

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE SUB-REGISTRY OF MWANZA

AT MWANZA

PC CIVIL APPEAL NO. 3308 OF 2024

*(Arising from Matrimonial Appeal No. 40/2023 of the Magu District Court and originating
from Matrimonial Cause No. 02 of 2023 of Magu Urban Primary Court)*

ORGENES MIANO MULUMBA APPELLANT

VERSUS

GRACE LAMECK MIKA RESPONDENT

JUDGEMENT

21st March & 10th May 2024

CHUMA, J.

The parties herein got married on 23rd December 2004. Their marriage was dissolved by Magu Urban Primary Court (trial court) vide Matrimonial Cause No. 02 of 2023. Dissatisfied by the decision of the trial court the appellant filed Matrimonial Appeal No. 40 of 2023 before the District Court of Magu. His appeal was dismissed hence this appeal involving five grounds of appeal for determination as hereunder;

1. The lower courts erred in law and fact for failure to properly evaluate the evidence on record leading to erroneous decisions regarding which properties were matrimonial properties;

2. The appellate court erred in law and fact by stating that there was a new issue raised by the appellant which was false;
3. The lower courts erred both in law and fact for ordering the division of matrimonial properties alleged to be acquired jointly without any proof whatsoever;
4. Both courts erred in law and fact for basing their decision on hearsay evidence thereby giving the respondent the house at Mkalama-Singida; and
5. The lower courts erred in law and fact by reaching their decision without giving each party the same standard of proof as required by law.

This appeal was argued by way of written submissions. The submissions were drawn and filed by the appellant and the respondent themselves.

The appellant abandoned the fourth ground of appeal and submitted in respect of the remaining grounds. In respect of the first ground, he submitted that the three houses in two plots at Magu which were held to be part of the matrimonial properties were acquired by the appellant before he married the respondent. Before division, they were already transferred to other persons. That is to say; plot No. 50 Block 'K' was transferred to **Stephano Salehe** and plot No. 53 Block 'HH' was

transferred to **Lameck Orgenes**. That the respective transfer was done on 5th November 2003 while the Marriage between the appellant and the respondent was contracted on 23rd December 2004. He submitted further that, the Appellate Court disregarded this fact for the reasons that the appellant presented it as an afterthought as it was not presented during trial. The respondent admits this fact before the trial court as it was captured in the trial court judgement in paragraph 3 of page 3. The appellant attempted to tender the evidence of ownership of the three houses at the first appellate court in vain as he was denied at the trial court. The reason advanced by the first appellate court to deny the admission of those documents was that they were not tendered during trial.

The appellant submitted regarding the second ground of appeal that, the first appellate court erred in law and fact for stating that there were new issues raised by the appellant at the appeal. That, the appellant testified regarding transfer of the same but the trial magistrate did not record the same. That, the first appellate court still had an avenue to receive additional evidence during the hearing of appeal vide Rule 14 of

the **Civil Procedure (Appeals in Proceedings Originating in Primary Court) Rules**; GN. No 312 of 1964 (hereinafter the Rules) but it failed.

Regarding the third ground of appeal, the extent of each part's contribution to the acquisition of matrimonial properties was not determined/analyzed as required by section 114 (2) (b) of the **Law of Marriage Act**, Cap. 29 R.E 2022 (hereinafter the Act). I was further referred to the case of **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (unreported) which was referred with approval by the court of appeal in **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018 at page 12. Further, some properties were erroneously considered to be matrimonial properties because some of the properties were the properties of the appellant's late father (Amos Miano Mulumba) who died on 9th June 2017. That, the appellant was only the administrator of the deceased's estates as appointed in Probate Cause No. 01 of 2018. Likewise, the three houses which are in two plots in Magu were already transferred to other persons.

