

IN THE HIGH COURT OF TANZANIA

TANGA SUB-REGISTRY - AT TANGA

PC MATRIMONIAL APPEAL NO. 3 OF 2023

Arising from the District Court of Handeni in Matrimonial Appeal No. 9 of 2022 originating from the Primary Court of Chanika in Handeni District in Matrimonial cause No. 15 of 2022

MOHAMED JABIRI MZIGE Appellant

VERSUS

HALIMA SELEMANI NJEMO Respondent

JUDGMENT

K.R. Mteule, J

11 March 2024 & 28 March 2024

The dispute in this appeal originates from the Primary Court of Chanika in Handeni District where the instant respondent filed **Matrimonial cause No. 15 of 2022** against the Appellant. In the Primary Court, the instant Respondent claimed for divorce, division of matrimonial assets and child maintenance. The Primary Court granted divorce, and ordered the custody of the child to be on the Respondent with 40,000 payable by the Appellant as maintenance. The Primary Court found the Respondent to have proved matrimonial ownership of property, hence declined to grant division of assets.

The Respondent was aggrieved by the decision of the Primary Court and appealed to the District Court of Handeni vide **Matrimonial Appeal**

No. 9 of 2022. In the District Court the Respondent who was the appellant therein, challenged the fairness of the distribution of matrimonial assets by the Primary Court. She further challenges the sufficiency of 550,000 awarded to the Respondent as a bride price for the stay of 10 year in the marriage. In this District Court, the decision of the Primary Court was varied on the aspect of division of matrimonial assets where the Respondent who was the appellant therein, was awarded 10% of the costs of the house in dispute. The Magistrate took into account the domestic contribution of the Respondent to the acquisition of the matrimonial home and the Islamic rites which requires a divorced wife to be given 10% of the assets as "Maliwaza". The Appellant being aggrieved by the decision of the District Court, preferred this appeal basing on two grounds.

In the first ground the appellant is challenging the award of 10% of the value of the house under **section 114 (2) of the Law of Marriage Act, Cap 29 RE 2019** without any proof on the ingredients in that provision.

In the second ground, the appellant faulted the District Court asserting failure to consider the weight of the evidence of the Appellant's marital

status effective from June 2015 when the very house was built as against the respondent's marriage of 20th March 2020.

The Appeal was heard orally. Both parties made their submissions and none of them was represented.

Submitting in support of the grounds of appeal, the appellant challenged the decision ordering him to pay 10% of the matrimonial house. He stated that the construction of the house in question did not involve the Respondent at all as it was constructed in 2017 before he married the Respondent in 2020.

The Appellant further challenged the construction of clause he cited from the Quran that even if the couple did not construct the house together, the divorced wife is entitled to 10% of the property. In his understanding, the paragraph cited from the Quran does not need payment of 10% but provides for the couple who have lived together, when divorced, the wife gets "kitoka nyumba" and not 10% as interpreted by the Magistrate. He prayed for the Court to quash the decision of the district court.

In reply, the Respondent did not dispute that the two officiated their married in 2020. Her argument is that she started living with the

Appellant before that official marriage. She stated that they got one child before the marriage and the child was born on 31/8/2018 which in her view, means that before the roofing of the house, they had already started living together as a wife and a husband.

She claimed to have contributed her own cash into the construction of the house in question. She continued to complain against the Primary Court Magistrate in deciding that she will not get anything because she did not send witnesses who saw her constructing the house while plans in matrimonial home are only known between the wife and the husband. In her view, the evidence of marriage certificate was enough to prove her contribution in the matrimonial property. She further challenged the holding of the District Court that since she was not employed but only a housewife while she is a businesswoman operating a pharmacy. She submitted that she just agreed to take 10% to let things go.

In rejoinder, the appellant reiterated what he submitted in the submission in chief. He admitted having met with the Respondent for the first time in relationship on 3rd December 2017 and by this time he had his other wives with whom he had already constructed the house to roofing. He admitted having got a child with the Respondent and promised to take care of the child as he is entitled to get his share from

his properties. He kept on questioning the criteria used to award 10% share to his divorced wife. He denied the assertion that she contributed to the construction.

