

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC. MATRIMONIAL APPEAL NO. 4 OF 2022

SELEVASIA NGUVUMALI APPELLANT

VERSUS

LADISLAUS KASUI RESPONDENT

(Appeal from the Judgment and decree of the District Court of Nkasi at Namanyere)

(N. S. Mwakibibi, RM I)

Dated 6th day of December 2021

In

(Matrimonial Appeal No. 11 of 2021)

JUDGMENT

Date: 15/07 & 24/08/2022

NKWABI, J.:

The appellant instituted a matrimonial cause in the Primary Court of Nkasi District sitting at Kirando. The matrimonial cause was assigned number 4 of 2021. The parties to this appeal were married in the year 1985. It would appear that in the year 2004 they separated. The illness of their son reconnected them and decided to continue living together. The controversy of the marriage resurfaced leading to this litigation. In the trial court, the appellant petitioned for divorce and division of the matrimonial properties which were granted. No one among the parties to this appeal is minded to

impugn the divorce decree. The appellant is keen to upset the order of division of the matrimonial assets. Her first attempt to do so, in the District Court, which is the 1st appellate court, crumbled to the ground as it was dismissed. She has approached this Court while backed by Mr. James Lubus, learned advocate.

In this Court, the appellant's counsel filed a petition of appeal comprising seven grounds of appeal. In the hearing that was conducted through written submissions, Mr. Lubus abandoned the 7th ground of appeal. He also argued the 2nd, 3rd, 4th 5th and 6th grounds of appeal together. He however, notably argued the 1st ground of appeal separately. I will determine this appeal in accordance with the sequence adopted by the counsel of the appellant in his submissions.

The first ground of appeal was that the learned Magistrate erred in law and fact by considering that the respondent did sell the matrimonial house without her consent and did not benefit from the act of sale and no compensation to that effect. On this ground of appeal, Mr. Lubus contended that a property acquired during the subsistence of the marriage is presumed

to be owned by both spouses equally. He cited **Anna Kanungha v. Andrea Kanungha** [1996] T.L.R 195 (HC). He insisted, even if it is registered in the name of one spouse, which in this case is irrelevant, it is presumed it is held in trust for the other spouse.

On the other hand, Mr. Lubus, criticized the first appellate court saying that it was wrong not to consider the sold matrimonial house by the respondent as the same was sold without spouse consent as provided under section 114 (1) of the Law of Marriage Act, Cap R.E. 2019 and case laws which are the case of **Bibie Maurid v. Mohamed Ibrahim** [1989] T.L.R. 162 and the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 CAT, (unreported) and quoted it:

"The issue of contribution made by each party does not mean monetary contribution, it can be work, property or works or advice toward the acquisition of the matrimonial assets."

Mr. Lubus urged, if the appellate court had considered the above holding of the Court of Appeal, division of the matrimonial assets would have ended 50% each. To further fortify this argument of his, Mr. Lubus cited **Anna**

Aloyce v. Zacharia Zebedayo Mgeta, PC Matrimonial Appeal No. 1/2020 HC at Mwanza which quoted with approval the case of **Victoria Sigala v Nolasco Kilasi**, PC Matrimonial Appeal No. 1 of 2012 (HC) (unreported) where it was held:

"Indeed, there is no fast and hard rule in deciding on the amount of contribution and division of the matrimonial assets. Where the matrimonial assets were acquired during the happy days of subsistence of marriage and in joint effort of spouses there is no need or requiring one spouse to give evidence to show the extent of her/his contribution of such assets should be automatically proceed in equal shares."

Replying to the submission of the learned counsel for the appellant on the 1st ground of appeal, the respondent argued that the first ground of appeal has no basis as the property did not exist at the time the matrimonial cause was instituted and the trial court was satisfied as such. He stressed, the appellant failed to prove the existence of the property as required by sections 110 and 111 of the Evidence Act and cases of **Pauline Samson Ndawaye v Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 and the case of

Prsca Dastan Haule v. James William Lyimo, Civil Appeal No. 199 of 2019. He advised the appellant to file a civil suit to claim for the sold house.

I have given due consideration to the submissions of both parties. I agree, the appellant cannot invalidate a sale of the house through a matrimonial cause, she ought to have done that, if possible, through a land case.

In addition, and with overwhelming respect to Mr. Lubus, I do not accept his further assertions on the first ground of appeal. This is because, proof of joint efforts towards the acquisition of the matrimonial assets in dispute is very crucial. That was not done in this case contrary to the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 CAT (unreported) where it was clearly held:

"The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. ...

It is clear therefore that extent of contribution by a party in a matrimonial proceedings is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise also where there is no evidence to prove extent of contribution."

In the appeal in the District Court, the first appellate court noted there was lack of evidence in respect of some of the alleged matrimonial properties. I add that there is no evidence adduced by the appellant regarding her contribution towards the acquisition of matrimonial properties of the marriage. In that regard, this Court has no basis for interfering with the concurrent finding of the lower courts in respect of the division of the matrimonial properties. It is also trite law that he who alleges must prove. The burden of proof albeit on the balance of probabilities was on the appellant who, in the trial court was the petitioner. The judgment of the trial court is clear that there was no house that is still a matrimonial property

since the same is admitted by the appellant that it is already sold. The complaint by the appellant in respect of the alleged house is dismissed as it is unmerited. The decision of the trial court in respect of the sold house is upheld. That said the first ground of appeal is unmerited. It fails.

The next grounds for my consideration and determination are the 2nd, 3rd, 4th, 5th, and 6th which Mr. Lubus submitted together upon. To summarize them, Mr. Lubus said that it is evident that the learned magistrate erred in law and fact in making a division of matrimonial assets without any regard to extent of their market values, for example:

- *"Mashamba ya nchi kavu ekari 16.*
 - *Shamba la bustani ekari 1 na robo.*
 - *Shamba la mbuga ekari 3 na nusu.*
 - *Miti kumi ya maembe.*
1. *While the respondent got much of the matrimonial assets than the appellant.*
 2. *Again while the respondent sold the matrimonial house without the consent of me ex-husband (sic) something which the total value of the*

house should be calculated and removed from the division of what the respondent was required to be awarded."

Mr. Lubus went on to mention the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and People's Rights on the rights of Women in Africa Article 7 of the Maputo protocol. Mr. Lubus intimated that it clearly provides that in case of separation, divorce or annulment of marriage, women, and men shall have the right to an equitable sharing of the joint property deriving from the marriage. Then Mr. Lubus prayed I allow the appeal with costs, quash the decisions of the first appellate court but also implored me to order division of matrimonial properties especially the sold house to be deducted from what is entitled to the respondent.

On the above complaints, it seems, the respondent was of the view that the trial court properly evaluated the evidence and divided the properties to parties according to the law. He prayed the appeal be dismissed with costs.

On my going through the lower courts' records, I find that the complaints about the value of the properties that the trial court divided the matrimonial


assets without considering their values, die a natural death for the reason that the appellant did not give any evidence in respect of the values of the properties. It is mundane law that submissions do not amount to evidence, see **Registered Trustees of the Archdiocese of Dar-es-Salaam vs. The Chairman Bunju Village Government**, Civil Appeal No. 147 of 2006 where it was held:

"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

In the upshot, I dismiss the appeal for being patently devoid of merits. The concurrent finding of both lower courts is upheld. Each party shall bear their own costs. It is so ordered.

DATED at SUMBAWANGA this 24th day of August, 2022.




J. F. NKWABI
JUDGE