

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IRINGA DISTRICT REGISTRY**

**AT IRINGA**

**MATRIMONIAL APPEAL NO. 01 OF 2023**

*(Originating from Matrimonial Cause No. 02 of 2020 at the Resident Magistrate's Court of Njombe at Njombe)*

**ZARINA MUSA NDONDOLE----- APPELLANT**

**VERSUS**

**EMMANUEL DANIEL MGAYA-----RESPONDENT**

**JUDGMENT**

**Date of Last Order: 09/05/2023**

**Date of Judgment: 19/05/2023**

**A. E. Mwipopo, J.**

Zarina Musa Ndongole, the appellant, and Emmanuel Daniel Mgaya, the respondent, contracted a customary marriage in 1986. In 1989 they contracted civil marriage, and in 1995 they contracted christian marriage. They were blessed with one child, who is a grown-up man now. After living together in harmony for more than 30 years, their marriage entered into turbulence. In 2020 the respondent petitioned for divorce and distribution of matrimonial properties in the Resident Magistrate's Court of Njombe at Njombe. The trial Resident Magistrate's Court dissolved the marriage without

distributing the matrimonial properties. The appellant was aggrieved by the decision of the trial Court for failure to divide matrimonial assets and appealed to the High Court in Matrimonial Appeal No. 10 of 2020. The High Court heard the appeal and ordered in its decision for the trial Court to hear the matter de novo on the acquisition of matrimonial properties and made orders for the division of matrimonial assets to the parties according to the law. The trial Court heard the evidence from both parties on acquiring the matrimonial assets and distributed the matrimonial assets. The appellant was not satisfied with the decision of the trial Court on the division of the matrimonial assets and filed this appeal.

The petition of appeal filed by the appellant contains seven grounds of appeal as provided hereunder:-

- 1. That, the trial Court erred in law and fact for failure to evaluate and analyse the evidence adduced by the appellant, which was strong and consistent before it compared to that of the respondent.*
- 2. That, the trial Court erred in law and facts for failure to include Mbogani Secondary School to be among the matrimonial property according to the evidence and recognised the respondent's names and evidence from the Assistant Registrar of Titles.*

3. *That, the trial Court erred in law and facts for failure to admit the Memorandum and Articles of Association of EMT Company Limited without reasonable cause.*
4. *That, the trial Court erred in law and facts for failure to visit locus in quo to confirm the existence of unsurveyed matrimonial properties mentioned by parties without sufficient reasons.*
5. *That, the trial Court erred in law and facts for failure to interpret and recognise that Emmanuel Daniel Mgaya, Emmanuel Tonya and Emmanuel Mgaya Tonya as the same person according to the evidence and exhibits admitted.*
6. *That, the trial Court erred in law and facts for failure to distribute the matrimonial properties equally among the parties without good cause.*
7. *That, the trial Court erred in law and facts for failure to distribute motor vehicles, insurance agent office proceeds and bank account to the parties without sufficient reason.*

The appellant and the respondent had legal representation in this appeal. Mr. Marco Kisakali, an advocate, represented the appellant, whereas Mr. Innocent Kibadu, an advocate, represented the respondent. Hearing of the appeal proceeded through written submissions following the prayer made by the counsel for the respondent.

It was the appellant's submission on the first ground of appeal that the appellant's testimony showed how she was involved in every step of the

acquisition of matrimonial properties. The appellant's evidence which her witnesses corroborated, proved that Mbogamo Secondary School, four houses, a bank account, an insurance office, houses at Mbeya, a house at Kisarawe Pwani, and two motor vehicles which were not distributed by the trial Court to be matrimonial assets.

In the second and fifth grounds of appeal, the appellant submitted that the evidence in the record proved that the respondent was the Manager of Mbogamo Secondary School and the appellant was Assistant Manager. Exhibit D3 and Exhibit P1 confirmed that the respondent is also known as Emmanuel Mgaya Tonya, Emmanuel Daniel Mgaya and Emmanuel Tonya. The names were used interchangeably. For that reason, properties appearing in those names were supposed to be divided among parties.

On the third ground of appeal, the appellant submitted that the trial Court disregarded the Memorandum and Articles of Association of EMT Company Limited without reason. The documents bear the names of Zarina Musa Mgaya and Emmanuel Mgaya Tonya. The respondent tendered the certificate for change of registration for identification (ID1) which bears the same name. If the trial Court admitted it, the documents would have helped in deciding the respondent's contribution to the establishment of EMT

Limited, an insurance agency company, and the respondent would get his share in the division of EMT Limited as a matrimonial asset.

