

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT MWANZA

PC CIVIL APPEAL No. 24 OF 2022

*(Originating from Ilemela District Court in Matrimonial Appeal No. 16 of 2021 and
Matrimonial Cause No. 29 of 2021 at Ilemela Primary Court)*

PASCHAZIA JAMA APPELLANT

VERSUS

DICKSON MAGAFU RESPONDENT

JUDGMENT

19th & 26th September, 2022

OTARU, J.

This is a second Appeal by the Appellant, Paschazia Jama who was Respondent in the trial court. She appealed against the whole judgment of the District Court of Ilemela District which was in all fours with the decision of the Primary Court of Ilemela in Matrimonial Cause No.29 of 2021, on the grant of divorce and division of matrimonial properties. The Respondent herein, Dickson Magafu was the Petitioner in the trial court.

The Respondent filed for divorce and division of matrimonial properties in the Primary Court of Ilemela at Ilemela. The divorce was granted and properties divided. The trial court considered three houses that were listed by the Respondent as properties acquired during the subsistence of the union between the parties. These are the Musoma,

Kitangiri and Lumala houses. The Appellant was given the Musoma house while the Respondent remained with the Kitangiri as well as Lumala houses. The Appellant was dissatisfied and appealed to the District Court, as she wanted the Kitangiri house. The District Court squarely agreed with the decision of the trial court and dismissed the Appeal.

When the matter came for hearing before this Court the parties appeared in person. Although both Parties had engaged legal services, both counsel did not appear. The parties prayed to proceed with the hearing as scheduled.

During the hearing, the Appellant dropped the issue of divorce and remained with division of matrimonial property. She submitted that both courts below erred in fact and in law when they deprived her of the Kitangiri house. The Appellant contended further that her dissatisfaction emanates from the fact that the Musoma house required extensive works and repairs that she is not able to do financially. She also stated that she had invested in improving the Kitangiri house where she resides with their son Isack and two grandchildren. She is worried that if the Respondent decides to evict them they will have nowhere to stay. She thus prayed for this Court to give her the Kitangiri house instead of the Musoma house.

The Respondent on the other hand, argued that he had no intention of evicting anyone from the Kitangiri house. He also added that the house in question is not even in his name as they built it for their son Isack and the same has been registered in his name. He also prayed for this Court not to fault the decisions of the courts below as the same were correct.

In response, the Appellant prayed that if she cannot get the Kitangiri house, she needed security and assurance that she will not be evicted there from.

Having heard the parties' submissions and prayers, I went on to determine whether the Appeal has merits or otherwise.

I have gone through the records of the courts below trying to understand what factors that were considered in dividing the properties. Both courts considered the fact that the Respondent was employed and earning a salary while the Appellant was *a mere house wife*. The District Court relied on the case of **Bibie Maulid v. Mohamed Ibrahim** [1980] TLR 162 on how much parties should get from the matrimonial assets, and considered the Appellant's contribution in terms of washing and preparing food for the family as well as supervising their buildings while the Respondent was employed. Both courts below agreed that the

Appellant had contributed to the properties and deserved to receive one of the three houses.

As established in the case of **Bibie Maulid** cited above and expounded in the landmark case of **Bi. Hawa Mohamed v. Ally Sefu** [1983] TLR 33 *joint efforts and work towards the acquiring of the assets* under the Law of Marriage Act, Cap 29 of the Laws of Tanzania, have to be construed as embracing the domestic efforts or work of husband and wife.

Before dividing the properties, the contribution of each spouse has to be considered. In the case of **Gabriel Nimrod Kurwijira V. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 (CA Tanga) (unreported), it was held that in resolving the issue of the extent of contribution, the court is to rely mostly on the evidence adduced by the parties. In this case, the trial court relied on the evidence adduced by the parties, weighed it and decided to give one house to the Appellant and two houses to the Respondent. I am therefore in no position to fault both courts below in their finding as to the extent of contribution of each party.

The question before this Court is what factors were used to determine who gets which house? Why was the Appellant given the Musoma house and not the Kitangiri one? It is not on record what

factors were used to determine who gets which house. According to the case of **Bi. Hawa Mohamed** cited above, *domestic duties* are to be treated as working not only for the current need of the husband and wife, but also for their future.

The Appellant had been requesting for the Kitandiri house from the very beginning. It is not in dispute that the Appellant has been residing in the Kitangiri house since before the Respondent filed for divorce. She spent many years of her life in that house and made improvements so she could live comfortably. The house in Musoma that she is given would require her to invest money therein and also move from Mwanza where she is already well settled, to Musoma. I believe that due consideration should have been given to the fact that the efforts invested in the properties are also intended for future enjoyment.

The Respondent did not dispute the fact that the Kitangiri house was acquired during the subsistence of the marriage, he however came with information that it was acquired for the benefit of their son, one Isack, who resides there with the Appellant and the same is registered in his name. This information was not provided anywhere in the courts below. Even the Appellant was surprised to hear it. Now what about the work that the Appellant did for the future as per **Bi. Hawa Mohamed's** case cited above.

The Court in **Gabriel Nimrod's** case was faced with a similar situation where spouses purchased property in the name of their offspring. The court advanced the test of *the intention of the parties*. Did the parties intend for the property to be matrimonial property or that of their son Isack? In this case, records indicate that the Respondent filed for divorce in the trial court and listed the three houses including the Kitangiri house as matrimonial properties to be divided between them. Now the same Respondent claims that the house is not matrimonial property. If we apply the test of *intention of the parties* what would be the outcome? Why does this information come now, from the same person who should have disclosed it at the earliest possible stage? Isn't this an afterthought because the house could be given to the Appellant?

I am inclined to believe that the parties' intention was to retain the Kitangiri house as their matrimonial property, why else would the Respondent list it as such? From the demeanour of the parties, I do not see how their intention would have been to part with the Kitangiri house (if at all it is registered in the name of Isack), while at the same time considering it as matrimonial property. The Appellant should have been given the Kitangiri house. If it is the issue of registration, the same be

fruits of her contribution to the matrimonial properties. This Appeal therefore has merits.

Consequently, the Appeal is allowed and the Appellant is hereby given the Kitangiri house in the place of the Musoma house. The decisions of the District Court of Ilemela in Matrimonial Appeal No. 16 of 2021 and Ilemela Primary Court in the Matrimonial Cause No. 29 of 2021 are reversed to the extent so stated.

This being a matrimonial matter, there is no order as to costs.

It is so ordered.

DATED at **MWANZA** this 26th day of September, 2022.



M.P. OTARU

JUDGE

26/09/2022

Judgement delivered in the Court in the presence of the Appellant and the Respondent, both in person.

The right of appeal is duly explained to the parties.



M.P. OTARU

JUDGE

26/09/2022