**IN THE HIGH COURT OF TANZANIA**

**(MWANZA SUB-REGISTRY)**

**AT MWANZA**

**MATRIMONIAL APPEAL NO. 04 OF 2022**

*(Originating from Resident Magistrate's Court of Mwanza at Mwanza in Matrimonial Case No. 07 of 2021)*

**DEVOTHA MYANIKO KACHUGU**

**@DEVOTHA ENGELBERT MAGANGA.....APPELLANT**

**VERSUS**

**MASAKA YUSUPH MAGANGA**

**@YUSUFU MASAKA MAGANGA.....RESPONDENT**

**JUDGMENT**

*Date of Last Order:24/08/2023*

*Date of Judgment:25/09/2023*

## Kamana, J:

Aggrieved by the decision of the trial court in respect of the division of matrimonial properties, the appellant preferred this appeal armed with the following grounds:

1. That the trial court erred in law and fact in reaching the final decision without considering all the evidence adduced by the appellant.
2. That the trial court erred in law and fact in the distribution of matrimonial property as it was not fair.

3. That the trial court erred in law and fact for determining the case without evaluating properly the evidence on the record.
4. That the trial court erred in law and fact by ignoring the division of some of the matrimonial properties acquired by both parties during the subsistence of their marriage.

Facts gathered from the record have it that the appellant and the respondent contracted a civil marriage in 2001. They were blessed with one daughter and several properties. Some years later, their union turned sour to the extent of precipitating the appellant to petition for divorce. Amongst the grounds advanced for divorce was adultery by the respondent. The respondent vehemently denied the allegations and proceeded to accuse the appellant of adultery.

Upon hearing the parties, the trial court found the marriage in question had broken down irreparably and proceeded to pronounce a divorce. Concerning the division of matrimonial properties, the trial court ordered that the appellant is entitled to twenty percent while percent whilst the remaining percentage was left to the respondent. The trial

court did not issue an order as to the custody of the only issue as the daughter was already 18 years of age.

During the hearing of this appeal, the appellant was advocated by Mr. Phidelis Mtewele, learned counsel. The respondents had the services of Messrs. Renatus Makori and Vedastus Lugwisha, both learned counsel. The appeal was argued for and against *viva voce*.

Submitting in support of the four grounds, Mr. Mtewele prefaced by intimating that the four grounds will be argued jointly. He went on to submit that his client had, during the trial, submitted documentary proof regarding the existence of matrimonial properties which were not considered by the trial court.

Mr. Mtewele mentioned the documentary proof to include the following:

(a) The purchase agreement of the plot situated at Kuzenza, Nyegezi Mwanza (Exh.PE2);

(b) The purchase agreement of the plot situated at Chanika Msumbiji, Dar es Salaam.

Regarding the plot situated at Kuzenza, Nyegezi in Mwanza, Mr. Mtewele faulted the decision of the trial court that subjected the three houses on such plot as matrimonial property instead of the five houses

situated on that plot. He argued that the two houses that were excluded from the matrimonial property were built during the subsistence of their marriage like the three houses and were supposed to form part of the matrimonial property situated on the plot.

The learned counsel viewed the holding of the trial court that the two houses belonged to the respondent's son Victor Maganga as an error on the account that the sale agreement (Exh.D2) between the respondent and his son lacked spousal consent as per the requirements of the Land Act, Cap.113 [RE.2019]. Buttressing his argument, the learned counsel invited the Court to consider the case of **Thabitha Muhondwa v. Mwango Ramadhani Maindo and Another**, Civil Appeal No. 28 of 2012.

Concerning the property situated at Chanika Msumbiji, Dar es Salaam, Mr. Mtewele attacked the trial court's finding that the two houses belonged to the respondent only as it was a gift from Victor Maganga, his son. He faulted such a finding as there was no exhibit that was tendered to prove that the houses were a gift as claimed by the respondent and his son who testified as DW3. The learned counsel argued that the only documentary proof that was admitted in respect of the property was Exh.P4 which was the sale agreement that was

tendered by the appellant. He opined that the trial court's failure to divide the two houses occasioned injustice to his client.

Regarding the twelve-acre farm in Geita, Mr. Mtewele registered his complaints that the farm was a matrimonial property as the same was purchased during the subsistence of the marriage. He argued further that the purported sale of that farm by the respondent is void for lack of spousal consent as per the Land Act.

Mr. Mtewele argued further that the trial court misdirected itself in holding that the two plots where the Adonai Open School and Bethlehem School have been constructed are not matrimonial properties. The learned counsel contended that the DW3 did not adduce any evidence to prove that the plots are his.

In summing up his contentions, Mr. Mtewele invited the Court to divide the matrimonial property equally as his client contributed to their acquisition since she was employed and had a small business that supported the acquisition of the properties. He went on to implore the Court to consider the appellant's contribution as a wife and mother to the respondent's daughter and the health challenges she faced during the marriage including removal of her womb.

