

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

ONE STOP JUDICIAL CENTRE

PC CIVIL APPEAL NO. 63 OF 2022

(Arising from Civil Appeal No. 66 of 2022 at Temeke District Court at One Stop Judicial Centre).

GUSTAVU A. NGOWI APPELLANT

VERSUS

UYAEL G. NGOWI 1st RESPONDENT

ELIAMAN LEMUNGE NKO 2nd RESPONDENT

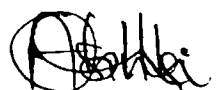
JUDGEMENT

Date of last order: - 13/03/2023

Date of Judgment: -13/06/2023

OMARI, J.:

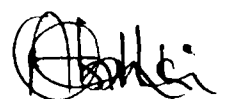
In brief, the 1st Respondent filed a Petition for divorce from the Appellant vide Matrimonial Cause No. 26 of 2020 having been married sometime in 1987. At the trial court the Appellant in contesting that he and the 1st Respondent acquired matrimonial properties jointly, testified that he had built only one house with the 1st Respondent, some of the other properties were acquired when he was married to his first wife. The trial court found the marriage had irreparably broken down, granted a divorce and ordered the distribution of matrimonial properties to the tune of 55% to the Appellant and 45% to the 1st



Respondent. Dissatisfied the Appellant instituted Matrimonial Appeal No. 67 of 2020. This appeal was unsuccessful.

When the file was remitted back to the primary court for execution the alleged first wife, who is now the 2nd Respondent appeared to object the distribution of matrimonial properties stating she is the one who acquired the same with the Appellant as they had a customary marriage since 1975. The objection was heard and on 02 March, 2021 the learned magistrate who heard the objection ruled that the person who was objecting was not a party to the proceedings before the court and any decision rendered would in turn have an effect in the decision rendered by the court, therefore they have no jurisdiction to change the decision already given. The file was then returned to the Magistrate in Charge. It would seem the 2nd Respondent persisted with the objection as the file was once again placed before a magistrate for hearing of the objection. Upon hearing of the same, the magistrate found in favour of the 2nd Respondent that one of the houses in Msewe and the Mpigi properties were hers, removed the same from the list of properties to be distributed leaving the rest to be distributed between the Appellant and 1st Respondent.

Aggrieved once more, the Appellant filed Civil Appeal No. 66 of 2021 armed with seven grounds of appeal. The Temeke District Court at One Stop Judicial Centre determined the said appeal and found that the Kimara Primary Court had erred in altering its own decision and giving the 2nd Respondent the Msewe property. In the learned district magistrates view the court should have dealt with what was before it, that is the objection against execution of the said judgment of the primary court. As for the Mpigi property the learned district court magistrate also found that like the Msewe property the court should have quashed the order for execution and not to determine who is the owner of the

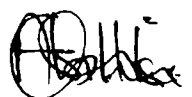


same. The learned magistrate then went on to quash the said judgment to the extent to which it is wrong.

The Appellant is aggrieved and once again challenging the decision of the Temeke District Court at the One Stop Judicial Centre in Matrimonial Appeal No.66 of 2022. In the Memorandum of Appeal the Appellant has raised five grounds of appeal as follows:

1. That the trial court erred in law and in facts for failure to determine the issue of division of matrimonial property between the Appellant and Eliamani Lemunge Nko, the 2nd Respondent resulting in a vague judgment totally un executable.
2. That the court erred in law and facts by failure to declare that the said Eliamani Lemunge Nko was not a legal wife of the Appellant who deserves any asset.
3. That the court erred in law and facts by granting Eliamani Lemunge Nko the proceeds of the assets which are not matrimonial proceedings between her and the Appellant.
4. That the court erred in law and facts by awarding 45% of the matrimonial assets to Uyael G. Ngowi as there was no proof of contribution to the acquisition of the same.
5. That the court erred in law and facts by including all 5 houses at Msewe, Ubungu knowing other houses belong to two siblings.

Therefore, the Appellant is praying for the orders that; this court quash the judgment of the district court and declare that Eliamani Lemunge Nko is not entitled to any of the matrimonial assets. He also wants this court to declare that some of the properties were not matrimonial assets with Uyael G. Ngowi



and to consider the contribution of Uyael G. Ngowi was only a house wife. Further, he wants this court to consider that some of the properties belongs to his two sons and some acquired before marriage and other relief the court deems fit to grant.

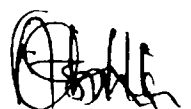
When the matter came for hearing the Appellant was represented by Martin Geoffrey, learned advocate and the 2nd Respondent was represented by Frank Ntuta, learned advocate. The 1st Respondent appeared in person and the matter was disposed by way of written submissions.

In consideration of the parties' submissions and the lower courts records the issue is whether the appeal has merit or not.

The first ground of the appeal revolves around the contention by the Appellant that he has never married the 2nd Respondent, they just cohabited and had five children, and she left with another man therefore she is not part of the Appellant's assets since he bought them when she was not there. The Appellant's counsel submitted that the issue of transferring the ownership of the house is total forgery because he was the one who told her to stay in that house. Similarly, the house in Kiboroloni Moshi does not concern both Respondents because he got it before he cohabited with the 2nd Respondent and before he married the 1st Respondent.

