IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISRTICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO.118 OF 2021

(*Arising from Matrimonial Appeal No. 11 of 2021, Originating from Matrimonial Cause No.13 of 2021 at Mkuza Primary Court*)

NICOLATHAR RAMADHANI ..... APPELLANT

VERSUS

AZIZI MOHAMED MBAMBA .....RESPONDENT

JUDGMENT

15/2/2022 & 16/9/2022

LALTAIKA, J

The appellant herein **NICOLATHAR RAMADHANI** is dissatisfied by the decision of the District Court of Kibaha at Kibaha in Civil Appeal Case 11 of 2021 whose genesis can be traced from Mkuza Primary Court in Matrimonial Cause No.13 of 2021.

At this juncture, I find it befitting to narrate the factual background of the appeal at hand. The appellant and the respondent were wife and husband. The duo contracted a marriage under Islamic rites in 2008. The matrimonial life between the parties was smooth until 2018 when their love life was encountered with several misunderstandings. The wife accused her husband of beating her up and having children out of his

wedlock. Neither their families nor the marriage reconciliation board succeeded to repair their marriage. As a result, the appellant knocked the door of Mkuza Primary Court seeking among other things the decree of divorce and division of matrimonial property.

Having heard the parties and their witnesses, the trial court granted divorce but there was no order for division of the matrimonial property. The reason for not granting the order was, allegedly, that there was no proof of joint acquisition of the same.

The respondent was aggrieved by the decision hence she appealed to the District Court of Kibaha (herein after the first appellate court). The first appellate court varied the decision of the trial primary court. It held that the house in which the parties were living was a matrimonial home. The first appellate court went on and ordered that such a house be sold and the proceed be divided equally (50/50) between the parties. Dissatisfied with the 1st appellate court's findings, the respondent in that appeal who is now the appellant, has lodged the present appeal with six grounds as reproduced herein below:

1. *That, the first appellate court erred in law and in facts for blessing the irregularities made by the Respondent herein during his submission, and thereby adopting and incorporating the same in its judgment and decree contrary to the law and practice, something which may results (sic!) to a serious confusion and collision in the execution stage.*
2. *That, the learned Magistrate erred in law and in facts for interfering with the proper findings of the trial court and thereby faulting the same basing on speculations and conjectures which the same lacks proof on the monetary contribution of the respondent to the acquisition of the house at Tanita-Kibaha.*
3. *That, the first Appellate Court erred in law and in fact for ordering that the house situated at Tanita-Kibaha to be divided into equal halves (50:50), while in essence the contribution of the appellant*

outweighs the contribution of the Respondent; while leaving other matrimonial properties undivided (those situated at Igumbiro - Morogoro).

4. *That, the learned trial court magistrate erred in law and in facts for pronouncing judgment basing on and by relying on the weak evidence of the respondent's witness (SU2 Fatuma Ado) which was rejected by the trial court for the same being contradictory and conjectures, hence reaching to an irrational and biased judgment.*
5. *That, the first Appellate Court misdirected itself for holding that the appellant herein neither explained to the court on how she acquired the land situated at Tanita-Kibaha nor disputed the evidence of Fatuma Ado(SU2);while the record of the trial court rectifies and shows that the appellant herein tendered supportive documents proving that the said property was registered on her name and explained incisively on how she acquired the same by using the money she obtained from taking loans facility from various financial institutions ,together with salary monies and allowances obtained from various attended seminars.*
6. *That, the first appellate court erred in law and in facts for rendering an irrational, contradictory and biased judgment in contravention with the rules of Principle of natural justice and mandatory requirement of the Constitution of the United Republic of Tanzania.*

When the appeal was called on for hearing, the appellant was represented by Mr. Loishiye Kisota, learned advocate while the responded enjoyed legal serviced of Mr. Hassan Chande, learned Advocate. With leave of this court, the appeal was argued by way of written submission. The court schedule jointly agreed upon was to the effect that the appellant's submission in chief be filed in this court on or before 25th November 2021, the respondent's reply filed on the 08th of December 2021 and the appellant's rejoinder (if any) be filed on 15th December,2021. Both counsels observed the court order with their submissions reaching this court on time. I congratulate them for their dedication.

