

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL NO.39 OF 2022

(C/f Civil Appeal No. 5 of 2022 at the District Court of Arumeru, originating from Matrimonial Cause No.8 of 2022 at Emaoi Primary Court,)

MOSES KINABOAPPELLANT

Vs

MKUNDE MSHANGA RESPONDENT

JUDGMENT

Date of last order:7-2-2023

Date of Judgment:6-3-2023

B.K.PHILLIP,J

This is a second appeal arising from judgment of the District Court of Arumeru at Arumeru in civil appeal no. 5 of 2022. A brief background to this appeal is as follows; the appellant was the respondent in the petition for divorce before Emaoi Primary Court in which the petitioner she prayed for an order for divorce, division of matrimonial properties and maintenance of the issues of marriage, namely Ester Moses, Fredrick Moses, Marlene Moses and Nolin Moses. The trial Magistrate framed two issues for determination by the court, to wit; **one**, whether the marriage between the petitioner and respondent had broken down irreparably. **Two**, what reliefs parties were entitled to. After receiving evidence from both sides the trial Magistrate held that the marriage between the appellant and the respondent had broken down irreparably. Consequently, granted the order for divorce and ordered the issues of marriage to be under the custody of the respondent. The appellant was granted right to visit the issues of marriage in accordance with the schedule which had to be agreed upon by the appellant and

respondent, and was ordered to pay the school fees for the issues of marriage.

With regard to the division of matrimonial properties, the respondent was awarded a residential house located at Dar es salaam Mtoni kijichi, a plot of land measuring 1000 square meters located at Gomba estate, a car make Toyota-Wish with registration no. T 211 DJC. The appellant was awarded a residential house located at Ngaramtoni Arusha, a plot of land measuring a half acre located at Terat Murieth and car make Toyota-Verosa with registration no. T 966 DBC. The remaining Matrimonial properties which includes a house located at Njiro, plot no.292 Block 'H', the subject of this appeal, (hereinafter to be referred to as the "disputed House"), plot of land measuring one acre located at Chalinze and household assets were ordered to be sold and proceeds thereof to be divided equally between the parties. In addition to the above, the trial court ordered that the disputed house and plot of land located at Chalinze shall be valuated by a government valuer to ascertain their value.

Aggrieved by the judgment of the primary court, the appellant lodged his appeal at the District Court of Arumeru. The appeal was heard on merit and at the end of the day the primary court's orders were upheld save for the orders for the appellant's right to visit the issues of marriage. The District Court granted the appellant right to visit the issues of marriage during weekends and stay with them during holidays. Undaunted, appellant lodged the instant appeal on the following grounds;

- i) *That, the Honourable Magistrate erred in law and fact for failure to evaluate the evidence of the certificate of occupancy for plot*

No. 292 block H, Njiro, Arusha municipality registered in the name of Irene Isack Mushi and the sale agreement between Irene Isack Mushi and Fredrick Simon Kinabo together with transfer documents which were all admitted as exhibits by the primary Court of Emaoi.

- ii) That, the Honourable Magistrate erred in law by confirming the decision and order that registered property situated on plot no. 292 block 'H' Njiro Arusha municipality be valued by the government valuer and divided among the parties to this appeal while the disputed property is validly registered in the name of Irene Isack Mushi and no transfer of title has been effected thereon.*
- iii) That, the Honourable Magistrate erred in law when she confirmed the decision of the primary court that plot no. 292 block H, Njiro Arusha municipality registered in the name of Irene Isack Mushi and sold to Fredrick Simon Kinabo is part of matrimonial property in serious contravention of section 60 of the Law of Marriage Act, 1971.*

This appeal was heard viva voce. The appellant appeared in person, he was not represented whereas respondent was represented by Mr. Said Said, learned Advocate.

Submitting on the 1st ground of appeal the appellant argued that the primary court of Emaoi dissolved their marriage and erroneously granted the respondent 50% of the value of the disputed house whereas the same is registered in the name of Irene Isack Mushi. Further, he submitted that the disputed house was acquired by his

father namely Fredrick S. Kinabo through a sale agreement between him and one Irene Isack Mushi in the year 2013 while he was working in Dar es Salaam. The sale agreement and land forms for the transfer of the ownership of the disputed house were signed by his father and Irene Isack Mushi.