The appellant submitted in support of the fifth ground of appeal that, the standard of proof in civil cases is balance of probabilities. The balance needs to be applied to both parties. That the lower courts subjected the

appellant to a standard of proof higher than required by the law. That, to the contrary, the respondent was subjected to lower standards of proof than that applied to the appellant. That, for failure to tender documentary evidence, the appellant's argument that the houses at Magu were transferred to other persons and that the farmland at Mkalama belongs to his late father were all rejected while on the other side, the respondent was not subjected to that standard of proof, her claims were just admitted and without being required to tender the necessary documentary evidences in support of her claims. He therefore prayed for the appeal to be allowed.

In reply it was submitted on the first ground of appeal that soon after divorcing his first wife, and chased her off, the appellant started living with the respondent up to the date of their marriage. The land on which they resided before and after their marriage had one building, after marriage, they maintained the same house and managed to construct other houses which are now used for rental business. They built another house in Singida which was divided to the respondent herein.

That, the respondent was not aware of any arrangement of disposition of the properties up to the date the same was raised by the

appellant at the first appellate court. That, the appellant is misguided in his contention that contribution to the acquisition of matrimonial property solely means money or purchasing of the property. Section 114 (3) of the Act, includes 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. The appellant remained silent and did not dispute the improvements made on the landed property after the union with the respondent. Therefore, according to her, both lower courts were judiciously guided by section 114 (2) of the Act and the landmark case of **Bi Hawa Mohamed vs Ally Sefu** [1983] TL 12.

On the second ground of appeal, she submitted that the appellant tried to impeach the credibility of the proceedings at the trial court. That in the case of **Halfani Sudi vs. Abieza Chichibi** [1998] TLR. 527 it was held that the Court record is a serious document, it should not be lightly impeached. Also, there is always a presumption that a Court record accurately represents what happened. Further reference was made to the case of **Exim Bank T. Ltd vs Johan Harld Christer Abrahamsson** (Civil Reference 11 of 2018 (unreported)).

She maintained that the fact that the land was transferred was a new fact raised on the first appellate stage. The applicant knew that he intended to tender evidence during the appeal but he agreed on the order of written submission while being aware that the right to adduce new evidence cannot be exercised by way of written submission.

On the third ground of appeal, it was her submission that the trial court was not given enough evidence concerning the contribution to the acquisition of properties by both parties to warrant any analysis. To her, the appellant is wrong to fault the lower court for having failed to analyse the evidence which was not adduced on record. That, the lower courts only considered the law and authorities regarding the division of matrimonial properties. That, in the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** Civil Appeal 102 of (unreported), in addressing a similar situation, the court of appeal stated on page 11 and 12 that;

"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. What we observed in the proceedings before the Primary Court is that, neither the appellant nor the respondent did

testify anything regarding the extent of contribution when acquiring the matrimonial properties..."

On the last ground of appeal, she submitted that the standard of proof in a civil case is on the balance of probability and the burden is upon a party who makes alleges in accordance with sections 110 (1) (2) and 112 of the **Evidence Act**, [CAP. 6 R.E. 2019]. Further reference was made to the case of **Godfrey Sayi vs. Anna Siame as Legal Representative of the Late Mary Mndolwa**, Civil Appeal No. 114 of 2012 (unreported). She prayed for the appeal to be dismissed.

The appellant rejoined that, the respondent was supposed to file her submission on or before 18th April 2024 but she filed it on 22nd April 2024 therefore he moved this court to disregard the respondent's submissions for being filed out of time. I was referred to the case of **Godfrey Kimbe vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014; and **National Insurance Corporation of (T) Ltd and Another vs. Shengena Limited**, Civil Application No. 20 of 2007 (both unreported) which states the principle that failure to lodge written submission after being so ordered by the court is tantamount to failure to defend one's case. He further contended that the submissions were served upon him on 4/4/2024 which

was the last date for him to file rejoinder. Further, the drawer of the respondent's submission did not sign on it and even the respondent's signature as seen in the submission differs from her signature as appears in the summons served upon her to appear for this matter.

With regards to the respondent's argument in the appeal, he rejoined that, Maintenance (repairs) if any in three houses at Magu were effected by owners. Further, repairs on someone's house by another person do not in any way transfer the ownership of such house to that other person who repaired it. Regarding the family and residential house constructed at Singida, he argued that the same was a product of his retirement benefits. That, the trial court did not properly analyse and evaluate the extent of the contribution of the parties in the acquisition of matrimonial properties as required by the law. He maintained his prayer for the appeal to be dismissed.

