

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

PC CIVIL APPEAL NO. 15 OF 2022

*(C/F Civil Appeal No. 15/2021, in the District Court of Karatu at Karatu Karatu
Originating from Matrimonial Cause No. 05/2021 in the Primary Court at Karatu)*

BENEDICT JOSEPHAPPELLANT

VERSUS

MAGDALENA HOSEA RESPONDENT

JUDGMENT

12/07/2022 & 27/09/2022

KAMUZORA, J.

Magdalena Hosea, the Respondent herein petitioned for the decree of divorce, division of matrimonial properties, custody as well as maintenance of children against Benedict Josephat, the Appellant herein at the Primary court of Karatu at Karatu (the trial court) in Matrimonial Cause No. 5 of 2021. The trial court after hearing the evidence adduced by both parties reached its decision that the marriage between the parties was irreparably broken down hence a decree of divorce was issued. On the claim for division of the matrimonial properties the trial court ordered the parties to equally distribute the matrimonial house to

which every party was entitled to 50% of the value of the house. The trial court also granted custody of the two issues of marriage under the care of the Respondent who is their mother and granted the Appellant a right to visit their children. In respect of maintenance of children, the trial court directed the parties to go to the juvenile court so that the issue of maintenance could be resolved.

Being dissatisfied by the decision of the trial court, the Appellant herein appealed to the District Court (the first appellate court) and advanced three grounds of appeal as follows: -

- 1) That, the trial Magistrate erred in both facts and law ordering that the issues should be placed under the Respondent while the Respondent maliciously left home and abandoned them.*
- 2) That, the trial Magistrate erred in both law and fact in ordering that the house be divided equally while the Respondent has not contributed whatsoever to the acquisition.*
- 3) That, the trial Magistrate erred in both law and fact relying on incredible and insufficient evidence in balancing probabilities.*

The first appellate court after hearing the appeal varied the trial court's decision and ordered that the two children of marriage be placed to the custody of their father who is the Appellant. In respect of division of matrimonial house, the first appellate court varied the trial court's finding and ordered the Respondent to only get 25% of the value of the

matrimonial house as her share. It is from that decision this appeal is preferred by the Appellant on the following grounds: -

- 1) That, the Appellate court erred in law and fact for ignoring that the house is not matrimonial as it was acquired before marriage.*
- 2) That, the appellate court erred in law and fact for failure to grant order that the Respondent ought to contribute to the maintenance of children.*
- 3) That, the appellate court erred in law and fact for ignoring that the Appellant had three wives and that the division made will affect the children.*
- 4) That, the appellate court erred in law and fact for failure to notice that the alleged loan was borrowed before marriage.*
- 5) That, the judgment is bad in law for giving the Respondent twenty-five percentage while she contributed nothing at all acquisition of the alleged house.*

When the matter was called for hearing the parties appeared in person with no legal representation and orally submitted to the appeal. Arguing in support of the appeal, the Appellant stated that, he started building the house while living with his first wife Katarina Akonay and finished it while living with his second wife Selina Sheudo and that, the Respondent being the third wife found the house already built. He added that the two wives left him in that house and he is living with all

his children born by all wives and if the house is sold then the Respondent's children share will be taken away.

Submitting on the second ground of maintenance of the children, the Appellant stated that, the Respondent should be ordered to pay for the half of the maintenance of the children as the children belongs both to the father and the mother. On the third ground the Appellant argued that, the 25 % of the share ordered to be given to the Respondent should be given to the children of the Respondents who are living with the Appellant.

Submitting on the issue of loan the Appellant stated that, he is not aware of the loan taken by the Respondent as he was married to her on 22/12/2008 while the loan was taken by the Respondent on 01/07/2008 hence the loan was not used in construction of the Appellants house.

Submitting on the fifth ground the Appellant insisted that, the Respondent had not contributed to the construction of the house hence prays for this court to substitute the order of the division of the house and order that the said share be directed to the Respondent's children.

The Respondent on the other hand submitted that, they had a Christian marriage with the Appellant and it is not true that the

Appellant had constructed a house before they got married. She insisted that, the Appellant had a plot and they used the Respondent's money to build a house.

Replying to the issue of maintenance of the children the Respondent submitted that, she is paying school fees for one of their children called Alfred Benedict Josephat studying in English medium school and the same was disclosed during hearing before the trial court.

