

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
TANGA DISTRICT REGISTRY  
AT TANGA**

**MATRIMONIAL APPEAL NO. 1 OF 2021**

(ARISING FROM MATRIMONIAL CAUS NO. 1 OF 2021 BEFORE THE DISTRICT COURT OF  
KOROGWE)

**RAJABU FRANK.....APPELLANT**

**VERSUS**

**MARIAM CHRISTIAN.....RESPONDENT**

**JUDGEMENT**

**Date of JUDGMENT- 23/09/2022**

**Mansoor, J:**

Rajabu Frank and Mariam Christian were husband and wife who celebrated their Traditional Marriage in the year 2010 according to the Appellant but according to the respondent they married traditionally or customarily in 2006, they were blessed with Four Issues, namely Ismail (12), Yasin (11), Aziza (8) and Fatma (3). The respondent alleged during trial that during the subsistence of their marriage, they acquired some properties including a House



located at Majengo Juu Area, at Hale in Korogwe District, a motorcycle, a container, a generator, and house utensils.

It was the respondent who petitioned for the divorce, division of assets and custody and maintenance of their children. She contended that she experienced cruelty from her husband, and that the marriage had irreparably broken down. She also claimed to have contributed towards the acquisition and development of the house located at Majengo Juu, Hale Village in Korogwe, and claimed for a share. The husband on the other hand did not want the divorce saying that he still loves his wife even though the wife was denying him conjugal rights for a continuous period of two years. He also said he married her in 2010 while he acquired and developed the property in 2007 before he married her, thus the house is his sole property not falling under the matrimonial property. However, the appellant pleaded before the Trial Court to mediate them rather than issuing the divorce. The appellant was minding the welfare of their children. In the case the divorce was

confirmed, he prayed for the custody of the children since he is the one who provides for their maintenance.

The Trial Court found the marriage to have been irreparably broken down, and it issued an order of divorce. Custody of the children were given to the wife and the husband was given the right of visitation. The Trial Court ordered the house to be divided into 60/40 shares, while the husband was given 60% of the shares, the wife was given 40%. The Trial Court also ordered the house to be valued by the Government Valuer, and that parties were at liberty to trade their shares or retain them shares. The furniture and household were ordered to be divided equally between them. The Appellant (husband) was ordered to provide maintenance for the children at the tune of Tshs 200,000 per month. He was also ordered to pay for their education, medical health as well as provision of clothing and wears.

Aggrieved by the decision of the Trial Court, the husband, appealed to the High Court, raising Five Grounds of Appeal, however in his

submissions in chief he dropped the 4<sup>th</sup> ground of appeal, and proceeded to argue ground No. 1 and 5 jointly. Ground No. 1 and 5 were as follows:

1. . The Trial Magistrate erred in law and in fact for ordering the distribution of the property in 60% and 40% ratio, without considering the evidence of the Appellant on acquisition and development of the suit property.

And Ground No. 5 reads:

5. the Trial Magistrate fell into error in dividing the matrimonial property while that property is neither matrimonial property nor belonging to the spouses.

The Appellant seems to argue that he made greater contribution towards the acquisition of the property compared to the domestic contribution made by his wife contrary to section 114(2) of the Law of Marriage Act. He also argues that the house should not be sold but it should be registered in the joint names



of their children. He also argues that the house is his sole property as he acquired it before he contracted the marriage with the respondent in 2010.

Regarding the 2<sup>nd</sup> ground of appeal, which is with regards with the order of payment of Tshs 200,000 towards maintenance of the children, the appellant argues that the Trial Court failed to consider the financial position of the Appellant, and again neglected to consider that the respondent also is well off and should contribute towards maintenance of their children.

The respondent made a reply to submissions in which she said the ratio of 60 % to the husband and 40% to the wife was fair, and the trial court considered the extent of each party's contribution towards the acquisition and development of the property. She disputed the transfer of the property in the names of their children saying that this is a matrimonial cause, and not probate.