For the 2nd Respondent, Mr. Ntuta submitted that she is the Appellant's first wife since 1975 and there is no order that has been issued to dissolve their marriage before the 1st Respondent married the Appellant.

Regarding the allegation that the transfer of the house at Mpiji Magoe was illegal, the counsel stated that there is no evidence as there is no police report attached in his submissions. Also, the 2nd Respondent has never been invited



to the Appellant's wedding in Dar es Salaam as she has been living in Dar es Salaam since 1975. Therefore, she is entitled to the distribution of the property because she is the wife of the Appellant and she has contributed to the acquisition of those properties. As regards the Kiboroloni house, the counsel submitted that the 2nd Respondent has no interest in it because she has been living in Dar es Salaam with the Appellant since 1975.

When it was her turn, the 1st Respondent asserted that the 2nd Respondent did not adduce any evidence to the effect that she had contributed to the acquisition of the assets. She went on to state that the 2nd Respondent has never been a legal wife, married to the Appellant. She submitted that she (the 1st Respondent) is the legal wife of the Appellant, as she married him in 1986 and by that time the Mpiji property was not in existence, they bought it with the Appellant in 1990's. Therefore the 2nd Respondent is not entitled to anything.

The record of the trial court is to the effect that the 1st Respondent testified that she married the Appellant in 1987. The Appellant also admitted that he married the 1st Respondent in 1987 at page 10 of the typed trial court proceedings. On the other hand, the Appellant testified that he had a first wife, she left but later came back. He also testified that he has acquired assets with the two women. The 2nd Respondent stated that she married the Appellant in 1975 and they have five children. They acquired the house at Msewe and Mpiji.

In consideration of the first to the third grounds of appeal and the evidence during trial; the Appellant's evidence is inconsistent with what he has submitted at Appeal. In the trial court he testified that the 2nd Respondent is his wife, whom he married in the customary form and they have acquired property.



However, in the memorandum of appeal he stated that she has never been his wife, so she did not deserve a share in the matrimonial properties. Basing on what has been explained the Appellant's complaints against the district court's decision is unjustified as the court considered the evidence of the parties they adduced at the trial court in reaching its decision. I find that the first three grounds of appeal lack merit.

The Appellant has also submitted on the 4th ground that the district court made a mistake in allocating 45% of the matrimonial property to the 1st Respondent because there was no proof of her contribution. He contended that he bought the property with his first wife even before he married the 1st Respondent so she did not contribute anything except the one storey house at Msewe. However, he contradicts his submission that she did not contribute anything but she was contributing by cooking, washing the Appellant's clothes as well as fetching sand from the river bank. To support his argument the appellant cited the case of **Bi. Hawa Mohamed v. Ally Sefu** (1983) T.L.R 32. In response the 1st Respondent submitted that the court confirmed that she is the legal wife of the Appellant, so she deserves and has the right to their matrimonial property. Citing the case of **Charles Manoo Kasare and another v. Apolina Manoo Kasare** (2003) T.L.R 426 where the court decided that:

'A wife cannot be discounted from the business of her husband even if she makes no direct monetary contribution to it; her wifely services during the lifetime of her husband would in itself entitle her to a share in the properties acquired.'



It is a legal requirement that in exercising its power for division of matrimonial assets the court must be satisfied with the contribution of each part in the acquisition of the property. This is expounded in section 114(2)(b) of the Law of Marriage Act CAP 29, R.E 2019 (the LMA) and the Court of Appeal's decision in the case of **Bi. Hawa Mohamed vs. Ally Sefu** (supra) among many others. In my considered view the Appellant cannot be saying that the 1st Respondent contributed through the means that she did and at the same time complain that she was illegally awarded 45% since there was no proof of contribution. In the case of **Charles Manoo Kasaro & Another v. Apolina W/O Manoo Kasaro**, (supra) the court held that domestic services allow a woman to a share in property 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 1st Respondent testified in the trial court the extent her contribution and the same was not contested by the Appellant who in his submission also recognizes the said contribution. In effect, I also find this ground as unmeritorious.

As for the fifth ground, that the remaining houses belong to the Appellant's sons and not to the Appellants. I have gone through the trial courts record and see no testimony as to the said houses belonging to the siblings as averred by the Appellant. This court has already pronounced itself as held in **Monica Sarah John v. Kassimu Rajabu Amour**, Miscellaneous Land Case Appeal No. 138 of 2018, High Court (Land Division) further the Court of Appeal in **Amos Masasi v. The Republic**, Criminal Appeal No. 280 of 2019 was vividly clear that on appeal a court is to look at matters that came up in the lower court(s) and were decided. In other words, this court is estopped from dealing



with new matters that were not decided upon by the trial court. Therefore, the fifth ground also fails for lacking merit.

The Appellant prayed that this court quash the judgment of the district court and declare that Eliamani Lemunge Nko is not entitled to any of the matrimonial assets. I agree with the district court magistrate that the primary court should have not varied its own decision and bring in the 2nd Respondent who was not a party to the main case. As for the distribution of the matrimonial properties which as already discussed I see no fault with what the trial court ordered in terms of distribution.

Basing on the foregoing explanation I see no reason to interfere with the decision of the district court. Therefore, the Appeal is unfounded hence it is dismissed without costs.





A.A. OMARI

JUDGE

13/06/2023

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


A.A. OMARI

JUDGE

13/06/2023

