

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 16 OF 2023

(Originating from the Judgment of the District Court of Arusha, Matrimonial Cause
No. 14 of 2021 before Hon. B.I. Mwakisuru-SRM)

GODSON MESHACK SIMANGA..... APPELLANT

VERSUS

JANETH MESHACK SIMANGARESPONDENT

JUDGMENT

12/09/2023 & 14/11/2023

MWASEBA, J.

The appellant, **Godson Meshack Simanga**, being aggrieved and dissatisfied by the judgment and decree of the District Court of Arusha at Arusha (Hon. B. I. Mwakisuru SRM), has appealed against the said decision on the following grounds of appeal:

- 1. The learned magistrate erred in law and fact when holding division of matrimonial in favour of the respondent by relying on secondary evidence tendered by the respondent which did not follow the procedures of admissibility.*



- 2. That the learned Magistrate grossly erred in law and fact by awarding 100% of the farm land 18 plots owned by the spouses which located at Olkerein Moshono, Arusha to the children and the Respondent.*
- 3. That the Magistrate grossly erred in law and fact by failing to consider the evidence provided by the appellant hence came up with a maintenance order against the Appellant which is in total disregard of his economic means.*
- 4. The learned magistrate erred in law and fact to include and divide all properties mentioned in the trial District court by Respondent to be matrimonial assets without considering that some properties do belong to the company.*
- 5. The learned magistrate erred in law and fact by failing to evaluate the evidence adduced at the trial hence came up with a wrong conclusion which occasioned failure and miscarriage of justice.*

The facts of this matter briefly are as follows: the parties started cohabitation in 1998, and through their relationship, they were blessed with three issues. Two of them have attained the age of majority. In 2010 the parties officially contracted their marriage under Christian rites at TAG

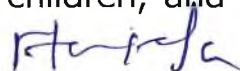


Themi Hill church in Arusha. Throughout this time, they enjoyed a peaceful marriage, but conflicts arose in 2012.

The appellant alleged that the respondent became arrogant, desiring the properties of their company to be considered matrimonial. Additionally, she changed her religion to become a Jehovah's Witness, contrary to their initial agreement. She also started denying him his matrimonial rights, claiming that they were not worshiping together. On her side, the respondent asserted that the appellant deserted his family and married another woman. Subsequently, he removed the respondent from the matrimonial house in Njiro, leaving his family to suffer.

During the subsistence of their marriage the parties acquired several properties including the company namely G.M Simanga Estate Ltd and its surveyed land with 18 plots from 74 to 91, houses thereon and other properties which are disputed to be matrimonial properties.

After hearing the petition brought by the appellant, the trial court granted a divorce to the parties. Maintenance of Tshs. 5,000,000/= was awarded to the respondent. The companies' properties were to be divided according to their shares, with 80% going to the appellant and 20% to the respondent. The house located at Njiro was to be divided equally, a Subaru car was awarded to the respondent and children, and the farm



land and unfinished house were granted to the children per the parties' agreement. Dissatisfied with this decision, the appellant is challenging the trial court's judgment based on the listed grounds.

During the hearing of this appeal, Mr. Bashiri Mallya Learned Counsel appeared for the appellant while the respondent appeared in person, unrepresented. The appeal was disposed of by way of written submission.

In support of the appeal on the first ground, Mr. Mallya challenged the trial court's decision to favour the respondent in the division of matrimonial properties. He argued that the trial court erred by relying on secondary evidence tendered by the respondent, specifically pointing to exhibits D1, D2, and D3. These exhibits were admitted by the court despite objections, as they were photocopies, rendering them inadmissible under **Sections 67 and 68 of the Tanzania Evidence Act**, Cap 6 R.E 2022.

Regarding the second ground of appeal, Mr. Mallya contended that the trial magistrate erred in law by awarding 100% of the farm land, consisting of 18 plots owned by the spouse's company located at Olkerien Moshono, to the children and the respondent. He referred to **Section 114 of the Law of Marriage Act**, which stipulates that matrimonial assets should be divided only between the parties. He also cited the case of



Samweli Moyo v. Marry Kassian Kayombo, (1999) TLR 197 in support of his argument.