Submitting in support of the appeal, starting with the first ground, Mr. Kisota stated that there was a serious irregularity at the first appellate court where the respondent (then appellant) changed the names of the parties at the appeal. It is Mr. Kisota's submission further that he had notified the court about such fatal errors and prayed that the appeal be struck out, but the first appellate court ignored his prayers by adopting the said fatal errors into its judgment.

As a result of such irregularity, the learned counsel for the appellant averred, the judgment of the first appellate court carries names of parties which are different compared to names of the parties at the trial court. It is Mr. Kisota's averment further that due to such variation, difficulties are bound to arise in the execution process.

Mr. Kisota forcefully submitted further that, names of the parties to a suit are central for their identification. He insisted that the right of appeal is a preserve of the parties who had been involved in the original suit. In the instant matter, Mr. Kisota averred, the parties appearing in the records of the trial court are quite different with the names of the parties appearing in the copy of judgments and decree of the first appellate court.

Giving specific examples to support his argument, Mr. Kisota asserted that the names that appeared in the certified copy of the trial court's judgment and in the petition of appeal filed by the respondent in the district court read **NICOLATHAR RAMADHANI VS. AZIZI MOHAMED** but when filling his submission in chief the respondent without leave of the court emerged with a new name of **AZIZI MOHAMED MBAMBA** instead of leaving the former name undisturbed.

According to the appellant's counsel AZIZI MOHAMED and AZIZI MOHAMED MBAMBA are two different persons in the eyes of the law. He insisted that AZIZI MOHAMED MBAMBA had no locus standi to prosecute the appeal since he was not a party in previous cases at the trial court (Matrimonial Cause No.13/2021).

To cement his argument the learned counsel cited the case of **AMINI NDAMA MZIRAY VS. CAPT. MILITON LUSAJO LAZARO**, CIVIL APPEAL NO.39 OF 2019 and the case of **CRDB BANK PLC (FORMERLY CRDB [1996] VS. GEORGE MATHEW KILINDU**, CIVIL APPEAL NO.110 0F 2017.

Having exhausted the first ground, the learned counsel opted to argue the 2nd, 3rd and 4th grounds of appeal jointly. Mr. Kisota averred that the first appellate court misdirected itself for ordering that the house situated at Tanita-Kibaha which was built by the appellant be divided into equal halves and leaving other matrimonial properties undivided particularly those situated at Igumbiro -Morogoro.

To bolster his argument, Mr. Kisota referred this court to page 2-3 of the trial court's judgment where the appellant had explained how she got the money to build the said house. The learned counsel argued further that trial court records clearly revealed that the appellant had adduced a very strong and quality evidence with supportive documents to build her case on how she acquired the properties including the house located at Tanita-Kibaha, but the first appellate court decided the case relying on mere speculations and assumptions basing on the very weak and contradictory evidence of SU2 (FATUMA ADO).

To fortify his stance, the learned counsel invited this court to the case of **NIMROD KURWIJILA VS. THERESIA MALONGO**, CIVIL APPEAL NO.102 OF 2018 and **REGINA GAUDENCE Vs. SADOCK JAMES**, CIVIL APPEAL NO 11 OF 2019 where it was stated that speculation has no room in civil justice.

Turning to the 5th and 6th grounds submitted jointly, the learned counsel forcefully argued that it was *res-Ipsa loquitor* that the appellant had testified how she acquired the house located at TANITA KIBAHA. The learned counsel argued further that the appellant had disputed the evidence of SU2 and the trial court clearly explained the reason for disregarding such evidence. To cement his argument, Mr. Kisota referred this court to page 9 of the trial court's judgment.

The leaned counsel asserted that the first appellate court was biased to fault the proper finding of the trial court and emerging with irrational findings which had no basis in law and derived from unknown source contrary to the mandatory requirements of **Article 107A (2)(a),(d) and (e) of the Constitution.**

On the strength of the above submission, Mr. Loishiye Kisota beckoned upon this court to find that this appeal has merits hence be allowed with costs.

In reply, counsel for the respondent Mr. Hassan Chande confronted head on the argument by his learned brother in the bar on variation of names. Mr. Chande averred that Azizi Mohamed Mbamba and Azizi Mohamed were the same person. The learned counsel averred further that the names were used interchangeably to mean the same person

without any intention to prejudice the appellant or to bring any confusion in the execution process.

