

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA

MATRIMONIAL APPEAL NO. 10 OF 2021

(Originating from Matrimonial Cause No. 5 of 2020 of the Mbeya District Court)

Between

BRIGHDON MWAMBALASWA APPELLANT

VERSUS

NISILE GIDION MWAMBEBULE RESPONDENT

JUDGMENT

Date of last order: 18th March 2022

Date of judgment: 20th May 2022

NGUNYALE J.

On the 23rd day of August, 1997 Brighdon Mwambalaswa and Nisile Gidion Mwambebule, who are the appellant and the respondent herein respectively, celebrated their marriage under Christian rites at KKKT Lutheran Church at Ipinda- Kyela, as evidenced by the marriage certificate which was admitted in evidence as exhibit P1. Their marriage was thereafter blessed with three issues. In 2020 the respondent, petitioned for divorce advancing five reasons which were listed in paragraph 8 and 9 of the petition notably, the appellant failure to take care of the family

including to pay school fees and food, change of behaviour by being short tempered and cruelty for beating the respondent, deserting the matrimonial home and lack of conjugal right for five years. It was contended further by the respondent in her pleading that efforts to settle the dispute with the appellant through amicable means by involving the Ward Conciliation Board had proved futile. A certificate issued by the Conciliation Board of Kalobe on the 2nd March, 2020 certifying that it had failed to reconcile the disputants was attached to the petition and not disputed by the appellant.

The respondent prayed for the Court to grant the following reliefs that is; **one**, dissolution of marriage; **two**, matrimonial assets to be valued and auctioned and the proceeds thereon to be divided equally; **three**, general damage of Tsh. 80,000,000/= to be paid by the appellant for hurting the respondent's feelings which have inflicted pain and suffering to the respondent; **four**, payment of arrears of maintenance for the upkeep of the family at the rate of Tsh. 500,000/= per month, reimbursement of education expenses paid at Mbalizi secondary for two years Tsh. 1,600,000/= and certificate and diploma at Mipango Dodoma Tsh. 1,000,000/= for three years to the issues of marriage, **five**, costs and **six**, any other reliefs that the honourable Court might deem fit and just to

grant. To establish her claims, the respondent relied on her own sworn testimony, which was supplemented by the testimonies of three witnesses namely, Alphonse Mwansabule(PW2), Philomon Kaduma(PW3) and Saimon Mwabulanya (PW4).

On his part, the appellant resisted almost all the claims advanced by the respondent save for the information concerning celebration of their marriage, issues of the marriage, referring the matter to marriage reconciliation board and some properties. To support his defence, apart from his own sworn testimony, he lined up one witness Atupele Andendekisye Lusasale (DW2).

From the pleadings which were lodged in Court by either party, the learned trial Resident Magistrate, framed the following three issues for determination that is;

- 1. Whether there was marriage between the parties.*
- 2. Whether the petitioner contributed toward acquisition of the properties for the Court to make decision.*
- 3. To what reliefs was each of the parties to the petition entitled.*

Upon hearing and analysing the evidence which was placed before her from either side, the finding of the trial Resident Magistrate in respect of the first issue was answered in affirmative, the marriage was dissolved. The second issue was answered also in affirmative and the matrimonial

properties were ordered to be equally shared. The Court placed Light Brighton in the custody of the petitioner while the appellant was duty bound to provide for their accommodation.

The decision of the trial Court aggrieved the appellant, knocked the door of this Court armed with six grounds of appeal namely;

- 1. That the trial Court erred in law and fact for ordering equal distribution of the matrimonial properties without considering the issue of contribution made by each spouse to ward acquisition of the same.*
- 2. That the trial Court erred in law and fact by ordering sale and equal division of the unfinished house as Itezi in disregard to the fact that I am the one who bought the plot and built the same by using a loan which is supposed to be in full by 2024.*
- 3. That the trial Court erred in law and fact by reckoning and treating that the plot of land that I bought at Ipinda Kyela are two plots hence rendering unequal division of the matrimonial property.*
- 4. That the trial Court erred in law and facts when it failed to order division of pharmacy business which is at Mbalizi which business we trade in the name of Lulu Medical Store named after our first-born child. We started the said business in 2000.*
- 5. That the trial Court erred in law and facts by ordering division of plots of Mwashiwawala Mbalizi which we bought in the name of the daughter in disregard to the fact that one plot was sold to enable*

us pay school fees for our children, hence I have been given another ghost plot.

