

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO.35 OF 2021

(C/F Matrimonial Cause No. 7 of 2020 at the Resident Magistrates' Court of Arusha at Arusha.)

LAANYUNI SUMUNIAPPELLANT

VERSUS

HELEN ELISA.....RESPONDENT

Date of last Order: 30/3/2022

Date of Judgment: 16/5/2022

B.K.PHILLIP,J

JUDGMENT

The Appellant herein being aggrieved by the judgment of the Resident Magistrates' Court of Arusha at Arusha lodged this appeal on the following grounds;

- i. That the learned trial Magistrate erred in law and in fact for not considering at all evidences adduced by the Petitioner (Appellant herein) and his Witnesses. ♥*
- ii. That the learned Magistrate erred in law and fact for failing to put proper records of the evidence adduced by the parties.*
- iii. That the learned trial Magistrate erred in law and in fact for ordering division of properties which are in dispute with another third party*

and the matter is pending for determination before a competent court of law.

- iv. That the learned trial Magistrate erred in law and in fact for leaving out without ordering division of some matrimonial properties which were pleaded by both parties.*
- v. That the learned trial Magistrate erred in law and in fact for the Appellant is ordered to take a property which is not a matrimonial one hence left the Appellant with nothing.*

A brief background to this appeal is that , the parties in this appeal got married in the year 1986 in Arusha. They had a peaceful marriage until 2008 , when their marriage encountered problems which resulted into serious misunderstandings between them. Each party blames the other party as being the source of the misunderstanding between them. Suffices to say that from 2008, conflicts became part of their marriage life. They had serious conflicts which involved threats and physical abuse to the extent that some of the incidences had to be reported to the police. The facts stated in the case reveal that the appellant has been staying in Denmark. However, he used to come to Tanzania to his family. Due to conflicts between him and the respondent he stopped going his family. After staying in separation for a long time the appellant lodge a petition for divorce at the Resident magistrates' Court of Arusha in which he prayed for the following reliefs;

- i) That the marriage between the petitioner and the respondent has been irreparably broken down.*

- ii) A decree of divorce be issued in favour of the petitioner.*
- iii) Division of matrimonial assets.*
- iv) An order that the Government Revenue due unpaid on the rented houses be paid by the respondent.*
- v) Costs of the petition.*
- vi) Any other reliefs this Court may deem fit and just to grant.*

In the petition for divorce the appellant stated as follows; That their marriage was blessed with one issue, namely Merkinoi Laanyuni, 32years old. During the subsistence of their marriage they jointly acquired the following properties;

- i) Twenty (20) rooms for renting located at Sanawari site Arusha.
- ii) One family House (matrimonial House) located at Kijenge Arusha.
- iii) Five (5) renting rooms for shops located at Kijenge Arusha.
- iv) Three (3) renting rooms for living located at Kijenge , Arusha.
- v) Two (2) Motor Vehicles, Model Suzuki, T780 MS and Suzuki T404 APE.
- vi) Furniture and other households worth Tshs 15,000,000/=

In her reply to the petition, the respondent did not object to the 1st, 2nd and 3rd prayers. She averred as follows; That the appellant omitted to mention a 15 Acres farm located at Monduli which was also jointly acquired during the subsistence of their marriage. She contributed so much in the acquisition of the matrimonial properties in terms of money, supervision and follow ups because she was working at YMCA and

thereafter Equatorial Tours Company up to 2017 whereas the appellant was in Denmark for a long time.

The petition was heard inter-parties. The appellant testified as PW1 and his testimony was supported by other three witnesses. The respondent was the only witness for the defence case. She testified as DW1. In the determination of the petition, the trial Magistrate framed three issues, to wit;

- a) Whether the marriage was irreparably broken.*
- b) Whether the matrimonial assets were jointly acquired.*
- c) Whether each party is entitled to equal share.*
- d) What reliefs are the parties entitled to.*

In its judgment the trial Court granted the decree for divorce and ordered the division of the matrimonial assets as follows;

- i) That the petitioner/appellant to remain with the three bed room house and two rooms mad house located within 15 Acres farm located in Monduli Juu.
- ii) That the respondent to remain with a house located at Kijenge Juu with three bed rooms for residential and five commercial rooms.
- iii) That the House located at Sanawari be valued and sold. The proceeds thereof be divided equally between the appellant and the respondent. That the parties to the case are given first priority, that is each one of them has a right to buy that house and

compensate the other party the appropriate purchase price as per the valuation report.

