

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(PC) MATRIMONIAL APPEAL CASE NO. 01 OF 2022

(Arising from Matrimonial Cause Appeal No. 05 of 2021 of Kigoma District Court, before K. Mutembe RM, Original Matrimonial Cause No. 5 of 2021 of Ujiji Primary Court before E.E. Sauli, RM)

DAMARI WATSON BIJINJA.....APPELLANT

VERSUS

INNOCENT S/O SANGANO..... RESPONDENT

J U D G M E N T

12/08/2022 & 19/08/2022

MANYANDA, J

The appellant, Damari Watson Bijinja, is appealing to this Court by inviting it to revisit the decision of the District Court of Kigoma in its appellate jurisdiction in Matrimonial Appeal No. 01 of 2022 dated 31/05/2021.

The District Court reversed the decision of the Ujiji Primary Court (trial court) in Matrimonial Cause No. 5 of 2021 concerning division of matrimonial properties, it upheld the orders of divorce and maintenance of the only child in their marriage. It ordered the trial court to take fresh



evidence on contributions of each party towards acquisition of the matrimonial properties in issue.

Before the trial court the appellant had petitioned for divorce, division of matrimonial properties and maintenance of the child. The trial court after hearing both parties ordered as follows:-

"mgawanyo wa wanandoa utakuwa kama ifuatavyo:-

- 1. Mdawa (imekosewa) amjengee mdai nyumba ambayo ataweza kuishi yeye pamoja na mtoto au kama ni kweli alikuwa anamjengea nyumba basi namalizie (imekosewa) hiyo nyumba na amkabidhi hiyo nyumba mdai, au vinginevyo nyumba walioshirikiana kujenga ifanyiwe tathmini kwa mujibu wa sheria iuzwe na wadaawa wagawane "pasu pasu" yaani 50% mdai na 50% mdaiwa.*
- 2. Grocery ambayo ilikufa na mdai hakupata, mgao wa masalia yaliyobaki hivyo mdaiwa ampatie mdai kiasi cha Tshs 500,000/=.*
- 3. Duka la miamala ya M-pesa Tigo-pesa, Airtel pamoja na bank mdaiwa ampatie Tshs 1,500,000/= kama sehemu ya mtaji wa hiyo biashara".*

Literally means matrimonial properties division was to be done in the order that the Respondent build a house for the Appellant or else complete the



one he was building for her, if at all. To give the Appellant Tshs 500,000/= as her share in a closed business of grocery and Tshs 1,500,000/= in the mobile money transactions agency shop.

The District Court found that the matrimonial properties division order unleashed by the trial court was unimplementable because, firstly, divorce was already issued therefore in no way the Respondent was responsible of building a house to a divorced wife. Secondly, there are no criteria for such distribution, thirdly since there is no proof of either of the parties causing the business loss, then, the loss idea was wrongly acted by the trial court. Fourthly, there was serious violation of section 114 of the Law of Marriage Act (LMA), [Cap. 20 R.E. 2002].

Having found so, the District Court directed the case to be re-heard on the issue of matrimonial property division before another magistrate.

The appellant is aggrieved by that order, hence the current appeal in which she has raised five grounds of appeal namely:-

- 1. That, the District Court of Kigoma grossly erred in law and fact when it failed to scrutinize the evidence as it was adduced by the parties herein. Hence renders the judgment ungrounded.*
- 2. That, the District Court of Kigoma grossly erred in law and fact when it failed to order the division of matrimonial properties that were*



acquired by joint effort between the Appellant and Respondent as the Appellant proved her claim to the required standard over her contributions regarding matrimonial properties.

