

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 91 OF 2021

(Arising from Kilombero District Court Matrimonial Appeal No. 13 of 2020 Originating from Mngeta Primary Court Matrimonial Cause No. 15 of 2020)

JUMA NJEGIME **APPELLANT**
VERSUS
MONIDA MSONGOLE **RESPONDENT**

JUDGMENT

22nd April and 1st June, 2022

BANZI, J.:

The Appellant, Juma Njegime and the Respondent, Monida Msongole were husband and wife after contracting customary marriage in 2015. They were blessed with one issue namely, Qarish Juma. Their marriage was officially dissolved by Mngeta Primary Court ("the Trial Court") via Matrimonial Cause No. 15 of 2020 after the Appellant successfully petitioned for divorce. Apart from dissolving the marriage, the Trial Court granted the custody of their child to the Respondent with maintenance order against the Appellant of Tshs.60,000/= per month. In respect of matrimonial assets, the same were ordered to be sold and proceeds of

households to be divided equally between the parties while proceeds of the house to be divided into 40% to the Appellant and 60% to the Respondent.

The appellant being dissatisfied with the decision of the Trial Court appealed to Kilombero District Court ("the first Appellate Court") via Matrimonial Appeal No. 13 of 2020 where his appeal was dismissed with costs. Still aggrieved, the Appellant preferred the Appeal to this Court on five grounds that;

- 1. That, the 1st trial court was hurried hearing the matrimonial cause without calling the credible witnesses of both sides in determining the cause despite of the parties had the witnesses to call.*
- 2. That, the trial court had not take (sic) trouble to call witnesses on proving by evidence of the joints efforts of the parties to the cause in acquisition of the matrimonial parties despite of the divorcees having witnesses.*
- 3. That, the appellant had credible and incontrovertible witnesses but the trial court had denied his constitution right and under statutory laws for building and proving his case under the principle of balance of probability.*

4. *That, the 1st appellate Court did not examine the trial court findings especially in the crucial matter of distributing the alleged matrimonial assets without receiving evidence from both sides, where the 1st appellate court used the written submissions of the parties as evidence to determine the acquisition and distribution of matrimonial assets which was wrong and unprocedural. Hence it also reached at a wrong decision. The trial court had to hear the case and receive the evidence of the parties and their evidence.*
5. *That, the presiding Resident Magistrates from both lower court forums pronounced afterthought judgments, because they examined shallow evidence from both sides.*

At the hearing of the appeal, the Appellant appeared in person while Ms. Stumai Moshi, learned Advocate appeared for the Respondent. The main complaint of the Appellant was on division of matrimonial house. According to him, the same was not jointly acquired. He insisted that, he acquired it alone after receiving inheritance from his father's estate following his death in 2008. He started to build it in 2009 and finished in 2014 before he married the Respondent in October 2015. Furthermore, although he admitted not to have informed the Trial Court about having

witnesses to support his evidence about acquisition of matrimonial properties, but he insisted to be denied right to call witnesses as he was not informed so by the Trial Court. Also, he requested this Court to look on percentage of distribution of the house in question because the Respondent acquired higher percentage while she contributed nothing on acquisition of the same. Thus, he prayed for this Court to allow the appeal and the case to be tried afresh.

In her reply, Ms. Moshi learned counsel for the Respondent submitted that, the 1st, 2nd and 3rd grounds raised by Appellant in his petition of appeal are new grounds which were not raised at the first Appellate Court. Thus, this Court lacks jurisdiction to entertain them as the same were not determined by the first Appellate Court. To cement her argument, she cited the case of **Athumini Ally Kingoma v. Aziz Ally Kingoma and 7 Others**, Land Appeal No. 128 of 2020 HC (unreported) and **Merita Naikininjari and Another v. Sailievo Roibanguti** [1998] TLR 120.

She went on to submit that, the submission by the Appellant on how he acquired the house in question was not in his evidence at the Trial Court. Conversely, the Trial Court record shows that, the same was

acquired by joint efforts as both parties were peasants engaging themselves in agricultural activities. The record also reveals that, the couple got married in 2015 and went to live in the house of the Appellant's mother until 2017 when they shifted to the house in dispute after they finished to build it.

