

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB-REGISTRY)
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

CIVIL APPEAL NO. 20 OF 2022

*(Arising from Kinondoni District Court Matrimonial Cause No. 31 of 2021 before Hon.
G.N. Barthy – SRM)*

TARIQ LESILIE PETER ANACHOURAAPPELLANT

VERSUS

LILA AWADHI ABDALLAH..... RESPONDENT

JUDGMENT

04/08/2022 & 19/09/2022

I.C. MUGETA, J

The parties' dispute is on division of the matrimonial assets particularly the houses at Kinyerezi, Majohe and Kinondoni - Dar es Salaam and an order for the appellant to pay Tshs. 250,000/= as maintenance for their two issues. They agree that the marriage between them has irreparably broken down, consequently, they don't contest the divorce decree issued by the trial court.

The appellant is represented by Benson Kuboja, learned advocate. He argued that the house at Kinyerezi was bought by the appellant before



marriage and the respondent contributed nothing towards its improvement. Therefore, it is not a matrimonial asset and the lower court erred to give the respondent 20% share in that house. He admitted that the house at Majohe is built on the plot bought by the respondent but the appellant contributed about Tshs. 200,000,000/= to build a house thereon, consequently, the trial court erred to exclude it from the matrimonial assets.

Submitting in relation to the house at Kinondoni, counsel for the appellant argued that since the same is registered in the name of the appellant, it is exclusively owned by him as there is no evidence from the respondent on her contribution towards its acquisition or improvements. On maintenance, he said the amount was awarded without ascertaining the actual income of the appellant. He made no suggestion on the earnings of his client for a reason that the appellant is unemployed after he failed to go back to Greece where he worked due to the outbreak of Covid 19.

The respondent is represented by Evarist Martin, learned counsel. He opposes the appeal supporting the decision of the lower court on the division of the house at Majohe and maintenance order. He opposes the

division of the house at Kinondoni where he thinks the division ought to have been on equal shares.

On the parties' contribution towards acquisition of the properties, he submitted that both parties were employed and earned income during the subsistence of their marriage, therefore, it is difficult to substantiate the extent of contribution by each of them. In his views, marriage relationship is not an investment scheme where each party ought to precisely keep records of her/his income and its application in the acquisition of the family assets. However, he is of the view that the respondent contributed more because despite being employed, she took care of the family all the time as the appellant worked abroad.

The learned counsel admitted further that the house at Kinyerezi was, indeed, bought before marriage but it was unfinished. That it was completed during marriage, therefore, the trial court rightly declared it a matrimonial asset. The learned counsel submitted that as there is no mathematical formulae to determine the extent of contribution of spouses, the registration of the house at Kinondoni which was acquired during marriage in the name of the appellant does not make it his sole property.

He prayed the court to vary the shares awarded to the respondent from 25% to 50% as the parties had equal contribution.

Regarding the house at Majohe, he submitted that the appellant did not prove how he provided the alleged Tshs. 200,000,000/=, therefore, it is the sole property of the respondent as determined by the trial court. On maintenance, he submitted that the amount awarded is on the lower side considering the income of the appellant of USD 2,000 per month as he is employed in Greece.

The rejoinder by counsel for the appellant essentially reiterates the submission in chief.

The petition of appeal has five grounds of appeal. The complaint about the distribution of the houses at Kinyerezi, Kinondoni and Majohe are articulated in the first, third and fourth grounds of appeal. Ground two is about exhibit D1 which is the sale agreement of the house at Kinyerezi. Counsel for the appellant has argued that had the trial court addressed its mind to the contents therein, he would not have declared that house a matrimonial property. Ground five is about the awarded maintenance being on the high side.

I shall deal with the first to fourth grounds jointly as they are interrelated.

The couples married on 22/04/2011 in Islamic rites. According to exhibit D1 the house at Kinyerezi was purchased on 30/12/2009 by the respondent. Unlike the submission by counsel for the respondent that the house was completed during marriage, exhibit D1 refers to a house not a semi-finished house. The reasons as to why the trial court declared the same a matrimonial house is somewhat unclear. However, it seems the learned Senior Resident Magistrate (as she then was) was convinced that the respondent contributed to its improvement before they married and that they briefly lived therein before they moved to Kinondoni. This cannot be true for the reasons hereunder.

In her evidence the respondent testified that they started their relation ship in 2010 which means the house was already acquired. Her testimony that when they met the plot had nothing and they started to build the house together in 2010 alludes to a possibility which is highly improbable when compared with the contents of exhibit D1 which says the appellant bought a house. In terms of section 100 of the Evidence Act, the contents of exhibit D1 excludes oral evidence as to whether the appellant bought a house or a plot with unfinished house. Indeed, as submitted by counsel for

the appellant, the trial court failed to properly analyse the evidence in exhibit D1 in relation to the acquisition of the house at Kinyerezi.

As a result, I hold that the house at Kinyerezi was bought before marriage and the respondent did not provide evidence on its improvement during marriage. I declare it a personal property of the appellant not subject to division as matrimonial assets. The decision of the trial court regarding this property is set aside. There are merits in the first and second grounds of appeal. I allow them.

