

IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
ONE STOP JUDICIAL CENTRE AT TEMEKE
PC CIVIL APPEAL No.57 OF 2022

*(Arising from Matrimonial Appeal No. 46 of 2021 at Temeke District Court, One Stop
Judicial Centre)*

JOEL AIDAN SEMBUCHÉ APPELLANT

VERSUS

ESTER JUMA HASSAN RESPONDENT

JUDGMENT

Date of last order: - 13/03/2023

Date of Judgment: -13/06/2023

OMARI, J.

A brief background of the matter as captured from the trial court's record is that; the Appellant and Respondent celebrated their marriage in the Christian form on 21 September, 2018. It would seem peace only prevailed for a short while after which difficulties ensued. As a result, the Appellant filed a Petition of divorce at the Temeke Primary Court at the One Stop Judicial Center vide Matrimonial Cause No.490 of 2021, praying for decree of divorce. The trial court concluded that the marriage had broken down and granted a decree of divorce. The marriage was not blessed with children thus, the only issue in dispute between the parties was a house.



In the trial court the Appellant disputed the Respondent's testimony that in their marriage they acquired a house jointly. She testified she contributed monetarily by taking out a loan and depositing some money into the Appellant's account as well as giving him cash for the construction of the house in dispute. The court held that the house in dispute was not a matrimonial property jointly acquired therefore not subject to distribution, as a result the Respondent was given domestic utensils only.

Aggrieved, she filed Matrimonial Appeal No. 46 of 2022 at the District Court of Temeke at the One Stop Judicial Centre on five grounds which revolve around the distribution of matrimonial property and her contribution towards acquisition of the same.

In the judgment delivered on 21 July, 2022 the District Court's findings were that the house was a matrimonial property jointly acquired by the parties. The Respondent was awarded a share of the house through her services of household chores. It was ordered the house be valued and distributed by ratio of 65% and 35% to the Appellant and the Respondent respectively.

The Appellant, dissatisfied with the decision of the District Court, preferred this Appeal on the following grounds:

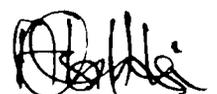
1. That, the first appellate court erred in law and fact by awarding the Respondent 35% of the value of the Appellant's house without any proof of her contribution on the acquisition or the substantial improvement on the said house.
2. That, the first Appellate court erred in law and fact by holding that the appellant's house was a matrimonial property subject to division

without any proof from the Respondent that it was acquired by their joint efforts.

Based on the two grounds, the Appellant prayed for this court to quash and set aside the order for division of the disputed house and the costs of this Appeal.

On the date set for hearing the parties appeared in person and the matter was disposed by way of written submissions.

Arguing in support of the grounds of appeal the Appellant began by explaining that the court misdirected itself by awarding the Respondent 35% of a house which belongs to the Appellant, despite there being no evidence to prove it. Referring to the case of **Hassan Mohammed Mfaume v. Republic**, (1981) T.L.R 167, the Appellant prayed that this court re-evaluate the evidence and come up with its findings, since it is legally justified in doing so. The Appellant also referred to section 114 of the Law of Marriage Act, Cap 29 RE 2019 (the LMA) stating that the provision has been considered in many cases one of them being that of **Samwel Moyo v. Mary Cassian Kayombo** (1999) T.L.R 197. He submitted further that the rationale behind ordering the division of matrimonial assets was underscored through the case of **Pulcheria Pundungu v. Samwel Huma Pundungu** [1985] T.L.R 11. Thus, for the court to properly exercise its jurisdiction under section 114(1) of the LMA it must first establish the three conditions as laid down in the case of **Samwel Moyo v. Mary Cassian Kayombo** (*supra*) that is; what is to be distributed must be matrimonial assets, it must have been acquired during the subsistence of the marriage and must have been acquired through joint efforts.



The Appellant contended that in the present case the disputed house was acquired before marriage and there was no improvement to it hence not subject to division in terms of section 114(1) of the LMA. Moreover, the Respondent was required to prove on a balance of probabilities the existence of the above conditions under Section 112 of the Evidence Act, CAP 6 R.E. 2022 but there is no evidence in the trial court records therefore the court was wrong to award to the respondent 35% of its value.

