

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

CIVIL APPEAL NO. 30 OF 2021

*(Arising from Matrimonial Cause No. 01 of 2021 in the District Court of Karatu at
Karatu)*

EDITHA SAMWEL NGAYDA..... APPELLANT

VERSUS

MODEST ANTONY DELI RESPONDENT

JUDGMENT

05/04/2022 & 24/05/2022

KAMUZORA, J.

Editha Samwel Ngadya and Modest Antony Deli started cohabiting in the year 2005 and officiated their marriage in the year 2016 when they contracted a Christian Marriage. They were blessed with two children Jackline and Josephine. When the misunderstanding aroused between the couple in the year 2017, the Appellant opted to flee with the children to her home town living the Respondent behind. She consequently filed a petition for the decree of divorce, division of matrimonial properties, custody of children and maintenance of children. The grounds put forward for divorce was the Respondent's alcoholic and cruel behaviours against the Appellant. The Appellant also claimed desertion as she opted to return

to her family home on 2017 because the Respondent was attacking her mentally by continuing threats to kill her.

The trial court upon hearing the evidence from the parties was satisfied that the marriage between the parties was broken beyond repair and proceeded on granting the decree for divorce. The trial court also was satisfied that there was no any matrimonial property jointly acquired by the parties during subsistence of their marriage but the court granted custody of children to the Appellant while the Respondent was ordered to pay Tshs. 100,000 per month as maintenance costs for the two children.

The Appellant approached this court on one ground that the trial court was wrong in denying her right over division of matrimonial properties jointly acquired. When the matter was set for hearing both the Appellant and the Respondent appeared in person and opted to argue the appeal by way of written submissions.

In her submission in support of appeal the Appellant argued that, she proved her case on the balance of probabilities that the house was jointly acquired thus the trial court was biased in disregarding her credible evidence. She referred the provision of section 114 of the Law of Marriage Act 1971 which require the court when granting or subsequent to granting decree for divorce to make an order for division of matrimonial properties.

The Appellant insisted that she proved before the trial court that they were living in a rented house before they built a house in a plot given to them by the Respondent's mother at Sumawe area. That, despite that evidence the trial court made no order regarding the family house and or any other family asset acquired during their marriage. Adopting the division of family asset as depicted from Lord Shams, Hasbury Law of England, 4th Edition P.491 the Appellant insisted that the house at Sumawe within Karatu District is a matrimonial house or family asset that was used by the parties as matrimonial home before they separated hence subject to division on the dissolution of their marriage.

The Appellant further submitted that the trial court wrongly relied on the fact that when they were given a plot there was no specific statement of the same was an absolute gift or not. To her, the plot was given to them without conditions and that is why they developed the same and made it their matrimonial home. She referred the case of **Bi Hawa Mohamed Vs Ally Seif [1983] TLR** at Pg.32 and prayed for this court to consider her evidence and order for division of matrimonial assets.

The Respondent on the other hand submitted that, the Appellant's complaint is based on the house at Sumawe while no dispute that the plot at Sumawe is the property of the Respondent's mother. That the claim by

the Respondent that they built a house is an afterthought because during trial she admitted that she found the house already built. The Respondent added that the Appellant was duty bound to prove her claims as it was held in the case of **Kwiga Maswa Vs Samwel Mtubatwa [1989] TLR 103**. He insisted that it was the duty of the Appellant to prove that they indeed developed the said house. That since the Appellant agree that the plot was given to them by the Respondent's mother, she failed to prove whether they were given the plot temporarily or permanently. He was of the view that if the Appellant still thinks that she has right over the land, the remedy to institute a land dispute against the Respondent's mother for their interest to be determined. On the claim that the Appellant is living with the children, the Respondent submitted that he was ordered to pay maintenance for the children at the tune of Tshs. 100,000/=. He however prays for this court to invoke its powers under section 95 of the Civil Procedure Code Cap. 33 RE 2019 and make an order that for the Respondent to pay maintenance 30 days after determination of this appeal and not for the period spent in this appeal as he has no means to pay for the outstanding maintenance costs.

In her rejoinder the Appellant reiterated the submission in chief and added that it is wrong to conclude that they entered into a house built by

the Respondent's mother. She explained that no dispute that the plot was given to them by the Respondent's mother but insisted that the two rooms house which they moved in were built by the Respondent and not his mother. That, the Appellant later contributed in building the five rooms house. To her it was wrong for the trial court to ignore her evidence proving that they developed the plot given to them by the Respondent's mother. She invited this court to re-evaluate the evidence on record on the issue of matrimonial properties and make a decision on the Appellant's contribution toward a house with five rooms.

