

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**TEMEKE SUB-REGISTRY**  
**(ONE STOP JUDICIAL CENTRE)**  
**AT TEMEKE**

**CIVIL APPEAL NO. 54 OF 2022**

**MWAJUMA YUSUPH MWENDA.....APPELLANT**

**VERSUS**

**SELEMANI BAKARI SELEMANI.....RESPONDENT**

*(Arising from the decision of the District Court of Temeke, One Judicial Stop Centre)*

*(Swai, SRM)*

*dated 28<sup>th</sup> September 2022*

*in*

*Matrimonial Cause No. 54 of 2021*

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**JUDGEMENT**

12<sup>th</sup> July & 11<sup>th</sup> September, 2023

**Rwizile J.**

The appellant being aggrieved by the decision of the District Court of Temeke, has appealed to this court raising the following grounds;

- 1. That, the trial magistrate erred in law and facts when he misapplied the provisions as set by law by taking into consideration the baseless and incredible evidence from the respondent's part and disregarding watertight and valuable evidence tendered by credible witnesses from the appellant's part.*
- 2. That, the trial magistrate erred in law by overlooking the provision as set by law when ordered three children born during*

*the existence of marriage residing with the appellant and ordering the respondent providing only TZS 100,000.00 per month for all three children equivalent to TZS 33,000.00 per each child, an amount which is insufficient for caring the children who are schooling.*

- 3. That, the trial magistrate erred in law and facts when he distributed the Matrimonial home and properties jointly acquired during the existence of marriage without taking into account the extent of contributions from each spouse.*
- 4. That, the trial Magistrate erred in law when he ordered that the appellant residing and caring the children whilst all. (sic)*
- 5. That, the trial Magistrate erred in law when he divided two matrimonial houses situated at Nzasa in the same Plot each party remaining and residing in his/her house whilst knowing that one of the sources of their marriage dispute is witchcraft beliefs therefore, they are enemies.*

On 12<sup>th</sup> July, 2023 this appeal was heard orally. The appellant enjoyed services of Mr. Mohamed Menyanga, learned advocate, while the respondent was served by Ms. Aisha Mohamed learned advocate. Arguing for the appellant on the first ground, Mr. Menyanga submitted that, the appellant had presented watertight evidence before the trial court but it was not properly evaluated and considered.

It was his argument that there was enough evidence of joint acquisition of properties because the appellant was employed and was paid salary of

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TZS 145,000.00 as proved by exhibit P5. He added, that the guest house was renovated, and the appellant's vehicle was bought on loan and the money generated was used for building houses. It was his further oral argument that renovating the house at Mbagala is the evidence that was disregarded. It was argued that the respondent did not procure any evidence to prove the extent of contribution.

The second ground is on custody of the children. It was argued that, the maintenance awarded is not enough as it is TZS 33,000.00 per child per month. The counsel further submitted that the amount suitable ought to be TZS 450,000.00 per month for all children.

On the third ground, it was stated that, division should be based on contribution towards acquisition of the matrimonial properties. The houses are in Lindi and one house in Dar Es Salaam is a guest house and another one is a residential house. According to him, division of matrimonial properties is not fair because the respondent has been given commercial houses and a motor vehicle. It was added that the same should be divided to both of them. Atleast each should get a commercial house, reference was made to the case of **Sixbert Bayi Sanka v Rose Nehemia Samzugui**, Civil Appeal No. 68 of 2022, Court of Appeal of Tanzania.

For the respondent, Ms. Aisha combined the first and the third grounds and argued them together. She stated that, the court properly evaluated the evidence and that the judgment is proper.

On division of properties, she argued, the house at Nzasa is also commercial as per exhibit U-1, which was the sole property of the respondent. According to her, the appellant, was given a house acquired jointly and houses at Lindi are semi-finished and not commercial. The learned counsel was of the opinion that, exhibit P-5 was based on the contract. Upon the expiry of the contract, she added, it was not extended and she became the house wife.

The counsel held the view that the court made a fair finding. More so, she said, the boat was the property of some other people, there is no proof of its existence. According to the learned counsel, the motor vehicle was bought by the respondent's efforts, so it was proper for him to be so awarded.

