

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.286 OF 2021

***(Arising from Civil Appeal No.115 of 2020 Kinondoni District Court,
Originating from Civil Case No. 210 of 2021 Kimara Primary Court)***

IGNAS MSONGANZILWA MGANYWA.....APPELLANT

VERSUS

THERESIA MATHIA MOSHA.....RESPONDENT

JUDGMENT

24/03/2023 & 06/04/2023

POMO, J

The Appellant, Ignas Msonganzilwa, has filed this appeal upon his dissatisfaction with the judgment of Kinondoni District Court in Civil Appeal No.115 of 2020 which was delivered on 19/7/2021 Honourable Jacob, RM against his favour. It is an appeal armed with three grounds of appeal, namely: -

- 1. That, the District Court erred in law and fact in allowing the appeal while there was sufficient evidence that the vehicle Landcruiser VX had never*

been the property of the appellant hence not eligible for division between the appellant and the respondent as a matrimonial property

2. That, the District Court erred in law and in fact and grossly misdirected by allowing the appeal without considering the concern of the appellant was purely a review before the trial court following the appellant's dissatisfaction with the decision which included the motor vehicle Landcruiser VX among the matrimonial properties while it is not a matrimonial property

3. That, the District Court erred in law and fact in allowing the appeal while there was sufficient evidence that the vehicle Landcruiser VX had never admitted the same (sic) to his property

The background to the appeal, albeit briefly, can be stated as follows. The parties were wife and husband having contracted Christianity marriage in 1998. During the subsistence of their marriage, they were blessed with one child. That, from 2007, unbearable misunderstanding within their marriage became the order of the day. Unable to continue tolerating anymore, the wife who is the respondent herein referred the matter to the marriage reconciliatory board of Makuburi Ward in Ubungo District in Dar es Salaam region which on 28/11/2019 issued its certificate to the effect that it has failed to reconcile them and that their marriage have broken down.

In lieu of the certificate, on 2/12/2019 the Respondent filed Matrimonial Cause No. 210 of 2019 before Kimara Primary Court in which she petitioned for divorce and division of matrimonial properties. Having heard the parties, the trial court delivered its judgment on 8th January, 2020. In that judgment, the trial court declared their marriage to have broken down beyond repair henceforth granted divorce decree sought. Consequently, division of matrimonial properties followed whereby the appellant, as a person whom the trial court considered to have contributed more towards the acquisition of the matrimonial properties, was granted seventy (70%) percent share while the remaining thirty (30%) percent was granted to the Respondent. According to that judgment, the matrimonial properties are, one house situated at Kimara Temboni; three motor vehicles which are VX, PRADO and NAOH and home furniture.

Neither party ever preferred an appeal against that judgment which was delivered by the trial court judgment on **8th January, 2020**.

When execution of decree in respect of division of matrimonial properties commenced, and the Court Broker having on 17/09/2020 been appointed by the trial court, the said trial court on 25/11/2020 removed in the list of matrimonial properties the Landcruiser VX on the ground that it

was not a matrimonial property rather belonged to one Ramadhani Omary Nassoro who sold it on loan to the Appellant who has not paid the purchase amount to the said seller.

It is that removal of the Landcruiser VX in the list of matrimonial properties which aggrieved the Respondent henceforth filed Civil Appeal No.115 of 2020 before Kinondoni District Court. The appeal which was decided in her favour by returning the Landcruiser VX in the list of matrimonial properties. The appellant is aggrieved hence this appeal.

On 20/10/2022 the appeal was ordered by this court to be argued by way of written submission. The parties fended for themselves without legal representations

Arguing the first ground of appeal, the appellant submitted that there was sufficient evidence on record that the Landcruiser VX had never been the appellant's property. That, the same should not be a subject of matrimonial properties and that there was no error made by the trial court in its ruling that the Landcruiser belongs to Ramadhani Omary Nassor which was so decided basing on the evidence given before it.