On the claim that the Appellant should institute a land case against the Respondent's mother she submitted that, her claim is not on ownership rather on joint acquired property which is a house with five rooms located at Sumawe. On the Respondent's prayer for waiver of the outstanding maintenance costs, the Appellant insisted that as the Respondent did not appeal against order for maintenance the same cannot be granted.

Having gone through the lower court records and the submissions by the parties, let me determine the very ground of appeal which is division of matrimonial properties. I agree with the submission by the Appellant that the law requires the court while granting or subsequent to

grant of decree for divorce to also issue among other orders an order for division of matrimonial properties. Read section 114 of the Law of Marriage Act. In number of cases, this court and the Court of appeal had made a thorough decision on definition of matrimonial properties. Basically, matrimonial properties will include all properties acquired during the subsistence of marriage or those acquired before but developed during the parties' marriage.

However, there is a clear principle that after determining that the certain properties are matrimonial properties, the court while making an order for division has to also consider the extent of contribution for each part before deciding the share each party is entitled.

In the present matter, the trial court made a decision that the alleged house was not a matrimonial house thus it did not need to go to the determination of the extent of contribution for each party. As well pointed out by the Appellant, this court being the first appellate court have mandate to re-evaluate the evidence and see if there was anything left behind by the trial court which denied parties their right. Based on that request I recaptured the following;

The Appellant admits that when she married the Respondent they were living in rented house. They were given a plot by her mother-in-law

and they moved in a two-rooms house built by the Respondent. She however did not state if that house was built by the Respondent after they were married or before and does not claim for that house. Her claim is for the house with five rooms which she claims was built with joint effort between her and the Respondent during their marriage. Her evidence reveals that while the Respondent was a casual labourer with no permanent employment the Appellant had permanent and was earning money which she contributed in building the house with five rooms and paying for children school fees.

The Respondent denied to have built a house with the Appellant and he was supported by his sister to testify that the house with five rooms was built by the Respondent's mother. His evidence however reveals something different and for easy of reference I would like to reproduce part of the Respondent's evidence at page 11 of the typed proceedings which read: -

"... Our house was small so we requested our parents to sell a small part for want of increasing another building. We agreed to build that house near the electric pole for our house which we lived in had no electricity and was far from the poles. We succeeded to build that building under the supervision of parents. After years we moved back to our business and to the previous house. All these were

agreement between I and my wife. It was never a one-sided decision."

With that evidence it becomes clear that despite the fact that the plot of land was given to them by the Respondent's mother, the Appellant contributed in the construction of five rooms house and the claim that the house belong to the Respondent's mother is unfounded. The Respondent's evidence also reveals that they sold part of the land given to them by their mother and purchased a land at another place which they also decided to sell and buy the motorcycle. The Respondent tried to raise the issue that the plot was not given to them permanently but still agree that they were able to sell part of the land for their development including buying another plot and then a motorcycle. Literally, all those could not be done by them if they had not acquired good title from the Respondent's mother. The conduct of the Respondent and the Appellant towards the land that was given to them by the Respondent's mother suggest they were fully given that land. Thus, in the absence of any clear evidence suggesting otherwise, the Respondent cannot come with an excuse that development done there in does not concern the Appellant on account that the land was given to them by his mother. Similarly, no proof that the house was built by the Respondent's mother and the Respondent himself admitted that the house was built by them under the supervision

of their parent though did not mention the kind of supervision they sought from their parents.

That being the case, it is my conclusion that the trial court was wrong to make a conclusion that the Appellant did not prove that there was matrimonial property acquired during their marriage. In my view, the house with five rooms located at Sumawe area within Karatu District is a matrimonial property.

Having said so it takes me to the determination of the extent of contribution and shares each part is entitled to the matrimonial property. The evidence by the Appellant that she contributed to the construction of the house was equally supported by her brother and the Respondent himself who admitted that the Appellant was working and running a business which, he joined her to run. He also admitted that the Appellant's income increased and they decide to take their children to a better school. He also admitted that the Appellant is the one paying to children school fees as he could not afford paying for private schools. This suggest that the Appellant apart from being the wife had financial capacity thus contributed towards acquisition of the matrimonial properties. I therefore find that it will be fair for the Appellant to be considered to have equally contributed to the acquisition of the matrimonial house.

On the Respondent's prayer for waiver of the outstanding maintenance costs, I concur with the Appellant submission that this is not among the grounds of appeal or issues brought before this court for determination. I will not therefore labour much to discuss the same.

In the upshot, I find this appeal to have merit hence allowed. The Appellant is entitled to half share of the matrimonial house with five rooms located at Sumawe are within Karatu District. Other orders of the order by the district court remain undisturbed. In considering that this is matrimonial matter, I make no order as to costs.

DATED at ARUSHA this 24th Day of May 2022

 
D.C. KAMUZORA
JUDGE