- iv) That the valuation report should be filed in Court for record keeping.
- v) Each party has to bear its own costs.

I ordered this appeal to be disposed of by way of written submissions. The learned advocates Yonas Masiaya Laizer and Ezra J. Mwaluko appeared for the appellant and the respondent respectively. Both filed their written submissions as ordered by the Court.

Mr. Masiaya abandoned the 2nd ground to appeal. Thus, he submitted for four grounds of appeal only. Submitting on the 1st ground of appeal, Mr. Masiaya, contended that the trial Magistrate, did not consider the some of the evidence adduced by the appellant and his witnesses which resulted into miscarriage of justice. Expounding his arguments on this ground, he pointed out that at pages 21 and 22 of the typed proceedings, it is clearly indicated that the appellant testified that they jointly acquired two motor vehicles , rooms for renting located at Kijenge and Sanawari, a plot at Sanawari and that the property located at Mbulu Juu is subject of a case pending before the District land and Housing Tribunal.(Henceforth "the Land Tribunal") Mr. Masiaya contended that the trial Court did not evaluate the above stated evidence. Out of surprise it included in the division of Matrimonial properties the property which is a subject of the case pending before the Land and Housing Tribunal as evidenced by Exhibit P6. Relying on the case of **Hussein Iddi and another Vs Republic, (1986) TLR 166**, Mr. Masiaya insisted that it is imperative

that the Court has to consider and evaluate all of the evidence adduced by both sides. The lower Court's decision is erroneous as it did not take into consideration the evidence adduced by the appellants, contended Mr Masiaya.

With regard to the 3rd ground of appeal, Mr. Masiaya argued that the trial Magistrate erred to include in the division of the Matrimonial Property, the property located at Monduli Juu because the same is a subject of the case which pending at the Land Tribunal (Application No.373 of 2017), as evidenced by Exhibit P6 which was tendered in Court by the Appellant. The pendency of the aforesaid case was admitted by the respondent. Masiaya referred this Court to page 22 of the typed proceedings to bolster his argument. He contended that the aforesaid property belong neither to the appellant nor the respondent as the dispute on its ownership is still pending before the Land Tribunal. The trial Court was not supposed to make an order in respect of that property since the issue pertaining to the ownership of the same is *res-subjudice*. To cement his arguments he cited the case of **Exim Bank (Tanzania) Limited Vs Bhesania Garage Limited and four others (2016) , TLSR 440**. Mr. Masiaya argued further that the trial Court's Order in respect of the aforesaid property is erroneous and will bring confusion, and miscarriage of justice since it will render the said Land Application No. 373 of 2017 nugatory.

With regard to the 4th ground of appeal, Mr. Masiaya, submitted as follows; That the trial Court did not include in the division of the matrimonial properties some of the properties which were jointly acquired to wit; Motor Vehicles with registration Numbers T404 APE and T780 MS, a plot located

at Moivo Sanawari, furniture and other households worth Tshs 15,000,000/=.He pointed out that all of the above mentioned properties are in the possession of the respondent. Thus, the appellant has been denied his share in the said properties which were acquired jointly, contrary to the legal principles pertaining to the distribution of Matrimonial property which are based on the principle of compensation. To cement his argument he cited the case of **Pulcheria Pundugu Vs Samwel Huma Pundugu (1985)TLR 7** and **Wilson Ishengoma Vs Florence Ishengoma, Matrimonial Appeal No. 01 of 2020, HC-Bukoba**, (unreported).

