IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

PC CIVIL APPEAL NO.87/2019

(Arising from the decision of the Temeke District Court in Civil Appeal No.113/2018 before Hon. Batulaine, RM, original Matrimonial Cause No.70/2018 of Temeke Primary Court before Hon. J. Massengi, PCM)

DANIEL MSELE MANYONYI.....APPELLANT

VERSUS

PRISCA MNYAGA NYANSURA.....RESPONDENT

JUDGMENT

13/12/2021 & 28/2/2022

I.C MUGETA, J.

The parties to this appeal married in 1998. According to the respondent troubles began in 2016 after the appellant, who is a military man, was transferred to work in Zanzibar. The respondent also alleged that the appellant mistreated her by chasing her and the children out of their matrimonial home and denied them maintenance. She further testified that they stopped sharing their matrimonial bed since 2016. The appellant denied those allegations except that he married another woman which he admitted to be true. In his evidence, he also accused the appellant for striking amorous relationship with a witch doctor.

When things became unbearable, the respondent decided to institute a matrimonial cause at Temeke Primary Court. She petitioned for divorce, distribution of matrimonial properties, maintenance and custody of the children. After a full trial, the trial court was satisfied that the parties lived under presumption of marriage and that their marriage had been irreparably broken down. Consequently, the marriage was dissolved and the matrimonial properties were divided at the ratio of 65% and 35% to the appellant and respondent respectively. Appellant was ordered to maintain his children, whose custody was given to the respondent, by paying Tsh. 280,000/= monthly.

The appellant was aggrieved by the decision of the trial court. He appealed at the district court of Temeke district. That court dismissed the appeal but varied the maintenance sum to Tsh.200,000/=. Appellant was not happy with this decision too. He has appealed to this court on four grounds summarised thus: -

1. *The lower courts erred to grant to the respondent 35% as shares in the properties.*
2. *The lower courts erred to grant shares to the respondent without proof of her material contribution in the acquisition of the matrimonial properties.*

3. *The district court erred to hold that the primary court of Temeke had jurisdiction to entertain this matrimonial dispute.*
4. *The first appellate court erred in law and in fact by denying the appellant the right to be heard.*

Both parties are represented. For the appellant is Mr. Charles Alex, learned advocate, and for the respondent is Miss. Happiness Materego, learned advocate. The case was argued by written submissions.

Counsel for the appellant argued jointly the first and second grounds of appeal. The general theme of his argument is that the respondent was awarded 35% share in the properties without proof of her contribution in their acquisition as the house at Mabibo was built in 1996 before marriage while the house at Mbagala, even though acquired during marriage, the respondent could not prove her contribution in its acquisition. The same applies to other properties which were acquired through appellant's salary and loans he took from several banks. According to the counsel for the appellant, the respondent is entitled to 5 – 10% share for domestic chores she performed.

On ground three learned advocate argued that since the parties are domiciled at Mbagala, the primary court at Temeke had no jurisdiction to

entertain their dispute. The court with jurisdiction, he submitted, is the primary court at Mbagala.

Regarding the fourth ground of appeal, the learned counsel submitted that the first appellate court disregarded the appellant's complaint that he was denied by the trial court the right to summon witnesses and his exhibits were unjustifiably not admitted by the trial court.

In reply, learned advocate for the respondent argued that the lower courts were right to give respondent 35% as her contribution towards acquisition of the properties for her effective performance of domestic chores. While he admitted that a house at Mabibo was acquired before marriage, it was substantially improved during marriage. The remaining properties like the house at Mbagala, two plots at Bunda and Kibaha and a car were acquired during marriage.

On jurisdiction of the primary court of Temeke he submitted that where there are two or more primary courts in one district, all of those court has the same jurisdiction on matters arising in that district. She supported her argument by the case of **Mrisho Pazi vs Tatu Juma** HCD 119 and section 3(2) of the Magistates' Court Act [Cap 11 R.E 2019].

Regarding the fourth ground, the learned advocate submitted that it is on record that the parties were afforded their right to be heard.

In the rejoinder, advocate for the appellant reiterated what he submitted in chief.

I shall start with ground three. The jurisdiction of the trial court. It is argued by the appellant that the Temeke primary court had no jurisdiction to entertain the dispute. Section 3(1), (2) of Cap 11 R.E 2019 states that: -

> *3.-(1) There are hereby established in every district primary courts which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the respective districts in which they are established.*

For the foregoing provision, it is certain that primary courts of a particular district have jurisdiction in the whole district for which they are established. They are established in numbers in each district in order to bring justice closer to the people. A party who is inconvenienced by the filing of a case at a court far away from his place of domicile ought to request for transfer of the case to the court of his convenience. This is an administrative and not jurisdictional issue. The third ground is, therefore, meritless. It is hereby dismissed.

Does the respondent deserve 35% of the matrimonial properties as her share? This question concerns the first and second grounds of appeal.

It is settled that in distribution of matrimonial properties, besides other factors, the two major factors to be considered are acquisition of matrimonial assets during subsistence of the marriage and the extent of contribution of each spouse toward acquisition of such assets, a principle expressed under section 114 of the Law of Marriage Act.