The Respondent submitted further that, she presented her marriage certificates hence she is the only legal wife of the Appellant. That, she wanted to take the children but the Appellant forced to stay with them and that she only knows about her children and not any other children. The Respondent insisted that, she took a loan while they were living together with the Appellant thus, prays for this court to order for division of matrimonial properties and she be given custody of her children.

In a rejoinder submission the Appellant added that, he was ready to pay school fees for the children only for the schools he could afford but the Respondent decided to take the children to another school. He claimed to have seven children and insisted that he built the house before he got married to the Respondent. It is the Appellant's prayer

that the court should not order for the division of matrimonial house as it will affect the children.

Having gone through the lower court records and the submissions by the parties, I revert to the determination of the grounds of appeal. In doing so, the first, third, fourth and fifth grounds of appeal will be discussed jointly as they relate to acquisition, contribution and division of matrimonial properties, but the second ground will be discussed separately as it relates to maintenance of children.

Stating with the first four grounds, it is the requirement of the law under section 114 of the Law of Marriage Act that, the court has to exercise powers to order division of matrimonial property during or subsequent to the grant of a decree of divorce. Basically, matrimonial properties include all properties acquired during the subsistence of marriage or those acquired before but developed during the parties' marriage. I am alive of the principle that, after determining that certain properties are matrimonial properties, the court in course of ordering for division has to also consider the extent of contribution for each part before deciding the share each party is entitled.

In the present matter, the trial court made a decision that the alleged house was a matrimonial house and that each party contributed

towards the construction of the said house. It was made clear that, the Appellant bought a plot of land to which the said house was built while on the side of the Respondent contributed money for the construction of the house. The trial court in considering the fact that the Respondent took a loan which aided to the construction of the said house and in considering other contribution as a wife to the Appellant and a mother to Appellant's children ordered for equal distribution of the matrimonial house.

In its decision, the first appellate court was in agreement with trial court finding that the house in question was a matrimonial property. However, the first Appellant court awarded 25% share of the matrimonial house on account that the Appellant had other two wives and children and that no proof that the loan claimed to be obtained by the Respondent was used in the construction of the matrimonial house.

In this appeal, the Appellant is contesting any contribution from the Respondent towards acquisition of the said house. I therefore opted to re-evaluate the evidence adduced before the trial court to ascertain as to whether the said house forms part of a matrimonial property or not.

It is in record and not disputed by the parties that, on 2/12/2008 the parties contracted a civil marriage followed by a Christian marriage on 06/06/2015. It is again in evidence that, prior to the marriage between the Appellant and the Respondent in year 1994 the Appellant had bought a land. The evidence reveals that, the house was constructed in that land when the parties had already started to cohabit. It is the evidence by the Appellant at page 28 of the trial court proceedings that he continued constructing the house while living with the Appellant. Reading page 28 of the typed trial court proceedings the Appellant stated that,

" ... aliporudi kutoka Qaru tukaanza mawasiliano na mdai na kuoana mwaka 2008 ndoa ya kiserikali. Nikaendelea kuishi nae huku najenga, mdai akawa anachangia kidogo."

From the above quoted words, it is clear that the Appellant and the Respondent constructed their matrimonial house while they were legally married. With that evidence and in considering what amount to matrimonial property, the said house fits in the definition of a matrimonial property. Thus, the two courts below were right to regard the house as a matrimonial house as it was acquired during the parties' marriage and not before the marriage as alleged by the Appellant.

Having determined that the house in question was a matrimonial property, the question is what was the contribution of the parties toward acquisition of the said property. It is the claim by the Appellant that, the Respondent contributed nothing in the construction of the said house. It is unfortunate that during his testimony at the trial court, the Appellant himself admitted at page 26 of the typed proceedings that, the Respondent was working meaning that he was earning money. The Appellant also admitted at page 28 and 31 to 32 of the proceedings that the Respondent contributed to the construction of the house. He however claimed that the Respondent's contribution was little. Part of the Appellant's evidence at page 28 of the proceedings reads: -

"Nikaendelea kuishi nae huku najenga, mdai akawa anachangia kidogo. Mwaka 2010 Kazi iliisha mdai akawa hana kazi nikaendelea na ujenzi mdai akiwa mama wa nyumbani."

When the Appellant was answering some of the question put to him, he admitted that in year 2008-2010 the Respondent had a part time job and in year 2011 the Respondent was not working and stayed home as house wife and by that time, there was ongoing construction of their house. At page 32 the Appellant quantified the contribution of the

Respondents contribution to be 10 bags of cement and Tshs. 300,000/= bricks.

