

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

PC MATRIMONIAL APPEAL NO. 8 OF 2023

(Arising from Matrimonial Appeal No. 8 of 2022 District Court of Bukoba; Originating from Matrimonial Cause No. 25 of 2022 Bukoba Urban Primary Court)

JANE A. AUGUSTINE..... APPELLANT

VERSUS

CLAUD V. KANENO..... RESPONDENT

JUDGMENT

16th and 24th November, 2023

BANZI, J.:

The respondent and the appellant were husband and wife who contracted their marriage under Christian rites on 29/08/2014. They were blessed with two issues. Their marriage was officially dissolved on 26th October, 2022 by Bukoba Urban Primary Court (the trial court) via Matrimonial Cause No. 25 of 2022 after the appellant successfully petitioned for divorce, maintenance of children and division of matrimonial assets.

In her evidence before the trial court, the appellant narrated how their marriage had broken down irreparably due to unending conflicts between them. Concerning the properties, she also explained in details how they acquired. According to her, she solely bought one plot at Mutukula and

registered it under her name, which has two houses; finished and unfinished. They jointly bought another plot at Kayanga, Karagwe which she contributed Tshs.300,000/= out of purchasing price; one plot at Mutukula which she just contributed 10% and the respondent 90%. Lastly, she bought a commercial building with frames with her own money located at Mutukula area. As far as the children are concerned, she prayed to be granted their custody because they were young girls and she was able to maintain them.

On the other hand, the respondent conceded existence of unending conflicts in their marriage. However, he claimed to still love his wife and he was not ready to divorce her. In respect of properties, although he did not testify about his contribution towards acquisition, he was not ready for them to be distributed among the couple because they belong to their children. He requested the trial court to grant him custody of children and as far as the documents concerning ownership of properties, he challenged its authenticity claiming to be forged.

After receiving the evidence of both sides, the trial court found that marriage between the parties was broken down irreparably, hence it issued the divorce. It further granted custody of both issues to the appellant with an order of visitation to the respondent but both were ordered to contribute

Tshs.100,000/= monthly for their maintenance. As far as matrimonial properties are concerned, the appellant was granted the plot at Mutukula with two houses and business building containing frames. The respondent was granted one plot at Kayanga and another at Mutukula.

Aggrieved with that decision, the respondent appealed to Bukoba District Court (the first appellate court) disputing for unequal distribution of matrimonial properties. After hearing the appeal, the first appellate court ordered the two houses at Mutukula situated in one plot be divided between the parties whereby, the respondent was ordered to take unfinished house and the appellant remained with the finished house. The respondent was also awarded the commercial building with frames, while, the appellant was awarded furniture, fixtures and domestic utensils. Being dissatisfied with the decision of the first appellate court, the appellant filed petition of appeal to this Court containing five grounds thus:

- 1. THAT, the first appellate court erred both in law and fact to hold that distribution of matrimonial properties by the trial court was not fair and equitable without due regard of the respondent's testimony that he has no reliable income and that he is not sure to earn TZS. 10,000/=;*
- 2. THAT, the first appellate court erred in law and in fact to re-divide matrimonial properties without due regard*

of the respondent's testimony which did not controvert appellant's testimony as to the extent of contribution by each party towards acquisition of matrimonial properties;

- 3. THAT, the first appellate court erred in law and in fact to hold that respondent provided maintenance of his family during subsistence of marriage the fact which is not borne in the records of the trial court;*
- 4. THAT, the 1st appellate court erred in law and fact to distribute furniture, fixtures and domestic utensils to the appellant where as in fact those properties do not exist;*
- 5. THAT, the first appellate court erred in fact for failure to take into consideration that distribution of exhaustive development in the appellant's plot at Mutukula to the appellant and respondent is likely to cause chaos and unnecessary costs of subdivision since the same is the registered land and the appellant is the title holder.*

At the hearing, the appellant was represented by Mr. Projestus Mulokozi, learned advocate, whereas the respondent appeared in person, unrepresented. On the request of the respondent, the appeal was argued by way of written submissions.

