

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISRTY
AT DAR ES SALAAM

MATRIMONIAL APPEAL NO. 293 OF 2020

*(From Matrimonial Cause No. 41 of 2020, Resident Magistrate Court of
Kinondoni at Kivukoni before Hon. S. W Mwakalobo, RM)*

CONSTANCIA NYABUSAMI.....APPELLANT

VERSUS

GONZALVA BUBERWARESPONDENT

Date of last order: 24/2/2023

Date of Ruling: 3/3/2023

JUDGMENT

MGONYA, J

Disgruntled by the Judgment and Decree of the Resident Magistrates Court of Dar es Salaam at Kivukoni. The Appellant appeal before this court against the said Judgment and Decree on the following grounds:

- 1. That Hon. Resident Magistrate erred in law and facts for distributing the matrimonial properties without considering the extent of contribution made by both parties.***
- 2. That Hon. Resident Magistrate erred in law and facts for distributing the matrimonial properties without***

considering the fact that the Respondent did squander matrimonial assets.

3. That Hon. Resident Magistrate erred in law and facts in ordering the distribution of matrimonial properties basing on the assets only without considering the liabilities the Appellant is enduring.

The appeal was disposed of in writing. Both parties were represented. Mr. John Lingopola, Advocate for the Appellant and Mr. Emmanuel Machibya, Advocate for the Respondent.

Mr. Lingopola consolidated the 1st and 2nd grounds of appeal. In regard on contributions of the jointly acquired assets, the Appellants Counsel faulted the trial court for failure to consider the fact that the Appellant contributed more than the Respondent. The trial court ordered 50% to the Appellant and 50% to the Respondent. That, the Appellant was an employee and both of the houses were acquired when the Respondent was a student. The Appellant acquired the assets through a loan from the CRDB Bank. The Counsel submitted further that, the trial court failed to consider that the Respondent squandered the assets. In so doing, the trial Magistrate distribution faulted the provision of **Section 114(2) of the Law of marriage Act Cap 89 [R. E. 2019]** and the principle laid down in **BI HAWA MOHAMMED V. ALLY SEFU, TLR 32** that the court in distributing the assets should consider the extent of

contributions made by each party. However the Respondent did not adduce any proof of his contribution to the jointly acquired assets.

Regarding on the issue of squandering of the matrimonial assets. It is the Appellant's Counsel assertion that the Respondent squandered the shops, mineral business, the cosmetic shop and the tailoring shop, these business were run by the Respondent but they never last. The Counsel again cited the case of **BI HAWA MOHAMED V ALLY SEFU (SUPRA)** with approval the case of **MARTIN V MARTIN (1976) 3 ALLER**, where it was pointed out that;

"The respondent conduct must be taken into account because a spouse cannot be allowed to filter away the assets by extravagant living or speculation and then claim as great share of what is left as he would been entitled if he would have behaved reasonably".

From the above submission, the Appellant's Advocate is of the view that the trial court failed to consider this issue and divided the matrimonial assets at the ration 50% each.

In the 3rd ground the Appellant stated that distribution of matrimonial assets based on the assets only without considering liabilities. It is submitted that the Appellant secured a loan from

CRDB to buy and develop matrimonial properties during the subsistence of their marriage. However, the trial court disregarded the loan acquired by the appellant and distributed the assets equally and not to share the liabilities to repay the loan. The Appellant cited the case of **RICHARD WILLIAM SAWE V. WOITARA RICHARD SAWE, Civil Appeal No. 38 of 1992, (unreported)**, which concerned the loan by one spouse who was still paying the installments of the loan where it was submitted that, the Court of Appeal held that: the parties should be made to participate not only on the division but also in the acquisition of the matrimonial assets in question. It is proceeded further the outstanding loan due to the appellant from the date the Respondent abandoned the Appellant was **Tshs. 118,700,000/-**. It is from the above facts, the Appellant prayed to this court to allow the appeal.

Responding, Mr. Machibya in regard to the 1st and 2nd grounds submitted that the Appellant was awarded a greater share of the matrimonial asset than the Respondent as follows: Plot No. 326 Block J located at Mtwivila area was divided at the ration of 75% to the Appellant and 25% to the Respondent, House Plot Not No. 43 Block N located at Mkimbizi 50% to Appellant and Respondent 50%, motor vehicle Kluger with registration No. 280 DLH 50% for the Appellant and 50% for the Respondent and 80% for the Appellant and 20% to the

Respondent for households items. In regard to the proof counsel submitted that the Respondent's list of additional documents containing the proof of his contributions of matrimonial assets was denied. Moreover, both houses were developed during the subsistence of marriage and that the Respondent adduced the business license to prove that he was a business man.

