

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE-STOP JUDICIAL CENTRE)
AT TEMEKE

PC CIVIL APPEAL NO. 23 OF 2022

(Appeal from the decision of District Court of Temeke at Temeke in Matrimonial Appeal No. 25 of 2021 delivered by Hon. K.T Mushi, SRM on 17th January 2022 and originated from Matrimonial Cause No. 15 of 2021 of Temeke Primary Court)

MUSTAFA MASHUSHANGA..... APPELLANT

VERSUS

AISHA ALLY..... RESPONDENT

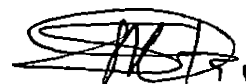
JUDGMENT

Date of last order: - 15/12/2022
Date of judgment: - 17/02/2023

OPIYO, J.

Mustafa Mashushanga aggrieved by the decision of the District Court of Temeke at Temeke in Matrimonial Appeal No. 25 of 2021 appealed against the said decision based on the following grounds:-

1. That, the Hon. Appellant court erred in law and facts to order the division of matrimonial property without proper consideration of



the contribution of each Party toward the acquisition of the matrimonial house.

2. That, the Hon. Appellant court erred in law and facts for failure to considering that the respondent and the appellant separated from 2014 and the appellant developed the house further in absence of the respondent.
3. That, the Hon. Appellant court erred in law and facts for ordering the parties to conduct valuation of the matrimonial house while it was not ordered properly each one party contribution toward to the acquisition of the property(*sic*)

This appeal was disposed of by oral submission whereby all the parties were in person and unrepresented. On 27th September 2022, the matter came for a hearing the appellant briefly stated that the respondent left about 11 to 12 years ago and got married to another man. It is just last year when she started demanding the distribution of matrimonial property. The Appellant further stated that when the respondent left the house was only one room and a half and when she came back it had 5 rooms with a fence and a toilet built outside and that is why she filed a suit. The appellant told the court that, given his age, he cannot rent a house as the first child is aged 20 years and the other is 14 years and he is in class six staying in the same house. He contended that he cannot share equally his own sweat with the respondent who did not contribute much, if anything in the acquisition of the house in question.



Reacting to the above submission, the respondent stated that the house was completed and it already had rooms when she left, and she is the one who bought the land and jointly constructed the house. She left when the elder child was in standard five. She left all the kids with him but, when the child reached form II the appellant chased him away and it is when she started to claim for share in the right. She continued to state that before the Local Government Authority, he (the appellant) agreed to give her 50,000/= and she requested for one room so that she may rent it in order to obtain money for the children, but he refused and never honoured his promise, prompting her to come to court with the claims. She stated to be the one who bought the property in the name of their elder son Bablii Mustapha. That the one who sold the same to her came to testify in court in her favour. She therefore argued that, this appeal is meritless and urged the court for its dismissal.

In the rejoinder, the appellant stated that the respondent had never been engaged in any business and he is the one who gave her money to buy the property. He is the one who was earning for the family and constructing the house. The respondent left him with two young children whom he had to stay with when the house only one room. He is now 52 and now that the children have grown she resurfaces to make him suffer, the act he termed as unfair. He reiterated his prayer he made in chief.

Upon perusal of the trial court judgment, it is manifested that the parties had two issues of marriage named "Bablii" 17 years and the second issue "Akhar" 10 years (*page 2 of Primary Court judgment*). On the same



page the trial Magistrate also stated that, the parties herein jointly acquired a house at Buza. In the sale agreement both agreed to write the name of their first child "Bablii"

What is gathered from the proceedings is that the property/the house is not in the name of either party. It is in the name of the disputant's first issue, one Bablii Mustapha. The issue that crops up from that is whether such property is subject to division during divorce? The appellant had maintained in the proceedings at trial that he built the house for his children and it is their property. He thus questioned the decision to divide the asset into equal parts among the two. Reviewing the trial court proceedings at page 4 of the typed proceedings this fact is not disputed. SM2 on Hamisi Rajabu Kindemela stated that he was the one who sold a piece of land to the parties and when the parties were finishing their final instalment they entered the name of their first issue (See *page 6 and 7 of the typed proceedings*). Such intention can be observed where the appellant stated;

"...kwenye nyumba ninayoishi kwa sasa sio kwangu wala kwake ni kwa Watoto wangu..." (page 8 of the trial court typed proceedings)

In answering the issue raised on the divisibility of the house in question, I am convinced that the evidence before the trial and the first appellate court was not properly analysed, as both courts missed the fact that the piece of land in which the house in dispute is situated is in the name of the third party not in the name of either party as shown by the trial

court typed proceeding at page 4 and 7. Although the sale agreement was not tendered in evidence, no party disputed this fact and one can safely derive the intention of the parties for the piece of land to belong to "Bablii" their son as already noted above. The property in such circumstance cannot be termed as a matrimonial property for the purpose of division in the circumstances as the parties herein already expressed their intention to the contrary. The inspiration is drawn from the case of **Gabriel Nimrod Kurwjila v Theresia Hassan Malongo, Civil Case No. 102 of 2018, the Court of Appeal at Tanga**, upheld the high court position that,

"And since it is in the name of their daughter, the same should remain the property of the daughter, one Leah Kurwijila as intended by the parties. "

In the instant appeal, it is not disputed that the piece of land belongs to Bablii Mustapha, same is the house involved in the decree of attachment as it forms part of the said land. Based on the trial court evidence, the house will always remain the property of Bablii, though the parties jointly contributed on its construction, hence it cannot be termed as a matrimonial asset.

Having said so, the judgement and decree of the first appellate court in relation to division of the house involved in this matter is hereby quashed and set aside. It is thereafter held that as the said house is in the name of the third party, one Bablii Mustapha, it is not subject to

division in the circumstances. I make no order as to costs due to the relationship between the parties.

Appeal allowed to the extent explained.



A handwritten signature in blue ink, appearing to be "M. P. Opiyo", written over a horizontal line.

M. P. OPIYO,
JUDGE
17/02/2023