On the second ground, it was submitted that maintenance order is proper in terms of section 44 (a) of the Law of the Child, Act [13, R.E 2019]. The court is to consider the welfare of the children. The respondent, it was argued, is not employed and is also paying school fees. The evidence

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proves, it was her view, that the amount awarded in maintenance is enough, hence the appeal be dismissed.

This appeal may be properly determined by dealing with grounds of appeal in the following heads;

- i. *Whether the trial court properly evaluated the evidence of acquisition of matrimonial properties,*
- ii. *Whether division of matrimonial properties to the parties was proper and,*
- iii. *Whether maintenance awarded is proper.*

Going by evidence, it was testified by the appellant before the trial court that, the parties during their marriage had jointly acquired three houses, one house at Mbagala Nzasa and two houses at Lindi town at Mitwero. Further it was testified by her that they also had a motor vehicle -Vox T679CRC, motorcycle and those other properties as listed under paragraph 9 of the petition for divorce. She further stated that she partly found in Dar es Salaam one residential house which was substantially developed by their joint efforts. This house, he said, is used as a guest house as per pictures -exhibit P-4. Lindi houses were built while working with the NGO and provided exhibit P-5. Her evidence also included, building of a fishing vessel by her salary from 2004 to February 2005.

There is evidence that she took a loan from DCB bank for buying fish nets and registered it in Mozambique in the respondent's name. This was proved by exhibit P-6. Her evidence was that the proceeds were injected in the shop and in a guest house. For her, the three children only depend on the guest house and the shop for their survival. When the vessel was sold, its proceeds, she admitted, were used to renovate the houses and for buying a motor vehicle. The same evidence was corroborated.

On party of the respondent, he had told the trial court that, he was an employee of Greece boat as an Assistant Captain. He said he was paid TZS 400,000.00 per month. He said, in 1996 bought a plot and constructed a house at Mbagala Nzasa in terms of exhibit U-1. He admitted to work at Lindi and he had married, the appellant who was then paid over a Million Tanzanian Shillings per month.

He, as well said, worked for Pepsi Company as a driver and used to be paid TZS1, 200,000.00 and built a house at a remaining space at Mbagala Nzasa. His evidence was clear that the appellant was a house wife, she was provided with capital for opening the shop. The respondent did not accept the fact that they owned a boat and sold a motor vehicle. According to the proceedings, the respondent was ready to give the appellant 25% of the property.

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The impugned judgment, in my considered view, clearly shows the evidence was considered by the trial court. He captured the evidence adduced especially on contribution by the parties towards acquisition of matrimonial properties and regarded the conditions stated under section 114 of the Law of Marriage Act, [Cap 29, R.E 2019]. Upon thorough scrutiny of the evidence, it clear that the houses were divided equally between the parties as it is was shown in the judgement. Based on the above I find no merit in the first and second grounds of appeal.

The last question to be determined by this court is whether maintenance order is proper. Section 129(1) of the Law of Marriage Act, provides, a man has the duty to maintain his family. In doing so, the court has to look at the means and station of life before an order for maintenance is made. In the instant case, the respondent was a driver and also a business man and no further proof of current status of his income. Also, from the proceedings of the lower court, one child is said to be born on 2003 and up to the time the trial court pronounced its judgment, the said child was 19 years. In the absence of evidence to the contrary, that child should not be subject to the custody and maintenance order.

Since the appellant was given a house at Mbagala Nzasa and one house at Lindi, she has a duty to contribute in support of the children for maintenance in terms of section 129(2) of the Law of marriage Act. From

the foregoing, I think, TZS 200,000.00 per month is enough to take care of the children. Other orders of the lower court remain undisturbed.

It should be noted though by passing that maintenance orders are mutable. Any of the parties may apply to the competent court for variation of the order if circumstances necessitate so. Parties may therefore do so if need be. In the final analysis, this appeal therefore, is partly allowed on the issue of maintenance. No order as to costs.



  
**A. K. RWIZILE**  
**JUDGE**  
**11.09.2023**