Arguing further in support of his Appeal the Appellant contended that the first appellate court's decision is based on the presumption that the Respondent was a housewife, to the contrary, she was not a housewife but a working woman. However, the court did not determine her monetary contribution to the acquisition or improvement of the house. He asserted that being a housewife is not an automatic guarantee of a share in matrimonial property unless there is evidence of contribution. He invited this court to refer to the decision in the case of **Charles Manoo Kasaro & Another v. Apolina W/O Manoo Kasaro**, (2003) T.L.R. 425, where the court held that domestic services allow a woman to a share in property acquired, but that property was acquired during the marriage and the wife performs her wifely services diligently such that the husband enjoys peace and harmony so that the said property can be acquired.

The Appellant further argued that in this case the property was purchased prior to the marriage and there was no improvement and therefore not subject to division under section 114(1) of the LMA. The Appellant's prayer is for this court to uphold this Appeal by quashing and setting aside the orders of the first appellate court and restoring the trial court's decision.

In reply the Respondent contended that the Appellant contradicts what he states as the grounds of appeal to his admission that the property was a matrimonial home as explained in paragraph 4 of page 2 of his submissions. According to her matrimonial home is defined in section 29 and section 2 (a) and (b) of the LMA which explains what a matrimonial home is. She further averred that all properties owned by them were gifts given to them during their wedding ceremony.

Regarding the cases cited by the Appellant the Respondent argued that they are unfound and distinguishable from this case and that the first appellate court rightly directed itself in exercising its jurisdiction conferred under section 114 of the LMA. According to the Respondent joint efforts was explained in the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] T.L.R 32 to include cooking, cleaning house and other works. Thus, the Appellant had no other person to do those works as they could not be done without the Respondent. The Respondent pleaded with this court to dismiss the Appeal with costs and uphold the decision of the first appellate court.

By way of rejoinder, the Appellant reacted to the Respondent's argument regarding contradictions in his submissions by making a distinction between matrimonial home and matrimonial property. He disputed the Respondent's contention that he has conceded that the said property was matrimonial property, that the Respondent has confused the two distinct concepts that is a matrimonial home and matrimonial property. The Appellant made reference to various sources including section 2(1) the LMA in a bid to clarify the differences between the two concepts.

In view of the said explanations the Appellant generally stated that a matrimonial home is a home for the married couple. He went on to submit that matrimonial property is not defined under the LMA but through case law including that of **Habiba Ahmad Nangulukuta and 2 Others v. Hassan Ausi Mchopa and Another**, Civil Appeal No. 10 of 2022, CAT (unreported) and that of **Bi Hawa Mohammed v. Ally Sefu** (*supra*).

As for the Respondent's claim that she has been doing domestic work as a wife thus, entitled to a share in the house, the Appellant stated that the case of **Bi Hawa Mohamed v. Ally Sefu** (*supra*) has been misplaced as it cannot be used to vest a property on an undeserving spouse for a simple fact of being a wife or a husband.

Having examined both parties' submissions and lower courts records the issue for determination is whether the first appellate court's distribution of the house in dispute was done in accordance with the law and having due regard to the Respondent's contribution to the acquisition of the said house.

Before going into the merit of the Appeal it is perhaps opportune to draw a distinction between matrimonial home and matrimonial property as two distinct legal concepts.

The fourth paragraph of page 2 of the Appellant's submissions referred by the respondent reads;

*'...despite these efforts, the parties could not be reconciled, **the matrimonial home became unbearable for the respondent who decided to desert it. To this end, the appellant decided to petition for divorce at the trial court.**'* (emphasis supplied)

This is what Respondent asserts that the Appellant has admitted that the house in dispute is matrimonial property. In his submission the Appellant contended that the Respondent has misconceived the distinction between a matrimonial home and matrimonial properties.

Matrimonial home is defined under section 2(1)(a) and (b) of the LMA which in part states:

"matrimonial home" means the building or part of a building in which the husband and wife ordinarily reside together and includes...'

As per section 59 of the LMA the matrimonial home has special privileges and protections and due to its relevance even outside the realm of domestic relations and matrimonial proceedings courts have sought to define what it is. For instance, in **National Bank of Commerce Ltd v. Nurbano Abdallah Mulla** (Civil Appeal No.283 of 2017) the Court of Appeal had this to say:

'The phrase matrimonial home is defined under section 2 of the Law of Marriage Act, Cap. 29, R.E. 2002 and the said section is in pari materia with section 112 (2) of the Land Act, which provides that; "matrimonial home means the building or part of a building in which the husband and wife ordinarily resides together...'

It further stated that :

'From the above provision, we are of the considered view that a property will be termed a matrimonial home when the spouses ordinarily occupied it as their family residence.'

