

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)**

AT MTWARA

PC. CIVIL APPEAL NO.19 OF 2021

*(Originating from Matrimonial Appeal No.3 Of 2021 Nachingwea District Court,
arising from matrimonial cause No. 7 of 2021 from Nachingwea Urban Primary Court
at Nachingwea).*

JUMA OMARY CHONDE APPELLANT

VERSUS

AZIZA RASHID RESPONDENT

*Date of last order: 29/03/2022
Date of Judgment: 30/05/2022*

JUDGMENT

MURUKE, J.

Aziza Rashid, filed matrimonial dispute at Nachingwea Urban Primary Court, petitioning for divorce and distribution of matrimonial properties. Trial court awarded applicant(respondent) 30% value of the matrimonial house, ½ share of farm, plot located at Namapwiya, one bicycle and ½ of the all house utensils. While 70% share of matrimonial house, plot located at Naipanga, one motorcycle and ½ of house utensils awarded to respondent (appellant).

Dissatisfied with that decision, respondent filed Matrimonial Appeal No. 03 of 2021 at Nachingwea District Court, in which the first appellate court decided in favour of the respondent by ordering Matrimonial asserts to be divided 50%. Appellant was dissatisfied thus, filed present appeal raising three grounds namely:-



1. That the first appellate court erred in law and facts in ordering equal distribution of properties without considering the contribution of each party in acquisition of the same.
2. That the first appellate court erred in law and facts in ordering re-division of properties equally without considering who is responsible for payment of the debts incurred in the acquisition of the said properties.
3. That the first appellate court erred in law and facts in disregarding the decision of Nachingwea Urban Primary court without analyzing the evidence on record.

On the date set for hearing, both appellant and respondent appeared in persons, thus, argued their case orally. In his submission appellant argued that, most of the property were acquired through loan. He took loan four times. Respondent contributed 1,000,000/= Tshs. Plot at Naipanga with is 500 blocks, acquired from last loan agreement, ending on 2024. Motorcycle was bought by sell of sim sim. Plot at Namapuya was bought through salary. Shamba of 15 acres only 6 acres there is cashew nut trees bought through loan. Home utensils were bought through allowance. Division was not proper. Respondent took loan and constructed their family house, so all what we acquired together was from the appellant who took loan while working as a teacher. Plot at Naipanga with 500 blocks was acquired from the first loan which was consolidation with the previous loan ending on 2024. He said, even house loan he is still paying to date. Respondent took loan, but she built house for their family. Appellant insisted that he is the one paying school fees and up keeping of the issues of marriage. In the end, he prayed to the court to consider records from primary court and reevaluate evidence.



In reply, respondent argued that, she contributed to the house of Nachingwea she took loan three times, and contributed in the acquisition of matrimonial asserts. Respondent also took loan used for contribution in the acquisition of matrimonial asserts. She added that, they have two children appellant is not taking care of them. She however admitted that, appellant contributing Tshs 200,000/= for upkeep of issues of marriage after every three months through social welfare. She insisted this court ordered equal division of matrimonial asserts.

In rejoinder appellant submitted that, evidence of purchase of plots and shamba are very strong in terms of trial court records. Respondent witnesses were not reliable, but his evidence was reliable. He insisted that, loan was used for construction of the house, buying plots and shamba. They were acquired through loan agreement. For the two issues of marriage, he is paying respondent Tshs 250,000/= as maintenance every three monthly.

Having heard both parties' submission on grounds of appeal, and gone through records of trial court and first appellate court, the issue to be determined is whether the matrimonial properties were properly divided. Before going in detailed, let me first clarify the meaning of matrimonial properties, and important factors to be considered by court when dividing matrimonial properties. According to **Duhaimes Law Dictionary** defined matrimonial property as;

"Property owned by one or both of two persons who are married to one another which, upon the application of one of the spouses to a court, is subject to division between them."

Similar definition was defined at <https://www.nsfamily.ca.married> to mean;



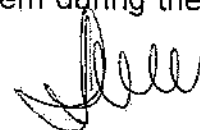
"Matrimonial property is property owned or obtained by either or both married spouses before or during their marriage. It is sometimes called matrimonial assets. Matrimonial property includes matrimonial home, the home that the couple lived in during their marriage."

Before dividing the matrimonial properties court in terms of evidence reproduced has to determine whether the property claimed are matrimonial asset or property, consideration must be had on ownership of the said property and contribution of the parties towards acquisition or improvement of the properties. This court (Kalegeya, J as he then was) endeavored to give a definition of a matrimonial asset/property in the case of **Mrs. Grentina Kabisa Mwakyami v. CRDB Bank Limited & 4 others, Commercial case No.51 of 2000 Dar es Salaam**, (unreported) where he said:-

"Although the term 'matrimonial home' is defined in the Law of Marriage Act... 'matrimonial property' is not. However, the obvious and logical interpretation of the latter is that this presupposes established or actual rights/interests of the spouse springing from 'joint ownership' element as opposed to deemed interests..."

There is no dispute that all properties mentioned are matrimonial properties, from both appellant and respondent evidence are matrimonial properties. It is now safe to consider division of the matrimonial property. In doing so, consideration must be had to the extent of contribution by each party, towards acquisition of matrimonial assets and other factors as provided under section 114 (1) and (2) of the Law of Marriage Act that reads:-

114 (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the



marriage by their joint efforts or to order the sale of any such asset and the division between the parties of proceeds of sale.

