

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

PC. CIVIL APPEAL NO. 20 OF 2023

(Originating from Tunduru District Court in Matrimonial Appeal No. 05 of 2022, Original Matrimonial Cause No. 15 of 2022 of Mlingoti Primary Court)

SEFU ALI MAKAMULA APPELLANT

VERSUS

HAPPYNESS XAVIER ASMANI RESPONDENT

JUDGMENT

Date of last Order: 24/08/2023

Date of Judgment: 29/09/2023

U. E. Madeha, J.

The Appellant, one Sefu Ali Makamia, being aggrieved by the decision made by Tunduru District Court in Matrimonial Appeal No. 05 of 2022, appeals before this Court on the sole ground of complaint that the lower Courts erred in law and in facts in division of matrimonial assets.

In an albeit brief, the background of this appeal as they can be grasped from the records of the lower Courts are to the effect that; the Appellant and the Respondent were husband and wife and their marriage

came into an end on the 17th day October, 2022, when the same was dissolved through a divorce decree issued by Mlingoti Primary Court (hereinafter to be referred as the trial Court). Apart from an order for divorce, the trial Court also ordered for division of matrimonial properties. The Appellant was dissatisfied by the orders for division of matrimonial properties and he unsuccessfully appealed before the District Court of Tunduru in which the decision of the trial Court was upheld.

In this appeal both parties enjoyed the legal services from the learned Counsel. The Appellant enjoyed the service of none other than Mr. Kaukuya Yusuph whereas the Respondent enjoyed the legal service of Mr. Kaizilege Prosper. By consensus of the parties the appeal was argued by way of written submissions and both Counsel filed their written submissions as it was scheduled by this Court.

Arguing in support of the appeal, Mr. Kaukuya submitted that from the records of the trial Court, it is undisputed fact that the properties which were proved to be jointly acquired by the parties are none other than; the motor vehicle (make Scania), the house located at Umoja area, the plot of farm located at Masasi District, garage, the motorcycle and a farm located at Kadeweale area measuring three acres. He further submitted that the trial

Court in ordering the division of matrimonial properties almost all properties were ordered to be sold and the proceeds to be distributed among the parties, however, for the reasons best known to itself, the trial Court ordered the house located at Umoja area to be given to the Respondent alone. In that case, he argued that, since there is ample evidence that the house was built in a plot of land which was bought by the Appellant prior to their marriage it was supposed to be sold and the proceeds of it be divided in equal share among the parties. To buttress that stance, he invited this Court to be guided by the decision of the Court of Appeal of Tanzania in **Salum Buzu v. Mariam Kibwana**, Civil Appeal No. 29 of 1992 (unreported). Mr. Kaukuya also invited this Court to be persuaded by the decision of this Court in **Hussein Mohamed Shela v. Neema Ally Ugomba**, PC. Civil Appeal No. 144 2019. Finally, he prayed for this appeal to be allowed and this Court order that a house located at Umoja area be sold and its proceeds be given to the parties in equal shares.

On the other hand, in reply to the submissions made by the Appellant's learned Counsel, Mr. Kaizilege submitted that, division of matrimonial properties is not an automatic power but it is given by the law.

Similarly, he added that the Court is always guided by the extent of contribution made by the parties. Expounding that position, he referred to the decision made in **Bibie Maurid v. Mohahed Ibrahim** (1989) T. L. R 162 and **Mariam Mhunya Hoza v. Godfrey Mwakifuna**, Civil Appeal No. 101 of 2019 (unreported).

Moreover, Mr. Kaizilege submitted that a house located at Umoja area was not proved to be one of the matrimonial properties since the Appellant failed to prove his contribution in its acquisition. To add to it, he also referred this Court to the provision of section 114 (1), (2) (b) of the *Law of Marriage Act* (Cap. 29, R. E. 2019). He argued further that the trial Court and the first appellate Court were right in granting the house located at Umoja area to the Respondent. Lastly, he prayed for this appeal to be dismissed for want of merit and the decision and orders of the trial Court and the first appellate Court to be upheld respectively.

Rejoining to the submissions made by the Respondent's learned counsel, the Appellant's counsel stated that the contention that the Appellant failed to prove his contribution towards acquisition of a house located at Umoja area does not hold water since the trial Court in its decision held that it was jointly acquired, even though, in ordering the

division of the properties the house was given to the Respondent. Lastly, he submitted that whatever was submitted by the Respondent's learned counsel are afterthought. Thus, he reiterated his prayer for this appeal to be allowed and a house located at Umoja area to be sold and its proceeds be divided equally among the parties.

As far as I am concerned, I have carefully read the submissions from the learned Counsel for both parties. From the beginning, I have to pinpoint that the dispute among the parties in this appeal is in respect to the division of a house located at Umoja area within Tunduru township. According to the decision of the trial Court which was upheld by the first appellate Court, the disputed house was declared to be the matrimonial property and it was among the properties which were subjected into division.