I have given due consideration to the rival submissions of both parties in dispute but before determining the grounds of appeal I will first determine the four contentions fronted by the appellant in his rejoinder that; the respondent's submissions were filed out of time; he was late

served with the respondent's submissions; the drawer of the submission did not sign and the signature of the respondent differs with the one appearing in the served summons.

As correctly pointed out by the appellant, the respondent's submissions were ordered to be filed on or before 18th April 2024. It is the law that the court's orders need to be complied with. I also agree with the appellant that failure to file one's submissions as ordered amounts to nonappearance to prosecute or defend one's case as stated in the case of **Godfrey Kimbe vs. Peter Ngonyani; and National Insurance Corporation of (T) Ltd and Another vs. Shengena Limited** (supra)

In the instant matter and according to the court system the submissions by the respondent were filed online on 18/4/2023. It is the law under section 21 (1) of the Judicature and Application of Laws Act (Electronic filling) Rules, GN No 148/2018 that, electronically filed documents are considered to have been filed in court on the date the same are so submitted online. I make reference to the case of **Cata Mining Ltd v Obetho Joseph Werema**, Land appeal No. 124 of 2021 (unreported). Therefore, the respondent's reply submission was filed on time.

With regards to delay of service, it was the contention by the appellant that the submissions were served upon him on 4/4/2024 but how was it served before being filed? As I have stated herein the submissions were done by the respondent online on 18/4/2023. It is very unfortunate to the appellant that this court has no proof of service of the said submission. Further assuming that he was served on 25/4/2024 as he claims to be served on the date which was the last date for filing the rejoinder, the appellant had an avenue to apply before this court for extension of time to prepare for a rejoinder. Because he has managed to file his rejoinder, in my view he was not prejudiced.

Regarding the claim that the drawer of the respondent's signature did not sign, the appellant did not cite any violated law. I am aware that section 43 (1) Advocates Act Cap 341 R.E 2019 forbids unqualified persons to draft legal documents. Also, failure to indicate the name of the drawer is an incurable defect as per section 44 (1) and (2) of the Advocates Act. Further reference is made to the case of **Robert Ibengwe vs The Director Hotel Tilapia (T) Ltd**, Civil Application No. 4 of 2010 (unreported). In this matter, the name of the respondent was endorsed as

a drawer. Therefore, in my view, the submission of the respondent did not violate any law with regard to the drawer.

Regarding the contention that the signature of the respondent in the submissions differs from that in the summons connotes the forgery allegation. This fact is serious and criminal in its nature having its own forum to deal with and needs to be proved on a higher degree of probability than is required in ordinary civil cases. See the case of **Gabriel Mathias Michael and another vs Halima Feruzi and 2 others**, Civil Appeal No. 28 of 2020; and **Dominicus Zimanimoto Makukula (administrator of the estates of the late Dommy Dominicus Makukula) vs Dominica Dominicus Makukula and 3 others**, Civil Appeal No. 359 of 2020 (both unreported). Therefore, all four contentions against the submission by the respondent are out of context. I will consider the reply submissions by the respondent.

Reverting to the grounds of appeal. It is worth noting at the outset that, in this matter there are concurrent findings of facts in two lower courts below. As a general rule, the second appellate court should be reluctant to interfere with concurrent findings of the two courts below

unless there is misdirection or misapprehension of evidence or violation of some principles of law or procedure or has occasioned a miscarriage of justice. See the case of **North Mara Gold Mine Limited vs Emmanuel Mwita Magesa**, Civil Appeal No. 271 of 2019 (unreported). In the case of **Neli Manase Foya vs Damian Mlinga** [2005] T.L.R 167 the court of appeal held inter alia that;

"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."

