

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC. CIVIL APPEAL NO. 32 OF 2022

*(Arising from Matrimonial Appeal No. 15 of 2021 in the District Court of Ilemela District
Originating from Matrimonial Cause No. 34 of 2021 in Ilemela Primary Court)*

RICHARD NJINGO MATANDULWA.....APPELLANT

VERSUS

BESTINA DAUDI MADELEKE.....RESPONDENT

JUDGMENT

12th July & 19 Sept., 2022

DYANSOBERA, J.:

In this appeal, the appellant, Richard Njinga Matandulwa, is seeking to impugn the decision of Ilemela District Court in Matrimonial Appeal No. 15 of 2021 delivered on 30th December, 2021. The appeal is directed against Bestina Daud Madeleke, the respondent.

A brief background of the matter leading to this appeal is apposite. The parties herein contracted Christian marriage at the Evangelical Lutheran Church of Tanzania on 22nd day of July, 2000. There is evidence, however, that the parties started living together in cohabitation since 28th July, 1997. They were blessed with two issues: Mathayo Richard and Neema Richard. The appellant was working with TANESCO as an electrician while the respondent was a house wife. The marriage could not subsist any longer as there arose some

misunderstandings alleged caused by the respondent's infidelity. This led to the parties being separated for almost nineteen years but then the appellant called her back to the matrimonial home despite the fact that the respondent had another man with whom two children had been sired. The appellant also had married another woman.

The appellant, however, believing that their relationship could not be tolerated any longer, he went to the Primary Court of Ilemela District at Ilemela Urban and filed Matrimonial Cause No. 34 of 2021 claiming dissolution of marriage and custody of children. He also prayed for other reliefs the court deemed fit to grant. In his evidence, the appellant denied to have jointly acquired any matrimonial property with the respondent. The respondent, however, told the trial court that they managed to acquire some properties including landed properties, farms at Sengerema and a milling machine.

After hearing the parties, the trial court dissolved the marriage and found that the contribution of the appellant was 75% while that of the respondent was only 25% on a piece of land situated at Bulola A Buswelu on Plot No. 382 Block 'A'. The learned Resident Magistrate ordered the house to be valued by the Government valuer and both contribute costs for obtaining the valuation and then any party would be at liberty to buy out the share of his fellow.

With regard to the custody of the children, the trial court ordered that since the children were adults, they had option to choose in whose custody they preferred.

The respondent, aggrieved, successfully appealed to the District Court in Matrimonial Appeal No. 15 of 2021. In its decision dated 30.12.2021, the District Court partly allowed the appeal by reversing the division of the landed property of the percentage of 75% by 25% and, instead, granted an equal division, that is 50% each.

In the present appeal the appellant is challenging the decision of the District Court mainly on the ground that the first appellate court failed to evaluate the evidence on the extent of contribution in the acquisition of the said matrimonial assets and that the first appellate court failed to appreciate that it was the respondent who was responsible to the breakdown of the marriage due to her infidelity.

bearable. Seeing this, the appellant filed Matrimonial Cause No. 34 of 2021 in the Primary Court of Ilemela District at Ilemela claiming dissolution of marriage, custody of children and any reliefs the court deemed fit to grant.

At the hearing of this appeal, both parties paddled their own canoe. At the time of hearing this appeal, the parties appeared on their

own, unrepresented. In addition to the filed six grounds of appeal the appellant contended that the division of matrimonial assets was not proper and argued that he acquired the said area and the house after the respondent had left the matrimonial home but then called her back two years late after their child passed an examination. He said that the house he subsequently occupied was built by the appellant and his other another woman. The appellant further argued that the respondent went there with a child called Goodluck whom she had sired by another man in 2014.

He insisted that the piece of the appellant built on belongs to his paternal uncle (*baba mkubwa*) *wakwa matandula*. He was also emphatic that the respondent found him with six children now but then had nine children who are the beneficiaries due to the fact that the area on which the house was built belonged to their grandfather.

The appellant rested his submission by asserting that the respondent wants to grab his property while he called her back with good intention and she is now HIV positive as he surprised her in adulterous association with his friend one Robert in a Guest House in Room No. 212.

Opposing the appeal, the respondent argued that property in dispute was bought in 2002 and they then managed to build a small hut

for overseeing the piece of land they had jointly acquired and that there are exhibits indicating that the property is matrimonial jointly bought by the parties. The appellant then got another woman who was the wife of his young brother and who decided to move where they had rented.

