

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
TEMEKE SUB-REGISTRY  
(ONE-STOP JUDICIAL CENTRE)  
AT TEMEKE**

**PC CIVIL APPEAL NO. 15 OF 2021**

*(Appeal from the decision of the District Court of Ilala at Kinyerezi  
in Matrimonial Appeal No. 67 of 2020, Originated from Ukonga Primary Court in  
Matrimonial Cause No. 130 of 2020)*

**GILBERT LYIMO.....APPELLANT**

**VERSUS**

**GETRUDE VENANCE TEMBA .....RESPONDENT**

**JUDGMENT**

Date of last order: - 01/09/2022  
Date of the judgment: - 29/11/2022

**OPIYO, J.**

Aggrieved by the decision of the District Court of Ilala at Kinyerezi in Matrimonial Appeal No. 67 of 2020 delivered on 15<sup>th</sup> September 2021 before Honourable F.E Luvunga, RM appeals to this court on the following grounds:-

1. That, the appellate District Court erred in law and facts to order that the respondent is entitled to 20% of the value of the house while the said house is not matrimonial property.
2. That, the appellate District Court erred in law and facts when ordered that the respondent is entitled to 20% of the house



without considering that the respondent had no contribution to the said house.

The parties counsel herein on 14<sup>th</sup> July 2022, in consensus, agreed to dispose of the matter by the way of written submission. Mr. Ladislaus Michael, acting for the appellant submitted that in Matrimonial Appeal No. 67 of 2022 at the District Court of Ilala at Kinyerezi, the appellant herein was the respondent and the court ordered the respondent herein to be entitled to 20% of the value of the house located at Kitunda, Kibeberu after regarding it as a matrimonial property. He argued that, in terms of section 114(1) of the Marriage Act for the property to be regarded as matrimonial property it must be acquired during the existence of marriage through the joint efforts of the spouses. That according to the evidence adduced, the property belongs to the appellant's mother and it was construed before 2011, the year in which the parties celebrated Christian marriage. He argued that, this evidence was corroborate by SU3 (Patricia Nyirenda) and SU4 (Selina Aloyce Lyimo). Above all, at the Primary Court, the respondent herein admitted the fact that the sale agreement was in the name of the appellant's mother, and no evidence was tendered to prove the ownership of the said house was transferred.

On the second ground of the appeal, he argued that the respondent had no contribution to the house as her evidence in the trial court was weak. The respondent's testimony that the piece of land was given to them as a gift at the celebration of their marriage in 2011 on which they managed to construct a disputed house in the same year is not correct as the evidence of the appellant was that parties erected fence only, the fact which does not change the ownership of the parties. The records

revealed that the construction of the said house in dispute commenced before the subsistence of marriage to which the respondent did not contribute anything, he argued. Above all, the respondent alleged to be employed but no employment contract was tendered to prove her assert that she contributed to the construction of the fence.

Replying to the submission, the respondent counsel Nickson Ludovick argued that, the house located at Kibeberu belongs to the appellant and respondent because the two were given land and bricks during their wedding. That, SU1 and SU4 at the primary Court did say the truth that the said house was developed by the parties as they were husband and wife (*page 4 of the Primary Court judgment*). The mother of the appellant is alive and she had never claimed the said house or given evidence to that effect or tendered title deed reflecting her name. Since there is no evidence brought to court in that regard, it remained matrimonial property, he maintained.

On the second ground, the respondent stated that the testimony of SM1, SM2, SU2, and SU3 proves that the said house has been developed during the subsistence of marriage and that both domestic and financial contribution has been made. At Page 3 of the Primary Court judgment, the appellant (SU1) said "things changed after the appellant had stopped working" this acts as an admission that the respondent was working so even the division of 20% to the respondent and 80% to the appellant is very unfair as she was working and appellant was not working. She urged the court to use its discretion to divide the same house at an equal percentage.



Having heard all the parties' submissions, the two raised issues can be disposed together as they both revolve around one issue as to whether the house located at Kitunda Kibeberu is a matrimonial house subject to the division. If so, whether the division of 20% to the respondent and 80% to the appellant is proper.

For clear understanding it is prudent we first examine what constitutes a matrimonial property. This terminology was intensively defined in the case of **Habiba Ahmadi Nangulukuta & 2 Others v Hassani Ausi Mchopa, Civil Appeal No. 10 of 2022, Court of Appeal at Mtwara (unreported)** where it was observed that,

*"In our jurisdiction, issues of matrimonial properties are governed by the Law of Marriage Act. However, the said law has not specifically defined the term matrimonial property or assets/ Unlike in other jurisdictions like India, the term 'matrimonial assets' is defined under section 4 (1) (a) of the Matrimonial Property Act, Chapter 275 Revised Statutes, 1989 as hereunder: -*

*"In this Act, '**matrimonial assets**' means the **matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage...**"*

*The definition given above is not far from what this Court stated in the famous case of **Bi. Hawa Mohamed** ...trying to search for a proper definition of what constitutes*

*'matrimonial assets in line with section 114 of the Law of Marriage Act. The Court stated that: -*

*"The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view the term 'matrimonial assets' means the same thing as what is otherwise described as family assets." Under paragraph 1064 of Lord Hailsham's HALBURY'S LAW OF ENGLAND, 4h Edition, p. 419, it is stated-*

*"The phrase 'family assets' has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of a capital nature, such as the matrimonial home and the furniture in it (2) those which are of a revenue nature – producing nature such as the earning power of the husband and wife."*

The above definition leaves no doubt that matrimonial property constitutes all the things which are acquired by one or other or both of the parties, during the existence of their marriage with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The

question is, was the property so acquired to constitute a matrimonial property?

