

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

PC. MATRIMONIAL APPEAL NO. 1 OF 2022

(Originating from Kahama District Court in Matrimonial Appeal No.5 of 2021)

**OMARY RAMADHANI KAYAMBA APPELLANT
VERSUS
FARIDA JUMA..... RESPONDENT**

JUDGMENT

1/12/2022

A. MATUMA, J:

At Kahama Urban Primary Court, the respondent herein sued the appellant for distribution of matrimonial assets after their marriage having been dissolved in previous suit.

After a full trial, the Learned Magistrate of the trial Primary Court found that the properties available for distribution to the parties were one house on Plot no. 1110 Block "0" Nyasubi, Titanium Company Limited, four Cows, one motorcycle, one acre of farm tree at Chato and six Plots of Mbulu. Thereafter the trial Court ordered equal distribution of the properties between the parties at 50% each.

The appellant become aggrieved with such decision and this appealed to the District Court of Kahama which dismissed the appeal hence this second appeal with a total of five grounds whose major complaint is that in ordering the distribution of matrimonial properties the

two court below disregarded the principle regarding distribution of matrimonial assets.

This appeal was heard by way of written submissions. Having gone through the records of the two Courts below and the submissions made by the parties in this appeal, I find two issues for determination.

- i. Whether there was sufficient evidence for the existence of the properties which were ordered to be distributed between the parties.*
- ii. Whether equal contribution of the matrimonial assets in the circumstances of this case is justifiable.*

Starting with the first issue I find that there is no dispute for the existence of the house at Plot No. 1110 Block "0" Nyasubi as a matrimonial property because there is no dispute that the appellant obtained the plot and started to construct the house prior to the marriage but the finishing of the house was done during the existence of the marriage. I have reached to this finding because the appellant himself started in evidence at page 27 of the trial court proceedings;

"Tarehe 12/05/2010 nilinunua kiwanja kwa Tshs. 1,500,000/= kwa pesa zangu mwenyewe zinazotokana na mshahara wangu na nikaanza ujenzi, hadi namuoia alikuta mimi hii nyumba najenga."

This evidence is supported by the sale agreement exhibit P1 which shows that he bought the Plot prior to their marriage. This is further admitted by the respondent in her submission at page 3 that;

"it is undisputed fact that the said plot was acquired by the appellant prior to the marriage"

In that respect, I find it not in dispute that the appellant as the sole owner of the plot but by operations of the law, having married the respondent and jointly improved the property, the same became a matrimonial property liable to be distributed upon divorce.

Titanium Company Limited as rightly held by the first appellate Court cannot be termed as a matrimonial property but rather a property owned by shares. The respondent is among the shareholders and therefore her entitlements in the property would be in accordance to the Memorandum and Articles of Association subject to the role and obligations of each shareholder. In that respect whoever claims any interest in the company should pursue them in the rightful forum.

There was a dispute to the number of cows. The appellant stated in evidence that there are only two cows but the respondent maintained that they are four.

Since there was no tangible evidence by the respondent of four cows, it was wrongly held by the trial Court of assumption basis that;

" kwa busara ya kawaida Mahakama hii inaona kwamba hata kama mdaiwa anasema Ng'ombe wako wawili baada ya Ng'ombe wa kwanza kuzaa na hajasema kwamba Ng'ombe hao wameacha kuzaa, basi Mahakama hii inakubaliana na mdai kwamba Ng'ombe hao wako wanne".

This wrong conclusion was wrongly upheld by the Appellate District Court because in decision making we use facts and evidence and not assumptions and speculations. This was a stance taken in the case **of Materuleison and J. Foya versus R. Sospiter (1998) TLR 102.**

It was the duty of the respondent to establish the existence of four cows and not to merely mentioning the number. I thus conclude that the undisputed existing cows are only two.