The learned counsel emphasized that the names Azizi Mohamed @ Azizi Mohamed Mbamba appeared on the land purchasing agreement of the matrimonial house situated at Tanita-Kibaha which was bought by the respondent from one Fatuma Ado, water bills, land rent, among other documents submitted to the trial magistrate as evidence.

It is Mr. Chande's submission that the reason as to why the first appellate court magistrate considered the slight variation of the names irrelevant is because he chose not to be tied up by technicalities as the counsel for the appellant would have wished. To support his argument on avoidance of technicalities, Mr. Chande reproduced Article **107A (1) and (2) of the Constitution of the United Republic of Tanzania of 1977** as amended from time to time.

Responding to Mr. Kisota's arguments that the first appellate court had misdirected itself for ordering that the house situated at Tanita-Kibaha which was built by the appellant be divided into equal halves and leaving other matrimonial properties undivided particularly those situated at Igumbiro -Morogoro, Mr. Hassan stated on the outset that the first appellate court had applied great wisdom to arrive to the decision to order division of matrimonial property.

Mr. Chande is of the firm view that the wisdom of the first appellate court was to the effect that spouses who had lived together for more than 20 years, had acquired matrimonial property and upon reviewing the evidence came to the conclusion that only the house located at Tanita - Kibaha bearing the name of Azizi Mohamed @ Azizi Mohamed Mbamba

qualified as matrimonial property and ordered the same to be distributed among the parties into two equal halves.

Mr. Chande went on to argue that the order for equal division of the [proceeds] of the house at Kibaha while leaving out other assets in Kwala (2 hectors of land) and Vigwaza (3/4 hectors) solely to the appellant amounted to infringement of the rights of his client as guaranteed by **Article 24 of the Constitution of the United Republic of Tanzania,1977**. I find this argument misplaced because it does not form a part of the submission in chief by counsel for the appellant.

On the allegation that the first appellate court had interfered with findings of the trial court, Mr. Hassan submitted that the first trial court's reasoning was in line with the common law principle of ***Quid Quid Plantatur Solo Solo Cedit*** (whosoever owns that piece of land will also own the things attached) and Latin principle that "which is attached to the land becomes part of the land" stressing that the principles were in line with section 22(2) of the Land Act ,1999 R.E 2019.

It is Mr. Chande's submission that his client Azizi Mohamed @Azizi Mohamed Mbamba had purchased the plot where the said Tanita -Kibaha house was built. He stressed that the evidence adduced by SU2 Fatuma Ado at the trial court supported his client's claim. To that end, the learned counsel averred, it was misleading for the appellant herein to claim sole ownership. To cement his argument Mr. Hassan invited this court to the case of **SINGH V. SINGH VOL 11 EAC 48.**

On grounds 4 and 5, Mr. Chande averred that upon going through the testimony of SU2 as recorded at page 10 of the first appellate court's judgement the court ordered distribution at the rate of 50:50 because it

was the only matrimonial house between the parties and not because it belonged to the appellant.

The Appellant's counsel in his rejoinder insisted that the shortfall of naming the parties to the proceeding was fatal as it may have prejudicial outcome of the proceedings such as decrees. He prayed the first ground of appeal to be allowed.

Rejoining on the 2,3 and 4 ground of appeal, Mr. Kisota stated that the respondent's allegations were baseless and lacked proof. The learned counsel referred this court to section 110 of the Evidence Act, Cap 6 R.E 2019 arguing that the respondent was supposed to prove his allegations. The learned counsel concluded his submission by a prayer that this court allows the appeal.

Having dispassionately considered submissions by both parties and the lower courts records, I am inclined to determine the merits of the appeal. I am fortified that the contest is based on two points; **one** disparity on the respondent's name, **second** order for equal distribution of the matrimonial asset namely the house at Tanita- Kibaha. These two points can dispose of the appeal in its entirety.

On the first point, I have had an opportunity to go through the pleadings and other documents from the first day when the appellant filed this suit at Mkuza Primary Court. The Reconciliation Board's Form from Ofisi ya BAKWATA Wilaya ya Kibaha bears the names Azizi Mohamed Mbamba. The marriage certificate, on the other hand, bears the name Azizi Mohamed. JPCF 52 Form (equivalent to a plaint in a primary courts) bears the name of the defendant as Azizi Mohamed Mbamba. The

Appellant is the one who instituted the suit therefore she is the one who named the defendant/respondent herein as Azizi Mohamed Mbamba.