Arguing in support of the appeal, Mr. Mulokozi submitted that, the appellant adduced evidence proving acquisition of all properties and the

extent of contribution by each party. According to Mr. Mulokozi, the appellant produced Exhibit A4 and A5 which proved that, she alone purchased Plot No. 62, Block D with title number 1136 located at Mutukula Kateebe for Tshs.1,050,000/= and the commercial building for Tshs.3,000,000/=. She further contributed Tshs.300,000/= and 10% in acquisition of plots at Karagwe and Mutukula respectively. However, in his defence, the respondent who is an entrepreneur expressed his uncertainty of earning Tshs.10,000/= per month. Also, he neither adduced evidence nor cross-examined the appellant in relation to his extent of contribution in acquisition of those properties. He further submitted that, the documents proving acquisition were admitted without objection and thus its contents were also admitted as it was held in the case of **Makubi Dogani v. Ngodongo Maganga** [2020] TZCA 1741 TanzLII.

He added that, the law is settled that, a person whose name is inserted in the registered right of occupancy is the lawful owner of that title unless there is evidence that the same was obtained fraudulently. He cited the case of **Amina Maulid Ambali and Others v. Ramadhani Juma** [2020] TZCA 19 TanzLII to support his argument. Moreover, he argued that, as the properties were acquired by one party in exclusion of the other party, there was no intention for the said property to be a matrimonial property.

Therefore, each party has to be identified as a private owner of property bearing his name. He cited case of **Francisca Amon Mgata v. Emmanuel William Mauki** [2022] TZHC 13437 TanzLII to buttress his point. He further cited the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** [2020] TZCA 31 TanzLII and submitted that, in absence of evidence from the respondent that, two houses in Plot No. 62 were acquired or substantially improved through joint efforts, such properties are excluded from matrimonial properties as they belong to the appellant who acquired by her own efforts. In that regard, Mr. Mulokozi urged this Court to uphold the division made by the trial court which considered the extent of contribution of each party towards acquisition of the said properties. Concerning the issue of maintenance of children and payment of school fees, Mr. Mulokozi stated that, it is the appellant who is maintaining and paying their school fees at Jaffary School. Thus, he prayed for appeal to be allowed.

In his reply, the respondent through Mr. Rwamayanga, learned advocate submitted that, for the property to be subjected for division must pass four tests that is; one, it must be a matrimonial property; two, acquired by joint efforts; three, the extent of contribution; and four, the need of the children. He also argued that, for the property to be regarded as a matrimonial property: first, should be acquired by one or the other or both

parties; second, with the intention that there should be continuing provision for them and their children during their joint lives; and third, is used for the benefit of the family as a whole. He supported his submission with the case of **Bi Hawa Mohamed v. Ally Seif** [1983] TLR 197. He contended that, the properties in dispute were acquired by either party during the subsistence of their marriage and they were intended to provide for their family, however, the appellant changed that intention after eruption of unending conflicts between them. He added that, although for the time being the respondent is economically incapacitated, previously, he was capable to contribute because he was an entrepreneur and he was taking care of the family in terms of food, shelter and clothes. As the burden of taking care of the family was lessen to the appellant, she was able to acquire the properties.

Furthermore, he argued that, as he was ordered to contribute Tshs.100,000/= per month for maintenance of children and pay school fees, the first appellate court was fair to award him the commercial building and unfinished house. He further stated that, although it was argued that the land in which the houses are situated is surveyed, still the respondent has rights because any land can be registered under ownership in common or can be subdivided under the Land Act [Cap 113 R.E 2019]. He urged the

court to uphold the findings of the first appellate court and dismiss the appeal.

In his rejoinder, Mr. Mulokozi stated that, the court after being satisfied that property is a matrimonial property subject to division, it has to determine the extent of contribution by each party in acquisition of that property. He contended that, the respondent in his submission admitted that, although the properties were acquired during subsistence of marriage, they were acquired by either of the parties separately. Hence, the first appellate court had no legal justification to interfere the distribution made by the trial court because the trial court distributed the properties according to contribution by each party.

He further insisted that, as the respondent has no capacity of earning Tshs.10,000/= per month, the appellant being an employee, she has capacity and had been maintaining their children by providing them with all necessities of life without assistance from the respondent. He concluded that, the respondent is not entitled to be given the commercial building and unfinished house because they were acquired and developed by the appellant. Regarding the utensils that were given to the appellant, Mr. Mulokozi argued that, as the appellant had left the matrimonial house for

three years, the said utensils that were awarded to her were not described and their existence is in question.

Having considered the submissions from both sides and having perused the records of the lower courts, the issue for determination is whether the first appellate court failed to evaluate the evidence on record and consequently, arrived into wrong decision in respect of distribution of matrimonial properties.

