the trial tribunal erred in law when it failed to consider the principles for division of matrimonial properties.*

Based on the aforesated grounds, the appellant prays this court to quash the order of division of matrimonial properties made by the trial court, make orders for re-division of matrimonial assets, and any other order this court deems fit to grant.

During the hearing of the appeal, the appellant was represented by Mr. Kelvin Kayaga, learned counsel whereas the respondent was unrepresented. With leave of the court, the matter was disposed of by written submission.

Submitting on the first ground of appeal Mr. Kelvin Kayaga Counsel for the appellant, stated that, the order of the court on the equal division

of matrimonial properties was improperly procured based on extraneous factors against the weight of evidence and contrary to the interests of justice.

He contended that the Court ordered the division of matrimonial properties which had already been disposed of. He gave an example of a motor vehicle with Registration No. T414 DGD at page 37 of the proceedings, the respondent stated that *"the car Make Passo I sold to pay back the rent"* thus it was not part of the properties at issue.

Mr. Kayaga contended further that the court-ordered division to non-existing properties without proof and that this had completely defeated the appellant's work by depriving him of a share of his efforts by awarding him non-existing properties. He submitted further that all known properties were vested in the respondent, while the appellant informed the court at page 25 of the proceedings that *"there is no unfinished house at Sikonge. If she says so, she may prove it." We have no farm at Ipole. I do not have a farm at Tumbi. I do not have a van make Toyota Coaster."*

To support his argument, Mr. Kayaga cited the case of ***Lucas Enock Luvanda vs Sayuni Samweli Kilamwegula, Matrimonial Appeal No. 02/2020 HC at Mbeya***, where it was stated that:

"One should provide adequate description of the land at issue for purposes of certainty of court orders. Otherwise, it may be difficult for the court to make certain executable orders.

..... Where a registered landed property is in dispute, disclosing its plot number or title number is important. Otherwise, describing its boundaries sufficiently to identify it from other pieces of land surrounding it is vital."

As to House Number, 25 Block K 501 at Uhazili Street within Tabora Municipality, the counsel for the appellant stated that its value is at 80% of all properties and it was all vested to the respondent alone, Mr. Kayaga contends that, the division did not amount to half-half as the Magistrate stated in the judgment.

On the second ground, Mr. Kayaga submitted that the appellant was denied a fair trial and, hence, offended the principles of natural justice by not considering his evidence. He argued that for such an omission, the decision of the trial court should be set aside.

As to the last ground of appeal on principles of division of matrimonial properties, Mr. Kayaga submitted that the trial court did not consider the extent of contribution by the parties, he cited section 114(1) of the Law of Marriage Act, Cap.29 [R.E 2019] which states;

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 the sale.

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

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

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

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

(d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

The counsel for the appellant further submitted that the respondent did not prove her contribution towards the acquisition of the properties

she listed to be matrimonial. He contended further that, the respondent had been receiving collections from the properties and had been using them for her sole benefit.

As to improvements made to house Number 25 Block K 501 at Uhazili Street, he submitted that the improvements were made by tenants under the agreement and through collection earned from the property itself, but the trial court did not take into consideration the fact that at all times the respondent was acting under the power of attorney. He beckoned to this court to allow his appeal.

In response, the respondent who defended herself submitted that, in dividing the matrimonial properties, the trial court observed the legal principle and evidence put before it. She attacked the appellant's submission by stating that what is stated in the submission is a mere denial lacking evidential weight.

As to the alleged issue of unknown properties that were distributed, the respondent submitted that the court has knowledge of the properties to be divided among spouses and that the couple being adults of sound mind who have cohabited for more than 20 years, it doesn't make sense that the respondent would just make up a story about the existence of a property. He termed it a dubious move to deny the respondent her distribution.

As to the allegations of failure to consider the appellant's evidence, the respondent responded that the court considered evidence of all parties and determined the same on the preponderance of probabilities as required by law.

Also, as to the consideration of principles of division, the respondent submitted that the appellant deserved the division made by the trial court because the appellant neglected his family way before the action for divorce, so she had been supporting the family by herself. The respondent prayed for the appeal to be dismissed for lack of merit.

In a short rejoinder, the appellant reiterated his submission in chief that since the properties' existence was challenged by the appellant, the Court ought to have awarded them to the respondent who knew their whereabouts. He contends that awarding the same to him was a clear denial of justice.

Further, the appellant submitted that, since the respondent did not dispute the submission that the house on Plot No. 25 Block K 501 covers more than 80% of the whole value of the properties ever owned by the parties, it is clear that awarding the said house to the respondent alone proves an uneven division of matrimonial properties.

Lastly, it was the appellant's submission that the fact that the trial Court neglected the duty to address the controversy over the existence of some of the properties was in itself a failure to consider the appellant's evidence. The appellant prayed the court to allow the appeal.

