

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**CIVIL APPEAL NO. 72 OF 2021**

(Originating from Matrimonial Cause No.52 of 2019, Kinondoni District Court dated  
29/12/2020 before Hon. E.A. Mwakalinga, SRM)

**FATIHUYA JUMANNE KASONGO..... APPELLANT**

**VERSUS**

**HASSAN SALUM MALINDA..... RESPONDENT**

**JUDGMENT**

Date of Last order: 30/03/2022

Date of Judgment: 29/04/2022

**E.E.KAKOLAKI, J.**

In this appeal the appellant Fatihuya Jumanne Kasongo is aggrieved by the decision of the District Court of Kinondoni (Mwakalinga-SRM) dated 29<sup>th</sup> December 2020. To appreciate the context of the case, I find it germane to narrate background of the case at hand albeit so briefly. The petitioner and the respondent contracted their marriage under Islamic rites on 1<sup>st</sup> March, 2013. During existence of their marriage the couple were blessed with two issues namely TC and TS (for the purposes of protecting their identity). The two led their matrimonial life smoothly for four years after the union before it was confronted with misunderstandings as the appellant alleges the respondent wanted to abuse her against the order of nature. As the conflicts

intensified, the respondent on 16<sup>th</sup> November 2017 and 22<sup>nd</sup> May 2018 respectively, issued two talak to the appellant as a result they parted ways while the two children remaining in her custody. Following that development the petitioner, petitioned for divorce at the Kinondoni District Court vide Matrimonial Cause No. 52, seeking for decree of divorce, and in addition to monthly maintenance Tshs.700,000/= to the issues, medical care or in alternative to enrol them with NHIF yearly, division of matrimonial property and any other relief the court would deemed fit to grant.

Having heard both parties evidence, the trial court granted divorce to the appellant together with an order for division of matrimonial properties which is two houses at the ration of 30% and 70% to the Respondent and households equally. Custody of the said two children remained with the Appellant and addition the respondent was ordered to provide or cover for children's school fees, health insurance as well as monthly maintenance to tune of Tsh.400,000/= (four hundred thousand) per month. Discontented with such decision, the appellant lodged the present appeal on five (5) grounds going thus:

1. That, the Honourable Magistrate erred in law and fact when considered the house at Mbagala Mwembe bamia with resolving the dispute as to whether the same is the matrimonial house or not.
2. That the Honourable Magistrate erred in law and fact in failing to give reasons in her judgment pertaining to the allegations of forgery on the face of exhibit D1.
3. That the Honourable Magistrate erred in law and fact when wrongly identified exhibit D1 for the house to be the vehicles with registration No. T200AZP.
4. That the Honourable Magistrate erred in law and fact for failure to consider that the vehicles with registration no. T200AZP has not been sold.
5. That the Honourable Magistrate erred in law and fact for failure to identify the vehicle with registration no. T200 AZP as the matrimonial property currently under the ownership of the respondent.

At the hearing of this appeal the appellant and the respondent each were represented. The appellant enjoyed the service of Mr. Josephat Mabula, Advocate while the respondent enjoyed the service of Mr. Mluge Karol Fabian, Advocate. With leave of the court the appeal was argued by way of

written submission and both parties adhered to the scheduled orders for filling their submissions. Mr. Mabula chose to argue four grounds of appeal while silently abandoning the fifth ground.

Submitting on the first ground of appeal regarding the inclusion of house at Mbagala Mwembe bamia belonging to the appellant into matrimonial properties, Mr. Mabula started by praying the Court to correct the word "with" as appeared in the 1<sup>st</sup> ground to read "without". He then proceeded to submit that, records are clear that both parties tendered exhibits in their urge to prove separate ownership over the house at Mbagala Mwembe bamia. Along those exhibits both parties tendered in court two letters from PCCB (exhibits P7 and D1 collectively) as justification for their ownership of the house and forgery disputes that existed between them. In her judgment the trial magistrate at page 4 paragraph 4 and 5 seemed to have summed up the evidence of the parties and nothing more. The trial magistrate left the dispute unresolved as to whether the said house at Mbagala Mwembe bamia forms up a matrimonial house or not.

Responding to this ground of appeal Mr. Mluge submitted that, the assertion by Mr. Mabula is untrue as it was not disputed that, the land in which the said house is located belongs to the respondent as that is supported by

evidence of DW2, Athuman Ramadhani was originally owned and sold it to the respondent. And that DW2 denied to have sold the said landed property to the Appellant thus, the appellant claims over the land intended to dispossess the respondent of his ownership of the house. He said, since it is the appellant who initiated criminal investigation at PCCB while in the process of filing her petition at the trial court there is no way the court could have gone further to discuss and decide over ownership of the house as the same was and is still in the hands of PCCB for investigation. He thus submitted this ground of appeal must fail.