The Respondent's Counsel proceeded further that, the Respondent contributed to the matrimonial assets. However, the issue of squandering matrimonial assets by the Respondent was not proved. The money obtained rent of the two house Tshs. 42,120,000/- was used by the Respondent to pay school fees for his two issues.

The loan of **118,700,000/=** emanated from **Tshs. 88,500,000/=** as house loan is said to have been borrowed by the Appellant without the consent of the Respondent. However, he consented on the house loan of **45,000,000/= of 2009** for a period of ten years. Therefore, it is the Respondent's view that the alleged loan of **Tshs. 88,500,000** was never proved.

Mr. Machibya proceeded further that the request to apportion the debt of the loan was not pleaded at the Memorandum of Appeal. Therefore, the prayer should not be granted. Besides, it is the new issue not pleaded at the trial court. He therefore, prayed to this court to dismiss the appeal with costs.

In the rejoinder, Mr. Lingopola submitted, the issue of **Tshs. 118,700,000/=** loan from the CRDB Bank was proved at the trial court and was not disputed by the Respondent, as the loan was secured during the subsistence of marriage. However, this is not a new issue and was pleaded in the Memorandum of Appeal as ground 3 that ***the matrimonial properties be distributed considering the liabilities being endured by the parties and the extent of contribution made by the parties.***

As the loan was taken for the best interest of the family.

In regard to the contributions, the respondent's contribution is said to have been based on the domestic duties but other factors such as money, property and work was not proved.

I have painstakingly considered the grounds of appeal, submissions in support and against the appeal and the lower courts record which I thoroughly read.

I will determine the 1st and 2nd ground of appeal in consolidation as submitted by Mr. Lingopola. Section 114(2) of the Law of Marriage Act require the court in dividing jointly acquired assets by spouses to consider the extent of contributions made by each party to acquire the matrimonial assets, as well as the development made on the asset.

Furtherance, contribution include domestic contribution as well as per the case of **Bi Hawa Mohamed v Ally Sefu (supra)**. Basing on the trial court record, the Appellant demonstrated her contribution on the matrimonial assets. Both the Appellant and the Respondent's counsel are in common that the Appellant contributed more than the Respondent. However, his contribution cannot be disregarded. It is as well certain that the respondent contribution over the asset was domestic. He also agreed on the loan secured by the Applicant from the CRDB bank which were used to develop the two houses. I am therefore, of the settled view that the trial court erred to distribute some of the asset equally. I find merit in this ground of appeal to the extent that the house Plot No. 43 Block N located at Mkimbizi be divided at the ratio of 60% to the Appellant and 40% the Respondent.

In regard to the 2nd ground, **Sections 110 and 111 of the Evidence Act** requiring a person who asserts on the existence of any facts must prove the existence of such facts. The onus of proving that the Respondent squandered the matrimonial assets lies on the Appellant. The record of the trial court shows that the Appellant failed to prove how the Respondent squandered the matrimonial assets. I therefore, find no substance in this ground of appeal.

In the last ground that Hon. Resident Magistrate erred in law and facts in ordering the distribution of matrimonial properties basing on the assets only without considering the liabilities the Appellant is enduring, the law is settled in the issue of debts of spouses at the dissolution of marriage. **Section 114 (2) (c)** of the Law of Marriage Act which reads:

In exercising the power conferred by subsection (1), the court shall have regard to –

(c) any debts owing by either party which were contracted for their joint benefit;

The trial court had to consider the existence of **Tshs. 118,700,000/=** loan from CRDB Bank and to apportion the debt accordingly. **I therefore find merits in this ground of appeal. However,** this court is satisfied with the decision that has been reached by the trial court as it is the one to evaluate the evidence and reach to the division of debt if it was appropriate. In this case, this Appellate court cannot open that avenue despite the fact that the law recognizes the situation.

In the final event, I partly allow the appeal and order as follows:

- 1. The house Plot No. 43 Block "N" located at Mkimbizi be divided at the ratio of 60% to the Appellant and 40% to the Respondent.***
- 2. Other orders of the trial court shall remain intact.***

It is so ordered

Right of appeal is explained.



A handwritten signature in blue ink, appearing to read "Mgonya".

L. E. MGONYA

JUDGE

3/3/2023

ORIGINAL