3. *That, the District Court of Kigoma grossly erred in law and fact when it ordered the matter to be remitted to the trial primary Court of Ujiji for re-trial in order to ascertain each party's contribution without considering the evidence as it was adduced by each party which legally had proven a contribution of each party over the acquisition of the said matrimonial properties.*
4. *That, could the District Court of Kigoma consider the evidence as it were adduced by the party herein above the Respondent was not entitled even 30% of shares of the said matrimonial properties as he failed to prove what he contributed as he had no job by the time while the Appellant proved to have been an engine of the family by doing different activities during the subsistence of their marriage.*
5. *That, the District Court of Kigoma grossly erred in law and fact when it failed to order the division of the matrimonial properties basing on the heavy evidence as it were adduced by the Appellant compared to the weak evidence adduced by the Respondent which was not supporting his claim. Hence the finding of the District Court*



of Kigoma was made for the interest of the Respondent in order the same can clear doubts over his extent of contributions.

At the hearing of the appeal, the Appellant was represented by Mr. Sylvester D. Sogomba, learned Advocate, who also represented her in the District Court and Mr. Sadiki Alik, learned Advocate, represented the Respondent, so did in the District Court.

Mr. Sogomba submitted in support of the appeal arguing all grounds together. He submitted that it was wrong for the District Court to order re-hearing of the case by the trial court because first both parties adduced their evidence on matrimonial assets acquired during their marriage and second, to re-hear their evidence means will afford opportunity for the Respondent to fill up gaps. Then Mr. Sogomba went on summarizing the evidence of each party. He submitted that when the couple got married both had no properties. That it is the appellant who was employed with Vodacom first, then the respondent later on got employed as sales man in a shop. That they managed to amass some properties which included two motorcycles and built one house on a plot acquired by the Respondent's father. He also submitted that the Respondent evidence is that he married the Appellant in 2014 and had no properties until in 2016 when he was employed. The counsel submitted that the challenge is on



the unimplementable order of re-hearing the parties while there is ample evidence of parties contributions in acquisition of the properties. The Counsel observed that since all other issues were not complained of the first appellate court ought to have dealt with only one issue, that is shares in the matrimonial house.

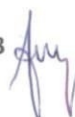
On the other hand, Mr. Aliko opposed the appeal and submitted that the first appellate court was correct in ordering re-hearing of the case by the trial court on the issue of contributions by parties towards acquisition of the matrimonial house. Mr. Aliko submitted that the Appellant failed to establish the tests set out under section 114(2)(b) of the LMA because there was no evidence of financial contribution by the Appellant while there was evidence of acquisition of the plot by the Respondent which was gifted to him by his parents. Moreover, the Counsel submitted that no evidence of materials supplied by her for construction of the house. However, smelling some ambiguities in the matrimonial assets distributions by the trial court Mr. Aliko invited this court to order the District Court redistribute the assets. In rejoinder Mr. Sogomba reiterated his submissions in chief.

As it can be gathered from the counsel for both sides submissions, the issue in this appeal is centered on the distribution of the matrimonial house.

In this appeal, the Appellant takes no concern on the orders of divorce and maintenance of the child where it was ordered that the Respondent to pay Tshs 100,000/= monthly.

From the submissions of the counsel for both sides, there is no concern also on issues of share in the business of mobile money transactions agency as well as the grocery. The parties lock horn on the acquisition of the matrimonial house where the District Court ordered parties to be reheard by the trial court because there is no evidence on their contributions.

In order for this court to determine this controversy it will need to revisit the evidence. I am alive that this court is a second appellate court; it can deal with matters of law or mixed matters of law and facts. However, it can interfere with findings by the two lower courts where their decisions are clearly wrong, unreasonable or are a result of a complete misapprehension of the substance, nature, non-direction on the evidence or where some principles are violated leading to miscarriage of justice.



In the case of **Godfrey Chilongola vs. Nicodemus Martine and 19 Others**, Land Case Appeal No. 29 of 2018 (unreported), this Court, Hon. Mruma, Judge, applying the principle in a civil case stated as follows:-

*"This being a second appeal, this court is not required to re-evaluate the evidence. That is a duty of the first appellate court which must review the evidence and consider the material before the trial court (See **Pandya Versus R.** [1957] E.A. 336 and **Okena Versus Republic** [1972] E.A 32). The second appellate court has no duty to re-evaluate the evidence adduced at the trial but it has the duty to consider the facts of the appeal to the extent of considering the relevant points of law or mixed law and facts as raised in the second appeal. In the process it may review the evidence (facts) adduced at the trial and particularly so if the first appellate court failed to discharge its primary obligation to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion".*

In this appeal the District Court when ordering re-hearing of the case as stated above held that there was no evidence of contributions by the parties towards acquisition of the matrimonial house.