What about the house at Kinondoni? This house was acquired during subsistence of the marriage. The respondent testified that as she is employed, her income was also used to buy this property even if it is registered in the name of the appellant. The respondent testified that she thought it was okay to register the property in the name of the appellant since they were married.

I find nothing upon which I can fault the respondent's evidence that she made financial contributions towards its acquisition. As a matter of fact, borne in evidence, she also made indirect contribution by domestic works including taking care of the children while the appellant was abroad. The

evidence of the appellant that the respondent contributed nothing is suspect. The respondent earned income from her employment and took care of the family. Her evidence that she is employed is undisputed. The appellant complained that he does not know where the respondent works. This, by itself, does not negate the respondent's evidence that she works as air hostess in an unspecified airline. In this regard, I agree with counsel for the respondent that the parties are entitled to equal shares in the house at Kinondoni. I set aside the order of the lower court awarding the respondent 25% shares only and substitute it with 50% shares each. There is no merits in the third ground of appeal. I dismiss it.

The respondent not only did not plead the house at Majohe in her petition but also neither led evidence about its acquisition and her contribution. Instead, she testified about constructing her house at Gongolamboto. I am not sure if Gongolamboto and Majohe are one and the same place. However, in his answer to the petition the respondent pleaded it and he led evidence that the land on which it is built belongs to the respondent but he paid about Tshs. 200,000,000/= to 300,000,000/= to build a house thereon. The respondent did not file the reply to the answer to the petition, therefore, the allegation that there is a matrimonial house at Majohe is

admitted by her and the evidence of the appellant about construction of the house thereon is uncontroverted. Unlike the lower court which found that this house belongs to the respondent in exclusion of the appellant, I find that that house is a matrimonial asset. There is merits in the fourth ground of appeal. I allow it. However, I award the house to the respondent. The reasons shall be evident hereunder.

As first appellate court, I am entitled to re-evaluate the evidence and make own findings against or in support of the finding the trial court. Having evaluated the evidence in its totality, it is my view that the trial court erred to declare the house at Kigamboni as personal assets of the appellant. This house was acquired during subsistence of the marriage. The appellant testified that he bought the plot from his personal income jointly with Seif Ally Litake (DW3). DW3 confirmed she contributed Tshs. 12,500,000/= to the purchase price of Tshs. 25,000,000/=. To the contrary the respondent testified that it was a proceed of the rent from the house at Kinyerezi. The evidence of purchase of the house at Kigamboni is in exhibit D3 (the sale agreement). This document shows that the buyer is the appellant. Seif Ally Litake is out of the picture. In terms of the contents of

exhibit D3, Seif Ally Litake cannot be heard as having a share in the said house.

Be as it may, the respondent contributed in its acquisition by her performing domestic works. Further, the appellant did not explain how the income from the rented house at Kinyerezi was expended to controvert the respondent's allegation that it was applied towards acquisition of the house at Kigamboni. It is, therefore, most probable that, indeed, income from the house at Kinyerezi was used to acquire this property. Despite my finding that the same is a private property of the appellant, income from the property was matrimonial asset as it was generated during subsistence of the marriage.

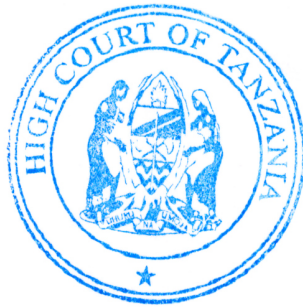
Further, the respondent contributed in obtaining the house at Kinondoni without which the house at Kinyerezi would have been used as a matrimonial home. Properties acquired from income which can be termed as matrimonial property are matrimonial properties too. The trial court held that the respondent did not prove that the house at Kigamboni is a proceed of the income from renting the Kinyerezi house. This is not true because she gave oral evidence to that effect. If the trial magistrate

contemplated documentary evidence, I see no possibility of proving such facts by documents in a matrimonial relationship. The respondent having asserted in her evidence how the rent was spent, the appellant had a duty to rebut it. He did not do so, therefore, the respondent ought to be believed. I declare, the house at Kigamboni as a matrimonial asset. Since I have awarded the house at Majohe to the respondent, I award it to the appellant.

I shall not be detained by the issue of maintenance. The appellant's complaint is that it is on high side considering that he is unemployed. In his evidence, the appellant admitted his income was USD 2000. Currently, he says he is unemployed after he failed to go back to Greece due to Covid 19 outbreak. This excuse has been overtaken by events because lockdowns are no longer there. As section 129 of the Law of Marriage Act imposes upon a man the duty to maintain his child, I find the award justified as maintenance for two children. I dismiss the fifth ground of appeal.

In conclusion the house at Kigamboni goes to the appellant and that at Kinyerezi is his personal property. The house at Mojohe goes to the respondent while that at Kinondoni shall be shared equally between the parties. The maintenance order is upheld.

The appeal succeeds to the stated extent. No orders as to costs.



Mugeta
I.C. MUGETA

JUDGE

19/09/2022

Court: - Judgement delivered in chamber in the presence of the appellant and Evarist Martin counsel for the respondent.

Sgd: I.C. MUGETA

JUDGE

19/09/2022