

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 28218 OF 2023

(Arising from the Judgment and Decree of the District Court of Temeke, One Stop
Judicial Centre at Temeke in Matrimonial Cause No.24 of2023)

ALLY MOHAMED HASSANI..... APPELLANT

VERSUS

MAYASA KAIMU MBALIKE..... RESPONDENT

JUDGMENT

19th April & 20th May 2024

BARTHY, J.:

The above-named appellant being aggrieved by the decision of the District Court of Temeke, One Stop Judicial Centre at Temeke, in Matrimonial Cause No. 24 of 2023, appeals against the whole decision on the following grounds;

- 1. That, the Hon. trial Magistrate erred in law and in fact in by awarding 50% to 50% distribution of matrimonial property in the absence of sufficient evidence by-the Respondent as to (sic) her contribution into acquisition of the property in dispute.*

2. That, the Hon. trial Magistrate erred in law and in fact by awarding the sum of Tanzanian Shillings Three Hundred thousand (Tshs. 300,000/=) as monthly costs for maintenance of the issues in the absence of sufficient evidence by the Respondent as to the ability of the Appellant to pay the amount in dispute.

Wherefore, the appellant prays for this appeal to be allowed with costs, and for the judgment and decree to be quashed and set aside.

The hearing of this appeal was disposed of by way of written submissions, which were timely filed according to the schedule.

In the appellant's submission, Mr. Andrew Miraa argued each ground separately. With respect to the first ground, he contended that the trial court erred in holding that the property located at Kimara is matrimonial property subject to division at a ratio of 50% to each party without sufficient evidence.

He highlighted the trial court's findings that the appellant financed the construction of the house, while the respondent's contribution was limited to moving bricks, sand and supervising the masons. To bolster his argument, he cited the case of **Bi Hawa Mohamed v. Ally Seif** [1983] TLR 32 C.A.

Mr. Miraa argued that the respondent's evidence was not disputed before the trial court. He stated that the court erred in holding that the property is matrimonial property subject to division and by awarding an equal share to the parties without considering the extent of each party's contribution towards the acquisition of the property. To support his argument, he referred to the case of **Angelina Mwamgunda vs. Haruna Mwakapiso**, Civil Appeal No. 14 of 2021 (HC), where the court considered awarding a greater share to the party who contributed more monetarily than the other who allegedly contributed in other ways.

On the second ground of appeal, Mr. Miraa argued that the trial court erred by awarding Tshs. 300,000/= as monthly maintenance costs for the children in the absence of sufficient evidence to support the appellant's ability to pay the amount in dispute.

He also made reference to page 4 of the impugned judgment, stating that simply because the appellant did not comment and said he was a driver, it did not justify the amount ordered. He also referred to section 110 (1) of the Evidence Act Cap 6 R.E 2022, asserting that the respondent had the duty to prove that the appellant could pay the amount ordered by the court monthly.

Mr. Miraa stated that this court, being the first appellate court, should exercise its powers by re-evaluating the evidence tendered during the trial

by the parties and come up with its own findings, given that the trial court did not properly evaluate the evidence presented before it, leading to a wrong decision. He referred to the case of **Mwajuma Mbegu vs. Kihvana Amani** [2004] TLR 410, where the court emphasized the appellate court's duty to re-evaluate evidence and make its own findings. held;

"The first appellate court has power to re-evaluate the evidence adduced at the trial and make factual findings therefrom, it cannot make such findings based on a document that was not before the trial court".

He therefore prayed that this appeal be allowed with costs, and that the judgment and decree of the District Court of Temeke, One Stop Judicial Centre (the trial court) in Matrimonial Cause No. 24, be quashed and set aside.

Opposing the grounds of appeal, Richard Godlisten Kimaro from Women's Legal Aid Centre (WLAC) prepared the reply submission on behalf of the respondent, addressing each ground separately.

Responding to the first ground, he firmly stated that the trial court was correct in ordering an equal division of the matrimonial property, including the matrimonial house located in the Kimara area, Ubungo District in Dar

es Salaam. Mr. Kimaro further argued that the appellant's claims of financing the construction of the house lacked basis, as he failed to provide proof during the hearing in terms of Section 110 of the Evidence Act.