With respect to motor vehicles, the learned counsel disputed the decision of the trial court that held that a motor vehicle make Nissan Vannete is not a matrimonial property. He complained that the said motor vehicle was transferred to the respondent's son as a way of avoiding the same being included in the matrimonial properties.

Responding with regard to the plot situated at Kuzenza where there are five houses, Mr. Makori opined that the trial court was correct in excluding the two houses on the basis of Exh.D2. On the spousal consent, the learned counsel downplayed the argument advanced by Mr. Mtelewele on the ground that such a requirement does not apply to unregistered land like the one in question. He went on by distinguishing the case of **Thabitha Muhondwa v. Mwango Ramadhani Maindo and Another** (Supra) as inapplicable in the circumstances of this case as the cited case was about a land dispute whilst the case at hand is a matrimonial one. Fortified by that position, Mr. Makori contended that the right recourse was to institute a land case in the Land Court.

Concerning the twelve-acre farm situated at Geita, Mr. Makori contended that the farm was sold way back before the institution of the matrimonial case at the trial court. He went on to argue that the appellant should be stopped from complaining on that as she did not

dispute the contents of the sale agreement between the respondent and the buyer which was admitted as Exh.D8.

As regards the two houses situated at Chanika Msumbiji in Dar es Salaam, Mr. Makori contended that the said property was a gift given to the respondent by his son when the latter was working with the United Nations. He substantiated the argument by submitting that the respondent's son was sending money to the respondent which was used for constructing the two houses. In that case, he argued that the appellant contributed nothing to its acquisition. He reasoned that the trial court was right in asserting that the division of such property would cause conflict as the appellant is not the respondent's son's mother.

Concerning the plot on which Adonai Open School is, Mr. Makori contended that the appellant did not furnish any evidence that proves that the plot is owned by the respondent. Likewise, the learned counsel was of the same view regarding the plot on which Bethlehem School is situated. He went on to argue that the plot on which Bethlehem School was built is owned by VSM Company Limited which is owned by him and his two sons.

Mr. Makori submitted further that the motor vehicle Nissan Vannete, as per the registration card, is owned by DW3 and not by the

respondent. In that case, he opined that the name that appears on the registration card is conclusive proof that the vehicle is owned by the person whose name appears on the card. To bolster the argument, the learned counsel cited the case of **Nacky Esther Nyange v. Mihayo Marijani Wilmore**, Civil Appeal No. 109 of 2019.

In concluding his remarks, Mr. Makori submitted that the trial court had properly considered the appellant's contribution as a wife and gave her twenty percent of the matrimonial properties. He beseeched the Court to find the appeal baseless and dismiss it with costs.

On his part, Mr. Lugwisha contended that the plot at Kuzenza was bought in October, 2001 before the marriage between the parties which was in December, 2001. The learned counsel submitted that the respondent testified during the trial where he got the money that was used to purchase the plot. He argued further that the appellant did not adduce any evidence to prove her contribution to the acquisition of the said plot. Based on that, the learned counsel reasoned that the plot was not a matrimonial property and hence there was no need for spousal consent when the respondent sold part of the plot to his son.

Mr. Lugwisha went on to argue that the appellant did not adduce any evidence to prove her contribution to the construction of the two

houses that belong to DW3. In that line, the learned counsel opined that since the appellant did not object to the fact that part of the plot was sold to DW3 by the respondent, she had no right to bring that issue at the appellate stage.

Concerning the plot on which Bethlehem School is built, Mr. Lugwisha contended that though the building permit bears the respondent's name, such a permit is not conclusive proof that the plot belongs to the respondent. He summed up by praying for the Court to uphold the decision of the trial court.

Mr. Mtewele did not rejoin.

Having heard the competing arguments of the rival parties, the task before me is to determine whether the appeal is meritorious. In so doing, as the first appellate Court, reconsideration and reevaluation of the evidence adduced during the trial is inevitable. In that regard, the judgment will determine what are the matrimonial properties according to the evidence adduced. Further, through the judgment, the contribution of each part to the acquisition of the property will be determined as per the evidence. Likewise, to what percentage the parties are entitled will be pronounced in the judgment.

Starting with the plot at Kuzenza, it is evident from the records that the same plot was purchased on 22nd October, 2001. According to the sale agreement (Exh.P2), the buyer was the respondent on behalf of his family which is mentioned in the agreement as comprising the respondent and the appellant.

I am aware of the arguments advanced by the learned counsel for the respondent that the plot was acquired before the marriage and hence not a matrimonial property. It is my considered opinion that there is a misconception, on the part of the learned counsel, as to what constitutes matrimonial property acquired during the subsistence of marriage. The law recognizes assets that are acquired by any party to the marriage before the marriage and substantially improved by the other or by both parties during the subsistence of marriage, as assets acquired during the subsistence of marriage. Section 114(3) of the Law of Marriage Act, Cap.29 provides:

> *'(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.'*

Undeniably, the plot was purchased by the respondent on behalf of himself and the appellant before their marriage as per the sale

agreement. Given that, even if the parties would not have married each other, the said plot belonged to them on an equal basis as the said agreement states nothing about the shares each party has on the said plot.