That, the Respondent never tendered any document from the Tanzania Revenue Authority (TRA) to prove that the vehicle in dispute belongs to the Appellant contrary to section 110 of the Evidence Act Cap.6 R.E.2019 which requires the one who allege to prove his allegation. That, the vehicle is thus not a matrimonial property because it was purchased on loan which loan is yet to be paid to the owner RAMADHANI OMARY NASSOR. It is the appellant's further submission that the vehicle was purchased on 1/7/2018 on loan the time when he was separated with the respondent. That, per the sale agreement tendered in court the vehicle in dispute does not qualify to be a matrimonial property. That, if loan is not going to be paid then the owner has the right to retake the vehicle.

That, even if the disputed vehicle is to be taken as a matrimonial property yet the Respondent contributed nothing to the acquisition. The Appellant referred to Section 114(2) of the Law of Marriage Act, Cap 29 R.E.2019 in that when dividing matrimonial properties, the court has to be guided by the contribution made by each spouse.

As to the second ground of appeal, it is the appellant's submission that, the matter which was before the trial court was purely a review, the appellant having raised dissatisfaction on the inclusion of the Landcruiser VX in the list

of matrimonial properties. That, there is nowhere the appellant admitted the vehicle under dispute to be matrimonial property. The sale agreement is a proof the vehicle is not a matrimonial property hence not eligible to form part of matrimonial properties for division. The Appellant then argued that the district court interfered the sale agreement between him and Ramadhani Omary Nassor contrary to the decision of this court in **Francis Kidanga Vs Kilimanjaro First Ferries Ltd, Revision No.668 of 2019 High Court (Labour Division) at Dar es Salaam (Unreported)** which held that where parties have freely entered into a binding agreements, neither courts nor parties to the agreement should interpolate anything or interfere with the terms and conditions therein, even where the agreement is made by lay people.

On the third ground of appeal, the appellant argued that it was not an afterthought and delaying tactic in raising his claim against inclusion of the vehicle in dispute during execution stage that it is not a matrimonial property. That, it was a genuine claim raised for interest of justice. That, the inclusion of that vehicle was a grave error.

In the end, the appellant prayed the appeal be allowed with costs.

Responding to the submission, generally, the Respondent argued, in respect of the first ground of appeal, that the vehicle is the matrimonial property as the information on ownership obtaining from the TRA it is in the name of the Appellant. That what the Appellant is doing is just to deny the Respondent her share on the properties they acquired jointly during subsistence of their marriage. That, the issue was not raised during trial where he was supposed to prove if the vehicle was a loaned property which is yet to be paid for and not otherwise. If at all it was not the appellant's belonging, the said seller could have filed objection proceedings which is not the case here.

It was her further submission that the appellant agreed to pay the respondent Tshs 8,000,000/- the share out of the disputed vehicle but on due date he came with different offer of Tsh 2,000,000/- which irritated the Respondent and therefore commenced execution. With that, the respondent argued that the assertion that the disputed vehicle is not a matrimonial property is an afterthought. Referring to the **proviso to section 114(2)(b) of the Law of Marriage Act**, the Respondent argued that courts are guided, in distribution of matrimonial properties by the extent of the contributions made by each party in money, property or work towards the

acquiring of the assets. The Respondent proved; she argued, the facts which were not disputed by the Appellant during trial

Concluding her submission, the Respondent argued that the District Court well considered all pertinent evidence adduced by the parties during trial and arrived at correct findings henceforth the grounds of appeal raised by the appellant be dismissed with costs for want of merit

In rejoinder, the appellant basically reiterated his submission in chief and added that there is no dispute the disputed vehicle belongs to the Appellant according to the TRA records but, to him, that does not make it a matrimonial property to be distributed to the parties herein and also it does not take away the fact that he purchased it on loan from Ramadhani Omary Nassoro and is bound by the agreement thereto

Having heard the rival submission from both parties for and against the appeal, the issue for determination is whether the appeal is merited or otherwise. In resolving the grounds of appeal raised, I will be guided by what stand determined by the district court vis-à-vis what is appealed against.