6. That the trial Court erred in law by its failure to analyse and evaluate evidence adduced before it hence arriving at unjust decision.

On the date called on for hearing the appeal, parties appeared in person, had no legal representation. By consensus of the parties disposal of the appeal took the form of written submission, consistently complied with the scheduled order of the Court.

The appellant joined the first and second grounds and submitted that the house at Itezi was bought through a loan which have to be repaid until 2024. He added that while pursuing degree he secured a loan from loan board instead of buying a motor vehicle he bought a house at Itezi. He continued to submit that he took loan from Tanzania Postal Bank, NMB and Walimu Saccoss. He complained also that division was ordered without valuation of the property.

Third and fifth grounds were also consolidated the appellant submitted that at Ipinda there is only one plot, though they bought them on two occasions but it has been joined to form one plot hence it was an error to treat as two different plots. He further added that even at Mwashiwawala there is only one plot which they sold for getting school fees for their children, he was therefore given a ghost plot.

Regarding Lulu Pharmacy in fourth ground, he argued that they started the said business in 2000 after he secured a loan of Tsh. 3,000,000/= from Walimu Saccos Society where 2,000,000/= was injected into that business and 1,000,000/= was utilised for university education. He faulted the trial Court for not ordering its division.

In sixth ground, he submitted that there was no documentary proof how the respondent contributed to ward acquisition of matrimonial properties contrary to the appellant who tendered the same. He contended that it was unjust to order equal distribution for he has a duty to pay school fees, pocket money and clothes for their children. In that regard he added that the respondent was given a lion share though she failed to prove the case.

In reply the respondent submitted that there was no proof that the house at Itezi was bought through a loan as such the property is presumed under section 60 of the Law of Marriage Act [Cap 29 R: E 2019] a matrimonial asset and each has equal share. He cited the case of **Bi Hawa Mohamed v Ally Seif** to bolster her point. The respondent further refuted the claim that the house was built using a loan from loan board as the same do not issue such loan. She added that no loan agreements were tendered to prove the appellant's allegation.

Regarding properties at Ipinda, the respondent submitted that there was evidence from DW2 that there were three plots at Ipinda and not one plot as alleged by the appellant.

As for Mwashiwawala plot the respondent submitted there were two plots but they sold one and remain one which he doesn't know if it was sold. She added that under section 59 of the Law of Marriage Act and 114 of the Land Act [Cap 113 R: 2019] her consent was to be obtained.

Regarding the Pharmacy at Mbalizi the respondent submitted that it was in her name and her sole property under section 59 of the Law of Marriage Act.

Regarding evaluation of evidence in sixth ground, the respondent argued that division depends on efforts towards the acquisition of the matrimonial property. She added that the appellant was the source of breakdown of marriage hence entitled to no share. She relied on the case of **Bi Hawa Mohamed**(supra) and **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293. She argued this Court to re-evaluate evidence.

The appellant had nothing useful to add in her rejoinder apart from restating what he stated during submission in chief.

I have passionately considered grounds of appeal, records of the lower Court and rival submissions and found that the only issue the Court is called to determine is whether the trial Court order for division of matrimonial property was after considering contribution of each party.

It has to be noted that in this appeal the order for dissolution of marriage, custody of Light Brighdon aged 14 years and payment of school fees, pocket money and clothes is not faulted by appellant even the respondent as there is no cross appeal.