On the third ground of appeal, Mr. Mallya argued that the trial court failed to consider the economic status of the appellant when ordering the payment of Tshs. 5,000,000/= for the maintenance of the respondent. He asserted that this amount was excessive given the appellant's means of obtaining his day-to-day income. He claimed that the order contravened **Section 116 of the Law of Marriage Act**. Additionally, he objected to the court's decision to grant the maintenance order when it was not sought by either party in the petition. To support his argument, he cited the case of **Aziz Ally Omary v. Eshe Majid Ganzel**, Civil Appeal No. 18 of 2022 (Unreported).

In his fourth ground of appeal, he referred this court to the case of **Salomon v. Salomon & Co. Ltd** (1896) UKHL 1, (1897) AC 22, in which the court held that when the entity is registered, it acquires legal personality, and its assets are entirely distinct from those of its directors and shareholders. The same principle is enshrined under **Section 15 (1) and (2) of the Companies Act**, No. 2 of 2002. Mr. Mallya further submitted that the trial magistrate divided the farm land of 18 plots

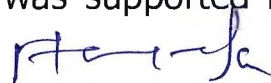


located at Olkerian, Moshono, which belongs to G.M Simanga Estate LTD, incorporated under the Laws of Tanzania.

He also submitted on the fifth ground of appeal arguing that the trial magistrate failed to evaluate the evidence presented at the trial court, leading to an incorrect conclusion that resulted in a failure and miscarriage of justice. Therefore, he prayed that the appeal be allowed, and the decision of the district court be quashed and set aside.

Responding to the first ground of appeal regarding the tendering of photocopies, the respondent explained that she is a lay person unfamiliar with legal procedures and was not represented. She clarified that when testifying at the trial court, she intended to tender the agreement regarding the house located at Moshono. It was initially objected to as a photocopy, but when the matter was set for hearing, she brought the original copy, which was admitted as exhibit D4 without objection.

Addressing the second ground of appeal, the respondent argued that there is no evidence presented by the appellant to prove that the said farm is the property of the spouses' company. She contended that, at the time of the trial, the plot was not considered matrimonial property, as evidenced by exhibit D4, in which the parties agreed to transfer the plot to the children. She asserted that this evidence was supported by the



testimony of DW2, who witnessed the agreement. Consequently, she argued that the case of **Samwel Moyo** (supra) cited by the appellant's counsel is not relevant to this matter, as the property had already been allocated to the children.

Regarding the 3rd ground of appeal, the respondent submitted that the trial magistrate complied with the law in ordering the maintenance of the respondent, as there is no evidence on record showing that the appellant lacks the means to maintain her.

In response to the fourth ground of appeal, she acknowledged that it is true that a company's assets cannot be demarcated from the company itself. However, in the current case, there is no evidence proving that the land of 18 plots located at Olkerian, Moshono belongs to G.M Simanga Estate LTD. She emphasized the cardinal principle that the one making an allegation must prove, and in this instance, the appellant failed to do so. Therefore, she argued that the case of **Salomon v. Salomon** (supra) cited above is distinguishable.

Addressing the fifth ground of appeal, she asserted that the trial magistrate properly evaluated the evidence presented in court, and the findings were in accordance with the laws governing spouses' rights and




matrimonial assets. Therefore, she prayed that the appeal be dismissed with costs.

In his rejoinder, Mr. Mallya reiterated his earlier submissions and added that the respondent was given an opportunity to bring the original documents of exhibits D1, D2, and D3, but they were not presented, as clearly shown in the record. He contended that the respondent's explanation of ignorance of the law does not justify the trial court's failure to comply with legal procedures in admitting documents.

He further clarified the issue of ownership of the farm land of 18 plots, asserting that they belong to the company, as indicated on page 9 of the judgment read together with page 16 of the proceedings. He argued that the fact that they were supposedly given to the children is incorrect since the plots are not in the names of the children, and there is no evidence of a transfer of the plots to the children.

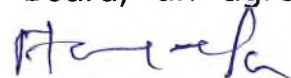
After reviewing the submissions from both parties and examining the record, the primary issue to be determined is whether the appeal has merit. I will begin with the fifth ground of appeal, where the appellant contends that the trial magistrate erred in law by not evaluating the evidence presented at the trial court, resulting in a wrong conclusion.



Upon scrutinizing the judgment of the trial court, subject to this appeal, it is observed that the evidence has been thoroughly evaluated. Nonetheless, even if the evidence were not properly evaluated, as the first appellate court, there is a duty to conduct a fresh re-evaluation of the entire evidence on record and arrive at independent conclusions, as emphasized by the Court of Appeal in the case of **Philipo Joseph Lukonde v. Faraji Ally Saidi** (2020) TLR, 576. This principle will be considered in the examination of other grounds of appeal.