In his rejoinder Mr. Mabula submitted that since the disputed house was and is still subjected to the PCCB investigation, the trial court was duty bound to exclude the house from matrimonial properties until when the dispute is concluded, thus prayed the 1<sup>st</sup> ground of appeal be allowed.

Having thoroughly considered the fighting submissions by the parties and perused records and evidence concerning ownership of the house in dispute situated at Mbagala Mwembe bamia, I find the appellant complaint to be meritorious. As evidence would go, there is no dispute that, through exhibits P1 and D1, the question of ownership of the land (house) at dispute in which both parties claim is still under PCCB investigation and that, the trial court

did not determine it apart from including the house as part of matrimonial property and proceed to divide it. To decide on its division as part of the matrimonial property in situation where the claim for personal/private ownership by the appellant is yet to be cleared from criminal investigation in my considered view operates as unlawful change of ownership and contravenes the spouse's right to own personal property as provided under section 58 of the Law of Marriage Act, [Cap 29 R.E 2019]. For easy reference I quote the same as hereunder:

*58. Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, 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.*

It is from the above position of the law this court finds that, when the appellant raised a point of private ownership of the house at Mbagala Mwembe bamia which was already subjected to criminal investigation before the PCCB as stated by both parties, what the magistrate ought to do was to leave the same undivided as pending its clearance from criminal allegations

of fraud in its acquisition. I therefore find that the learned trial magistrate misdirected herself to include the said house as part of the matrimonial property. Therefore, I allow this ground of appeal.

Coming to the second ground on the court's failure to adjudge on allegation of forgery of exhibit D1, Mr. Mabula contended that, during cross examination of DW2 at page 33 and 34 and D3 at page 38 and 39 of the proceeding, the issue of forgery of sale agreement of the land (house) by the respondent (exhibit D1) was raised by appellant but the trial magistrate refrained from deciding on the same despite of being a photocopy. In his response Mr. Mluge, countered that, this ground of appeal is misconceived. He argued, the raised issue of forgery being a criminal question that need proof beyond reasonable doubt and still under investigation of PCCB, the trial court was not a proper forum to adjudicate the same as it was. He submitted this ground of appeal ought to be dismissed.

In his rejoinder submission the Appellant's counsel emphasized that, the trial court had jurisdiction to determine any issue raised before it during the proceedings of the case and any assertion from respondent's advocate that, its jurisdiction was restricted on matrimonial matters only was the mere argument from the bar not borne for the impugned decision. He concluded

that, court's silence on determination of ownership and forgery allegation of the Mbagala mwembe bamia house leaves room for parties to decide themselves on undetermined issues hence the ground has merit.

Having dispassionately considered the rival submission on this ground, I hasten to find the same is devoid of merit. I do as forgery is a criminal matter dealt by the court when exercising its criminal jurisdiction and not during adjudication of matrimonial causes dully dealt with under the Law of Marriage Act and its rules together with the Law of the Child if need arises. On this ground I therefore embrace Mr. Mluge's propositions that, the trial magistrate was not duty bound not to deal in any way with the issue of forgery for not being a proper forum to adjudicate on it. Therefore, the second ground of appeal has no merit and I dismiss it.

Turning to the third ground of appeal, Mr. Mabula submitted that, the trial magistrate wrongly referred to exhibit D1, the sale agreement of the disputed plot purportedly sold to the respondent by DW2 as proof to the alleged sold vehicle by respondent, something which prejudiced the appellant and deprived her rights to the vehicle which she left when departed the matrimonial home. Responding to this ground Mr.Mluge argued that, it is not true that Exhibit D1 was associated with the sold vehicle by the trial



magistrate. He said the appellant's counsel tries to mislead this court as the paragraph referred in the judgment at page 2 is very clear but the counsel for the appellant misquoted it to meet his ends. In his view appellant's counsel quotation was misleading as what the trial magistrate indicated is that the respondent tendered exhibit D1 and his testimony was supported by those of DW2 and DW3. In his rejoinder the Appellant's Counsel reiterates her submission in chief without new additions.

I have had an ample time to read the impugned judgment concerning the complaint raised in the 3<sup>rd</sup> ground, that the trial magistrate erred by referring exhibit D1 to prove alleged sale of the vehicle by the respondent while the same is for the sale agreement. I think the same need not detain this court. For better appreciation of the said complaint it is imperative that I quote the whole paragraph 4 of page 2 of the trial court judgment:

*"However on the other side of the Respondent he testified that, during the marriage life time, he managed to acquire two houses. He bought a plot on February 2012. The Respondent bought another plot in July 2012 at Mbagala Chamazi Mbande Mwembe Bamia and third house bought 2015, those properties were acquired through his work at Access Bank. The vehicles*

*sold when economy drop after redundancy. (Sale agreement and Hati ya uchukuaji vielelezo was tendered and marked as Exh D1...."*

As it can be noted from the above cited excerpt, there is nowhere the trial magistrate wrongly referred exhibit D1 as agreement for sale of the vehicle with registration no. T200AZP. Assuming the same was so wrongly referring to sale of the above mentioned motor vehicle which is not the case, still I would have held error to be inconsequential for want of proof by Mr. Mabula on how the appellant was prejudiced The third ground of appeal I find is baseless for want of merit.