Guided by the above position I will determine the grounds of appeal. The first and second grounds of appeal interrelate. I will therefore determine them together. It was contended by the appellant that two plots at Magu were not matrimonial properties because plot No. 50 Block 'K' was acquired before marriage and was transferred to Stephano Salehe and plot No. 53 Block 'HH' was transferred to Lameck Orgenes before marriage.

The appellant tried to tender the transfer documents at the first appellate court but they were rejected. On his part, the respondent submitted that the respondent found one house in the respective plots. That by their joint efforts they managed to construct other two houses thereon and that she was not aware of the transfer until when the appellant raised the same at the appellate court. With regards to transfer documents, the respondent was of the view that the same was correctly rejected as it was improper to tender evidence in written submissions.

I have read the evidence on record. The respondent on page 9 testified that

"Viwanja vya magu vyote nilikuta amenunua na mke wake wa zamani, ambaye waliachana lakini mimi nimeshiriki kujenga naye nyumba"

This piece of evidence was not challenged during cross-examination. The position is well settled that, failure of a party to cross-examine a witness amounts to an admission of all that has been stated by a particular witness. See; **Khalidi Mlyuka versus Republic, Criminal Appeal no. 442 of 2019** (CAT-Iringa) (unreported) on page 13.

Matrimonial properties include those assets which were acquired before marriage by one spouse but substantially improved during the subsistence of marriage. See the case of **Helmina Nyoni vs Yerima Magoti**, Civil Appeal No. 61/2020 (unreported). By building the houses in the respective plots during the subsistence of their marriage, the said properties were correctly held to be matrimonial assets worth division.

Regarding the transfer of the said plots, the evidence of the appellant from pages 11 to 14 of the trial court proceedings said nothing regarding the transfer of the said plots to the respective transferee. His evidence mainly focused on a house located at Msumbiji Mkalama regarding other properties he generally testified on page 15 that;

"mali nyingi ambazo nimezipata, sitafanya mgawanyo. Kwangu mimi sikubaliani na hoja yake. Mimi nitaandika wosia na yeye atapata haki yake..."

Therefore, in my view, the trial court never determined the issue of whether the plots were not forming part of the matrimonial property for the reason that they were transferred. This fact was indeed raised during an appeal at the District Court. As correctly reasoned by the first appellate court, cardinal law is that an appellate court cannot consider matters of

fact not taken or pleaded in the trial court. See the case of **Richard Majenga vs Specioza Sylvester**, Civil Appeal No. 208 of 2018, **(unreported)**.

The first appellate court was also justified in not considering the submissions made readings the transfer raised in a written submission because it is a settled law that submissions are not evidence. The court of appeal in **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (unreported) held:

"...submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

It was also argued by the appellant that the appellate court had the power to receive additional evidence under Rule 14 of the Rules. The said provision is reproduced for ease of reference. It reads;

*"At the hearing of an appeal, the appellate court, **after hearing such additional evidence, if any, as it may***

***permit or require**, shall first hear the appellant or his agent and then, unless it forthwith dismisses the appeal, the respondent or his agent and the appellant or his agent shall have the right to reply.*" (bolding rendered for emphasis).

It is clear from this provision that new evidence will only be considered before the hearing of an appeal and only after parties are afforded the right to be heard on such additional evidence. Before such evidence is received, the court needs to permit receipt of such new evidence therefore it must be moved. What the appellant did on 16/10/2023, he prayed for his appeal to be heard by written submissions. He filled his submissions regarding his grounds of appeal before moving the court to receive new evidence.

Moreover, the reception of additional evidence has its conditions as reaffirmed in the case of **Idrisa R. Hayeshi vs. Emmanuel Elinami Makundi**, Civil Application No. 113/08 of 2020 (Unreported) that;

- i. That the evidence could not have been obtained with reasonable diligence for use at the trial.*

- ii. *The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.*
- iii. *The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.*

In the instant matter, the said documents would have failed to align with the 1st condition as there was no explanation as to why they were not mentioned or produced before trial. In other words, they were stated as an afterthought.