With regard of 4th and 5th ground Ms. Moshi submitted that, the trial court was right on its decision since the trial court records show that both parties were given rights to present their case and to cross-examine each other. Also, both admitted on how they jointly acquired their properties including the house in question. She stated further that the first Appellate Court was properly decided the matter since it was bound with trial court's evidence. Also, the distribution of 60% and 40% to Respondent and Appellant respectively, was arrived due to the wrongful acts of the Appellant which led to the broken down of marriage such as beatings, lock out and bringing concubines to the house while the Respondent was away and taking away some of properties. Thus, the Appellant cannot be benefited out of his wrong doing since he is the guilty party on the breakdown of marriage. She supported her argument with the cases of **Rodney Baraka and Laurian Ngaiza v. Daniel Marcus Mtanga PC**

Appeal No. 109 of 2019, HC (unreported) and **Chigoli Gohamingo v. Wilson Mchani** [1983] TLR 311. She added that, the distribution was equitable and right for the interest of justice considering that, the Appellant does not comply with the order of maintenance of the child. She finally prayed for the appeal to be dismissed with costs.

In rejoinder, the Appellant denied being the guilty party to the broken down of their marriage. He stated that, he neither took away the properties nor beat or locked out the Respondent. Also, he did not bring concubines to their house. In respect of maintenance order, he submitted that, he used to deposit the ordered amount every month to the Trial Court but the Respondent did not go to collect the same so the Trial Court ordered him to stop depositing until the Respondent appears.

Having carefully considered the grounds of appeal preferred by the Appellant, the records of the two courts below and submissions by both sides, the main issue before this Court for determination is whether the two courts below failed to evaluate the evidence on record and consequently, arrived into wrong decision in respect of distribution of matrimonial assets.

Before determining the main issue, I find it pertinent to begin with grounds number 1, 2 and 3. I am constrained to agree with learned Counsel for the Respondent that, the grounds in question are new as they were neither raised, discussed nor decided by the First Appellate court. Aside from the cases of **Athumani Ally Kingoma v. Aziz Ally Kingoma and 7 Others**, and **Merita Naikirininjari and Another v. Sailievo Roibanguti** (Supra) cited to by learned Counsel for the Respondent, there are plethora of decisions on this issue. For instance, in the case of **Simon Godson Macha (Administrator of the Estate of the late Godson Macha) v. Mary Kimambo (Administratrix of the Estate of the late Kesia Zebedayo Tenga**, Civil Appeal No. 393 of 2019 (unreported), CAT at Tanga, the Court of Appeal stated that:

".....all seven grounds of appeal raised by the appellant herein are on new issues which were neither raised nor discussed in the first appellate court. There is a long chain of authorities which have taken the stance that matters not canvassed by the lower courts cannot be raised in this Court."

The Court of Appeal went on and underscored the positions held in unreported decisions in the cases of **Juma Manjano v. Republic**,

Criminal Appeal No. 211 of 2009, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 and **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016 that, matters not raised at the first appellate court cannot be raised in a second appellate court.

In this matter, when the Appellant filed his appeal before the First Appellate court, he raised two grounds. The first one concerned failure by trial court to analyse, evaluate and assess the evidence and the second one was about distribution of matrimonial assets. These were the only grounds which were discussed and determined by the First Appellate court. In that regard and since the first, second and third grounds had nothing to do with the two grounds raised and discussed in the First Appellate court, this Court has no jurisdiction to entertain those new grounds.

Be it as it may, assuming the grounds in question were not new, yet still, the Appellant's complaint would be fruitless because the Trial Court record shows that, upon completion of his testimony, the case was adjourned to another date and he was ordered to bring his witnesses. On the said date, the Appellant did not bring any witness as per last order but he prayed to close his case. Thus, at this level, he cannot blame the Trial Court out of his own deeds.

I now turn to the main issue which is the gist of fourth and fifth grounds. In his submission, the Appellant claimed to acquire the house in question in 2009 to 2014 before he married the Respondent after receiving his inheritance following the death of his father in 2008. On the other hand, it was the contention of the Respondent through her Counsel that, the house in question was acquired by joint efforts by both parties through agricultural activities.