It is apparent from the record that, the centre of grievance between parties from the first appellate court to this Court is distribution of matrimonial assets. According to section 114 (1) of the Law of Marriage Act [Cap. 29 R.E. 2019] (the LMA), the court is empowered, 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. In doing so, it has to consider among other things, the extent of the contributions made by each party in money, property or work towards the acquiring of the assets as well as the needs of the children, if any. See section 114 (2) (b) and (d) of the LMA. Also, it is settled law that, the extent of contribution by a party in matrimonial

proceeding is a question of evidence. This was stated in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** (supra) that:

The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution.

Reverting to the matter at hand, before the trial court, appellant stated how the properties were acquired and how she contributed in their acquisition. She told the trial court, that she is an employee. She also narrated how the properties were acquired and how she contributed in its acquisition. According to her, through her own efforts, she built two houses in Plot No. 62 Block D located at Mutukula. Also, through her own efforts, she acquired the commercial building with frames. It was also her evidence that, as far as the plot located at Kayanga, she only contributed Tshs.300,000/= while another plot at Mutukula, she only contributed 10% and the remaining 90% came from the respondent. As rightly submitted by Mr. Mulokozi, the respondent did not dispute such evidence or cross-examine the appellant on how those properties were acquired and how he contributed in their acquisition. Since he failed to cross-examine her on that vital aspect,

it connotes that, he accepted what was stated by the appellant. It is an established principle that, where a party fails to cross-examine a witness on crucial issue, he deemed to have accepted such evidence and the court should be hesitant to believe him at a later stage when rebutting that issue. In the case of **Patrick William Magubo v. Lilian Peter Kitali** [2022] TZCA 441 TanzLII, it was stated that:

"It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth."

This was also stated in **Bomu Mohamedi v. Hamisi Amiri** [2020] 2 TLR 144 (CA) and **Paulina Samson Ndawavya v. Theresia Thomas Madaha** [2019] TZCA 453 TanzLII.

On his side, the respondent at page 17 of the typed proceedings, he stated that

"Mimi ni mjasiliamali hivyo sina kipato cha uhalali 10,000 kwa mwezi naweza kuipata au nisiipate."

Apart from that, in his whole testimony before the trial court, the respondent did not state how the matrimonial properties were acquired and

how he contributed towards its acquisition. He only concentrated in leading evidence for proving divorce and urged the court to preserve properties for their children. Although the respondent in his submission before the first appellate court, claimed to contribute much to the acquisition of properties because he was working with Tigo, his claim remains to be a mere submission because he did not state this in his testimony before the trial court. Thus, his contention that he was working with Tigo was nothing but an afterthought.

Despite glaring and unopposed evidence from the appellant in respect of acquisition of all properties, the first appellate court went on and varied the distribution of those properties made by the trial court without any justification. If it was about the issue of equality of division of matrimonial assets as envisaged under section 114 (2) of the LMA, it is my considered view that, such issue cannot arise in respect of the two houses in Plot No. 62 and commercial building with frames where the respondent did not adduce any evidence at all to prove extent of his contribution to its acquisition and their improvement. In addition, the decision of the first appellate court to give the respondent one house in Plot No. 62 and commercial building on the ground that, he has duty to maintain the children and pay their school fees, with due respect lacks basis considering the fact

that, there was no evidence adduced by the respondent to establish his contribution towards acquisition or improvement of the two properties in question.

Apart from that, the learned magistrate of the first appellate court awarded the fixtures, furniture and domestic utensils to the appellant without considering the evidence on record because, according to the testimony of the respondent, the appellant took all of them when the fracas happened. The learned magistrate did not labour to ascertain whether the said utensils still exist or not. Besides, they were not among the matrimonial properties mentioned by parties.

That being said, I find the appeal with merit and allow it by quashing the judgment of the first appellate court. Consequently, I hereby restore and uphold the judgment and orders of the trial court. Owing to the nature of the matter, I make no orders as to costs.



I. K. BANZI
JUDGE
24/11/2023

Delivered this 24th day of November, 2023 in the absence of the appellant with notice and in the presence of the respondent in person. Right of appeal duly explained.



A handwritten signature in blue ink, appearing to read "I. K. Banzi". The signature is fluid and stylized, with a long horizontal stroke at the end.

I. K. BANZI
JUDGE
24/11/2023