Regarding maintenance of the children, the respondent referred the Court to the Law of the Child Act, Cap 13 R: E 2019 which directs and demands the father of the children to take care of the children. That during trial, the appellant confirmed before the Court that he was earning Tshs 500,000 per month, and so the amount of Tshs 200,000 ordered towards maintenance of Four Children was fair.

I have read and considered the arguments by both sides. Regarding the division of the matrimonial assets, the appellant claimed to have had the house even before he married the respondent. There is on record that the house was purchased by Rajabu, the appellant from Omari Selemani for a consideration of Tshs 1,650,000 on 09<sup>th</sup> August 2007. There was no proof given before the Trial Court proving as to when the marriage between the parties were contracted, and since the respondent was the one who initiated the case at Trial Court, she had a duty to prove that she was married in 2006 before the property was purchased in 2007, and whether the property was developed before or after

their marriage. This is the cardinal law of evidence that he who alleges must prove. In the absence of any proof that she was married in 2006 before the house was purchased by the appellant, there is a rebuttable presumption that she was married in 2010, and she found the house already constructed and developed. Section 114 (3) requires the Court to consider the contribution of a spouse in developing the property even if the property was acquired before the marriage, and this section reads:

Section 114 (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.

The respondent was duty bound to prove before the court that the house which was acquired and built before she was married was substantially improved during the marriage. Since the respondent failed to prove these facts to the satisfaction of the Court, then as

stated in section 58 of the Law of Marriage Act, a spouse has the right to own and acquire property independently, and marriages should not operate to change ownership of any property to which either the husband or wife acquired separately and independently. This section reads

Section 58. Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding, and disposing of any property.

From the above, it is vividly clear that the house was the property of the husband, in which he acquired and developed it before the marriage, and he is entitled to own it independently. The order made by the Trial Court for division of the property located at Majengo Juu Hale is



therefore quashed and set aside, as the property belonged to the husband solely in exclusion of the wife, and it did not form part of the matrimonial asset.

Section 60 of the Law of Marriage Act gave a presumption even if the property is acquired during the subsistence of the marriage but by the husband or wife alone, there is a rebuttable presumption that the property belongs to the husband in exclusion to the wife, or to the wife in exclusion of the husband, this section reads:

Section 60.       Where during the subsistence of a marriage, any property is acquired-

- (a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; or
- (b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

Since the property is in the name of the husband, then there was a duty on the part of the respondent to prove that the house was extensively improved during the marriage, which duty she failed to discharge. Therefore, the rebuttable presumption is that the property is the property of the husband in exclusion of the wife.

Regarding the order of maintenance of the children, I agree that Section 129 of the Marriage Act, it is the duty of the man to maintain his children, and this section reads:

Section 129. -(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.

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- (2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far, as he is unable to maintain them.

The husband is obliged under the law to maintain his children whether they are in his custody or the custody of any other person. On top of the monthly maintenance of Tshs 200,000 ordered by the Trial Court, the appellant is bound by the law to provide for the accommodation of the children, clothing, food, and education. The amount ordered by the court is reasonable considering that the husband has admitted that he earns about Tshs 500,000 a month.

For the above stated reasons this appeal is partly allowed. The property located at Majengo Juu in Hale belongs solely to the Appellant and cannot be subject to division. The appellant is however ordered to maintain his children by paying the maintenance allowance of Tshs 200,000 per month. He is also



ordered to provide for their accommodation, clothing, and education.

Appeal is partly allowed, and each party shall bear his/her own costs of the appeal.

**DATED at TANGA this 23<sup>rd</sup> day of SEPTEMBER 2022**



A handwritten signature in blue ink, appearing to read "L. Mansoor", is written over the printed name.

**L. MANSOOR**

**JUDGE**

**23<sup>RD</sup> SEPTEMBER 2022**