Additionally, he emphasized that properties acquired during the subsistence of the marriage through their joint effort are subject to distribution under section 114 (3) of the Law of Marriage Act, Cap 29, R.E 2019.

Furthermore, any properties acquired by either party before the marriage but substantially improved during the marriage through their joint efforts are also subject to distribution as per section 114 (1) of the Law of Marriage Act. To support his argument, he cited the case of **Bi Hawa Mohamed** (supra). He therefore stated that the trial court considered all these aspects and was correct in ordering an equal division.

Regarding the second ground, concerning the maintenance amount of Tsh 300,000/=, Mr. Kimaro argued that section 125 (1) of the Law of Marriage Act (supra) imposes the duty on the man to maintain marital children.

Therefore, the court was right to award it as per Section 44 (a), (b), (c), (d), and (e) of the Law of the Child Act, Cap 13, R.E. 2019, considering

all three children are still minors, as stated on pages 2 and 4 of the judgment. Thus, it is the respondent's prayer that the appeal be dismissed with costs.

In his rejoinder, Mr. Miraa maintained the arguments presented in his initial submission, and this court finds no need to reproduce the same.

Before addressing the grounds of appeal, it is essential to understand the background of the case in the trial court. The respondent filed for divorce in the District Court of Temeke, One Stop Centre, under Matrimonial Cause No. 24/2023.

The petition was sought on several orders: a declaration that the marriage had broken down irretrievably, equal distribution of matrimonial properties, custody of the children, and maintenance of Tshs. 300,000 per month, with the appellant covering education and medical expenses.

After hearing the parties, the trial court issued a divorce decree, awarded custody of the three minor children to the respondent, granted visitation rights to the appellant, ordered maintenance payments of Tshs. 300,000 per month, and mandated an equal division of the matrimonial properties. Dissatisfied with these orders, the appellant has brought this appeal.

Having reviewed the written submissions of both parties and thoroughly examined the case records, the court is now tasked with determining whether this appeal has merit.

In determining this appeal, I will address each ground of appeal separately. I will begin with the first ground of appeal, in which the appellant argues that the trial court erred in distributing the assets equally, assigning 50% to each party, without sufficient supporting evidence.

Going through the records of the trial court, the respondent herein had informed the trial court whereby that, they constructed the house together and the appellant. She demonstrated that whenever the appellant would travel, she used to carry bricks and sand for construction. The appellant herein did not cross-examine her with respect to this evidence. Implying that he admitted to that evidence.

The provision of section 114(1) of the Law of Marriage Act (*supra*) empowers the court to order the division of properties acquired through the joint efforts of the parties during the subsistence of the marriage. Furthermore, section 114(2) of the Law of Marriage Act requires the court to assess the extent of contribution made by each party, for easy reference the said provision is quoted hereunder.

*114(2) In exercising the power conferred by subsection (1),
the court shall have regard to*

- (a) N/A
- (b) *the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
- (c) N/A
- (d) N/A

With respect to the house at issue, the respondent stated before the trial court that she made her contribution through work and service, while the appellant contributed monetarily. It is now an established principle that domestic work also amounts to a contribution to matrimonial assets. In the case of **Bi Hawa Mohamed** (supra), the court considered major factors in determining what constitutes matrimonial property and held that:

"(i) Since the welfare of the 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;

(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."

The respondent testified before the trial court that she contributed to the construction of the house by carrying bricks and sand, supervising the construction, and performing other domestic duties as a wife. Her testimony regarding these contributions was not challenged by the appellant. On the other hand, the appellant did not provide any evidence or statements regarding his contribution to the acquisition of the property. In the case of **Patrick William Magubo vs Lilian Peter Kitali** (Civil Appeal No. 41 of 2019) Court of Appeal at Mwanza [2022] TZCA 441, the court held that;

.... it is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth.

The court further held that;

since the respondent did not utilize that opportunity during the trial, to challenge the evidence of DW1, challenging it at this stage, is nothing but an afterthought.