Moreover, the appellate contended that the trial court ignored the documentary evidence (exhibit D1) which he tendered in court and included the disputed house in the list of matrimonial properties relying on the testimony of the respondent and her witnesses in total disregard of the fact that the ownership of the disputed house had not yet been transferred to his father who signed the sale agreement. He strongly argued that the 1st appellate court upheld the order of the primary court in which the respondent was unlawfully granted 50% of the value of the disputed house in contravention of the laws, in particular section 33 (1) of the Land Registration Act, sections 37 (1) (5), 61 (1) 62 (2) of the Land Act, Cap 113 and section 100 and 66 of the Tanzania Evidence Act, ('TEA'). Relying on exhibit D1, the appellant insisted that the lower courts erred in law by ignoring the clear provisions of land laws and declaring the disputed house as his property whereas the legal requirements for disposition and transfer of the disputed house were not yet completed at the time of the hearing the petition for divorce and the appeal at the 1st appellate court. He was of the view that the 1st appellate court abrogated its responsibility by failure to re-evaluate the evidence adduced. To support his stance he cited the case of the **Registered Trustees of Joy in the Harvest Vs Hamza K. Sungura, Civil Appeal No. 149 of 2017**, (unreported) and **Hassan Mzee Mfaume vs Republic (1981) TLR 167** in which the court held that an

appellate court has powers to re-evaluate the evidence adduced at the trial court and come up with its own findings.

Furthermore, the appellant contended that it is on record that the respondent admitted that she was not a party to the sale agreement in respect of the disputed house. To substantiate his contention he referred this court to page 24 and 25 of the trial court's proceedings. He went on submitting that where there is documentary evidence the court is ought not to rely on oral evidence. He cited the case of **CRDB Bank PLC Vs Nokwim Investment Co Limited and Novatus Akwinino Mwananengule, Civil Appeal No. 105 of 2021**, to bolster his argument.

Expounding on the implications of the order made by the lower courts, the appellant contended, the lower courts' order in respect of the disputed house is erroneous and inexecutable since it purports to transfer the ownership of the disputed house to him whereas the documents pertaining to the ownership of the disputed house are not in his name. He cited sections 61 (1) and 62 (2) of the Land Act, to cement his arguments. Relying on the provisions of section 60 of the Law of Marriage Act, the appellant argued that both lower courts erred to hold that the disputed house forms part of the matrimonial properties because the same was not acquired by parties herein. To cement his argument, he cited the case of **Gabriel Nimrod Kurwijila Vs Theresia Hasssan Malonyo, Civil Appeal no. 102 of 2018** (unreported) in which the court held that a property acquired by a 3rd party cannot form part of the matrimonial properties. He insisted that the order made by the lower courts is inexecutable because it is based on oral evidence only and not backed up by any document. He added

that no one can give what he does not have. In this case the disputed house is not registered in his name so he cannot give it to anybody, contended the appellant.

In rebuttal, the learned Advocate Said contended that this appeal has no merit and the submission made by appellant is misleading. The appellant has raised new grounds and issues which were not raised at the primary court. He strongly argued that during the hearing of the petition for divorce at no point the appellant did claim that the disputed house is not a matrimonial property. Referring this court to page 24 of the typed proceedings of the primary court, Mr. Said contended that the appellant admitted that the disputed house was bought by his father on their behalf (appellant and respondent). Thus, the appellant's allegation that the disputed house belongs to his father is a new issue and an afterthought. Furthermore, Mr. Said pointed out that the position of law is that the appellant court cannot entertain issues which were not raised at the lower Court. To cement his argument, he cited the case of **Richard Majenja Vs Specioza Sylivester, Civil Appeal No.208 of 2018** (unreported).