Moving to the first ground of appeal, Mr. Mallya challenged the trial court's decision to divide matrimonial assets in favour of the respondent, by relying on secondary evidence that did not adhere to proper admissibility procedures. He specifically pointed to exhibit D1, D2, and D3 and argued that their admission violated **Sections 67 and 68 of the Evidence Act**. The respondent, however, claims to be a layperson, unaware of the obligation to present original documents. She explained that when directed to bring the original document, she submitted the parties' agreement, which was admitted as exhibit D4.

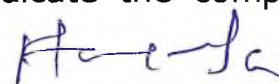
Upon examination of the record, particularly at page 23 and 25 of the proceedings, it is noted that exhibit D1, D2, and D3, consisting of recommendations from the Ward Conciliation Board, an agreement



between the parties on matrimonial assets, and a sale agreement, respectively, were objected in court. However, the trial magistrate admitted them reserving the reasons to be featured in the judgment. Looking at the judgment particularly on page 3, the admissibility of exhibit D1 and D3 was not discussed.

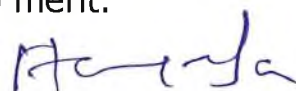
Considering that exhibit D1 was received as a photocopy without following proper procedures and exhibit D3 was received while it was not annexed to the pleadings, the conclusion aligns with Mr. Mallya's argument that this constituted a contravention of legal requirements. Consequently, these exhibits are expunged from the record. Regarding exhibit D2, the agreement between the parties on matrimonial assets, the respondent complied with the direction of the court to bring the original copy, and it was admitted as Exhibit D4 without objection. Therefore, this ground has merit with respect to some of the exhibits which deserves to be expunged from the record as I do.

After swotting the second, third, and fourth grounds of appeal, the appellant challenges the division of matrimonial properties to the respondent and issues of marriage, arguing that the farm land belongs to the spouse's company. The court examined the Memorandum and Articles of Association (exhibit G.S 2), which did not indicate the company's



properties. Additionally, exhibit G.S 3, the Moshono Ward Minutes, showed that the parties' company sought a building permit, which did not establish ownership of the land. The appellant, who sued the respondent, failed to produce the certificate of title to prove the farm land was not a matrimonial asset but a company asset. The court then considered exhibit D4, the agreement between the parties to give the land to their issues of marriage as agreed by both parties.

While acknowledging that, according to **Section 114 of the Law of Marriage Act**, properties should be divided among the parties after divorce and not given to issues of marriage, I am aware that parties may wish to distribute their properties to their children, and such an agreement would be blessed by the court. This notion was well expounded by the Court of Appeal in the case of **Gabriel Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 (Tanzlii) the court agreed with the High Court argument of honouring the parties' agreement of buying the matrimonial property for their issue of marriage. In the case at hand, as evidenced by exhibit D4 which was admitted in court without objection, the parties agreed to offer their issues of marriage with the house located at Orkereyani Moshono with 18 plots. Consequently, the second and fourth grounds of appeal are deemed to have no merit.



Moving to the third ground of appeal, Mr. Mallya argued that the trial magistrate did not consider the appellant's economic status when ordering maintenance for the respondent, and further contended that the amount of Tshs 5,000,000/= was not pleaded by the respondent. I concur with Mr. Mallya, learned counsel for the appellant that the court cannot grant an order that was not pleaded. This was stated in the case of **Astepro Investment Co. Ltd v. Jawinga Company Limited**, Civil Appeal No. 8 of 2015 (Unreported) The Court of Appeal held inter alia at page 17 that:

"Back to the appeal before us, the decision which was delivered by the learned trial judge, did not arise from what had been averred by the parties in their pleadings"

That being the legal position, I agree with Mr. Mallya that the trial court erred in law by granting maintenance order to the spouse while the same was not pleaded. Thus, this ground has merit.


As a result, the appeal is partly allowed. The order for maintenance of the respondent in the amount of Tshs 5,000,000/= is quashed and set aside. However, the division of matrimonial assets and maintenance for the child under 18 remain undisturbed. Due to the nature of the case, each party is ordered to bear its own costs.



It is so ordered.

DATED at **ARUSHA** this 14th day of November, 2023.




N. R. MWASEBA
JUDGE