It is my finding further that the trial primary court Magistrate in his judgment named the defendant as Azizi Mohamed. This did not bless the respondent hence lodged his appeal to the district court. Upon hearing of the appeal, the first appellate court in its judgment named the appellant as Azizi Mohamed Mbamba the name which appears also in the parties' submission before this court.

Premised on the above finding, I hesitate to believe the contention by the Learned Counsel for the appellant that the interchangeability of the respondent's name may lead to any difficulty and lead to injustice. The parties know each other very well. They were husband and wife. Entertaining the thought that the arrangements of names lead to having a totally different person does not pass the test of logic. It is, in my opinion, tantamount to promoting endless litigation. I find it improper for this court to venture into discussing the issue of names which was not disputed by the parties from the beginning. If I may add, parties are represented in this court because they have been addressed by the names that they recognize. Thinking that execution will be hampered by such use of two names instead of three is fear of the unknown.

On the second ground of appeal, the issue of division of matrimonial property is well catered for by The Law of Marriage Act, Cap 29 R.E. 2019.The laws is very clear on what are the joint properties and what the court must consider when dealing with the division of the same. Under **section 114** the court is vested with power to order division of matrimonial property following an order for divorce or separation.

Although the parties in this appeal prayed for the court's order relating to other assets acquired during the subsistence of marriage, the house at Tanita is the main reason of dispute in this appeal. I find no reason to discuss other properties not disputed.

The appellant claims that the said house is her sole property. The respondent, likewise, claims the same to be his own property. Faced by such a scenario, courts of law resort to the law of evidence. In our jurisdiction, section **110 of the Law of Evidence Act, Cap 6 R.E 2019** requires a party who alleges to prove on the alleged facts. The exact sentence that is often quoted is to the effect that "he who alleges must prove."

The appellant alleges that she is the one who brought the plot at Tanita-Kibaha before she met the respondent, and she used her money to build the said house. To prove her assertion, she submitted the sale agreement as an exhibit which shows that she bought the plot way back in 2006.

The respondent, on the other hand, who also claims to be the sole owner, brought a witness who purported be the original owner of the plot and testified that the respondent had bought the said plot and built the house. Nevertheless, there was no sale agreement tendered. Under this situation this court finds that, on the balance of probabilities, it is the appellant who bought the said plot and not the respondent.

The next question that I ask myself is whether going by the above finding, the appellant automatically becomes the sole owner of the land (and anything over it particularly the disputed house). Is the respondent entitled to any share?

To answer this question, I go no further than Section 114 (3) Of the Marriage Act, (supra) which provides:

> *"...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."*

Inspired by the above position of the law, I entertain no doubt in my mind that the couple had worked together during their married life to improve the house they call their matrimonial property. The respondent (who was the husband) was not just seating there. I am aware that the appellant had testified that she is a salaried civil servant and even produced copies of her loan agreements which she allegedly used to build the house. Undoubtedly, hers may have been a greater contribution compared to that of the respondent but as meagre at it is, the respondent's contribution cannot be ignored. See **Bibie Maulid v. Mohamed Ibrahim** [1989] TLR 162 and **Yesse Mrisho v. Sania Abdu** (Civil Appeal No.147 Of 2016).

The assertion that the respondent was not in any formal employment does not add up to me. The contribution referred to in the section cited above is not limited to monetary. This court in the case of **Amon Benedictor Buchwa v. Aisha Shabani Hamisi** (PC Matrimonial Appeal 11 of 2019) [2020] TZHC 118 quoted with approval the Ugandan case of **Kagga v Kagga,** High Court Divorce Case No.11 of 2005, Uganda where it was held that:

> *"Our courts have established a principle which recognizes each spouse's contribution to the acquisition of property and this contribution may be direct or monetary. When distributing the property of such divorced couple, it is*

immaterial that one of the spouses was not financially endowed ..."

Having examined the evidence on record closely, however, I am fortified that the appellant's contribution outweighs that of the respondent. I, therefore, vary the distribution made by the first appellate court relating to the house at Tanita-Kibaha. The appellant is now entitled to 70% while the respondent 30%. This being a matrimonial matter, I make no orders as to costs. Each party to bear its own costs.

It is so ordered.

E.I. LALTAIKA

JUDGE

16.9.2022