So, the first question is, were the parties married? The lower courts made a concurrent finding that despite the parties living together since 1998, the appellant having paid the bride price, their relationship was not a marriage but a presumption of marriage. The trial court found that a customary marriage was not completed for several reasons. I would let the record speak for itself: -

> *'... ili mahakama ijiridhishe kwamba kulikuwa na ndoa ya kimila baina ya wadaawa ni lazima SU1 awe amelipa mahari, wadaawa wawe wanatoka kabila moja, kuwe na sherehe pamoja na cheti cha ndoa".*

The district court admitted dowry was pay but proceeded to hold that payment of dowry by itself is not sufficient proof of marriage because no witness testified to have attended their wedding! She cited the case of

Ramadhani Ramadhani v. Sungi Andalu [1984] T.L.R 158 where it was held: -

> *'payment of bride wealth even if proved is not evidence of existence of marriage. There must be clear evidence of marriage'.*

With all due respect, I am unable to agree with both lower courts' findings. While payment of dowry is undisputed, the appellant admitted to have started living with the respondent as his wife since 1998. Joseph Muyaga Nyansira (SM2) who is the respondent's brother testified that the parties started living together as husband and wife after the appellant paid dowry. Indeed, there is no evidence that payment of dowry was followed by marriage ceremony. However, living together after payment of dowry is a clear evidence of marriage consummation and presupposes performance of marriage ceremony. This is what matters and not the wedding ceremony since there is no law or evidence on record that in the parties' customs, marriage ceremony is a marriage precondition. The holdings of the trial court that a customary marriage ought to be between people of the same tribe and evidenced by a certificate are at best misconceived. Customary marriage is recognised under section 25(1)(d) of the Act which reads: -

'A marriage may, subject to the provisions of this Act, be contracted in Tanzania–

(a) ..... (b)..... (c) ..... [all not relevant]

(d) where the parties belong to a community or to communities which follow customary law, in civil form or according to the rites of the customary law'.

This law refers to community or communities. Therefore, people of different communities or tribes can contract a customary marriage. Since there is no evidence that the parties violated any rites of their customs after payment of dowry, their marriage is a valid customary marriage.

Marriage certificates are governed by section 33 of the Law of Marriage Act. They are issued by District Registrars, Kadhis and Ministers of Religion in case of Civil, Islamic and Christian marriages. Those who marry customarily are issued with such certificates upon application to the District Registrar under section 43(5) of the Law of Marriage Act. Failure to do so in time does not invalidate their marriage. In view of the foregoing I hold that the appellant had no presumed marriage. They contracted a valid customary marriage.

Did they acquire properties during subsistence of their customary marriage? According to the evidence on record, it is undisputed that the house at Mabibo was acquired before marriage. However, it was

substantially improved after marriage as said by the respondent's witnesses and undisputed by the appellant. It is, therefore, a matrimonial asset together with the other properties, namely, a house at Mbagala, a car and plots at Bunda and Kibaha subject to division between the parties. This leads to the dispute on the distribution shares which I hereunder determines.

There is no dispute that the respondent was a house wife whose contribution was limited to performance of domestic chores. Hence, all the properties were acquired from the appellant's income. What, therefore, is the measure of her extent of contribution in the acquisition of those assets? In **Gabriel Nimrod Kurwijira vs Theresia Hassani Malongo,** Civil appeal No. 102/2018, Court of Appeal – Tanga it was held: -

> *'The issue of extent of contribution made by each party does not necessarily mean monetary contribution; it can either be property, or work or even advice towards the acquiring of the matrimonial property'.*

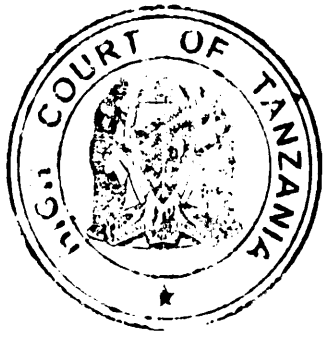
In this case the respondent's contribution was through domestic work in support of an employed spouse. There is also evidence of SM2 and SM3 that she participated in laying bricks and supervision of construction works of the house at Mbagala and improvement of the house at Mabibo.

The two lower courts made a concurrent finding that the respondent deserves 35% as her contribution. This is not a finding of fact on evidence but a reasonable estimation of entitlement. There is no formulae on how to reach the decision in such cases which makes the process subjective. It is my view that it is high time subjectivity in distribution of matrimonial assets where the contribution of one party is solely performance of domestic works is ended. To this end, I would argue that where effective performance of domestic chores in support of employed spouse is proved and no matrimonial offence is alleged and proved against the unemployed spouse, the general rule should be that the matrimonial properties are to be shared equally. Giving less share should be the exception upon giving reasons per the facts of each case. Era is gone where domestic works were underestimated.

In this case, therefore, had it not been for the concurrent finding of the trial courts which I think I should not disturb as the respondent did not appeal; having considered evidence on the time parties lived together (about 20 years), children born out of the marriage (five children), age of the parties and the general circumstances of this case, I would have applied this principle. Nevertheless, for that reason, I shall leave it at that. The first and second grounds are dismissed.

Lastly, was the appellant not heard as alleged in the fourth grounds? The argument is that he was barred to summon witnesses and his exhibits were not admitted. The two allegations impeach the sanctity of the trial court record. It is settled that court record cannot be lightly impeached without solid proof of the allegation. In this case the trial court record does not show that the appellant asked for leave or summons to call any witness and the same were rejected. Without evidence to the contrary, this record is deemed to be correct. Further, the record of the evidence of the appellant does not show that he attempted to tender any document. For the foregoing, the fourth ground is found without merits.

In the event, this appeal is dismissed. The decision of the lower courts regarding the distribution of matrimonial properties is upheld. I give no orders as to costs.



I.C. MUGETA

JUDGE

28/2/2022

Court: - Judgment delivered in chambers in the absence of all parties.

Sgd: I.C. MUGETA

JUDGE

28/2/2022