It was Mr. Said's contention that the appellant quoted the provision of the Land Act out of context because this is matrimonial case not a land case. Exhibit D1 was admitted in evidence and the appellant admitted that the plot of land where the suit property is situated was bought by his father on their behalf (appellant and respondent). Then appellant and respondent jointly built the disputed house on that plot of land. Mr. Said added that section 110 of the Evidence Act provides that whoever alleges anything has to prove it. He was of a strong view that the

appellant's failure to bring his father in the court to prove that the disputed house belongs to his father is fatal. To bolster his argument he cited the case of **Reginard Danda Vs Felichina Wikesi, Civil appeal no. 265 of 2018** (unreported).

Furthermore, Mr. Said argued that the appellant does not dispute the respondent's contribution in acquisition of matrimonial properties which includes the disputed house, the subject to this appeal. He maintained that the disputed house was acquired jointly by the appellant and respondent.

With regard to the court order for valuation of the disputed house, Mr. Said argued that it is a normal practice for the matrimonial properties to be valued before effecting the court order for the sale of the property in question and distribution of the proceeds of sale realized thereof. He distinguished the case of **Gabriel Nimrod Kurwijila** (supra) from this case on the ground that in the instant case the appellant requested his father to buy the plot of land where the disputed house is situated on his behalf and the respondent. Also, he distinguished the case of **CRDB** (supra) from the instant case on the ground that the matter in hand is a matrimonial case and the dispute between the parties over division of matrimonial properties whereas the **CRDB** case (supra) was on matters pertaining to loan recovery. He maintained that the lower court's order for the valuation of the disputed house by the Government valuer is proper.

In rejoinder, the appellant reiterated his submission in chief. Moreover, he submitted that this appeal is based on the point of law and evidence. It is a cardinal principle of the law that a point of law can be raised at

any stage, contended the appellant. He refuted Mr. Said's contention that he has raised new issues which were not dealt with at the trial court on the ground that he is the one who tendered in court exhibit D1 and the same forms part of the court's records. Thus, any concern in relation to exhibit D1 cannot be termed as a new issue.

With regard to the respondent's contribution in acquisition of the disputed property, the appellant was emphatic that during the hearing of the petition for divorce he disputed the respondent's assertion on the contribution on the acquisition of the matrimonial properties. He urged this Court be guided by the provisions of section 114 (2) of the Law of Marriage Act which requires the court to have regard to the extent of contribution made by spouses toward acquiring the assets in question. He insisted that the disputed house is not a matrimonial property because there is no transfer of ownership of the said property to him and the order for the equal division of the value of the disputed house is not fair. Moreover, the appellant maintained that the respondent's assertion that the disputed house was built jointly by her and the appellant is not substantiated.

Furthermore, the appellant argued that the documentary evidence he tendered in court (exhibit D1) is enough to prove that the disputed house does not form part of the matrimonial properties. Therefore, there was no need for his father to appear in court to testify on the ownership of the disputed house because documentary evidence prevails over oral evidence. He cited section 100 of the Evidence Act to fortify his arguments and maintained that disposition of land cannot be substantiated by oral evidence.

On the application of the Land Act, the appellant submitted that a mere fact that this is matrimonial case did not give a leeway to the lower courts to disregard the clear provisions of the Land Act. He referred this court to section 33 of the Land Registration Act which provides for the rights of a registered owner of an estate. Also, he distinguished the case of **Danda** (supra) from this case on the ground that the matter which was dealt with in that case did not require registration of the document while in this case the issue in hand requires registration of the relevant documents pertaining to the ownership of the disputed house.

Having perused court's records and dispassionately analyzed the rival arguments made by the appellant and Mr. Said, I am of the opinion that the issues for determination in this appeal are; **One**, whether or not the disputed house forms part of the matrimonial properties. **Two**, whether or not the lower court's orders in respect of the disputed house are proper.