According to her, the money used to buy the piece of land was a transfer allowance paid to her and the children. She contended that she given TZS 300,000/= while the child was paid 150,000/= and the remaining money was used to buy used clothes with which the respondent managed to construct a small house. After the appellant defaulted to maintain the children, she referred the matter to *Dawati la jinsia*, then to the Social Welfare office where he paid 150,000/=. In court the appellant managed to pay TZS 180,000/-only. He then raised the issue of the house as matrimonial property. She asserted that the children are still dependent on them but the appellant dislikes their going to school.

Having considered the records of the lower courts and the petition of appeal together with the parties' submissions, I have, at this juncture to point out that the amount each is entitled from the matrimonial property depends on the contribution of each party to the acquisition of the said house and this is a matter of evidence. In the case of

Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo, Civil Appeal No. 102 of 2018 Tanga, the Court of Appeal stated:-

“It is clear therefore that extent of contribution by the party in a matrimonial proceeding in a question of evidence”

Going by the evidence given by both parties, I am constrained to believe that the appellant suppressed his evidence when he argued that he jointly acquired nothing with the respondent as was amply proved in evidence that parties jointly acquired the landed property and the respondent managed to give sufficient explanation on the extent of her contribution in the acquisition of the said asset.

Refuting the appellant’s claims that he built the house while they were in separation, the respondent told the trial court that the construction of the house started in 2002 and was completed in 2005 while they separated on 3rd day of December, 2013. Joseph James, the respondent called as her witness and who testified as DW 2 recalled that the appellant got a piece of land from Alphonse Ngumbe in 2002 and started the construction. He argued that the respondent was supervising the construction while the appellant was going to work. The respondent supported her evidence by tendering exhibit D 1 which is a sale agreement dated 27th April, 2002 between the Richard Matandulwa, the appellant and Bestina Daud Madeleka, the respondent

on one side and Alphonse Ngumbe, on the other side. There was also exhibit D 3, a document from the Plot Allocating Committee bearing the names of Neema and Mathayo Matandulwa as the allocatees of Plot No. 382 Block 'A' Busega in Ilemela Municipality. The trial court accepted the respondent's argument that she made contribution to the acquisition of the landed property.

In the judgment, the first appellate Resident Magistrate found as an undisputed fact that the plot holding the matrimonial house in dispute was bought by the joint efforts of the parties and that the respondent contributed partly from the money the appellant had been paid as transfer allowance and gave Tshs.450, 000/= to the respondent and partly from her business she was conducting.

I think the decision of the District Court cannot be faulted. In the first place, it was established in evidence that the respondent contributed to the acquisition of the matrimonial house which was also bought in the names of both parties as evidenced by exhibit D 2 and second, the law relating to the distribution of matrimonial assets is clear.

Admittedly, the trial court and first appellate court derived their powers to divide the matrimonial properties/assets to the parties by virtue of section 114(1) of the Law of Marriage Act which provides:

"114.

(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale."

In exercising that power a court is guided by the factors enshrined in subsection (2) of section 114 of the Law of Marriage Act and which provides that:

"(2) In exercising the power conferred by subsection (1), the court shall have regard—

(a) to the customs of the community to which the parties belong;

(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(c) to any debts owing by either party which were contracted for their joint benefit; and

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

The law as indicated above give mandate to the court that, subject to considerations stipulated under paragraphs (a), (b), (c) and (d) of sub-section (2) of Section 114 of the Act, it shall incline towards equality of division. This means that when the learned Resident Magistrate at the first appellate court ordered each party to get 50% of the shares to the house, he was acting within the dictates of the law.

With this glaring fact, I find nothing to fault that finding and hold that the appeal is devoid of legal merit.

The parties are advised to look for a certified competent valuer of their own choice to value the house. Any party is at liberty to buy out the share of his/her counter part so that he retains the house.

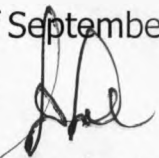
In the upshot, the appeal is dismissed with no order as to costs.

Order accordingly.



W. P. Dyansobera
Judge
19.9.2022

This judgment has been delivered is delivered under my hand and the seal of the court on this 19th day of September, 2022 in the presence of the appellant and the respondent.



W. P. Dyansobera
Judge