

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA

MATRIMONIAL APPEAL NO. 01 OF 2022

(Originating from Civil Case No. 04/2021 and arising from matrimonial appeal No.
12/2021 at Kwimba District Court)

REGINA MICHAEL NDALAWA APPELLANT

VERSUS

DALALI JOHN RESPONDENT

JUDGMENT

17/2/2023 & 5/5/2023

ROBERT, J:-

The appellant, Regina d/o Michael Ndalawha, having been aggrieved with the decision of the District Court of Kwimba in Matrimonial Appeal No. 12/2021 delivered on 30th November, 2021 in favour of the respondent, preferred an appeal to this Court.

This appeal involves a dispute between spouses regarding division of matrimonial properties. The respondent, Dalali John, successfully filed an action at the Primary Court of Bungulwa seeking an order for divorce, division of matrimonial property and maintenance of children. Aggrieved with an

order for division of matrimonial property, the appellant filed an appeal at the District Court of Kwimba disputing division of matrimonial properties. The District Court dismissed the appeal and upheld the decision of the trial court. Still aggrieved, the appellant preferred this appeal armed with the following grounds:-

1. *That, the appellate court erred in law and fact for unfair distribution of matrimonial properties relying on the fact that the respondent was a businessman without taking into consideration that the capital of the alleged business was derived from joint efforts of the both parties herein.*
2. *That, the appellate court erred in law and fact for deciding only the properties found at Isabilo village in Kwimba District without taking consideration the properties which were taken by the respondent to Mpanda District like machine and 27 cows.*
3. *That, the appellate court erred in law and fact for failure to evaluate the evidence adduced by the respondent that he spent 27 cows for school fees of 1,500,000/=*

When this appeal came up for hearing both parties appeared in person without representation. At the request of parties, the appeal was disposed of by way of written submissions. Appellant's submissions were prepared by Paulo John Dotto, learned counsel whereas the respondent engaged Gibson R. Ishengoma, learned counsel for drawing.

Highlighting on the first ground of appeal, the appellant faulted the District Court for unfair division of matrimonial properties. He argued that the District Court was wrong for putting more consideration on the fact that the respondent was a businessman without taking into consideration the fact that the capital for that business was acquired as a result of joint efforts of parties as spouses.

He referred the Court to section 114(2)(b) of the Law of Marriage Act, (Cap. 29 R.E. 2019) which requires the Court to have regard to the extent of contributions made by each party in money, property or work towards acquisition of assets.

He referred the Court to the case of **Scolastica Stanslaus vs Bosco Maiko**, PC Civil Appeal No. 04 of 2017 where this Court observed that:

"...since the couple acquired the properties during the subsistence of their marriage by their joint effort then the appellant is entitled to the share depending on her contribution, leaving her empty handed is a total injustice to her as she deserved something for her sweat for all those years. The law is very clear that wife's performance of domestic

activities amounts to contribution toward acquisition of matrimonial properties.”

From the position above, he submitted that the District Court was wrong for failure to divide fairly the properties acquired by parties through their joint effort and prayed for this appeal to be allowed.

Coming to the second ground of appeal, counsel for the appellant faulted the District Court for paying much attention on the properties acquired at the village of Isabilo only leaving out the properties sent by the respondent to Mpanda which are the grinding machine and 27 heads of cattle.

He referred the Court to the case of **Mariam Mahanyu Hoza vs Godfrey Lwitiko Mwakifuna**, Civil Appeal No. 101 of 2019 which decided that matrimonial properties acquired in a marriage by joint efforts of the spouses be divided between parties.

Coming to the third ground, the learned counsel faulted the District Court for failure to evaluate evidence adduced by the respondent that the 27 heads of cattle were used for payment of school fees, that is, TZS 1,500,000/=. He referred the court to the case of **TPB Bank (Formerly**

Bank ya Posta Tanzania) vs Bininual Hussein Said, Land Appeal No. 13 of 2019 which cited with approval the case of Salle versus Associated Motor Boats Co. Ltd (1968) EA 123 that, "*the appellate Court is mandated to reconsider and evaluate evidence and come with conclusion.*"

He maintained that, the respondent shifted a lot of matrimonial properties to Mpanda and thereafter started a family squabble deliberately in order to retain the properties kept at Mpanda. On that basis, he prayed that the appeal be allowed.

In response, the respondent argued that there is no dispute that parties contributed in acquisition of the matrimonial properties. However, the extent of respondent's contributions was tremendously higher compared to that of the appellant who was a mere house wife taking care of matrimonial home and well-being of the family. He maintained that, since division of matrimonial properties is determined by the extent of each party's contribution, the distribution to the appellant was much fair compared to her trivial contribution. To support his argument, he made reference to the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 where the Court decided that in the absence of evidence

establishing contribution or efforts of the appellant, the court cannot be blamed for not considering the same in its decision.

On that position, he submitted that there is no evidence on record proving direct contribution of the appellant to mandate her claims in the instant appeal. Hence, he prayed for the appeal to be dismissed.