Mr.Masiaya's arguments in respect of the 5th Ground of Appeal are basically similar to the arguments he made in the 4th ground of Appeal since the same are all related to the trial Magistrate's Order in respect of the property that is alleged to be a subject of a case before the Land Tribunal. Mr.Masiaya's concern in this ground of Appeal is that if at the end of the case the Land Tribunal rules out that the said property belongs to the 1st respondent, then the appellant will be left without anything, which will be a gross deprivation of his right over the matrimonial properties he contributed dearly in their acquisition.

In conclusion of his submission, Mr. Masiaya implored this Court to allow this appeal and order re-division of the Matrimonial properties to the effect that the appellant should take the house for renting located at Sanawari and one of the Vehicles.The respondent should take the matrimonial house and the rooms for renting at Kijenge, pay to the appellant Tshs 7,000,000/= being part of value for furniture and other

households. The Plot at Moivo Sanawari should be sold and the proceeds thereof should be divided equally to the appellant and the respondent.

In response, the respondent's Advocate Mr. Ezra Mwaluko, supported the decision of the trial Court. He made a general response to all grounds of Appeal. He contended that the decision of the trial Court is correct as per the evidence adduced by the respondent which proved that all of the matrimonial properties which were distributed by the Court were jointly acquired by the appellant and the respondent. With regard to the property located at Monduli Juu which is alleged to be a subject of the land Application No. 373 of 2017, Mr. Mwaluko contended that the trial Magistrate's decision to include it in the division of the matrimonial property cannot be faulted because the respondent adduced ample evidence that same is among the matrimonial properties. He referred this Court to Exhibit D4, in which it is stated that the farm located at Mbulu Juu belongs to the appellant and the respondent. He went on submitting that the said Land Application No. 373 of 2017 was filed before the Land Tribunal by the respondent after the Appellant started claiming that the said land at Mbulu Juu belongs to his mother. However, looking at the evidence adduced in this case, there is ample evidence that the said farm was part of the matrimonial properties jointly acquired by the appellant and the respondent, that is why the trial Magistrate included it in the list of matrimonial properties and ordered the same to be taken by the appellant.

In addition to the above, Mr. Mwaluko conceded that the trial Court did not include in the division of the matrimonial properties the undeveloped

plot that is located at Sanawari. He prayed that the same should be sold and the proceeds thereof be divided equally between the parties herein.

Moreover, it was Mr. Mwaluko's arguments that the trial Court did not make any order for the division of the two motor vehicles because no evidence was adduced to prove that they are still into existence. With regard to the division of the furniture and other household items, Mr. Mwaluko contended that the trial Court did not make any order in respect of the same because the house at Monduli juu which was ordered to be taken by the appellant has furniture and other households items. Thus, it was correct for the furniture and other household items at Kijenge to remain intact. Mr. Mwaluko prayed that the lower Court's order should not be varied save for the prayer he made in respect of the undeveloped plot located at Sanawari.

In rejoinder, Mr. Masiaya reiterated his submission in chief and added that the evidence adduced at the hearing cannot be a proof of ownership of the plot at Monduli Juu since there is a dispute over the ownership of the same pending for hearing at the Land Tribunal. He insisted that currently the premises in the said plot is under the possession of the appellant's mother and his son. The appellant was sending money from abroad for the construction of that premises for his mother as most of the people normally do. In addition, Mr. Masiaya pointed out the following; That the appellant contributed to the acquisition of the furniture and other household items at Kijenge house. He deserves to be given part of the same. The House at Monduli Juu is occupied by other people. Thus, it is not correct to assume that the appellant will have his share of the

furniture and other household's item at Monduli Juu premises. Also, he contended that at Monduli Juu premises there are no furniture worth the name.

Having analyzed the submissions made by the learned advocates and perused the Court's records, before going into the determination of the grounds of appeal, let me point out that the grounds of appeal raised by the appellant can be reduced into two grounds only. As it can be noted from the submission made by Mr. Masiaya, his arguments in respect of the 3rd and 5th grounds of appeal are intertwined. They were all centered on one ground that is; *The trial Court erred in law to include the properties located at Monduli Juu in the division of the matrimonial property while there is a case at the Land and Housing Tribunal in respect of the ownership of the same that is pending for hearing*. The 1st and 4th grounds of appeal are all based on the analysis and consideration of the evidence adduced by the parties. These two grounds can be reduced into one ground, to wit; *That the trial Court erred in law and fact for failure to properly analyze and consider the evidence adduced as a result arrived at an erroneous decision and did not issue any order for the division of some the matrimonial properties*.