Coming to the last ground which is ground number four, the appellant's counsel submitted that, the trial court erred ought not to have believed the assertion by the respondent that, the vehicle no. T200 AZP was sold thus not forming part of matrimonial property, without any proof to that effect. He said, transfer of ownership of vehicle involves written contract, therefore in the absence of even a copy of sale agreement the court ought to believe that vehicle has not been sold. He referred this court to section 110(1) and (2) and section 115 of the evidence Act, cap 6 R.E 2019 which requires the

one who alleges the existence of the certain facts to prove them and invited the court to find merit on the ground.

Mr. Mluge's effect to this ground was to the effect that, the allegation that the said vehicle by Mr. Mabula is not sold does not hold water as it is very simple to know who owns it by searching its registration at TRA. He said the provision of section 110 of the Tanzania Evidence Act is two way traffic as the appellant also ought to have proved existence of the said motor vehicle for asserting that it is a matrimonial property. In his view this ground of appeal is baseless and holds no water and the same has to be dismissed with cost as there is no reason for faulting the trial court decision.

In a rejoinder submission Mr. Mabula submitted that, it is in the records of the lower court that when the appellant left her matrimonial home the vehicle no.T200AZP was still under the ownership of the respondent. Any story regarding the sale and/or transfer of the same after her departure is not only unknown to the appellant but also the law and if the same is alleged to be true must have been proved by the respondent who possess the knowledge of the same being sold. He should not have shifted the burden to the appellant. The respondent should also bear the consequences of selling matrimonial property like a thief without involvement of her divorcee,

Mr. Mabula stressed and insisted on the need of this court to find the ground meritorious.

Having paid regard to the submission by both counsels on this ground of appeal, it is clear from records that the genesis of the appellant complaint in ground four of the appeal is the Vehicle with registration No. T200 AZP. The appellant when testifying as well as in their written submission contended that, during their marriage life apart from houses they had two vehicles. She tendered in court a photocopy of the above referred motor vehicle as exhibit P6 in discharging her duty under section 110 of Evidence Act, that they owned the said motor vehicle with registration No. T200 AZP in which the respondent alleges was sold during existence of their marriage. Since the respondent alleges that the same was sold during their marriage then the onus of so proving shifts to him. As he failed to so prove the trial court ought to have disbelieved his story and instead believe the appellant's story that the same was existing and it was acquired under existence of marriage hence formed part of matrimonial property which I hereby do. What I find was lacking on the appellant's part is a proof of her contribution towards its acquisition as that does not base on the credibility of the respondent's evidence as it was held in the case of **Paulina Samson Ndawavya Vs.**

**Theresia Thomas Madaha**, (Civil Appeal No.45 of 2017)[2019]TZCA 453 (11 December 2019)[www.tanzlii.org](http://www.tanzlii.org). In this case the Court of Appeal among other things stated that the success of the appellant's case does not depend on the Respondent's credibility but it depends on the appellant discharge of her burden of proof on the required standard in civil cases. A glance of an eye to exhibit P6 has revealed that it was imported in the year 2014 in the name of the respondent and during marriage subsistence. Despite of the fact that the appellant has failed to prove financial contribution toward acquisition of the same still it is undisputable fact that, the appellant was discharging her matrimonial chores and providing her husband with peaceful mind hence her contribution towards acquisition of the said motor vehicle. See the case of **Bi Hawa Mohamed Vs. Ally Seifu** (1983) TLR 12. I therefore find merit in this ground and uphold it.

All said and done, I find this appeal is partly meritorious hence allowed as far as the 1<sup>st</sup> and 4<sup>th</sup> grounds are concerned and partly fails on the rest of the grounds. I therefore vary the decision of the trial court by removing from the list of matrimonial properties the house under PCCB investigation located at Mbagala Mwembe bamia till finalisation of the investigation. Further to that I order for division of the motor vehicle with registration No. T200 AZP

by 30% to 70% to appellant and respondent respectively or its equivalent value. Otherwise the rest of the trial court decision remains intact.

I make no order as regards to the costs.

It is do ordered.

DATED at Dar es salaam this day of 29<sup>th</sup> Day of April, 2022



E. E. KAKOLAKI

**JUDGE**

29/04/2022.

The Judgment has been delivered at Dar es Salaam today on 29<sup>th</sup> day of April, 2022 in the presence of Mr. Joseph Mbonimpa advocate holding brief for Mr. Josephat Sayi Mabula, advocate for the appellant and Mr. Fabian Karol Mluge advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

29/04/2022