He submitted further that, the appellant's contention that some of the matrimonial properties were taken to Mpanda is an afterthought to justify her greedy intent because the said properties are no longer in existence having been sold if at all they existed. He maintained that this fact was not disputed by the appellant both at the trial Court and first appellate court. He argued further that, the said properties were never subject of the matrimonial dispute.

From the submissions of parties in this appeal, the main question for determination boils down to whether the division of matrimonial property between parties in this matter was fairly done.

Section 114(1) of the Law of Marriage Act, (Cap. 29 R.E. 2019) gives power to the courts to order the division between parties of any assets acquired by their joint efforts during their marriage subsequent to the grant

of a decree of divorce. In exercising this power, the Court is required, among others, to have regard to the extent of the contributions made by each party in money, property or work towards acquisition of the assets under section 114(2)(b) of the Act.

The appellant's complaint in this matter is that, first, the courts below did not take into account that the capital of the respondent's business was derived from joint efforts of both parties; secondly, the courts did not take into consideration the properties which were taken by the respondent to Mpanda District such as milling machine and 27 cows. Thirdly, the first appellate court failed to evaluate the respondent's evidence that he spent 27 heads of cow for school fees of TZS 1,500,000/=.

Having perused the records of this matter, it is clear to this Court that in division of matrimonial properties, the trial court took into consideration efforts of each party in acquiring the money used for capital in respondent's business and other factors complained of by the appellant. At page 2 of the impugned decision of the trial Court, the Court stated that:

"Katika Mgawanyo wa mali ya ndoa Mahakama imepitia hoja za pande zote mbili na mahakama imeona wadaawa hawakuwa na kazi rasmi na hivyo kuona wote walishiriki kilimo katika kuchuma mali zao japo mtaji huo wa

kilimo na mifugo ulianza kwa mdai kama alivyoonyesha kuwa kweli kazi kubwa kwao ilikuwa kilimo lakini pia yeye alifanya biashara na pia sehemu kubwa ya mtaji huo ulitokana na kulima mashamba ya kwao na baadae kupata mtaji walioweza kuendeleza na mke wake ambae ni mdaiwa na baadae kuongezea kwa biashara yake katika kupatikana kwa mali ya ndoa.”

The trial Court proceeded at page 3 of the impugned judgment to divide the matrimonial properties by taking into consideration the extent of contribution of both parties, the needs of the children of marriage and the fact that the respondent had already taken 27 heads of cattle to Mpanda. The Court stated as follows:

“Hivyo mahakama kwenye mgawanyo wa mali ya ndoa imeona wadaawa wote wanastahili kufaidi matunda ya mali yao waliochuma japo kwa kutegemea kila mmoja mchango wake ulikuwa nini na pia kwa kuangalia mahitaji ya watoto wao ambapo mdaiwa anakaa nao na pia mahakama imezingatia pia kuwa mdai aliondoka na mtaji wa ng’ombe 27 kwenda nazo huko mpanda hivyo mahakama imelizingatia hilo kwa upande wa mdaiwa kwa sababu ilikuwa ni nguvu yao ya pamoja na pia kudhingatia (sic) kuwa mdaiwa pia anakaa na watoto wao wa ndoa.”

Having reflected on the considerations by the trial Court in division of matrimonial properties, the District Court rightly found no reason to interfere with the findings of the trial Court.

Considering the grounds of appeal preferred by the appellant, it is obvious that issues raised in this appeal were properly considered by the Courts below. The appellant has not indicated how she wanted the division of the property to be. However, this Court is satisfied that, considering the circumstances of this case, the Courts below were properly guided by the law and evidence adduced to divide matrimonial properties between parties in this case by inclining toward equality of division.


It should be noted that, although at the District Court the respondent argued that the 27 heads of cattle taken to Mpanda were sold and he used the money to pay for school fees for his daughter, that argument did not feature in the proceedings of the trial Court. As alluded to in this judgment, the impugned decision of the trial Court indicates that, in dividing the matrimonial properties, the trial Court rightly took into consideration the fact that the respondent had already taken 27 heads of cattle to Mpanda. Evidence adduced by the appellant at the trial Court indicates that, the respondent had already informed her that the heads of cattle had exchanged hands and the respondent used the proceeds thereof to buy rice. Thereafter, he sold the said rice and bought milling machine and some farms. However, there was no evidence of existence of the said properties. It was therefore

right for the trial Court, when dividing matrimonial properties, to take into consideration the fact that the respondent had already taken 27 heads of cattle to Mpanda. That said, this Court finds that, contrary to the appellant's argument, the trial Court took into consideration the properties taken by the respondent to Mpanda when dividing the matrimonial properties.

In the circumstances, I find no merit in this appeal and I dismiss it accordingly. I give no order for costs on equitable considerations to avoid creating further acrimony between parties in this matter.

It is so ordered.




K.N. ROBERT
JUDGE
5/5/2023