The assertion that the money that was used to pay the purchase price was the respondent's money accrued from the sale of his house at Mlandizi, in my opinion, is baseless as there was no proof that it was that money that really purchased the plot. Likewise, that assertion is negated by the agreement which states that the plot was purchased by the respondent on his and the appellant's behalf.

Further, it is evident that the respondent sold part of the plot to his son (DW3) and not two houses as contended by the learned counsel for the appellant. This is evidenced by the respondent and DW3, a fact which was not disputed by the appellant. While mindful that this is not a land court, I do not hesitate to opine that the respondent was not justified to sell part of the plot which was bought by himself and the appellant before their marriage without involving the appellant. Likewise, since the plot was transformed into matrimonial property, the respondent was still supposed to involve the appellant in the sale.

In that regard, it is my considered view that the respondent before the dissolution of the marriage had benefitted from the sale of the plot. Considering the wifely role played by the appellant as correctly held by the trial court, I hold that the remaining three houses be divided into forty percent to the appellant and sixty percent to the respondent. At this point, the forty percent accrued to the appellant represents her twenty percent shares as given by the trial court. The remaining sixty percent represents the eighty percent given by the trial court to the respondent which includes the benefits he gained when he sold part of the plot to his son.

Concerning the houses situated at Chanika Msumbiji, Dar es Salaam, according to the evidence adduced during the trial, the plot on which the houses were built was purchased during the subsistence of the marriage on 16th March, 2012 as per the purchasing agreement (Exh.P4). The purchaser was the respondent. In her evidence, the appellant testified how she contributed towards the acquisition of matrimonial properties through her salary and the small business she had. The respondent on his part testified that the houses were given to him as a gift from his son and hence they do not form part of the matrimonial property. To strengthen his case, the respondent tendered a

bundle of bank statements to prove that he received from his son the money that was used to build the house.

Without much ado, I brush off the arguments advanced by the learned counsel for the respondent that the said houses were a gift and not matrimonial properties for the following reasons. One, according to Exh.P4, the purchaser of the plot on which the houses were built was the respondent. As I stated earlier, that purchase was done during the subsistence of the marriage. Two, there is no proof that the said houses were built as a gift from the respondent's son to the respondent as the bank statements that show the transfer of money from the respondent's son to the respondent cannot be taken to be proof of the alleged gift. Three, there is no proof that the said transferred money was used to construct the said houses.

Having taken that course, I hold that the houses situated at Chanika Msumbiji, Dar es Salaam are matrimonial properties. The question now is to what percentage the appellant is entitled to. I have considered the wifely contribution by the appellant as evidenced during the trial and I see no reason to depart from the findings of the trial court so far as the contribution is concerned. She is entitled to twenty percent of the said houses. However, for the reasons to be stated hereunder, the

two houses are to be divided into forty percent to the appellant and sixty percent to the respondent.

Regarding the twelve-acre farm situated at Nyalubanga, according to the evidence adduced, the same was purchased on 13th July,2013 when the marriage was in subsistence. This is per the sale agreement (Exh.P3). The purchaser was the respondent. The respondent admitted to having owned the farm and he testified that he sold the same to Kanyerere Kidesheni. According to his testimony, the farm was sold on 9th July, 2021 during the subsistence of marriage as per Exh.D8.

Cognizant of the appellant's wifely contribution towards the acquisition of matrimonial properties, it is obvious that the sale did not benefit her despite her contribution. The respondent's evidence that the money accrued from the sale was used to settle their daughter at the college, in my opinion, is flimsy. I hold so as there was no evidence that proves that the said money was used for the benefit of their daughter.

Given that, the respondent should not be allowed to benefit from the sale of such farm at the expense of the appellant. In that case, his eighty percent stake in the houses situated at Chanika Msumbiji, Dar es Salaam is reduced to sixty percent.

Regarding other landed properties situated at Geita, my perusal of the records convinces me to conclude that the appellant did not prove their existence to the required standard. In her testimony, the appellant managed to mention the properties without adducing evidence as to their existence and status of ownership.

Concerning the motor vehicle Nissan Vannete, I hasten to conclude that the same does not form part of matrimonial properties. The Registration Card clearly bears the name of Victor Yusuph Maganga as the owner. No evidence was tendered to prove that the car was once owned by the respondent to outweigh the registration card tendered by the respondent as Exh.D9.

In the upshot, the appeal is allowed to the extent stated herein. Right To Appeal Explained. Order accordingly.

**DATED** at **MWANZA** this 25th day of September, 2023.

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

**KS KAMANA**

**JUDGE**