

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF DAR ES SALAAM)
AT DAR ES SALAAM
MATRIMONIAL APPEAL NO 01 OF 2021

(Arising from the Judgment and Decree of Morogoro District Court before Hon E. USHACKY)

HERIETH JOSEPH LUKINDO APPELANT

VERSUS

SIMBA PAUL RUPIA RESPONDENT

JUDGMENT

Last Court Order on:15/02/2022

Judgment date on:04/03/2022

NGWEMBE, J.

This appeal is purely related to equal division of matrimonial property among the disputants. That the trial court at the end decided to declare a house built at plot No. 137 Block 7 Lukobe area within Morogoro Municipality as a Matrimonial Property, hence proceeded to equally distribute among the disputants (50%/50%). Such decision aggrieved the appellant, hence this appeal clothed with three grounds, all centers on ownership of the suit house and its division among them.

Tracing the genesis of this appeal, the two happily celebrated their marriage under Christian ritual at Dar es Salaam in the Congregation of Kijitonyama Evangelical Lutheran Church on 08/11/2014. However, their



joyful marriage did not last longer before experiencing floods of conflicts, which eroded their marriage into intolerable situation.

Unfortunate may be to the loving spouses, in year 2020 their marriage was ultimately reached in a stage of voluntary separation for some months before the appellant could petition for dissolution of their loving marriage. Henceforth, with deep hearted, the appellant under assistance of Bahati Kashoza, an advocated from **PJC Premier Attorney**, on 27th February, 2020 filed in the District Court of Morogoro a petition for divorce, praying among others, dissolution of their marriage, custody of their child to the petitioner (appellant) and Maintenance of the child.

In that petition, the petitioner (appellant) did not ask for division of matrimonial properties. However, in determination of the whole dispute, the trial court was satisfied that their marriage was indeed eroded by persistent floods of conflicts, which amounted into cruelty mentally and physically. Thus, dissolved their marriage and proceeded to issue other orders including maintenance of their child, right to visit the child by both parties and more so, found their house as a matrimonial property, hence each party departed with 50% shares.

It seems both were happy and satisfied with the court order as none of them appealed against, save only on declaration of the said house as matrimonial house and its division. Therefore, this court is called upon to decide on whether the said house is a matrimonial property or otherwise, if the answer is in affirmative, then whether the disputants are entitled to equal shares?



Prior to deep consideration of the raised issues herein above, and discussion on the merits and demerits of this appeal, I find compelled to point out some fundamental features of marriage. Marriage as was rightly defined by the Law of Marriage Act (section 9) is "*a voluntary union of man and a woman intended to last for their joint lives*" In other societies under certain faith, marriage is categorized as a Holy Communion unifying two matured loving man and woman into one body for the rest of their life. Therefore, once married is forever. In such society the term divorce is a foreign terminology. In fact, marriage is a sacred union of man and woman intended to last forever. Out of that union, new life in the world is born, that is why marriage is not an issue between the two loving spouses, rather is a concern of, both family members and the general public. Thus, whoever decide to enter into such institution, must be matured physically, mentally and with serious commitment. It is the only institution, so far, I am aware of, which awards graduation certificate to each party on a day of wedding, before the two lives together.

Despite such good intention of our Law of Marriage Act, yet the legislature foresaw possibilities upon which, marriage becomes intolerable, hence reluctantly enacted section 107 to give room for either divorce or separation.

In this appeal, the trial court was satisfied that there was intolerable cruelty to the appellant, hence divorce was inevitable. On the hearing of this appeal, both parties procured legal assistance from learned advocates. The appellant was represented by Mr. Jovin Manyama, while the respondent was represented by Mr. Gabriel Mwansoho. In arguing



the grounds of appeal, Mr. Manyama convincingly submitted that the suit house was built in a plot owned by the appellant. Even during trial, the same argument prevailed and documentary evidences proved same that the founding person of that plot of land is the appellant. Perusing the trial court's proceedings, it is settled that this point is not disputed by either party.