From the foregoing, in the determination of this appeal I shall confine myself to the two grounds stated herein above which are broad enough to capture all the arguments raised by the learned Advocates.

Now, starting with the 1st ground which is in respect of the plot located at Monduli Juu, the evidence adduced by both sides shows that there is case

pending at the Land Tribunal of Arusha at Arusha (Application No.373 of 2017). The Copy of the said Application was tendered in Court by the Appellant and was admitted as Exhibit P6. The Proceedings show that there was no any objection on the admission of Exhibit P6. Upon perusing the contents of Exhibit P6, I noted that the same was filed by the respondent herein against her mother in law (1st respondent) and the appellant herein (2nd respondent). The dispute therein is on the ownership of the farm located at Monduli juu which is the subject of this appeal too as it is claimed to be one of the matrimonial properties jointly acquired by the parties herein. In short, in the said Application No. 373 of 2017 , among the prayers made by the applicant (the respondent herein) is the declaration that the farm at Mbulu Juu belongs to the appellant and the respondent. As per the evidence adduced, there is no proof that the said Application No. 373 of 2017 has been determined. In his submissions Mr. Masiaya indicated that the said application is not yet determined and that assertion was not disputed by Mr. Mwaluko. Under the circumstances , I can safely make a finding that the said application is still pending for hearing at the Land Tribunal and it was filed prior to the petition, the subject of this appeal.

From the foregoing it has to be noted that, since there is a case pending at the Land and Housing Tribunal, the ownership of the Plot at Monduli Juu shall be known after the determination of the application at the Land Tribunal. Neither the trial Court nor this Court can make any order on whether or not the farm located at Monduli Juu is a matrimonial property. It follows therefore that Mr. Mwaluko's argument that in this case

the respondent tendered sufficient evidence to prove that the farm at Monduli Juu is among the matrimonial properties is misconceived. I am in agreement with Mr. Masiaya that the trial Court erred to include the farm located at Monduli Juu in the distribution of the matrimonial properties. Exhibit D4 which Mr. Mwaluko relies upon in his contention that the farm located at Monduli Juu is a matrimonial property cannot be of any help in this appeal because the dispute over the ownership of that farm is already before the Land Tribunal. The same was not supposed to be dealt with in the petition for divorce. In other words, as correctly submitted by Mr. Masiaya, that issue is *res subjudice*.

In the upshot it is the finding of this Court that the trial Court erred in law and fact to include the farm located at Monduli Juu in the division of the matrimonial properties. In fact, the learned advocates would have moved the trial Court to stay the proceedings in respect of the division of the matrimonial properties pending the determination of the said Application No. 373 of 2017. It was imperative to stay the proceedings for the division of the matrimonial properties to await the decision of the Land Tribunal on who is a rightful owner(s) of the farm located at Monduli Juu. The trial Court was supposed to grant the order for divorce only since the same is not contested by the respondent and the issue on the division of the matrimonial properties was supposed to await the determination of the dispute over the ownership of the farm located at Mbulu Juu.

Since I have made a finding that the trial Court was supposed to stay the proceedings in respect of the division of matrimonial properties pending the determination of Application No. 373 of 2017, I do not see any

plausible reasons to proceed with the determination of the second issue on analysis and evaluation of evidence adduced. Under the circumstances, I am compelled to nullify the proceedings of the trial Court in respect of the division of the matrimonial properties as I hereby do. The proceedings in respect of the division of the matrimonial properties are hereby nullified and the order for the division of the matrimonial properties is hereby set aside. The petition has to be tried *de novo* before another Magistrate. The trial *de novo* has to await the determination of the land Application No. 373 of 2017. I give no order as to costs.

Dated this 16th day of May 2022.




B.K.PHILLIP
JUDGE