Now, the two cows and the motor cycle were bought by the appellant during the existence of the marriage. In law the properties of either spouse whether obtained prior or during the marriage, they do not automatically turn into being matrimonial properties and liable to be distribute. There must be proof of the extent of contribution. In the case of **Happyness John Vs Bavesch Hindocha and 3 others, Land Case no. 10 of 2017** this court at Shinyanga held that'

"There has been a long standing misconception by the Public at large and even some judicial staffs that once the marriage is established both spouses are owners of each and every property acquired by one of them. It is the light time now we stop such misconception."

In that particulars case, this court quoted section 58 of the Law of Marriage Act, Cap. 29 R.E 2019 which provides that a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

Since the respondent had no positive evidence towards the purchase of the said cow which was bought at Tshs. 130,000/= and the motorcycle which was bought at Tshs. 600,000/= it was wrong for the two courts below to order distribution of such properties merely because the respondent made general claims without any sufficient proof to how she participated in buying such properties.

Even though, it is on record that the motor cycle is not in possession of either spouse. It was seized by FINCA. Such evidence which was given by the appellant was not challenged. In that respect, it was wrong to order distribution of none existing property.

I therefore determine that the two cows are not distributable, they are not matrimonial properties. The motorcycle is not in existence and can not therefore be distributed to the parties.

About one acre of the farm tree at Chato, it is not in dispute that such farm is existing.

The respondent did not explain how that farm was obtained but the appellant testified that he bought the same after taking a loan from CRDB Bank. He borrowed Tshs. 50,000,000/= which he used for various activities including buying the farm tree at Tshs 1,500,000/= and the farm at Mbulu which was later surveyed into twenty plots but by the time of the divorce there was a remaining of only six plots as per records.

The respondent was fully involved in the loan taking as a spouse. She did not however participate in assisting the appellant to repay the loan as claimed by the appellant and conceded by the respondent;

Appellant at page 12 of the trial Court Proceedings;

" Mdai wakati anaondoka aliniacha na mkopo wa Tshs. 67,000,000/= nimeulipa mwenyewe mpaka umenimaliza"

The respondent at page 6 of the trial court proceedings;

" Sikushiriki kulipa huo mkopo"

In the circumstances, it was wrong for the two courts below to order distribution of the properties without considering all these material facts. If the farms were to be distributed, then the respondent should have been equally ordered to reimburse the appellant part of the repaid loans. It is quite unfair to benefit one spouse at the toil of the other. I therefore find that the farm tree is not liable for distribution but the six plots would be subject to distribution just by considering the minimal role the respondent played in obtaining the loan though she did not participate in its repayment. With the herein above analysis, I conclude that the only available properties for distribution to the parties are the house at Nyasubi area and the six plots at Mbulu. That takes me to the second issue on whether in the circumstances of this case, equal distribution of such properties at 50% each is justifiable.

Without chewing words, equal distribution is not justifiable. The distribution of matrimonial properties is guided by the principle of extent of contribution. Any distribution contrary to the principle would be "ugawaji wa kiharakati" as it was held in the case of ***Mariam Safari versus Dotto Maliseli, PC Civil Appeal no. 21/2022.***

In this case, apart from the general claims by the respondent that she contributed towards the acquisition of the properties, she alleged that she had her businesses of buying vitenge and selling them and that she

participated into vicoba succoss. What is required in law is the proof of extent of contribution and not proof of the sources of income. One may have a well-known source of income but at the same time the use of his income goes unknown.

Therefore, it is not enough for one to say I was doing this and that business. Such is no even important. What is important is the evidence of contribution towards the acquisition of the properties.

The respondent did not prove any physical contribution towards the acquisition of the said properties. In that respect I find it that she benefits into the properties by virtue of being house wife.

I therefore set aside the order of equal distribution made by the trial court and upheld by the District Court and substitute for it an order that the appellant is entitled to 70% of the market value of the house on plot no.1110 Block "0" Nyasubi area and the respondent 30% thereof.

The appellant is further entitled to five plots at Mbulu while the respondent shall take one.

This appeal is therefore allowed to the extent herein above stated.
No orders as to costs. Right of appeal explained.



A. MATUMA
JUDGE
01/12/2022