The trial Court, in its judgment ordered the disputed house to be given to the Respondent and instead of it the Appellant was given a plot of land located at Masasi District. In this appeal the Appellant is challenging the order for the division of house located at Umoja area. Undoubtedly, there is no dispute on whether it was jointly acquired by the parties when they were in their marriage. The power of the court to divide the

matrimonial assets is derived from the provision of section 114 (1) and (2) of the *Law of Marriage Act* (Cap. 29, R. E. 2019) which provides as hereunder:

- (1) *"The court shall have power when granting or subsequent to the grant of a decree of separation or divorce to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of the said sale.*
- (2) *In exercising the power conferred by subsection (1) the court shall have regard:*
 - (a) *To customs of the community to which the parties belong.*
 - (b) *To extend the contributions made by each party in money, property or work towards the acquiring of the assets.*
 - (c) *To any debts owing by either party which were contributed for their joint benefit and*
 - (d) *To the needs of the infant children, if any, in the marriage."*

In the case of **Cleophas M. Matibaro v. Sophia Washusa**, Civil Application No. 13 of 2011, in which it was made clear by the Court of Appeal of Tanzania that there must be a link between the accumulation of wealth and the responsibility of the couple during such accumulation. Thus, for the matrimonial assets to be subject for distribution they must be assets acquired by the parties during their marriage.

Therefore, the power of the Court to divide the matrimonial assets under section 114 (1) of the *Law of Marriage Act* (supra) can only be invoked when the following conditions exist:

- i. When the court has granted or is granted a decree of divorce or separation,*
- ii. When there are matrimonial or family assets which were acquired by the parties during the marriage; and*
- iii. When the acquisition of such assets was brought about by the joint efforts of the parties.*

Under similar situation, in the case of **Bi. Hawa Mohamed v. Ally Sefu** (1983) T. L. R 33, the concept of separate ownership of properties by spouses was discussed in relation to the *Law of Marriage Act* (supra). According to this case, the concept is recognized under sections 58 and 60 of the *Law of Marriage Act* (Cap. 29, R. E. 2019). In this case of **Bi. Hawa Mohamed v. Ally Seif** (supra) it was held that:

- i. "Since the welfare of the family is an essential component of Economic Activities, it is proper to consider the contribution of a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets.*

- ii. *The joint effort and work towards the acquiring of the assets have to construe as a joint effort for domestic effort of work of husband and wife."*

From the record of the trial Court, it is crystal clear that were all involved in business activities which they were doing jointly. Section 114 (2) of the *Law of Marriage Act* (Cap. 29, R. E. 2019), empowers the Court to have regard in the division of matrimonial property.

a) *"... the extent of the contributions made by a party in money, property or work towards the acquiring of the assets".*

b) *"... the needs of the infant children if any of the marriage and subject to those considerations, shall include towards equality of division the Law recognized in terms of money, property or work", section 4 (b), the law of Marriage Act (Cap. 29, R. E. 2002).*

It is a legal principle in division of matrimonial properties that where it has proved that the properties were jointly acquired by the parties, the Court has to order for equal division. This was the position of the Court of Appeal of Tanzania in **Salum Buza v. Mariam Kibwana** (supra), in which the Court had this to state:

"Where the evidence properly adduced that each party made substantial contribution towards acquisition of

matrimonial assets, justice requires equal division of matrimonial assets in question”.

Also, according to the provision of section 114 (2) (b) of the *Law of Marriage Act* (supra), division must be made after taking into consideration the contribution made by each party. Also, the Court of Appeal in **Gabriel Mimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018, clearly elaborated on the importance of considering the extent of contribution. See also the decision made in **Mohamed Abdallah v. Halima Lisangwe** (1988) T. L. R 197 and **Reginald Danda v. Felichina Wikesi**, Civil Appeal No. 265 of 2018 (unreported).

In this appeal, having made perusal on the Court records and the submissions made by the learned Counsel for the parties, I find both parties contributed in the acquisition of the matrimonial properties since they were doing business together. In fact, the Respondent was the one who facilitate their business by providing capital for the business.

The Appellant's complaint in this appeal is in relation to the orders for the distribution of a house in which the trial Court ordered to be given to the Respondent. Having carefully considered the available evidence and the decisions of the lower courts, I am of the view that the parties proved their

contributions towards the acquisition of the house located at Umoja area. They built the house jointly; despite the fact that the piece of land on which it was built was acquired by the Respondent before their marriage.

The trial Court in its orders for the division of the matrimonial property ordered a house located at Umoja area to be given to the Respondent and the Appellant be given a plot of land located at Masasi for the reason that the piece of land in which the house was built by the parties was acquired by the Respondent prior to their marriage. I find that order was not properly made.

Therefore, in the circumstances and the for the foregoing reasons, I find that this appeal has merit and it is allowed. The decision of the lower Courts ordering the Appellant to be given a plot of land located at Masasi and the Respondent to be given a house located at Umoja area is varied. I order for the Appellant to be given 40% and the Respondent 60% of the market value of a house located at Umoja area within Tunduru township and a plot of land located at Masasi to be sold and its proceeds to be equally divided between the parties. Other orders of the lower Courts remain undisturbed. I make no order for costs. It is so ordered.

DATED and DELIVERED at **SONGEA** this 29th day of September, 2023.




U. E. MADEHA

JUDGE

29/09/2023

COURT: Judgment is read over in the presence of the Appellant and Mr. Kaizilege Prosper, the learned advocate for the Respondent. Right of appeal is explained.




U. E. MADEHA

JUDGE

29/09/2023