However, proceeded to argued that the suit plot was developed into a residential house by the appellant prior to their marriage. That she procured a loan from CRDB Bank and NMB Bank together with some support from her parent. Proceeded to criticize the respondent for failure to prove his contributions towards development and improvement of the suit house. To support this argument, the learned advocate cited the case of **Anna Kanungha Vs. Andrew Kanungha [1996] TLR. 195** and the case of **Hemed Said Vs. Mohamed Mbilu [1984] TLR. 114.** After referring to those cases, turned again against the trial court for accepting mere allegations that the respondent made any contribution to the development and improvement of the suit house.

Equally important the learned advocate argued quite rightly, that the married spouse may own private properties despite being married. Supported his assertion by section 58 of the Act, also referred this court to the case of **Regina Rutandula Vs. Pendo Joseph, Matrimonial Appeal No. 05 of 2012.** Rested by insisting that the suit plot was an individual property of the appellant. Therefore, it was wrong for the trial court to consider it as matrimonial property, hence wrongly divided equally between the disputants. Concluded by a prayer that the appeal be allowed.

In turn Mr. Gabriel Mwansoho, vigorous argued by praising the trial court for a well-considered judgement in line with applicable laws and its principles. Referred this court to section 2 of the Act which defined matrimonial property. Turned to the appeal that the suit house was a matrimonial house, where the disputants were jointly built it and happily lived therein.

Undisputedly, the learned advocate concurred to the fact that the founder of that plot of land was the appellant prior to their marriage, but the issue is not ownership rather is who contributed what in developing it. The respondent developed that plot into a residential home for their family.

Further argued by referring to pages 9 and 10 of the judgement on how the respondent purchased bricks to build the suit house. Also referred to the evidence of DW3 on how he introduced to the street leaders on his intention to build such house. Added that the construction of their residential house, which is the subject matter of this suit commenced on 2018 and ended on 2019. Therefore, under section 114 (3) of the Act, the house is a matrimonial home capable of being equally distributed among them.

Rightly pointed out that a property which was acquired prior to marriage may become matrimonial only if, there is substantial improvement made therein by both parties during subsistence of their marriage. To buttress his argument, Mr. Mwansoho referred this court to the case of **Yesse Mrisho Vs. Sania Abdul, Civil Appeal No. 147 of 2016** also referred to the case of **Gabriel Nimrod Kurwijila Vs. Theresia Hassan Malongo, civil appeal No. 102 of 2018**. Rested by insisting



that the trial court was right to declare that the house is a matrimonial property and the trial court rightly divided equally among them.

In rejoinder, the learned advocate came up with a new fact that the suit house was built by the appellant on year 2013, prior to their marriage, but was unfinished. Thus, the respondent to have any right over it, ought to come up with enough evidence on his contribution (if any). Rested by reiterating to the submission in chief that the appeal be allowed.

As I have already highlighted herein above, the crux of this appeal is ownership and division of the suit house. I find this ground is answered quickly by analyzing the evidences adduced during trial. To begin with, it is evident that the suit plot of land was founded by the appellant prior to their marriage. Also, it is on record that the respondent produced evidence on how he participated in developing the suit house. This fact is undisputed because, he proved it by calling evidences of purchasing bricks used to build that house. The appellant during trial ought to contradict that fact by another evidence. For instance, production of enough evidence indicating those bricks purchased by the respondent may be, were used to build another house outside the suit house. Above all, it is not disputed, the respondent went to the street leaders and introduced himself on his intention to start developing his plot of land. These are unchallenged evidences.