Mr. Sogomba argued that the evidence well established the contributions by each party. Mr. Aliko has no dispute on the contributions but his concern is on proof of the extent of the contribution by each party, that is the reason he agrees with rehearing of the parties so that each one can establish the said extent of contribution by giving the nitty-gritties of their contributions.

Distribution of matrimonial assets is governed by Section 114(2) of the LMA which provides for the tests on establishing a party's contribution in matrimonial property. It reads as follows:-

"114(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 debt owing by either party which were contracted for their joint benefit.

d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards quality of division". (Emphasis added)

The relevant test in this matter which is the center of the controversy is in subsection 2(b), that is, the extent of contribution.



The provision was interpreted in the famous case of **Bi Hawa Mohamed vs. Ally Seif** [1983] TLR.32 where the Court of Appeal held inter alia as follows:-

"Since the welfare of the family is an essential component of the economic activities of a family man or woman, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets".

The Court of Appeal went further stating as follows:-

"the 'joint efforts' and work towards the acquiring of the assets' have to be construed as embracing the domestic 'efforts' or 'work' of husband and wife".

Mr. Sogomba's view is that the evidence adduced before the trial court sufficed while Mr. Alik's view is that it didn't suffice as it needs nitty-gritties of the contributions.

I think Mr. Sogomba is right because the extent of contribution is looked at the evidence generally, it needs not to be proved by the nitty-gritties of the contributions such as how much shillings, how many bricks how many bags of cements or iron sheets did each one provides. In my understanding, in cases like this one, where the matrimonial property is a matrimonial house, couples do sit together and share their inputs towards

construction of their nest in which they would nurse their issues and live for the rest of their life. Their contributions becomes to be in both material or moral. The distribution therefore, is compensatory in nature reached at in the discretion of the court based on the adduced evidence. This court stated in the case of **Pulcheria Pundugu vs. Samwel Huma Pundugu** [1988] TLR 7 as follows:-

"The principle underlying division of matrimonial properties is one of compensation, it does not make any difference whether what is been compensated is direct monetary contribution or domestic service".

In my views in this matter where the evidence established that during their marriage the Appellant was employed and ran a mobile money transactions agency business and a grocery; also the Respondent was employed as sales man in a shop, both contributed towards construction of the matrimonial house.

It is true from the evidence presented before the trial court that the plot on which the house is built was gifted the Respondent. However, as submitted by Mr. Sogomba, the same was substantially developed by the joint efforts of the parties.

Moreover section 114(3) of the LMA makes it clear that references to assets acquired during marriage includes assets owned before the



marriage by one party but which have been substantially improved during the marriage by the other party or by their joint efforts.

It is my further view that the District Court failed to apply the law on division of matrimonial assets on to the facts adduced before the trial court. Therefore, its order for rehearing of the parties on their contributions was given blindly in forgetfulness of the adduced evidence before the trial court.

However, the District Court was right in holding that the order for the Respondent to build a new house or complete the one he was building, if any, and award it to the Appellant was untenable and un-executable after having granted the divorce.

In the result I find the appeal as meritorious. Consequently I make the following orders:-

- 1. The appeal is allowed.*
- 2. The judgement of the District Court is hereby quashed and its decree set aside.*
- 3. The judgement of the trial court is upheld save for the order on division of matrimonial assets which is also vacated and in lieu thereof I do hereby order that the matrimonial house in issue be*

valuated and sold, the proceeds thereof be shared 50% by each party.


4. The rest orders of the trial court remain undisturbed.

5. No order as to the costs.

Order accordingly.

Dated at Kigoma this 19th August, 2022.




MANYANDA

JUDGE