(2) In exercising the power conferred by subsection (1), the court shall here regard:

(a) To the customs of the community to which the parties belong.

(b) To the extent of the contribution made by each party in money, property or work towards the acquiring of the assets.

Under section 114 (3) of the Law of Marriage act, and section 161 (2) of the Land Act, Matrimonial properties includes assets owned by one spouse before marriage but substantially improved by the other or by joint efforts during marriage, or to which the other spouse has contributed by her effort. Efforts to recognize contribution made by another spouse in supervision of building of matrimonial house was discussed in the case of **Jane Gilbert Uriyo Vs Gilbert Urio 1982 TLR 355**, where Mzavas, as then was JK, held that;

Supervision of building of a matrimonial house is legally contribution to the acquisition of the said property.

In the same principal, High Court at Dodoma in the case of **Anna Kanugha v. Andrea Kanugha, 1996 TLR page 195 Mwalusanya J.**, held that;

(i) Personal property is liable for distribution in terms of section 114 (3) of the Law of Marriage Act, when such property has been substantially improved during the marriage by the joint efforts of the spouses.



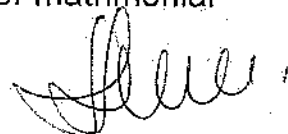
- (ii) There was evidence to suggest that some cattle were purchased during the subsistence of the marriage with the proceeds of crop sales.

Kenya was faced with a situation and circumstances similar to the one in this case, in the case of **Gissing v. Gissing [1970] 2 ALL ER 780**, the Kenya Court of Appeal held that:-

"Where the disputed property is not registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution, either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made substantial but unascertainable contribution, it may be equitable to apply the maxim 'equity is equality.'"

I am aware that the cited decision is only of persuasive value and does not bind this court. However, I find it to be good law applicable in the circumstances of this case.

It is on record and not disputed by appellant that, when Respondent left to her parents, she left all issues of marriage, I understand and appreciate appellant efforts in acquisition of matrimonial properties while married with Respondent. Netherless, division has to consider other factors apart from contribution like who is in custody of the issues of marriage and maintenance costs. In **Civil Appeal No.79 of 2013** arising out of **Matrimonial cause No.11/2011** between **Rozemary Stella Chombe Jairo Vs. David Kitundu Jairo Dar es Salaam registry** (unreported) while condemning costs of school fees to the two issue of marriage studying at South Africa, while ordering division of matrimonial properties, High Court held that:-

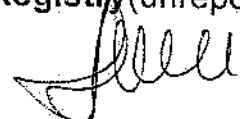


However, it is worth considering respondent responsibility of maintaining and paying school fees, for the two issues studying outside the country South Africa.

In this appeal, the tag of war arose where the trial court ordered respondent be awarded 30% of the share of the matrimonial house and appellant 70%. The evidence on records shows that all the properties acquired during the existence of their marriage through loans and other sources of income, like seminars, salaries and money obtained from farm proceeds. However, the respondent petitioner at the trial never explained in detailed with necessary documents to prove her contribution. She only testified generally that she was contributed to the acquisition of matrimonial properties. She never tendered any receipts to proof the amount of loan borrowed by her as contribution in the acquisition of matrimonial properties.

I understand that even if she did not contribute anything in terms of money, only being a wife of appellant, she is entitled to division of matrimonial properties, but she had a duty to prove her assertion that she used to take loan to contribute in the acquisition of matrimonial properties. Appellant explained clearly in details how he contributed in the acquisition of matrimonial properties. He tendered various documents to justify the amount of money (loan) borrowed from different banks in different period of time. Trial court admitted Annexures K to Annexure K5 which proved the amount of money taken by appellant.

Nevertheless, division has to consider other factors apart from contribution, like who is in custody of the issues of marriage and maintenance costs. In Civil Appeal No. 79 of 2013 arising out of Matrimonial Cause No. 11/2011 between **Rozemary Stalla Chombe Jairo Vs. David Kitundu Jairo, Dar es salaam Registry** (unreported)

 7

while condemning costs of school fees to the two issues of marriage studying at South Africa, while ordering division of matrimonial properties High Court held that: -

"However, it is worth considering respondent responsibility of maintaining and paying school fees, for the two issues studying outside the country South Africa."

In this case at hand, appellant is the one paying fees of the two issues of marriage, maintaining them. More so, he is the one paying loan for the matrimonial house located at Nachingwea and plot with 500 blocks located at Naipinga, the said loan will end on 2024. Notably, the evidence on record is very clear interning Annexure K4(salary sleep), after loan deduction appellant remains only with Tshs 314,870/= net salary the amount appellant paying as up keeping is rent process from house at Nachingwea one of the matrimonial properties. Same to be valued, any of the parties to refund the other his/her share, at the percentage ordered by trial primary court. I understand, it is very difficult to divide matrimonial properties in prices terms, however to meet end of justice to this appeal, I quash the decision of the first appellate court in Matrimonial Appeal No. 03 of 2021 with its orders. I therefore uphold the decision of the trial court with above variations. From the nature of this case each party will bear own costs.



Z.G. Muruke
Z.G. Muruke

Judge

30/05/2022

Judgment delivered in the presence of Applicant and Respondent both in the persons.



A handwritten signature in blue ink, appearing to read "Z.G. Muruke".

Z.G. Muruke

Judge

30/05/2022