

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MTWARA
AT MTWARA**

PC MATRIMONIAL APPEAL NO. 20 OF 2022

(Originating from Matrimonial Cause No. 35 of 2021 at Mtwara Urban Primary Court within Mtwara District, arising from Consolidated Matrimonial Appeal No. 1 & 2 of 2022 at Mtwara District Court)

RUKIA ATHUMANI ISSA -----APPELLANT

Vs

ALLY AHMAD SAIDI -----RESPONDENT

JUDGEMENT

*Date of last Order: 19.09.2023
Date of Judgment: 22.12.2023*

Ebrahim, J.

This is the second appeal. The appellant lodged seven grounds of appeal, however in her submission she prayed to abandon the sixth ground. Therefore, the grounds of appeal for consideration by the courts are as follows:

1. That, the first appellate court erred in law and fact by failure to take into account evidences of the appellant in relation to the

house located at Raha Leo and Plot located at Msanga mkuu. The appellate Magistrate misdirected by considering that they are matrimonial properties while it was evidenced that, those properties were purchased and owned by the appellant alone.

2. That, the first appellate court erred in law and fact by dividing properties owned by the sole appellant without any justification. The appellant has proved that house located at Raha Leo in Mtwara municipality was purchased and built up to "lenta" by the appellant alone before she cohabited with respondent.
3. That, the first appellate court erred in law and fact by dividing 50% - 50% of the house located at Raha Leo and Plot located at Msanga Mkuu without taking into account that, those are properties purchased and owned by the appellant alone as admitted by respondent in his testimony.
4. That, the first appellate court erred in law and fact by failure to determine and analyze the evidence of the respondent who failed to prove the extent of his contribution on the house located at Raha Leo and Plot located at Msanga Mkuu.

Erroneously, the first Appellate court went on to divide those properties without legal justification.

5. That, the first appellate court erred in law and fact by denying division of matrimonial house located at Kiangu, without taking into consideration that it was obtained by joint effort of the parties. The appellant was the one who contributed stones and supervised Masons when they were building the said house.
6. That, the first appellate court erred in law and fact by failure to grant prayer of the appellant for purpose ends of justice, to call more witnesses as per section 21 (1)(a) of the Magistrate Court Act [Cap 11 R.E. 2019].

The brief background of this matter, according to the records goes thus; the appellant-initiated divorce proceedings at the Primary Court of Mtwara Urban claiming that she had Islamic marriage with the respondent but they did not have a marriage certificate. They had no children. She contended that during the subsistence of their marriage, they acquired a house which is located at Kiangu only. Thereafter they had a dispute between them and from there she paralyzed. She said, she had not seen the respondent since 2015

and that the said house was built during the subsistence of their marriage while she was present. She saw the respondent going to Kilwa, and she was with the masons. She contended further that the stones used for building the toilet were brought by her and she also gave the respondent TZS. 350,000/=.

On his side, the respondent told the trial court that they contracted an Islamic marriage with the appellant in 2008 but they were not given a marriage certificate. He said during the subsistence of their marriage, they acquired one house located at Raha Leo, Mtwara and one plot located at Msanga Mkuu. He also testified that the plot was bought by the appellant before they were married but he contributed some money. So, the house which is located at Raha Leo and the plot at Msanga Mkuu were bought by the appellant and he was not directly involved. As for plot at Msanga Mkuu, it was bought by using the money from the rent of the house which they built together. Further to that he testified that in all those days he had a fishing boat and he was getting 300,000/= or more. When he was cross examined by the court, he told the court that as for Kiangu

house together with his family; they inherited from his father but he developed it and bought it from his relatives.

After considering the evidence presented before her, the trial Magistrate found the parties cohabited under the presumption of marriage under **Section 160(1) of the Law of Marriage Act, Cap 29 RE 2019**. Thus, they could not be an order for the decree of divorce. The trial court proceeded to distribute the properties acquired during the subsistence of presumption of their marriage under **Section 114 (1) of the Law of Marriage Act Cap. 29 R.E 2019 (LMA)**. The trial court therefore made the following order: (a) a house located at Raha Leo be divided at the ratio of 80% to the appellant and 20% to the respondent; (b) a house located at Kiangu be divided at the ratio of 40% to the appellant and 60% to the respondent; and (c) a plot located at Msanga Mkuu be divided equally between the parties.

Aggrieved, they both appealed to the District Court of Mtwara. The first appellate court re-evaluated the District Court of Mtwara evidence on record, reversed the decision of the trial court, also made an order that a house located at Raha Leo be divided equally between parties; a house located at Kiangu was given 100%

to the respondent; and the plot located at Msanga Mkuu be divided equally between parties.

Aggrieved, the appellant appealed to this court.

The appeal was disposed of by way of written submission as per the schedule set by the court. The appellant appeared in person, unrepresented whilst the respondent was represented by advocate Radhia Luhuna.

In determining the appeal, I shall refer to the relevant submissions made by the parties in the cause of traversing substantive issues. I shall also address the grounds of appeal generally.

I have dispassionately gone through the rival submissions from both parties as well the evidence on record.

My review of the judgements of the lower courts shows that while the primary court made a specific finding that the house located at Raha Leo and the plot located at Msanga Mkuu were matrimonial properties, the District Court did not make any findings on the status of the said properties. The District Court simply distributed the house located at Kiangu to the respondent and went on to divide the plot

located at Msanga Mkuu in equal shares between the parties. I could have addressed this issue on merits but there is a technical error. After the appellant closed her case, The respondent gave his testimony contending that the properties which were acquired during the substance of their marriage was the house located at Raha Leo and the plot located at Msanga Mkuu. The said properties were not listed by the appellant at the filing of the petition. The appellant was not given a chance to respond besides the opportunity to cross examine him. Therefore, the parties, particularly the appellant, was not fully heard on the status of properties situated at Raha Leo and Msanga Mkuu. As the District Court did not make a finding on this issue, I invoke my revision powers to quash the decision of the primary court to the effect that the house located at Raha Leo and the plot located at Msanga Mkuu is subject to determination before the court after hearing both parties.

Consequently, I only uphold the decision of the trial court to the effect that the house located at Kiangu be divided at the ratio of 40% to the appellant and 60% to the respondent. I quash and set aside the decision of the district court which declared the house

located at Kiangu to be given 100% to the respondent on the reason that the respondent failed to call his relatives whom he alleged that he purchased the said house from them.

Regarding the status of the house located at Raha Leo and the plot located at Msanga Mkuu, I direct the primary court to rehear the evidence on the status of the said properties and make a finding which shall be limited to declaring whether the house located at Raha Leo and the plot located at Msanga Mkuu are matrimonial properties and make necessary order concerning distribution of properties if any.

In the event, the appeal is allowed to the extent explained above. Being a matrimonial case, I made no orders as to costs.

Ordered Accordingly.

22.12.2023
Mtwara.




R.A Ebrahim
Judge.