Regarding the 4<sup>th</sup> ground of appeal, it was the appellant's submission that the trial Court failed to visit the locus in quo without sufficient reason. The appellant prayed for the trial Court to visit the locus in quo to satisfy itself on the existence of unsurveyed matrimonial properties. The trial Court distributed matrimonial properties without seeing them, which was improper as the properties differ in size and value. The Court of Appeal elaborated on the necessity of visiting locus in quo in the case of **Amos Rikado Namahala vs. Mbaraka Alfani and Another [2020] TLR 21**.

The appellant's submission on the 6<sup>th</sup> ground of appeal was that the trial Court failed to divide the matrimonial properties equally. The respondent is collecting from 2020 up to date more than shillings 7,800,000/= as rent. As those matrimonial assets have generated income, the same was supposed to be distributed to both parties. Further, the respondent harvested one acre of trees and collected proceeds from the insurance agency while the case was going on, but the amount of money obtained was not distributed.

It was the appellant's submission on the last ground of appeal that the trial Court erred for not distributing as matrimonial assets motor vehicles, insurance agency office and bank accounts without sufficient reason. The trial Court rejected the appellant's evidence and relied on the respondent's evidence even without satisfying itself on the existence of the said properties.

In reply, it was the respondent's submission on the first ground of appeal that the trial Court adequately considered, analysed and evaluated all parties' evidence before reaching the decision. The appellant generally faulted the trial Court decision. The ownership of schools or houses is proved by documentary evidence, not mere scripture. Mbokamo School is registered in the name of Youth Workers, and its chairperson is Oscar Makweta. The appellant did not prove the existence of two houses at Mbeya and one house at Kisarawe. There is no evidence of the identity of the said houses. The official search – Exhibit D3 shows that plot No. 20, Block 5, where Mbogamo Secondary is built, is in the name of Emmanuel Mgaya Tonya. The said names in Exhibit D3 are different from respondent names. Exhibit D3 has a disclaimer in the foot, showing that the search does not guarantee the genuineness of the certificate of title in question. The Mbogomo Secondary

School ownership is to the NGO under registration number 3868. Most of DW3's testimony on Exhibit D3 was hearsay and hence cannot be relied upon. The appellant failed to prove the existence of the alleged matrimonial property.

On the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, the respondent tendered Exhibit D1, the appellant identity card, showing that Mbogamo Secondary School employed her. Being an employee of the school does not prove that the appellant and respondent owned the school. An NGO owns the school, and the appellant was a member of the NGO. The appellant could recover her shares in the NGO but not claim the school to be matrimonial property. There is no deed poll to prove that Emmanuel Tonya, Emmanuel Mgaya Tonya and the respondent are the same person. Without legal documents, it could not be said that those other names belong to the respondent.

Regarding the 3<sup>rd</sup> ground of appeal, it was the respondent's submission that it is in the record that the insurance agency known as EMT General Enterprises is a company limited by shares. It is a legal person where each shareholder has shares in the company. The company cannot be matrimonial property. The appellant could recover her shares in the company according to company laws if the company belonged to her.

On the issue of visiting locus in quo, which is the 4<sup>th</sup> ground of appeal, the respondent submitted that visiting the locus of quo is the discretion of the trial Court upon satisfaction that there is a need. The Court considered the appellant's prayer to visit the locus in quo and gave reason for its decision not to agree with the prayer. Where the evidence adduced is sufficient, there is no need to visit the locus in quo as it was held in the case of **Dar Es Salaam Water and Sewerage Authority vs. Didas Kameka and 17 Others**, Civil Appeal No. 223 of 2019, Court of Appeal of Tanzania at Dar Es Salaam, (unreported). The case of **Amos Rikado Namahala vs. Mbaraka Alfani and Another**, (supra) cited by the appellant was concerned with the dispute over the boundaries in the land case. In contrast, in the present case, the issue is the existence of the alleged matrimonial assets for distribution.

The respondent's submission on the 6<sup>th</sup> ground of appeal is that the division of matrimonial assets was fair, and the same was done depending on each party's efforts in acquiring the properties. The claims for rent are new and were not raised at the trial Court. The respondent relied on the position stated in the case of **Remihus Muganga vs. Barrick Bulyanhulu Gold Mine**, Civil Appeal No. 47 of 2017, Court of Appeal of Tanzania at



Mwanza, (unreported), that parties have to prove contributions to shares and money in enumerated bank accounts in the name of the other party in matrimonial case.