Respondent claimed before the trial court that she was working and she obtained a loan that assisted them in buying the car and construction of the house. The evidence of loan was discarded by the first appellate court on account that the loan was obtained before the Respondent married the Appellant the fact which I also support. Exhibit XY1 a loan contract states that the said loan was taken by the Respondent on 01/07/2008 but the parties contracted their civil marriage on 02/12/2008. This proves that the loan was obtained before marriage and no evidence proving that it was used in acquisition of matrimonial properties.

I however find that, even without a proof of the loan, there is ample evidence as shown above proving that the Respondent contributed in the construction of the said house in two ways; **one**, she was working and the Appellant admitted that she made some contribution to the construction of the house, **two**, she was a wife and mother of the children to the Appellant thus, she cannot be regarded as an empty shell. In considering the land mark case of **Bibie Mauridi Vs. Mohamed Ibrahimu** [1989] TLR 162 it is in my considered view that,

there is evidence showing the Respondent's contribution towards acquisition of matrimonial house. Now the question is whether 25% awarded by the first appellate court to the Respondent reflect the extent of her contribution.

The Respondent did not raise a counter appeal on the decision of the first appellate court meaning that she was satisfied with such a decision. During hearing of appeal, she only insisted that she contributed in the acquisition of the property and prayed for an order for division of the same. The Appellant on the other hand claimed that, the first appellate court made its decision without considering that the Appellant had three wives and the division will affect the children. To him, it could be better if the 25% given to the Respondent to be left in the ownership of her children who are living with the Appellant.

The first appellate in making its decision took into consideration the evidence that the Respondent was the third wife and that the Appellant resides with all children of the former wives and the Respondent's children. I however do not agree with such reasoning for the reasons that, apart from the claim by the Appellant that he had customary marriage with his former two wives before he married the Respondent, no evidence was presented by him before the trial court to

prove such a claim. There is no dispute that the Appellant and the Respondent officiated their civil marriage before they contracted a Christian marriage which by its nature is a monogamous marriage. Thus, the contention that the court was to regard other two wives while ordering for division of properties is unwarranted.

As with regard to the children, the law only requires the court to consider the welfare of the children but it does not impose the liability to divide the matrimonial property to the children. In my view, the children welfare was considered by the first appellate court and that is why the award was varied from 50% to 25%. I therefore find that, the award of 25% of the matrimonial house issued by the first appellate was reasonable and fair in considering also the Respondent's contribution.

I however find contradiction in the 1st appellate court's finding as the magistrate went further by describing the Respondent's share as three rooms of the house. He did not state if the 25% share is equivalent to 3 rooms in the house thus raises the contradiction on what exactly was awarded to the Respondent. To avoid an order which will be hard to execute for being ambiguous, I find that the Respondent stand entitled to 25% of the value of the matrimonial property.

Regarding the second ground it is the contention by the Appellant that the appellate court erred for failure to grant an order that the Respondent ought to contribute to the maintenance of the children. Reading the grounds raised by the Appellant at the first appellate court there is no any ground in respect of the maintenance of the children that was raised by the Appellant at the first appellate court.

It is a settled principle of law that, a second appellate court cannot adjudicate on a matter which was not raised for determination before the first appellate court. As pointed out above, the record of appeal of the District Court of Karatu which is the first appellate court, the issue for maintenance was not among the Appellant's three grounds of appeal which he filed in that court. In the case of **Abdul Athuman Vs. Republic** (2004) TLR 151 court discussed the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. It was held that, the Court of Appeal has no such jurisdiction. Similarly, the issue on maintenance having not raised and adjudicated upon by the first appellate court, it cannot be brought before this court on the argument that the first appellate court filed to consider it. This ground of appeal is therefore cannot stand.

In the upshot, I allow the 4th ground but the rest of the grounds are dismissed serve for the clarification given regarding the award on percentage and number of rooms. The award of 75% to the Appellant and 25% to the Respondent of the matrimonial house is therefore maintained. Any of the party has the option to compensate the other party to the extent awarded and retain the matrimonial house. In considering that this is matrimonial matter, I make no order as to costs.

DATED at **ARUSHA** this 27th day of September, 2022.


 **D.C. KAMUZORA**
JUDGE