On the other hand, matrimonial property is not defined in the LMA but has received broad elaboration through case law. In the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 (unreported) on the distinction between matrimonial home and matrimonial property the Court of Appeal stated that:

'On the other hand, the phrase matrimonial property has a similar meaning to what is referred as matrimonial asset and it includes a matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage.'

In an earlier case of **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 (unreported) it was stated that:

'Matrimonial properties are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts.'

While a matrimonial home may be a matrimonial asset in some instances it may not as the two are two distinct legal concepts. In the present Appeal the Appellant's reference was to a place of abode that they as former spouses used to reside and not as what the Respondent was purporting, by him calling it a matrimonial home he had admitted it is matrimonial property.

That said, the LMA vests courts with the powers to order division of the properties jointly acquired when issuing a decree of divorce or separation, section 114 (1) of the LMA provides:

'...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 sale.'

Moreover, section 114 (2) in part states:

*In exercising the power conferred by subsection (1), the court shall have regard to: -... (b) **the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; ...and subject to those considerations, shall incline towards equality of division.***
(emphasis supplied)

Additionally, section 114(3) of the LMA provides further guidance to the courts as regards what is to be distributed as matrimonial property; it states:

'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.'

From the above provisions and the cases of **Pulcheria Pundungu v. Samwel Huma Pundungu** (*supra*) and **Samwel Moyo v. Mary Cassian Kayombo** (*supra*), in exercising the powers conferred under section 114 of the LMA a court has to ensure three conditions are established. The three conditions are; that the assets set for distribution must be matrimonial assets, they must have been acquired by the parties during the subsistence

of the marriage and they must have been acquired by the joint efforts of the parties; see also **Bi Hawa Mohamed v. Ally Sefu** (*supra*).

Guided by the said conditions this court has to interrogate whether the house in dispute is matrimonial property and whether the Respondent had any contribution in its acquisition. Before doing so it would also be proper to state that I am alive to the principle that the first appellate court is obliged to re-evaluate the evidence adduced in the trial court and this has been the subject of many decisions see for instance; **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another**, Civil Appeal No. 421 of 2021. I have gone through the judgment of the first appellate court and hold the view that its judgment is reached after proper evaluation of the evidence adduced in the trial court.

The Appellant has claimed that the District Court made a mistake by deciding that the Appellant's house is a matrimonial property, thus, dividing it without any evidence from the Respondent that it was obtained through their joint efforts. He was also of the view that the first appellate court mixed up facts by calling the said house his property yet holding she made improvements to the same. On the part of the Respondent she submitted that the District Court directed itself in using its power in section 114 of the LMA and considered the case of **Bi Hawa Mohamed v. Ally Sefu** (*supra*), where the court explained that joint efforts include cooking, cleaning and other domestic chores.

From the record, it is not disputed that the plot on which the house was constructed was independently owned by the Appellant. Construction of the

house in dispute began in 2012 by the Appellant, before he married the Respondent. However, the house was improved when the parties were living together. Reading from page 6 of the typed proceedings the Appellant testified:

'Kiwanja nilinunua mwaka 2010 na nilianza kukiendeleza mwaka 2012. Mpaka Napata ajali nyumba ilikuwa kwenye rinta. Nilifunga ndoa nikiwa naugua...'

On her side, the Respondent testified as shown on page 8 of the typed proceedings:

'tarehe 28/02/2018 mdai alipata ajali na mimi nikiwa kama mpenzi wake wakati huo ndie nilie muhudumia kwani tulikuwa tunaishi kama mke na mume...'

From the parties testimony it is apparent that when the Appellant started to construct the house in 2012 he was not married to the Respondent. They got married in 2018; although they had been living together before that, and the house was in the lintel stage, therefore, still under construction. The construction of the house continued after the two got married, therefore the development from the lintel stage to a finished house. Hence, part of the house in dispute was built when the parties were married. Basing on the above explanation the first appellate court considered the house matrimonial property thus, divided it to the parties in the manner that it did, that is 65% to the Appellant who had bought the land and developed the said house to



the lintel stage, and 35% of the said house to the Respondent who came in after the two got married.