However, before embarking on the determination of the issues I have pointed out herein above, I need to first resolve Mr. Said's concern that the appellant has raised new issues which were not dealt at the trial court. It is true that the issue on whether or not the disputed house forms part of the matrimonial properties was not among the issues raised at the trial court. The court's records reveal that the concern on whether the disputed property forms part of the matrimonial properties and the appropriateness of the order for valuation and sale of the same were raised at the 1st appellate court. However, it is on record that at the trial court the appellant tendered in court exhibit D1, (the sale agreement in respect of the disputed property) exhibits D2, D3 and

D4 (The land forms for notification of disposition, application for approval of disposition and transfer of right of occupancy respectively) and exhibit D5 (the certificate of occupancy for plot no. 292 block 'H' Njiro Arusha). The aforementioned exhibits show that the disputed property was bought by one Frederick Simon Kinabo from one Irene Isack Mushi. I am inclined to agree with the appellant that the issue he has raised in this appeal is a legal issue bearing in mind that as evidenced by exhibit D1-D5 inclusive, plot no.292 block 'H' Njiro Arusha was sold to one Feredrick Kinabo by one Irene Isack Mushi and is still registered in her name. Therefore, the appellant cannot be faulted for raising it at an appellant stage. Likewise, the appellant cannot be faulted for raising his concern on the practicability of the lower court's order in respect of the disputed house at this stage because the same could not have been raised at the trial court before the determination of the petition for divorce. Also, it is noteworthy that these two issues were raised at the first appellate Court.

Having said the above, I will deal with all the grounds of appeal raised by the appellant conjointly. The Court's record reveal that when the appellant prayed to tender exhibits D1,D2,D3,D4 and D5 the respondent objected to the admission of the same in evidence. She told the trial Magistrate that she was ready to withdraw her objection if the appellant would have agreed that the appellant and herself (respondent) asked the appellant's father to buy the plot of land where the disputed house is situated on their behalf. In response to the respondent's objection, the appellant told the trial Magistrate that he was in agreement with the respondent that his father bought the plot of land in question on their behalf. So, exhibits D1- D5 inclusive were admitted in evidence.

Not only that, in his testimony the appellant testified that in 2013, he requested his father, Mr. Frederick Simon Kinabo to buy a plot of land at Njiro in Arusha (Plot No.292 Block 'H') on his behalf. The price for that plot of land was Tshs 13,000,000/=.It is noteworthy that going by appellant's testimony it is not in dispute that the plot of land where the disputed house is situated was bought during the subsistence of the marriage between the appellant and respondent since it was bought in 2013 and the parties herein separated in February 2017. Similarly, the construction of the disputed house started during the subsistence of the marriage between the appellant and respondent as evidenced by the appellant's testimony and his witnesses. SU3 (Gretytony Nyauringo) who testified that he was employed by the appellant for the construction of the disputed house in 2015 and worked with the appellant up to 2016. Thereafter, he left for Dar es Salaam and by that time construction of disputed was still in progress.SU4 (Emmanuel Kavindi) also a mason, his testimony is to the effect that he was engaged by the appellant in the construction of the disputed house sometimes in 2017.

The above aside, exhibits D1, D2 D3, D4, and D5 show that the right of occupancy in respect of disputed house is in the name of Irene Isack Mushi because no transfer of ownership of that property was effected to either the appellant's father or the appellant or the respondent. It is noteworthy that the contents of exhibits D1- D5 inclusive are in line with the appellant's testimony, that is, he requested his father, Mr. Fedrerick Simon Kinabo to buy plot no.292 block 'H' Njiro, Arusha on his behalf.It is the appellant who effected the development on that plot of land by building the disputed house. Therefore, according to the evidence

adduced before the trial court, in reality the disputed house belongs to the appellant and respondent, that is why the appellant is in possession of all the documents pertaining to the ownership of plot no.292 block 'H' Njiro –Arusha where the disputed property is situated. To my understanding, the appellant is urging this court to look at exhibit D1- D5 inclusive only and leave aside the testimonies made in court by the witnesses from both sides and his own testimony. Let me say outright here that evidence adduced at the hearing of a case has to be analyzed and examined in its entirety. The pertinent question which arises here is; Given the evidence adduced by both sides, the fact that the transfer of ownership of the plot of land where the disputed house is situated has not yet been effected after filling in the land forms (exhibits D1-D4), does it automatically mean that the disputed house belongs to Irene Isack Mushi, the current registered owner of plot No. 292 block 'H' Njiro, Arusha as per exhibit D5? It is my settled opinion that the evidence adduced by the appellant himself has rebutted the presumption that the registered owner of the certificate of title in plot no.292 block 'H' Njiro, Arusha, namely Irene Mushi is the lawful owner of the disputed house by proving that he is the one who requested his father to buy plot No. 292 block 'H' Njiro, Arusha on his behalf, he built the disputed house therein and he is in possession of all relevant documents pertaining to the ownership of the same. Similarly, the evidence adduced has proved that even the appellant's father is not the owner of the disputed house despite the fact that exhibits D1-D4 inclusive were signed by him.