On the last ground of appeal, the respondent replied that the distribution of the Insurance Agent Company is a misplaced argument. The division of motor vehicles as matrimonial properties was impossible since they were non existent. The two motor vehicles owned by the parties were Toyota Canter and Suzuki, which were sold during their marriage and the proceeds were used for family maintenance. The respondent testified this, and the appellant did not dispute it. It means the appellant accepted the facts, and she was stopped from disputing it. On the bank account, apart from mentioning the account number, there is no evidence that the respondent owns the said bank account, and there is no evidence to prove that appellant was a signatory to the bank account.

In rejoinder, the appellant retaliated her submission in chief and distinguished the cited case of **Dar Es Salaam Water and Sewerage Authority**, (supra), in the sense that the case was over pure land matters and not in a matrimonial case as in the present case.

From above submissions, the dispute to be determined is the validity of division of matrimonial assets. The appellant is aggrieved with the distribution of matrimonial properties as she wants all properties she listed in her testimony to be distributed equally. It was her view that the properties she mentioned in her testimony which were not divided were matrimonial assets since the evidence in the record proved that those properties were matrimonial assets. She asserts that failure of the trial Court to visit the locus in quo has led to unequal distribution of matrimonial assets.

It is a settled law that assets acquired by parties during their marriage by joint efforts are supposed to be divided among parties by the Court in matrimonial cases. In the division of the matrimonial assets, the Court must consider, among other factors, the extent of the contributions made by each party in money, property or work towards acquiring the asset. This is provided under sections 114 (1) and (2) (b) of the Law of Marriage Act, Cap. 29 R.E. 2019. The Court of Appeal in the case of **Bi Hawa Mohamed vs. Ally Seif, [1983] TLR 33**, held that the wife, in looking after the matrimonial home, must be regarded as working not only for her current needs but also for her future needs and such future has to be provided from the matrimonial or family assets jointly acquired during the marriage in

keeping with the extent of her contribution. See. **Yesse Mrisho vs. Sania Abdul**, Civil Appeal No. 147 of 2016, Court of Appeal of Tanzania at Mwanza, (unreported).

The trial Court held that the appellant's contribution to the matrimonial assets was domestic work, advice and caring for their child when the respondent was busy with studies and working. I agree with the holding of the trial Court that the appellant contributed to the acquisition of matrimonial assets through domestic work, advice, caring for their child and caring for their home during their marriage. Thus, the appellant has the right of division to every property acquired during their marriage as she contributed to its acquisition.

In identifying the matrimonial assets, the trial Court found that there is sufficient evidence to prove on a balance of probabilities that four houses at Ramadhani Street, a kitchen building near Mbogamo Secondary School, a structure for college and one farm in the Wende area were matrimonial properties. The rest of the properties mentioned by the appellant, including Mbogamo Secondary School, motor vehicles, a plot at Kisarawe – Mkuranga area, a Plot at Dar Es Salaam, houses at Mbeya area and Wanging'ombe were excluded by the trial Court for the absence of proof of documentary

evidence, or the use of the name Emmanuel Mgaya Tonya which is not the names of the parties in this case. The appellant submitted that there was sufficient evidence to prove the excluded properties were matrimonial assets.

The appellant alleged that the excluded properties were matrimonial assets. The respondent uses the names Emmanuel Mgaya Tonya and Emmanuel Daniel Tonya interchangeably. As a result, the properties registered in those names are supposed to be matrimonial properties which were supposed to be divided to parties herein. The respondent contended that no deed poll was filed to prove those names belonged to the respondent.

Revisiting the evidence in the record, the respondent is known and sued in the matrimonial case as Emmanuel Daniel Mgaya. In the proceedings, the respondent testified that NGO owns Mbogamo Secondary School and the school is not among the properties owned by Emmanuel Daniel Tonya while referring to himself. Also, during cross-examination, the respondent admitted that he was receiving rent of two his houses at Ramadhani Street as Emmanuel Daniel Tonya. This proves, on the balance of probabilities, that the respondent is also called Emmanuel Daniel Tonya.

For the appellant's aversion that the respondent's other name is Emmanuel Mgaya Tonya, there is no evidence to prove that the respondent's other name is Emmanuel Mgaya Tonya. In the absence of evidence to prove that the respondent's other name is Emmanuel Mgaya Tonya, it could not be presumed that the name belongs to the respondent. Thus, properties owned in the name of Emmanuel Daniel Tonya acquired during the marriage are matrimonial assets. But, those assets in the name of Emmanuel Mgaya Tonya are not matrimonial assets.