Having heard from both parties, the issues for determination by this court are whether the trial court considered the evidence of both sides and whether the distribution of properties was proper.

This being the first appeal, this court is under an obligation to re-evaluate the evidence presented to the trial court for fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.

Having passionately considered the rival submissions made by both parties and gone through the trial court records. I am now in a position to analyze the grounds of appeal listed by the appellant. Since the 1st and 3rd ground are intertwined, I will combine them, and the 2nd ground will be disposed of separately.

Before stumping on the grounds of appeal, I found one important issue that was not raised by the parties in the appeal, but for clarity in the court records, I find it prudent for the court's intervention. It is on

record that, one of the issues that were framed in the trial court was *whether the marriage between the parties was contracted in 1994 or 2014*. From the record of the trial court, both parties tendered certificates of marriage celebrated on different dates, but the learned trial Magistrate went on to grant the divorce without stating anything about the two marriage certificates and without discussing that framed issue.

I am aware of the decision in ***Kukal Properties Development Ltd vs Maloo & Others (1990-1994) EA 281***, where it was held that the court is obliged to decide on every issue framed in making its decision. As to the case at hand, the record demonstrates clearly that, in making his final decision, the learned trial magistrate abandoned the first issue.

Now, taking the position of the trial magistrate, it is my considered view that, since the court was furnished with two different certificates of marriage, disposing of the first issue was important before shifting into the second issue of whether the marriage was broken irreparably.

The parties contracted an Islamic marriage but they were contesting the date the marriage was contracted. It is my observation that the reason for that contest and the decision thereof *touches the properties that were alleged to be matrimonial*; for that reason and to be in a good position to properly divide the assets to the disputing

parties, the trial court ought to have dissolved the first issue rightly before dissolving the marriage.

Since none of the parties is contesting the grant of divorce, this court is under the obligation to re-evaluate the evidence and come up with a clear decision on a proper date that the marriage was said to have been celebrated.

Before the trial Court, the appellant tendered a certificate of marriage with a serial number 078359 celebrated in Tabora on 19/06/2014. Further, the said certificate displays that at the time of celebration the appellant was 45 years old and the respondent was 34 years old.

On the contrary, the respondent stated before the trial court that she was married to the appellant on 3rd October, 1994; she tendered a certificate of marriage with a serial Number 47797 celebrated in Tabora on 03/10/1994. The second certificate discloses that at the time of the celebration, the appellant was 36 years old and the respondent was 27 years old.

Further, on page 34 of the typed proceedings, the respondent told the trial court that, she was 12 years old when she married the appellant, as she was born in December, 1984, and she stayed with him for 25 years; so at the time her evidence was recorded, she was 36

years old. This evidence contradicts the information filled in the marriage certificate admitted to court as exhibit D1. The certificate shows that on 3rd October, 1994 when the marriage was celebrated, the respondent was 27 years old, not 12 years as she stated before the court.

Further, she told the court that she was born in December, 1984 and she got married to the appellant in October 1994, making that simple calculation the answer would lead to ten (10) years, not twelve (12) years as stated in the proceedings.

Another contradiction comes from the evidence of DW3 one Lomeyani Ole Separe (55). This witness told the court that, the respondent Fatuma is her sister. She was born in the year 1970 and he was present when her sister Fatuma was born. This evidence contradicts the respondent's testimony where she told the court that she was born in 1984.

Based on the evidence above, there are a handful of reasons to believe that the marriage between the parties was celebrated in 2014 as evidenced by a certificate produced by the appellant. In our country, it is common for parties to live together as husband and wife and decide to formalize the marriage even after years of living together. Having accepted the certificate of marriage celebrated in 2014 does not

do away with the fact that the parties had lived together before that date.

The contract of sale of House at Plot 25B Block K 501 near Uhazili area (exhibit P5) executed on 18/11/2004 reveals that the appellant, who was the purchaser, named his daughter Asnath Salehe and his wife Fatuma Salehe to be his heirs. This exhibit proves that in 2004 when the house was purchased from the government, the appellant and respondent were living together as husband and wife.

Back to the *2nd ground* of appeal, the trial court failed to consider the evidence adduced by the appellant; as stated by the appellant in his submission summarised herein, during the hearing in the trial court, he notified the court about the non-existence of some properties listed by the respondent to be matrimonial properties.

The obvious question, therefore, is whether the records bear any such anomalies for this court to correct them. The record is clear that the trial court did not consider the evidence on record in relation to the existence of the alleged matrimonial properties.

According to page 25 of the proceedings, the appellant informed the court that there were no unfinished houses at Sikonge, no farms at Ipole and Tumbi, no Motor vehicle make Toyota Coaster, and the Motor

Vehicle with registration No. T414 DGD was sold by the respondent. He asked the respondent to prove the existence of those properties.

