

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

AT ARUSHA

CIVIL APPEAL NO. 06 OF 2022

(Originating from District Court of Arusha at Arusha in Matrimonial Cause No. 13 of 2020)

SUSAN PETER MBARIA.....APPLICANT

VERSUS

BARIKIEL JOSEPH BEE..... RESPONDENT

JUDGMENT

29/08/2022 & 24/10/2022

MWASEBA, J.

Before the District Court of Arusha, the appellant herein petitioned for dissolution of her marriage which she contracted with the respondent and the division of matrimonial properties. The main reasons advanced by the appellant for the dissolution of their marriage are on the grounds of Adultery, Cruelty and Wilful neglect by the respondent herein.

The trial court having heard both parties together with the evidence submitted before it, the marriage between the appellant and respondent was dissolved and a decree of divorce was issued. As for the

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matrimonial properties, which are; a house located at kwa Morombo, the appellant's shares were 30% and the respondent's shares were 70%, a plot with a cosmetic shop was given to the appellant, home furnitures/ utensils were to be divided equally among the parties.

Aggrieved, the appellant has preferred an appeal to this court armed with three grounds of appeal which I take the liberty to reproduce as follows:

- i. That, the Trial Court erred in law and Fact by ordering unequal division of matrimonial property.*
- ii. That, the trial court erred in law for not giving reasons for the decision.*
- iii. That, the trial court erred both in law and fact by failing to analyse properly the evidence adduced by both parties and ended up in rendering erroneous decision.*

At the hearing of this appeal, the Appellant was represented by Ms Joyce Samwel, learned counsel whereas Mr Fridolin Bwemelo, learned Counsel represented the Respondent. The appeal was argued by way of written submissions.

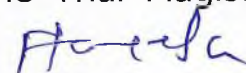
Submitting on the first ground of appeal, Ms. Joyce Samwel argued that, the appellant was the sole source of income during the subsistence of their marriage as she was working with Glitter Gems. She added that the

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respondent was a form four leaver and she was the one who was financing him in his Tour Guide studies until when he was employed by Conscorp as a Tour Guide. It was submitted further that apart from the house located at Kwa Morombo which was subject of division there were other three houses which were not divided.

More to that, despite of being the pillar of the acquisition of matrimonial assets she ended up being mistreated by the respondent through beatings and being involved in unfounded allegations and at the end she was chased out of her own home. Therefore, she is entitled to a fair distribution of matrimonial properties as she was not a house wife throughout the subsistence of their marriage. She cited the case of **Bi Hawa Mohamed Vs Ally Seif** [1993] TLR 32 and **Charles Manoo Kasare and Another Vs Apolina Manoo Kaare** [2003] TLR 425 to support her arguments and prayed for the matrimonial properties to be equally divided among them.

On the second ground of appeal, Ms Joyce Samwel argued that the trial court judgment was not properly composed as required by **Order XX Rule 4 of the Civil Procedure Code**, Cap 33 of the laws as no reasons for the decision were advanced by the Trial Magistrate. She



prayed for the said judgment to be quashed and an order of a composition of another judgment be issued.

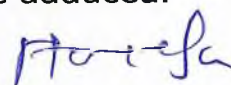
On the last ground of appeal, the appellant submitted that her evidence was not well considered by the trial court and that it trusted the evidence of the respondent despite his failure to produce documentary evidence. Further to that there are other properties which were not distributed among them. It was her prayer before this court to analyse the evidence and come with a proper division of all matrimonial properties. To buttress her point, she cited **Section 65 (e), 67(1) (c) and 110 (2) of the Evidence Act**, Cap 6, R.E 2022.

Responding to the first ground of appeal, Mr Bwemelo told the court that **Section 114 of the Law of Marriage Act**, Cap 29 R.E 2019 allows division of matrimonial properties based on contribution of each party, the principle which was well expounded in **Bi Hawa's case** (supra). The evidence at the trial court revealed that the appellant was a house wife leaving the respondent as a sole bread winner of the family and when they parted their ways a matrimonial house was not yet finished. There was no other evidence to prove other properties alleged acquired by the parties herein during the subsistence of their marriage.



He further submitted that, the respondent understands that a house wife has a contribution towards acquisition of matrimonial properties, however, to order equal distribution of properties will be unjust to the respondent who was put directly to acquiring matrimonial properties and was the one taking care of their two issues whereby one of them is at the University. He stated that the allegation that the appellant was the one who financed the respondent in his studies was unsubstantiated, as the appellant failed not only to state how much she was paying for respondent's fee but also did not mention a college attended by the respondent. This creates doubt if she really financed him in his studies. Further to that even if she really supported him, it was either before they contracted their Christian marriage in 2000 or even when they started cohabitation. Therefore, it cannot be counted as contribution towards acquisition of matrimonial properties as per **Section 114 of LMA.**

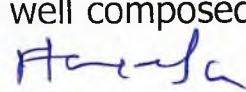
Submitting on the second ground, Mr Bwemelo argued that the judgment of the trial court was well reasoned as shown at page 15, 16 and 17 of the impugned judgment there is a reasoning by the court where the trial magistrate evaluated the evidence adduced.



Responding to the third ground, Mr Bwemelo submitted that the trial court rightly analysed the evidence submitted before it since the appellant failed to prove the existence of other properties apart from the one located at Kwa Morombo area. As for the argument that she had documents over the said properties the same could have been brought before the court to prove the allegation. Further to that PW1 and PW2 contradicted each other as to the location of the house alleged to have been built in Karatu. Regarding the vehicle, the respondent denied to own a motor vehicle one Toyota Peizer in his life. It was the respondent's prayer for the appeal to be dismissed with costs.