It was also the submissions of the appellant that he testified regarding the said transfer but the trial court did not record his testimony. This is again firstly raised at this court. It was not the argument before the first appellate court. I pose here and remember the words of my brother Mlacha J. in the case of **Respicius s/o Patrick @ Mtazangira and another vs Republic**, Criminal Sessions Case No. 56 of 2018 (unreported) that;

“Why is it that people do not want to say the truth...”

The appellant is raising new facts now and then. As correctly argued by the respondent, the court's records are considered to be sanctity, their authenticity cannot easily be impeached. This position is also stated in the case of **Selemani Juma Masala v Sylvester Paul Masha and another**, Civil Reference No. 13 of 2018; and **Alex Ndendya vs the Republic**; Criminal Appeal No. 207 of 2018 (both Unreported). Henceforth, the first and second grounds of appeal lacks merit.

Regarding the third ground of appeal, it was the submission by the appellant that, the extent of each part's contribution to the acquisition of matrimonial properties was not determined/analyzed. Also, some properties were erroneously considered to be matrimonial properties because some of the properties were the properties of the appellant's late father (Amos Miano Mulumba). The respondent was of the view that both parties did not adduce evidence to the extent of contribution. The court was guided by law and authorities.

I have read the judgements of two lower courts below to see whether there was an analysis of evidence regarding contributions toward the acquisition of matrimonial properties. On page 13 the trial court's

judgement considered the domestic efforts of the respondent toward acquisition of matrimonial properties. Likewise, the first appellate court on pages 8 and 9 was satisfied that the properties were acquired and/or developed during the subsistence of their marriage. See the case of **Reginald Danda V. Felician Wikes. Civil Appeal No 265 of 2018 and Charles Manoo Kasala & another V. Apolina Manoo Kasala [2003]TLR425**. Therefore, there is a concurrent finding regarding this fact. I have no reason to interfere with this finding because; **one**; the respondent testified her contribution toward the acquisition of matrimonial properties. She stated on page 10 of the proceedings that;

"Mimi sikuwa na kazi ila nilichangia kwa nguvu zangu kwa kuwapikia mafundi na kukufulia. Tumeishi nawewe kwa muda wa miaka 19"

Two; regarding the properties alleged to have belonged to the appellant's late father there was no evidence tendered by the appellant except exhibit D8 (letters of Administration-Form No. IV). No inventory was tendered which states what properties belong to the deceased. Further, when asked by the court the appellant testified on page 16 that;

*"Viwanja viko viwili ambavyo havijaendelezwa. Viko Mwabela-Mkalama na kingine Madukani-Mkalama. **Kwenye viwanja hivyo ana haki.**" (emphasis added)*

Therefore, I find no justifiable reason to interfere with the concurrent findings of two lower courts. I am satisfied that there was no misdirection or misapprehension of evidence or violation of principles of law or procedure. The third ground of appeal lacks merit as well.

The last ground of appeal should not detain me, as I have stated hereinabove the appellant not only failed to tender documentary evidence during the trial but also never testified with regards to the alleged transfer of Houses at Magu. He also failed to substantiate his allegations regarding the properties belonging to his late father. The evidence by the respondent, on the other hand, was mainly supported by the appellant himself with regard to the Plots at Mwabela-Mkalama and Madukani-Mkalama as I have quoted herein above. Further on page 13 of the proceedings, the appellant testified;

"Hakukuwa na makubaliano ila niliona nimjengee huyu mama ili asisumbuliwe na mke wa kwanza..."

Henceforth, it is not true that the appellant was placed to a higher standard of proof than the respondent. The fifth ground of appeal is devoid of merit.

In the upshot, all grounds of appeal are barren of merit. I find no reason to fault the decision of the District Court of Magu in Matrimonial Appeal No. 40 of 2023 and that of Primary Court Matrimonial Case No 02 of 2023. The appeal is then dismissed. Owing to the nature of the matter, I desist from making an order for cost.

Right of Appeal fully explained to the parties.

Dated at **MWANZA** this 10th day of May 2024.



W. M. CHUMA
JUDGE

Judgment delivered in court before the parties who attended virtually this 10th day of May 2024.

W. M. CHUMA
JUDGE