In the contrary, the appellant has come up with convincing evidence that among other efforts, she took loan from NMB Bank and CRDB Bank, which were used to construct the suit house. Such facts were supported by documentary evidences, that is, loan agreements. However, such



facts are defeated by reading the agreements themselves. It is true that the appellant took loan of TZS. 3, 800,000/= from NMB on 07/01/2019. Likewise, the loan of TZS. 9, 700,000/= from CRDB Bank on 16th May, 2019. These facts are evidenced by documents thus, undisputed. However, such evidence is contradicted with her own assertion that she built that house in year 2013 before marriage. Also is contradictory to the evidence of DW2 and DW3 who testified that the respondent purchased bricks on June 2018 and at the same time he introduced to street leaders at the same year that he wanted to develop his plot of land.

Therefore, I would conclude that the assertion of building the suit land in year 2013 is not backed by concrete evidences, rather the suit house was built in year 2018.

Undoubtedly, such year the disputants were still husband and wife, since their marriage was tabled before the marriage conciliation Board and the letter therein was issued on 4/10/2019. It goes like a day followed by night that the house was a matrimonial property.

Having so decided the pertinent issue for determination is whether each one contributed equally on the development of such house to justify equal division of shares. With a help of Judge Maina in the case of **Bibie Maulidi Vs. Mohamed Ibrahimu [1989] T.L.R 162 &163** at page 164 provided a long living guidance to the court on matters of division of matrimonial properties when held:-

"Among factors to be considered in deciding how much parties should get from the matrimonial assets when the marriage is dissolved are the extent of the contribution by

each party and customs of the community and needs of the infant children"

The guidance of Judge Maina is in line with section 114 (2) of the Law of Marriage Act, which section is quoted hereunder:-

114 (2) *"In exercising the power..... the court shall have regard to the:*

(a) N/A

(b) The extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

The basic factors in division of matrimonial properties are; first contribution of each party in acquisition of properties; second, customs of the disputing parties; third, debts, if any; and fourth, welfare of children, if any.

It should be noted that, the extent of contribution is a matter of evidence, in civil disputes including matrimonial matters like this one, the one having heavier evidence shall win the case, while a party with weak evidence may lose. This position was clearly expressed in the case of **Gabriel Nimrod Kurwijila Vs. Theresia Hassan Malongo, Civil Appeal No 102 of 2018** (CAT – Tanga) (Unreported), also in the case of **Yesse Mrisho Vs. Sania Abdu (Supra)** where it was held:-

"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets. It is clear therefore that extent of contribution by a



party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise, also where there is no evidence to prove extent of contribution"

In similar vein, in the case of **Samwel Moyo Vs. Marry Cassian Kayombo (1999) TLR 197 P 200** the court held:-

"It is apparent that the assets envisage thereto, must firstly, be matrimonial assets; secondly, they must have been acquired by them during the marriage and thirdly, they must have been acquired by their joint efforts. These three conditions must exist before the Courts power to divide matrimonial or family assets under section 114 (i) is invoked".

Further as per the contents of section 114 (2) of the LMA it is plain and clear that, failure to prove the extent of contribution, either party is estopped from claiming more than what was proved to be his/her contribution. In respect to this appeal, the appellant failed to prove the extent that she built the suit house alone. The respondent proved his contribution to the development of the suit house. Accordingly, she cannot blame the court for the percentage she was awarded. Considering more inquisitively, it is a fact that the appellant is the owner of the suit plot and that she might have contributed slightly more than the respondent.



That being said and done, this appeal is partly dismissed to the extent that the suit house is a matrimonial property as was rightly decided by the trial court. On percentage of shares, I order suit house be valued immediately, out of the total value, the appellant shall receive 60% shares while the respondent shall remain with 40% shares of the suit house. Either one may compensate another according to the shares so decided. In the circumstances of this appeal, it is just and equitable to order each one to bear his own cost.

It is so ordered.

Dated at Dar es Salaam this 4th day of March, 2022



**NGWEMBE J,
JUDGE.**

04/03/2022.

Judgment delivered and dated 4th March, 2022 in the presence of Jovith Byarugaba Advocate for the Appellant and Jovith Byarugaba for Gabriel Mwansoho Advocate for the Respondent.

Right to appeal explained.



**NGWEMBE J
JUDGE**

04/03/2022