In the pleadings the petitioner/respondent listed under paragraph 14 properties subject for division. In the reply to petition the appellant noted existence of plots at Ipinda, Itezi and Ngyeke, regarding Mwakapangala plot he asserted that there is only one plot. The appellant pleaded that the pharmacy at Mbalizi and bank account had been not included as alleged in paragraph 8(v) of the reply to the petition. In its judgment the trial Court ordered a house at Ipinda, 2 plots at Ipinda and a plot at Mwashiwawala to be given to appellant while the respondent was given a house at Kalobe, farm at Ngyeke near Matema Beach and plot at Mwashiwawala while the unfinished house at Itezi was ordered to be sold and money to be shared equally.

It has to be noted that determination of the share of matrimonial property to be divided to the parties upon dissolution of the marriage is purely a matter of fact which will depend on weight of evidence given regarding contribution of each party in acquiring them. The side with heavier, reliable and credible evidence will obviously take a lion share and the one with weak and questionable evidences may lose or take a lioness share.

The appellant's complaint is in regard to plot at Ipinda, Mwashiwawala, Itezi and the pharmacy at Mbalizi. In resolving the issue, I will start with the plot at Mwashiwawala, there is no evidence that there were two plots at Mwashiwawala. On the other hand, there is evidence from both parties that the said plot was sold. From the evidence given it is not clear if the Mwashiwawala plot is the same which was pleaded to be located at Mwakapangala. Be it as it may, I agree with the appellant that there is no plot at Mwashiwawala which was in existent for division to the parties after it had been sold.

Regarding the house located at Itezi, there is no evidence that the appellant bought it through loan. There was no documentary evidence tendered to prove the same. All documents tendered by the appellant were not connected to the house at Itezi. It is the law under section 110 of the Evidence Act, Cap 6 R.E. 2019 that, whoever desires any Court to

give decision as to any legal right or liability, dependent on the existence of facts which he asserts, he has to prove those facts. See the case of **Regnard Danda v. Felichina Wikesi**, Civil Appeal No. 265 of 2018, CAT at Iringa(Unreported). In this appeal the said duty was not discharged by the appellant. Therefore, order of the trial Court stands.

Coming to plot at Ipinda, there is evidence that they bought three plots at different time one in 1999 for Tsh. 130,000/= and another in for Th. 240,000/=. Also, there is evidence from the appellant that in 2004 they bought another plot at Ipinda for Tsh. 3,700,000/= There is no evidence showing that the said plots were merged to form one plot. There is evidence that there is unfinished house at Ipinda though did not come clear in which plot it is erected. Considering the nature of the complaint of the appellant and submission of the respondent be it one plot or more does not make any difference on the order made by the trial Court which is not faulted. Therefore, I don't find any cogent reason to fault the trial Court order.

The other property is the pharmacy at Mbalizi, there is no dispute that it was acquired during subsistence of the marriage. The appellant submitted that it was not included in the division of matrimonial property while the respondent argued that it is her personal property. On this I have noted

that there is no dispute that there is pharmacy at Mbalizi. The appellant in his evidence stated he injected 2,000,000/= the evidence which was never challenged by the respondent by way of cross examination. Based on that evidence it ought to be included as a matrimonial property subject for division after dissolving the marriage. Given the evidence in record the pharmacy at Mbalizi t/a Lulu Pharmacy has to be divided equally by the disputants. Each party has to be given first opinion should it be decided to be sold.

From what I have deliberated above, the appeal is partly allowed to the extent of removing the plots at Mwashiwawala Mbalizi from division to the parties and including the Lulu pharmacy in the division as a matrimonial property each having equal share. Other orders of the trial Court stand undisturbed. This is a matrimonial matter I make no order as to costs.

DATED at MBEYA this 20th day of May, 2022


D. P. Ngunyale
Judge

20/05/2022

Judgment delivered this 20th day of May 2022 in presence of both parties; the respondent was represented by Kilving Kuboja Gamba learned advocate.


D. P. Ngunyale
Judge
20/05/2022