

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. MATRIMONIAL APPEAL NO. 3 OF 2021

(C/O Sumbawanga District Court Matrimonial Cause No. 2 of 2021)

AMINA A. MWANJA APPELLANT

VERSUS

DAUDI S. TEMELA RESPONDENT

Date: 04 & 21/02/2022

JUDGMENT

Nkwabi, J.:

A decree of divorce was issued by the trial court in respect of the parties in this appeal. Division of the matrimonial properties jointly acquired by the parties during the pendency of the hapless marriage was ordered. Further the trial court ordered the custody of the issues of the marriage be in the appellant.

The appellant was perplexed by the order of the division of the matrimonial properties, as such she filed this appeal seeking redress. Two grounds of appeal were raised by her learned counsel, Ms. Neema Charles. They are:

1. That the trial Court erred in law and facts by distributing appellant's house which was not a matrimonial asset and declared another house



which is matrimonial asset belongs to respondent while it was not established on balance of probabilities by the respondent.

2. That the trial Court erred in law and facts by failing to consider the joint efforts of appellant during the division of Cows, pigs, trolley and mattress.

It is due to the above provocation of appeal, the appellant urges this court to set aside the division of the assets and this court proceeds to divide the assets in accordance with the evidence.

My determination on the preliminary objection that the appeal is timed barred raised by the respondent will be very brief. The decision of the District Court was delivered on 10/09/2021. The exchequer receipt signifying the completion of the admission process of the appeal as per, **Gregory Raphael v Pastory Rwehabula** [2005] TLR 99, was issued on 28/09/2021. The appeal was therefore filed only 18 days from the date of the judgment which is well within statutory time for filing appeals of this nature. As to the delay of serving the summons for the respondent to appear in court to defend the appeal, that blame cannot be shouldered on the appellant in the

circumstances of this case. It is, therefore, not true as the respondent tried to impress upon this court that this appeal is time barred.

On my decision of the merits or demerits of the appeal, maybe I should start to state the obvious, it is mundane law that parties are bound by their pleadings. This is the position taken by the Court of Appeal of Tanzania in **Melchiades John Mwenda v Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga – Deceased) & 2 Others, Civil Appeal No 57/2018** (CAT) Unreported) at p. 24

"... It is elementary law which is settled in our jurisdiction that the court will grant only a relief which has been prayed for - see: James Funke Gwagilo v. Attorney General [2004] T.L.R. 161 and Hotel Travertine Limited & 2 Others v National Bank of Commerce Limited [2006] T.L.R. 133."

In her petition for divorce, the appellant listed the matrimonial properties which they jointly acquired, in paragraph 9. For clarity, I reproduce the same.

9. That during the subsistence of their marriage the petitioner and Respondent jointly acquired properties as follows:-

(a). Matrimonial house situated at Isesa area at Ward of Mollo within Sumbawanga Municipality, the house is nearby Isesa road.

(b). Farm measured 2 acres at Malonje Village. 4 cows, 14 pigs, 5 beds, 3 mattress and 2 trolleys.

Replying to the petition for divorce, particularly on its paragraph 9, the respondent had these:

4. That your humble respondent denies the allegations in paragraph 9 (a) and (b) and state that the disputed house is owned by our children under my guardianship. Also, the matrimonial subject to division are farm measured 2 acres at Malonje village, 2 cows, six pigs which remain after eruption of African pig swain deceases and 1 bed only.

In her testimony in the trial court, the appellant had this in respect of the acquired house:

"... during the existence of marriage, we succeeded to acquire the following properties, one house, I bought the plot on which the house was constructed and it is the respondent who had constructed it ...

We have no any agreement on the ownership of the house, there is no agreement that house will be owned by our children and we will be the care taker of the house ...”

So, there is no mention in the evidence of the appellant that they acquired two houses. As such, the house which ought to be divided among the parties in this appeal is the house situated in Isesa. The trial court, therefore, reached at a wrong conclusion that the parties had jointly acquired two houses. It should be remembered, he who alleges must prove. It is the petitioner, now the appellant in this appeal, who had to prove and not otherwise. In other words, even if the 2nd house really exists, which was brought up by the respondent during his defence, the respondent offended the authority in Mwenda’s case (supra). There is a rule against taking a party to proceedings by surprise. Further proof of joint efforts towards the acquisition of the alleged 2nd house by the appellant was not done contrary to the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo, Civil Appeal No. 102 of 2018** (unreported). The culmination of the discussion in respect of the 1st ground of appeal is that the trial court was justified in the division of the house which

is situated at Isesa (the first house) and it ought to have stopped there and not decided in respect of the alleged 2nd house as it was not pleaded. The authority of **Adriano Gedarm Kipalile v Ester Ignas Luambano, Civil Appeal No. 95 of 2011**, CAT, (unreported) I have been referred to by Ms. Charles, learned counsel for the appellant is, with respect to Ms. Charles, clearly distinguishable to the circumstances of this case, which distinct features I need not state herein as they are so obvious. The 1st ground of appeal succeeds only to the extent stated hereinabove.

Before I embark on the 2nd ground of appeal, for the same, however, I should go back to the regular law that an appellate court will only reverse a decision which cannot be rationally supported as stated in **Ibrahim Ahmed v. Halima Guleti [1968] HCD no. 76**.

The appellant calls upon this court to reverse the distribution of the matrimonial properties due to her claim that the trial Court erred in law and facts by failing to consider the joint efforts of appellant during the division of Cows, pigs, trolley and mattress.

I have carefully considered the distribution of the matrimonial assets made by the trial court and I have found no way I can disturb it. The appellant was allotted a two acres shamba which is a permanent asset while the respondent being allotted nothing in respect of the shamba, that appears to me to balance the excess in number of the of the cows and pigs which were distributed to the respondent than allotted to the appellant. As to the mattress, it was stated that the appellant had taken one mattress prior to the matrimonial cause being instituted. The remaining mattresses, therefore, cannot further be distributed. The 2nd ground of appeal is devoid of merits. It is dismissed.

I should also state here that for whatever reasons the respondent is requesting for custody of the children, cannot be granted at this stage or in these proceedings as his fresh allegations need evidence contrary to what he made in this appeal as they are mere submissions and not evidence. His prayer for custody of the children cannot be entertained too as submitted by Ms. Charles that there is no cross-appeal. The prayer by the respondent for custody of the children is dismissed for those reasons.

I finalize by stating that the appeal is bereft of perfection save for the alleged 2nd house whereas the order that the 2nd house is given to the respondent is quashed and set aside. As such the appeal is partly allowed to the extent indicated in this judgment. Each party to bear their own costs.

It is so ordered.

DATED at **SUMBAWANGA** this 21st day of February, 2022.




J. F. Nkwabi
JUDGE