Going through the trial court record at page 4 the respondent stated that they lived for more than 10 years and they acquired a house located at Kibeberu having also a business frame nearby. During cross-examination as it is shown on page 5 of the trial court, typed proceedings she stated that they constructed the said house on the plot which they were given during their wedding by their mother in law. She admitted however at Page 6 of the trial court typed proceedings that the property is still in the name of the appellants' mother. This is in contrast to what was stated by the appellant at pages 14 and 15 of the trial court proceedings where he stated that the house was given to them by his mother for residence only as they work to acquire their own, but ownership of the house remained with his mother. The appellant's testimony was corroborated by his witnesses. What can be observed from these stories is that the house in question already in place by the time of parties' marriage, only few renovations were made during their occupancy. In records, the renovation included fence construction and business frame construction (See Page 17 and 19 of trial court proceedings). All these were done while the property was still in the name of the appellant's mother. The issue that still remained is whether the property in another person's is a matrimonial property a matrimonial property.

The general presumption is that the one in whose name the property is, is the owner. The property is stated to be in the name of the appellant's mother. It is the respondent who claims that the same was given to them by the said owner during their wedding. No sufficient proof came

from her side to prove that. The unfavourable evidence from her also came from the fact that she is not clear in what state the property was in at the time the alleged gift was given to them. At first, she said they were given a bare land and slowly they constructed. But at the same time in cross examination she said, the house was incomplete at the time of the gift (See page 5 of the proceedings). At page 9 one of the respondent's witness, Edwiga Venance, stated that the couple were given a bare land and after sometime they constructed 2 bedroom house and invited him to their home. In my view, this constitutes material contradiction as far as establishment of one's contribution is concerned. The court fails to know with certainty the extent of the contribution sought to be proved. Inconsistencies in evidence are tolerated only when they are minor and not fatal, not when it involve material contradiction (see the case **Joseph Sypriano v The Republic, Criminal Appeal No 158 of 2011, CAT and Mohamed Said Matula v. Republic [1995] TLR 3**) in the latter case the Court of Appeal of Tanzania stated that:-

*"The Court has the duty to address the inconsistencies and try to resolve where possible or else the Court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the roots of the matter."*

As the respondent lead a contradictory testimony in regard to what was allegedly given to them at the time of marriage, adverse inference is drawn on her testimony in this regard. The issue whether the property was given to them as a gift remain unproven on the balance of probability. The matter is made worse by the fact that the property is still in the name of another person for all that long duration of their



marriage. Like the trial court, the central question remains, why was the ownership not changed if the parties were given the said house and in what state? That was the first thing requiring proof in proving the property was indeed a matrimonial property and not of the one in whose name it was originally in.

The first appellate court divided the property giving regard to the alleged respondents' contribution through development and renovations as the same occurred when the parties were already married (*see page 9 and 10 of the District Court judgment*). In my view this was a misconception as it was done without establishing if it was a matrimonial property and eligible for division in the first place. This is because, the improvements made on the property that is not a matrimonial property does not entitle the contributor to a share and by itself does not change property to a matrimonial property. Therefore, in answering the first issue as to whether the house located at Kitunda Kiboberu is a matrimonial house, it is my view that, the issue attracts a negative answer.

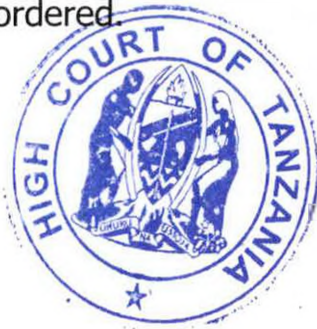
In granting the order of division of a property in such circumstances, the court shall consider the extent of the contribution made by each party in money, property, or work towards the acquisition of the assets. In the case at hand by virtue of section 114(2)(b) of the Law of Marriage Act, Cap 29, R.E 2019, since the property has not been proved to qualify as matrimonial property to determine joint contribution, the alleged distribution was not merited, at all. The improvements, if any are inseparable from the property that did not qualify as a matrimonial property. Ordering entitlement of a spouse on such property falls heavily against the interest of a third party in whose name the property, but is

not a party to the this matter. The first appellate court misdirected itself by venturing in to that.

The second issue to resolve is whether the division of 20% to the respondent and 80% to the appellant is just. From the facts the evidence adduced at the trial court and the finding that the house was not a matrimonial property, I believe I am out rightly justified to hold that the division of the property that did not qualify as such was wrong. Only matrimonial property is eligible for division. As property house that was divided by the District court did not so qualify, appeal is hereby allowed. The judgement and decree of the District court of Ilala in Matrimonial Appeal no 67 of 2020 is quashed and set aside. of the court the decision of the District Court. The house at is not a matrimonial property, hence not subject of division.

No order as to costs being a matrimonial matter.

It is so ordered.



A handwritten signature in blue ink, appearing to read "M. P. Opiyo", is written over a horizontal line.

**M. P. OPIYO,**  
**JUDGE**  
**29/11/2022**