I had opportunity of perusing the records of the Trial Court. The Appellant among other things testified as follows:

"Sisi tulioana mwaka 2015, kwa ndoa ya kimila na kufanikiwa kupata mtoto mmoja Qarish Juma (5), tuna mali kama matofali 5000, TV, Solar na betri yake, meza moja na Azam king'amuzi na vyombo, ila nyumba na kiwanja alinikuta navyo pia, na mali hizo tulizipata kupitia kilimo cha mpunga."

On the other hand, the Respondent among other things testified as follows:

"Niliolewa 2015 Oktoba na nilifikia kwao tukajenga nyumba na iliisha 2017 ndio tukawa tumehamia 2018..."

From two sets of testimony, it is clear that, the Appellant claimed to acquire the house in question prior to their marriage. Conversely, the Respondent also claimed that, the house in question was acquired during the subsistence of marriage. However, when the Respondent was cross-examined by the Appellant, she admitted that the plot was acquired before their marriage but the house was jointly acquired. Through the Respondent's admission, it can be concluded that, the plot was acquired prior to the marriage. However, as far as the house is concerned, although the Appellant claimed to have acquired it prior to their marriage but he did not adduce any evidence to prove how he acquired the same leave alone when he started to build and finish it. It is a settled law that, he who alleges must prove. The Appellant did not produce any document or call any material witness to substantiate his claim despite being given opportunity to call his witnesses. It is clear that, the Appellant failed to prove on the balance of probabilities that he acquired the house in dispute before he married the Respondent. His argument about building the same from 2009 to 2014 from the proceeds of his father's estate following his death in 2008 is unfounded because it is not in his testimony before the Trial Court. In these premises, I am constrained to agree with the

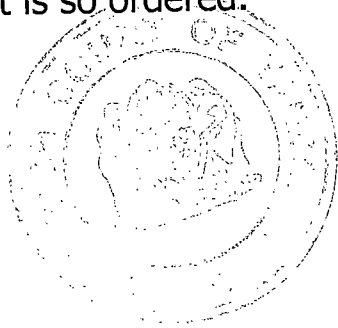
concurrent findings of the two courts below that the house in question is an asset jointly acquired by the parties during the subsistence of their marriage through their agricultural activities.

Reverting to the issue of percentage on division of the house in dispute, the Trial Court arrived into conclusion of 40% to 60% after concluding that, the Appellant cannot benefit from his wrong doing after being the guilty party in breaking down their marriage. According to the Trial Court, the Appellant was the reason for the breakdown of their marriage after he decided to marry another woman without the consent of the Respondent. With due respect, the evidence shows that, the marriage between the Appellate and the Respondent was contracted under customary rites which according to section 10 (2) (a) of the Law of Marriage Act [Cap.29 R.E. 2019] ("the LMA") is presumed to be polygamous or potentially polygamous unless, the contrary is proved. Besides, the LMA does not provide for wife's consent as prerequisite before a husband under customary marriage wishes to add another wife. In the considered view of this Court, the Trial Court was not justified to award the Appellant 40% basing on such reason. Likewise, the First Appellate Court was not justified to uphold the decision of the Trial Court basing on such

reason. Therefore, since both parties claimed to be involved in agricultural activities, I think equal division of 50 percent in respect of the house in question would be just and equitable to each party.

That being said, the appeal succeeds to the extent shown above. The order of the trial court in respect of division of matrimonial house of 40% to the Appellant and 60% to the Respondent is varied and the same shall be 50% to each party. Owing to the nature of the matter, each party shall bear its own costs.

It is so ordered.



A handwritten signature in black ink, appearing to read "I. K. Banzi".

I. K. BANZI

JUDGE

01/06/2022

Delivery this 1st day of June, 2022 in the presence of the Appellant and the Respondent both in person. Right of appeal fully explained.



A handwritten signature in black ink, appearing to read "I. K. Banzi".

I. K. BANZI

JUDGE

01/06/2022