Having perused throughout the proceedings, the respondent never attempted to prove the existence of the properties in question or attempted to make any comment on the existence of the said properties, but the trial magistrate went on to divide them between the parties without proof of their existence. For that reason, I agree with the appellant that the trial court did not consider the evidence that questioned the existence of some of the properties.

As to the question of whether the distribution made by the trial court was proper, I find it appropriate to highlight some issues before analyzing this ground; from the list of properties submitted by the respondent before the trial court, there was no dispute about the existence of the following properties;

1. House at Plot 25B Block K 501 near Uhazili
2. House at Mihogoni Mbugani
3. A Plot at Usule Block C
4. A land at Plot No. 260 Block X Lwanzali
5. A Plot at Inala Area Block A and

6. Household utensils

However, out of the six properties whose existence was not contested, a farm at Block "A" Inala area was not distributed to any of the parties, and the trial court's judgment and the decree extracted therefrom are silent about that property.

In distributing matrimonial assets, the courts are guided by section 114 of the Law of Marriage Act Cap 29 [R.E 2019] which provides: -

"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.

In exercising the powers conferred by section (1), the Court shall have regard to

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

Further, at subsection (3) to same section it provides that: -

(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.

Having examined the record of the trial court and the submissions made by the parties, there is no doubt that the appellant and respondent had lived as husband and wife, bore children, and then dissolved the marriage by divorce. The appellant, on his side, claimed that the properties listed by the respondent were not matrimonial assets.

There is no dispute, the said properties may be registered in the name of the appellant, but considering the good life they had and the time they lived together, one cannot say that the respondent had contributed nothing to the development of the said properties because she was a housewife with no job. In the case of **Charles Manoo Kasara & Another V Apolina Manoo Kasara [2003]** T.L.R 425, the court reiterated that;

"Wifely service of a wife entitles her to the division of matrimonial property regardless of her direct contribution.

Also in **Reginald Danda V Felician Wikesi**, Civil Appeal No. 265 of 2018 (Unreported) it was held that,

"[the respondent was entitled to division of the matrimonial assets even if she had not made any direct contribution to their acquisition, for as long as she was a wife who had made indirect contribution through domestic chores.]"

The submissions made by the parties suggest that the rivalry on the distribution of properties is centered on House at Plot 25B Block K 501 near Uhazili area which the appellant claimed that it forms 80% of all properties listed by the respondent.

After passing through the records, it is clear that the acquisition of the Plot No. 25B Blok K 501 Uhazili area was done by the appellant from his salary, but on the other hand, the respondent submitted before the trial court her work contributes towards the developments made to the said house. She stated that in the area she constructed five shops, made maintenance in the house by changing all doors, new wiring, and adding a room in the rear area, the rooms which are rented by Uhazili College Students.

As to other properties, the respondent claimed contribution just by virtue of being a wife of the appellant as she used to cook for him and bear him children.

The respondent agreed that all the developments she made to House on Plot No. 25B Blok K 501 she made out of money she collected from tenants as she has exclusively supervised it since 2012.

Upon examining the judgment of the trial court, it seems to me that, the learned magistrate did not consider the fact that it was the appellant who bought plot No. 25B Blok K 501 out of his own salary, and the respondent's contribution was not monetary, but rather it was a work of supervising the construction and maintenance of the house; so, it was not proper for the trial court to allocate the entire house exclusively to the respondent.

The evidence of the substantial improvement of the house in the Uhazili area by the respondent gives her a share of the said property. Considering that evidence, the appellant is entitled to 50 percent and the respondent is entitled to 50 percent of the value of Plot No. 25B Blok K 501 Uhazili area.

As for the remaining properties, as I have listed below, which were not disputed,

1. House at Mihogoni Mbugani
2. A Plot at Usule Block C

3. A land at Plot No. 260 Block X Lwanzali

4. A Plot at Inala Area Block A and

5. Household utensils

These will also be divided half by half upon determination of the valued amount.

That being said and done, the appeal succeeds to the indicated extent.
There is no order as to cost since this is a matrimonial case.

Order accordingly.



A. BAHATI SALEMA

JUDGE

01/07/2022



Date: 01/07/2022

Coram: Hon. J. Kato, Ag DR

Appellant: Present

Respondent: Present.

B/C Grace Mkemwa, RMA

Kelvin Kayaga for the appellant, I pray for judgment to be given.

Court: Prayer granted and the judgment is delivered in open court in the presence of both sides this 01st July, 2022 and right to further appeal is explained fully.

A handwritten signature in blue ink, appearing to be "J. Kato", is written over the printed name.

J. KATO

Ag. DEPUTY REGISTRAR

01/07/2022