Having considered the arguments by both parties and the records of this matter, the main issues for determination in line with the grounds of appeal are whether the trial court judgment was well composed and whether there was a proper division of matrimonial properties among the parties herein.

Starting with the issue as to whether the judgment was well composed, the appellant complained that the judgment was not well composed as required by **Order XX Rule 4 of the CPC** while the respondent's counsel was of the view that the judgment was well composed based on the legal requirement.



For easy reference, **Order XX Rule 4 of the CPC** provides that:

"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

Having revisited the trial court's judgment, page 1 up to 10 there is a summary of facts, issues were raised at page 11 and reasons for decision and the decision are also depicted at page 12 to 18 of the impugned judgment. Thus, the trial court's judgment leaves no doubt that the same complies with the requirements of **Order XX Rules (4) and (5) of the CPC**. I have no hesitation to state that based on the record of appeal before this court, the learned trial Magistrate sufficiently described and deliberated on the facts regarding the position of the parties presented before her. Then she resolved the three issues that were framed and agreed upon before she came to the conclusion that the marriage had broken down beyond repair and divided the properties acquired during the substance of their marriage. Thus, this ground lacks merit.

Coming to the issue of whether there was a proper division of matrimonial properties among the parties herein, the counsel for the appellant alleged that the evidence was not properly evaluated by the

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trial court that's why it came with the erroneous decision regarding the distribution of matrimonial properties.

It is a trite law that the first appellate court is entitled to re-evaluate the entire evidence adduced at the trial court and subject it to critical scrutiny and arrive at its independent decision. The said duty was well explained by the court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic** [2010] eKLR which held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also Ally Patric Sanga versus R, Criminal Appeal No. 341 of 2017 CAT (Unreported).

However, in doing so the appellate court must warn itself that, it was the trial court who saw the witness testifying and considering his/her demeanour thus the guiding principle is that a finding of a fact made by

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the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles.

In the present appeal, as per the trial court record, the appellant (PW1) testified that among the properties acquired jointly during the subsistence of their marriage are a house at kwa Morombo where they bought a plot in 2001 and build a house in 2004, A plot bought in 2004, another plot is located where there is a matrimonial house. Another plot at Kwa Morombo Market, and a plot at Karatu near Slaughter house. Other properties are two motor vehicles, Toyota Paizer with Registration No. T 969 ASK and a land cruiser which was bought after the appellant left but she was available during the process of buying it. There were also home utensils, saloon properties and 100 chickens. On the other hand, PW2 and PW3 supported the evidence of PW1 that the parties had houses, plot and motor vehicle but they are not aware of the details of the said properties except for the house situated at Kwa Morombo and a plot where they build a frame for business purposes.

On his side, the respondent stated that the appellant left one house at Kwa Morombo and a plot where he built a frame for the appellant and he had one motor vehicle "Vox Wagon" which was given to him by his

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late Father. He also tendered a sale agreement for a plot at Msasani area, Muriet and a plot where they built business frames (See Exhibit R3 and R5 respectively). He added that the appellant left one house but currently there are four houses at the same compound and submitted that since the appellant was a house wife the said properties cannot be divided equally between them.

The division of matrimonial properties after a decree of divorce has been issued is governed by **Section 114(1) of the LMA**. The section provides:

"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 our instant appeal, the records reveal that the appellant was employed before marriage and after marriage she became a house wife leaving the respondent working alone. However, being a house wife does not remove the fact that she contributed to the acquisition of the properties proved to have been acquired during the subsistence of their marriage. As it was held in the case of **Scolastica Spendu vs.**

Hence

Ulimbakisya Ambokile Sipendi and Another, Matrimonial Cause No.

2 of 2012, the Court stated;

"Even if it will be said the Appellant did not contribute cash money in acquiring the house sought to be divide but she contributed through doing domestic works and supervising finishing construction of the house."

See also the case of **Bi Hawa Mohamed Vs Ally Sefu** (supra), **Gabriel Nimrod Kurwijila Vs Theresia Hassani Malongo**, (Civil Appeal 102 of 2018) [2020] TZCA 31 (20 February 2020) ;(Tanzlii), and **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (CAT-unreported).

In our application apart from a house located at Kwa Morombo and a plot where they build a frame for business purpose and home utensils, the appellant failed to prove if the other properties she mentioned do exists and if they were acquired during the subsistence of their marriage with the respondent. Further to that, the appellant alleged that she left 100 chickens with the respondent, however, taking into consideration the eight (8) years they had been apart it is impossible for the said chickens to remain as they were when they separated in 2012.

That being said and done, this court finds no reasons to vary the decision of the trial court regarding the division of matrimonial

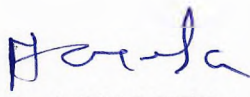

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properties as there is no evidence of misapprehension of the evidence by the trial court to act on wrong principles.

In view thereof, it is the finding of this court that the appellant failed to prove her claims on the standard required in civil cases which is on the balance of probabilities. Consequently, the appeal is devoid of merit and is hereby dismissed in its entirety. No order as to costs issued taking into consideration the relationship that existed between the parties.

It is so ordered.

DATED at **ARUSHA** this 24th day of October, 2022.


 **N.R. MWASEBA**
JUDGE
24/10/2022