According to the evidence on record, it is clear that the respondent had her contribution in the house at Kimara. Having so established that the house at Kimara was the joint effort of the spouse, it is crucial to

assess the extent of contribution made by each party. In the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo** (Civil Appeal No. 102 of 2018) [2020] TZCA 31 the case 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.*** [Emphasis is supplied].

Grasping from the evidence of the respondent, it implies that the contributions made by the appellant were significant, suggesting that he has put in substantial effort towards acquiring the property. Given this account, it is not just for the trial court to distribute the house equally between the parties.

Therefore, the distribution of the house in Ubungo District, Dar es Salaam, as determined by the trial court, is reversed and this court orders that the house be divided according to the following ratio: the appellant is awarded 70%, and the respondent is awarded 30% of the property's value. This division can be implemented either by selling the house and distributing the proceeds accordingly or by the appellant compensating the respondent for her share based on a proper valuation. Hence, the

first ground of appeal has merit to the extent that the shares are adjusted as specified.

Turning to the second ground of appeal, where the appellant is challenging the trial court's order for maintenance of three children to the tune of Tshs. 300,000/= per month. According to the trial court records, the respondent stated on page 6 of the trial court proceedings that the appellant is a driver who is capable of providing for his children. This evidence was not challenged, and the appellant did not present any evidence on this issue.

Under Section 129(1) of the Law of Marriage Act, the duty to maintain children is placed on the man, whether they are in his custody or not. The provision states;

*"Save where an agreement or order of court otherwise provides, it shall be the **duty of a man to maintain his children**, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, and education as may be reasonable having regard to his **means and station in life** or by paying the cost thereof."*[Emphasis is supplied].

In assessing the amount to be paid for the maintenance of children, the court must consider the means and station of life of the parties when issuing the order. The trial court noted in its findings that the appellant did not provide any evidence regarding his income or lifestyle. Additionally, he failed to cross-examine the respondent, who stated that the appellant is capable of paying the amount requested.

I agree with the trial court's findings of the trial court that the appellant's silence implied acceptance of the respondent's account as truthful. This principle was articulated in the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (Civil Appeal No. 45 of 2017) in the Court of Appeal of Tanzania at Mwanza [2019] TZCA 453, which quoted with approval the case of **Shadrack Balinago vs. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS), and the Attorney General**, Civil Appeal No. 223 of 2017 (unreported), where it was held that

failure to cross-examine a witness on a particular important point may lead the court to infer that the cross examining party accepts the witness' evidence and it will be difficult to suggest that the evidence should be rejected.

It is therefore clear that the appellant, at this stage of the appeal, is estopped from raising an issue he opted not to challenge or provide evidence for at the trial level.

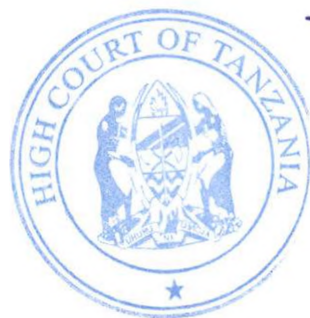
However, as a passing remark, I would encourage the lower courts to order a social inquiry report to be conducted by the social welfare officer in terms of section 136 of the Law of Marriage Act when addressing questions related to the custody or maintenance of any child.

Such a report ensures that the maintenance assessment adheres to legal standards and ethical considerations, safeguarding the child's rights and ensuring fair treatment of both parents. Therefore, this ground is found to be devoid of merit and is disregarded.

In view of the foregoing, I find that this appeal has partly succeeded to the extent of reversing the trial court's order on the division of the house at Kimara. Given the nature of this matter, I give no order as to costs.

It is so ordered.

Dated at Dar es Salaam this 20th day of May, 2024.



A handwritten signature in blue ink, appearing to read "G. N. Barthy".

G. N. BARTHY

JUDGE

Delivered in the presence of the Respondent in person, RMA. Ms. Bernadina and in the absence of the Appellant and his advocate.

Sgd: G. N. Barthly

Judge

20/05/2024