In addition to the above, neither the appellant's father nor Irene Isack Mushi raised any concern on the ownership of the disputed house. I

have perused the cases cited by the appellant in support of his arguments, I entirely agree with Mr. Said that the same are distinguishable from this case because they have different set of facts. In fact, they are irrelevant because in this case there is ample evidence proving that the disputed house belongs to the appellant and respondent though it is not yet registered in their names.

At this juncture let me point out that, the appellant's arguments on the application of the Land Act and Land Registration Act as far as the ownership and transfer of landed property is concerned are correct, but the same are irrelevant because in this case there is no dispute over the ownership of the disputed house. As alluded earlier in this judgment, neither Irene Mushi nor Mr. Frederick Kinabo have claimed to be the lawful owners of the disputed House. Had it been that Irene Mushi or Mr. Frederick Kinabo is claiming ownership of the disputed house, then the provisions of the Land Act and Land Registration Act cited by the appellant would be applicable. The appellant's arguments are in total contradiction to his testimony and his witnesses' testimonies. I have said earlier in this judgment that in his testimony the appellant told the trial court that he bought the said plot No.292, block 'H' Njiro for Tshs 13,000,000/= through the assistance of his father, Mr. Frederick Kinabo and thereafter he started construction of the disputed house. His testimony is supported by the testimony of his witnesses (SU2, SU3 and SU4). I agree with the appellant that the transfer of the ownership of the disputed plot have not yet been effected but there is ample evidence proving that the disputed house is owned by the parties herein since plot no.292 block 'H' Njiro Arusha was bought during the substance of their marriage and the construction of the house started

during the substance of their marriage. In the case of **Bi Hawa Mohamed Vs Ally Sefu (1983) T.L.R 32**, the Court of Appeal had this say on the courts' power to order division of matrimonial property provided in section 114 of the Law of Marriage Act;

".....It is apparent from the citation and the wording of section 114 that the assets envisaged thereat must firstly be matrimonial assets, and secondly, they must have been acquired by them during the marriage by their joint efforts".

In this case there is no dispute that the appellant and the respondent are both employed. They were married in 2006 and separated in February 2017. The property which were acquired during the subsistence of their marriage were acquired jointly and this includes the disputed house since there is no evidence adduced by either party to the contrary.

From the foregoing it is the finding of this court that the disputed house forms part of the matrimonial properties. Thus, I do not find any justification to fault the trial court's order for valuation and sale of the disputed house since the same forms part of the matrimonial properties. However, the evidence adduced shows that the appellant and respondent separated in February 2017 and by that time the construction of the disputed house was half way. Thereafter the appellant continued with the construction of the disputed house on his own. The respondent did not adduce any evidence to the contrary. Under the circumstances, it is obvious that the appellant's assertion that he contributed more than the respondent in the construction of the disputed house is correct. Thus, I hereby vary the lower court's order in respect of the distribution of the proceeds from the disputed house

and order that the appellant shall take 65% of the value of the disputed house and the respondent shall take 35%.Further, I hereby order that upon valuation of the disputed house either party in this appeal is at liberty to compensate the other party his/her share as ordered herein above, otherwise the disputed property shall be auctioned.

With regard to the appellant's argument that the primary court's order for the sale of the disputed house is inexecutable, the same is misconceived because the Registrar of titles acts in accordance with the documents submitted before him/her including court orders. (See the provisions of Part VIII, sections 73-74 of the Land Registration Act).

In any case, I find the appellant's contention is imaginary because at this stage it is not practical to state whether or not the primary court's order is inexecutable until when an application for execution is filled in court and determined.

In the upshot, this appeal partly succeeds to the extent explained herein above. Each party will bear his/her costs.

Dated this 6th day of March 2023.



B.K.PHILLIP

JUDGE