He added that he is a public servant and that he built the house by using his loan which is being deducted from his salaries. She questioned the status of the other wives who stayed with him for a longer time from the time of construction of the house if the respondent gets 10% share.

From the grounds of appeal and the parties' submissions, the issue is **whether the appeal has merits**. The appellant is disputing the award of 10% to the Respondent. His argument is that the ingredients of **section 114 (2) of the Law of Marriage Act** were not observed by the District Court. To easily comprehend the gist of Section 114 (2) supra, it is suitable to reproduce the entire provision of section 114. It provides:-

"114.-(1) 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.

(2) In exercising the power conferred by subsection (1), the court shall have regard to

(a) the customs of the community to which the parties belong.

(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets.

(c) any debts owing by either party which were contracted for their joint benefit; and

(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) 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.

I have considered the reasoning of the 1st Appellate Court in granting the challenged 10% of the value of the asset. It is on record, and so confirmed by the 1st Appellate Court that parties started relationship in 2017 and got a child in 2018 and in 2020 they contracted an Islamic Marriage. It is not disputed that the house was still under construction at a roofing stage in 2017/2018 and this was the time when the appellant started relationship with the Respondent which resulted into their child who was born in 2018. Although there was no evidence of

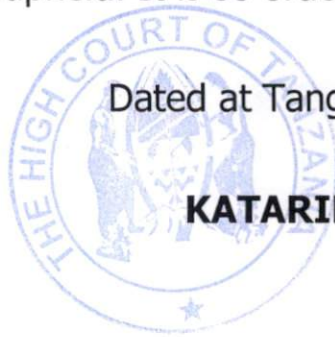
direct contribution of the respondent to the costs of the construction of the house, the 1st Appellate Court was guided by the case of **Bi Hawa Mohamed vs Ally Sefu (1983) TLR 32**, in considering the domestic works as a contribution to the part of construction effected while living together. It is obvious that, even though the Respondent found the Appellant to have already started construction and only witnessed its construction while at a roofing stage. This can be considered as improvement pursuant to **Section 114 (3) of the Law of Marriage Act** supra. See the case of **Anna Kanugha vs Andrea Kanugha [1006] TLR 195**. In this case it was held:-

"Personal Property is liable for distribution in terms of Section 114 (3) of the Law of Marriage Act when such property has been substantially improved during the marriage by the joint efforts of the spouses."

Pursuant to **Section 114 (2) supra** the Magistrate took into consideration the customs guiding the marriage of the parties which is Islamic rites which requires a divorced wife to get something as "maliwaza." Although verse 236 Surat Baqara from the Quran referred to by the Magistrate in the 1st Appellate Court does not tell exactly how much should be the "maliwaza", the case of **Bi Hawa Mahamed** guided the Magistrate in assessing the amount. He found the nature of

the relationship not justifying 50% of the division of the assets. The District Magistrate assessed it to 10%. Since the District Court Magistrate was guided by the provision of **Section 114 (3) of the Law of Marriage Act**, the Islamic customs guiding the parties' marriage and the case law of **Bi Hawa Mohamed** supra, I see no reasons to interfere with his assessment of the quantum of 10% as the amount entitled to Respondent.

The Appellant's argument that he has other wives cannot stand because this is a matter of division of matrimonial assets to a divorced wife. No evidence that the remaining wives will be divorced as well to require their shares after divorce. Even so, still they can get a bigger share than the respondent as the Appellant still remains with 90% of the value of the house. The aforesaid answers the issue as to whether the appeal has merits negatively. Consequently, I find the appeal with no merits. Consequently, the appeal is dismissed, and the decision of the District Court is upheld. It is so ordered.



Dated at Tanga this 28th day of March 2024

A handwritten signature in blue ink, appearing to read "Katarina Revocati Mteule".

KATARINA REVOCATI MTEULE

JUDGE

28/2/2024

Court:

The Judgment is delivered this 28th Day of March 2024 in the presence of both parties in person.



A handwritten signature in blue ink, appearing to be "Rf", is written above the judge's name.

KATARINA REVOCATI MTEULE

JUDGE

28TH MARCH 2024