This brings me to the issue of the Respondent's extent of contribution in acquisition of the disputed house. From the record and the parties submissions it is not in dispute that the house was completed post 2018 when the parties got married. Whether it was by way of construction and or improvement to the existing structure; as a wife, the Respondent took part in the finishing of the house. The record is very clear, the first Appellate court was satisfied that there was no evidence as to the Respondent giving the Appellant TZS 3,000,000 as she alleged therefore, augmenting the Appellant's contention that the Respondent failed to prove her monetary contribution. This is so because in the trial court the Respondent had testified that she deposited money to the tune of TZS 6,000,000 into the Appellant's account but upon cross examination the said deposit was found to have been made by an Asha Juma @Asha Juma Hassan who is not Esther Juma, that is the Respondent. Her efforts to convince the court that it was herself who did the deposit hit a block wall as the Affidavit as to names she brought to court was found to be unregistered and could not be relied on. In the first appellate court, she relied on the TZS 3,000,000 which she had alleged to

give the Appellant as cash in the trial court. The first appellate court was satisfied that there is no evidence as to the Respondent giving the said money to the Appellant. However, looking at page 4 through to page 6 of the typed judgment the first appellate court's magistrate does a thorough analysis of the contribution of the wife, in this case the Respondent in the acquisition and improvements of the property of the husband begotten before the marriage using the evidence adduced in the trial court. In the learned magistrate's view, the wife's contribution falls within section 114 of the LMA since the husband testified that by 2018 when he got the accident it was in the lintel stage, thus, unfinished when he married the Respondent, therefore her contribution to the finishing of the said house regardless of whether she works outside the home or is engaged in economic activities. I am in agreement with the first appellate magistrate that the Respondent did contribute to the finishing of the said house. The Appellant is of the view that she cannot be entitled on the basis of the **Bi Hawa Mohammed v. Ally Sefu** (*supra*) understanding of contribution since in fact she is not a house wife to the contrary she is a working woman. The record depicts that the Respondent is a teacher and she is involved in VICOBA, thus her source of income. However, there is no where in the record that the Appellant



contested the Respondent's testimony that she did chores and took care of him when he was sick, after the accident.

In my considered view being a housewife, meaning one may not be working outside the home does not deter one from having economic activities in addition to doing the daily household activities neither does it automatically mean that one is actually engaged in the household activities. Likewise, being a working woman does not necessarily mean that the person is not involved in the household activities and chores or as some would put it wifely duties. The latter is what led the learned magistrate in the first appellate court to not only recognize the contribution of the Respondent in the disputed house but also grant her a 35% share.

It is a legal requirement that the spouse who claims a share in matrimonial property must prove the extent of their contribution towards the acquisition of the said property. This is provided under section 114(2)(b) of the LMA and in the case of **Yesse Mrisho v. Sania Abdul** (*supra*) as already seen elsewhere in this judgment. It is also necessary for the extent of contribution towards the acquisition of the matrimonial property to be proved, so it is a matter of evidence. This was emphasized by the Court of Appeal in the case



of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo** (*supra*). The court held 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".

The Appellant herein challenges the decision of the district court in that it awarded the Respondent 35% of the value of the house without proof of her contribution. The district court based its decision in the principle established in the case of **Bi Hawa Mohamed v. Ally Sefu** (*supra*) as a criterion in awarding the respondent 35% share. In above mentioned case, the Court of Appeal stated that:

'(i) Since the welfare of family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets; and(ii) the "joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts" or "work" of husband and wife'

In a later decision of **Bibie Maulid v. Mohamed Ibrahim** [1989] TLR 162 the court had this to say:

'Performance of domestic duties amounts to contribution towards such acquisition but not necessarily 50%. The amount to be awarded will normally depend on the extent of contribution made by each party. There must be evidence to show the extent of contribution made by each party towards the acquisition of the assets.'

The district court was of the view that since the Respondent found the Appellant with the house that was at the lintel stage, it was improved during their marriage, she was entitled to a share of the value of the house. Although the Respondent did not prove her contribution in terms of money the district court found that when the wife finds a husband with a personal property and the property is developed and improved in value, then the wife has the right of share through her duties as a wife. Moreover, it is in my view that the Respondent albeit being a working woman, testified that she nursed the Appellant after he was involved in an accident. All of which entitle her to a share of the properties that were acquired during the marriage as her contribution then can be seen in the chores and duties she had dutifully partaken in before conflict ensued between the two.

Basing on the circumstances of this matter I find no reason to depart from the findings of the district court. I therefore find the Appeal is unmerited and



consequently it is dismissed. Since this is a matrimonial matter, I make no order as to costs.

It is so ordered.



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A.A. OMARI

JUDGE

13/06/2023

Judgment delivered and dated 13th day of June, 2023.

A handwritten signature in black ink, appearing to read "A.A. Omari".

A.A. OMARI

JUDGE

13/06/2023

A handwritten signature in black ink, appearing to read "A.A. Omari".