The appellant submitted that Mbogamo Secondary School was a matrimonial asset acquired during their marriage, and she relied on Exhibit D3, a receipt of search which shows that the plot where the school is situated is owned by Emmanuel Mgaya Tonya. However, there is no proof that Emmanuel Mgaya Tonya is the respondent. During cross-examination, the appellant admitted that the school is registered in the name of a Youth Worker and the Chairperson of the NGO is Oscar Makweta. The respondent was the coordinator of the school and the manager. With such evidence, it could not be said there is proof that the Mbogamo Secondary School is a matrimonial asset.

For the plot at Kisarawe – Mkuranga area, Plot at Dar Es Salaam and two houses at Mwakibete area in Mbeya, the evidence available does not give sufficient details of the existence of the mentioned properties. The respondent disputed its existence. So, the appellant had the burden to prove the existence of the said plots and houses. The appellant submitted that visiting these areas could have proven its existence, but without detailed information about these plots and houses, it was impossible to visit them. The reason provided by the trial Court when declining the prayer of the appellant to visit the locus in quo is sufficient and reasonable. The trial Court visits locus in quo only where there is a need, and the evidence available on record is sufficient to make the Court determine the matter. In the case of **Dar Es Salaam Water and Sewerage Authority vs. Didas Kareka and 17 Others**, (supra), it was held on page 29 of the judgment that:-

*"We are mindful of the fact that there is no law which forcefully and mandatorily requires the court or tribunal to inspect a locus in quo, as the same is done at the discretion of the court or tribunal, particularly when it is necessary to verify evidence adduced by the parties during trial."*

In the case of **Nizar M.H. Ladak vs. Gulamali Fazal Janmohamed** [1980] TLR 29, the Court of Appeal held that:

*"It is only in exceptional circumstances that a court should inspect a locus in quo, as by doing so, a court may unconsciously take the role of a witness rather than an adjudicator."*

The learned trial Magistrate found it unnecessary to inspect the locus in quo as the evidence placed before him was sufficient to dispose of the dispute. The trial Court doesn't need to visit the locus in quo where there is adequate evidence in the record to prove the existence of the plots and houses. As it was held by the trial Court, visiting locus in quo is the same as going to search for existing the mentioned houses and plots. This may turn the trial Court to be the witness. The same was stated by the former East Africa Court of Appeal in the case of **Mukasa vs. Uganda [1964] EA 698**, where it held: -

*"A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary and possible, to have such proof ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view, a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence. "*

Thus, the trial Court correctly decided not to visit the locus in quo as the appellant requested.

The appellant mentioned the motor vehicle Suzuki Escudo with registration No. T 987 BJX and Suzuki Swift with registration No. T 481 to be among the matrimonial assets. The registration number of Suzuki Swift is not complete. The ownership of motor vehicles is not proved by mentioning the registration number only. The ownership of the motor vehicle is proved by a registration card (license) or sale agreement. Thus, the evidence on the said motor vehicle as the matrimonial asset was insufficient.

On the ownership of EMT Enterprises Company, both parties testified that the company, which deals with insurance agencies, was acquired during the marriage. The respondent testified that he owned the company established in 2019. The appellant testified that the company is matrimonial asset established in 2000. Thus, this company was established during their marriage and it is matrimonial asset. The respondent's submission that the company is owned by shares and it could not be among the matrimonial assets does not hold water. As the company was established during their marriage the appellant contributed to its acquisition. The company qualifies to be matrimonial asset.



On the amount of money in the bank account, proceeds from EMT Enterprises Company and the sale of trees from Wende farm, there is no proof of the respective amount of money to be divided. There is no proof of the owner of the mentioned bank account. The proceeds from the EMT Enterprises Company are unknown and cannot be assumed. The proceeds from the trees sold from Wende farm are unknown, and as the farm was not distributed to any party when the respondent sold the trees, I find it improper for the parties to claim for the said proceeds.

Moreover, I agree with the respondent that the appellant did not claim for the money in the bank account and proceeds from EMT Enterprises Company and the selling of trees in Wende farm in her petition. Besides, the evidence in the record must be sufficient to make this Court or trial Court distribute the proceeds or money in a bank account.

Therefore, the appeal partly succeeds to the extent discussed herein. The decision and distribution made by the trial Court are upheld, save only to the exclusion of EMT Enterprises Company as a matrimonial asset. EMT Enterprises Company is a matrimonial asset that must be divided equally between the appellant and the respondent. I order for the shares of EMT Enterprises Company to be divided equally between the appellant and the

respondent, where each has to get 50% of the company's shares. As the appeal is partly allowed, each party shall bear its costs of the suit. It is so ordered accordingly.



**A. E. MWIPOPO**  
**JUDGE**  
**19/05/2023**