The district Court findings is provided at the last but two paragraph of page 5 of the typed judgment. The same reads thus: -

*"In the case under scrutiny, there is nothing to indicate the existence of any of the **stated factors that would have necessitated the court to review its previous decision.** As the Appellant rightly argued, if the vehicle was really bought on an unpaid loan, that was a fact known to the respondent from the beginning of the case. **Having failed to table it before the court during trial, makes his attempt to do so in the midst of an execution an afterthought.** In fact, by doing so, the court gave him an unfair advantage to correct his mistakes at trial, at the expense of the rights of the Appellant.*

*On the basis of those reasons, **I am satisfied that the entire trial court's proceeding dated 29/09/2021 and the decision to remove the said vehicle from the list of matrimonial items is illegal and a travesty of the law and justice and can not be left standing. They are set aside and the trial court decision dated 8/01/2020 is hereby restored**".* End of quote

I have reproduced the findings purposely with a view of looking out if real the grounds of appeal raised by the Appellant challenges what was decided by the district court.

In the first ground of appeal the appellant's complaint is that the district court erred in law and fact in allowing the appeal while there was sufficient evidence that the vehicle Landcruiser VX had never been the property of the Appellant hence incapable of being matrimonial property.

Whether there was evidence or not is something which was not decided by the district court. Lucidly from the excerpt above, the district court set aside the primary court findings on the ground that the issue as to whether the Landcruiser VX was bought on loan bases or otherwise couldn't have been raised and determined during execution. In my view, the ground is not connected anyhow to what was decided by the district court. Equally so, is the third ground of appeal in which the appellant is challenging the District Court that it *erred in law and fact in allowing the appeal while there was sufficient evidence that the vehicle Landcruiser VX had never admitted the same (sic) to his property*

In **Remigious Muganga Vs Barrick Bulyanhulu Gold Mine, Civil Appeal No.47 of 2017 CAT at Mwanza (Unreported)** at page 13 the Court of Appeal of Tanzania had this to state: -

*"It is a settled principle that a matter **which did not arise in the lower court cannot** be entertained by this Court on appeal. In the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (unreported), for example, the Court stated as follows:*

"It is now settled that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by neither the trial court nor the High Court on appeal".

End of quote

The Court of appeal went on to conclude at page 13 thus: -

*"On the basis of the foregoing reasons, there is no gainsaying that **the ground of appeal raises a new matter which cannot be entertained by the Court.**"* End of quote

Guided by the court of appeal decision in **Muganga** case (supra), I find the Appellant's first and third grounds of appeal to be misconceived as they

are on issues which were not determined by the district court. I thus dismiss them for being unmerited

Again, in the second ground of appeal, the appellant's is challenging that *the District Court erred in law and in fact and grossly misdirected by allowing the appeal without considering the concern of the appellant (sic) was purely a review before the trial court following the appellant's dissatisfaction with the decision which included the motor vehicle Landcruiser VX among the matrimonial properties while it is not a matrimonial property*

On this, the learned resident magistrate was categorical that the primary court had no power to review its own decision. In support of that stance reference was made to the Magistrates Courts Act, Cap 11 R.E.2019 where the primary Court derives its powers and found powers of review of its own decision is not such power possessed by it. It was expected of the appellant to show to this court on how the primary court has such power to review its own decision but nothing is said by him. Even the tests for review set by the Court of Appeal in **Emmanuel Conrad Yospati Vs Republic, Criminal Application No.90/07 of 2019 CAT (Unreported)** referred to by the District Court at page 5 of the impugned decision are not met because the allegedly subject matter, the motor vehicle VX, was not apparent on the face of record that the trial court decided it to be not part of the matrimonial

court rather needed evidence which in turn come to be adduced during execution. This ground of appeal also fails for lack of merit

In the upshot, the appeal is devoid of merit and I hereby dismiss it. since it is a matrimonial case, each party shall bear its own costs.

It is so ordered.

Right of Appeal explained.

Dated at **DAR ES SALAAM** this 6th day of April, 2023.



MUSA K. POMO

JUDGE

6/4/2023

