

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
MBEYA SUB - REGISTRY  
AT MBEYA**

**PC MATRIMONIAL APPEAL NO 06 OF 2023**

*(Originating from Tunduma Primary Court in Matrimonial Case No. 70 of 2022 and  
Matrimonial Appeal No. 02 of 2023 at Momba District Court)*

**ROIDA MKANYEGHE KAYOMBO.....APPELLANT**

**VERSUS**

**EMMANUEL RUBEN MWAFOGO.....RESPONDENT**

**JUDGMENT**

*Date: 3 May 2024 & 31 May 2024*

**SINDA, J.:**

This is the second appeal by the appellant. The appellant had petitioned for divorce and distribution of matrimonial properties in Matrimonial Cause No. 70 of 2022 at Tunduma Primary Court (the **Trial Court**). The court found that the marriage had broken down irreparably and issued a divorce. The appellant was dissatisfied with the decision of the Trial Court on the distribution of matrimonial properties and unsuccessfully appealed to the District Court of Momba at Chapwa (the **District Court**). Still aggrieved, she appealed to this Court.

The appellant appeals on two grounds as follows:

- 1. That the appellate court erred in law and facts for its failure to analyse properly the evidence of both parties so as to reach the proper decision*
- 2. That the appellate court erred in law and fact by upholding the decision of the Trial Court which erroneously decided that the alleged house is not a matrimonial property.*

At the hearing of the appeal, both parties appeared in person unrepresented. The appeal was argued by way of written submission.

In supporting the first ground of appeal, the appellant argued in her written submission that the disputed house in Sogea is a matrimonial home acquired by joint efforts between her and the respondent. She added the property should be divided in equal shares, a fact that the District Court failed to consider while making its decision. To support her argument, she cited section 114 (1) of the Law of Marriage Act Cap 29, R.E 2019 (the **LMA**) and the case of ***Bi Hawa Mohamed vs Ally Seif***, Civil Appeal No. 9 of 1983 (CAT at Dar es Salaam). She further submitted that the allegations by the respondent that the said house is not a matrimonial property are not true as he has no evidence.

Turning now to the second ground of appeal, the appellant contended in her written submission that during the trial, the respondent and his witnesses

claimed that the said property was owned by the respondent's parents, but they failed to prove their allegations with any documentary exhibits. She added that the respondent and his witnesses are trying to fabricate the facts and their words are not sufficient in convincing the court.

In replying to the submission, the respondent opposed the grounds of appeal. He argued that both the Trial Court and the District Court decided the matter in respect of the evidence adduced before it. He stated that his evidence and that of his witnesses is watertight compared to the appellant. He argued that the appellant with her witnesses failed to testify as to when and how the disputed house was a matrimonial home.

The respondent further contended that as per section 114 (1) of the LMA, the court is vested with powers to divide matrimonial properties which the parties acquired by their joint effort during marriage. He further contended that the disputed house was not a matrimonial property but was owned by the respondent's parents.

He further stated that the case of ***Bi Hawa Mohamed vs Ally Seif*** (supra), as cited by the appellant, does not apply in this instance because the disputed house was not a matrimonial property acquired by their joint effort. Thus, it is not eligible to be divided. To emphasise his argument, he cited the case of ***Mariam Tumbo vs Harold Tumbo*** (1983) TLR 162 HC.

On the issue of the exhibit, the respondent argued that there is no exhibit since the respondent's parents acquired the house natively back in the 1970s during "Operation Sogea," and they remain owners of the said house to this day. Thus, the appellant's allegation that the house is a matrimonial property is untrue.

In her rejoinder, the appellant argued that the respondent, in his submission, confessed to not having any exhibit proving ownership because his parents acquired the property natively. She added that the respondent intends to misdirect the court. Therefore, it becomes hard to believe the contention that the house is owned by his parents. She insisted that the house was a matrimonial property acquired by their joint efforts and urged the court to be guided by section 114 (1) of the LMA.

I have considered the record, the submission by both parties and the law.

I will respond to the first and second ground together. In this matter the appellant claims the house is a matrimonial property acquired by their joint efforts. However, the respondent negates those claims by stating that the house belongs to his parents.

It is not disputed that any matrimonial property jointly acquired by the spouses during the existence of their marriage should be divided between them depending on each spouse's contribution towards the acquisition of the said property. The same was discussed in the case of ***Mariam Tumbo versus Harold Tumbo*** (supra).

After going through the records, I find no fault in the findings of the two lower courts as they reached their decision based on the available evidence. It is a known principle that he who alleges must prove. In this particular case, the duty was bestowed on the appellant since she claimed the existence of the matrimonial property. This duty is also explained in the case of ***Anthony Masanga vs Penina (Mama Mgesi) and Another***, Civil Appeal No. 118 of 2014 and under section 110 (1) (2) and 111 of the Law of Evidence Act, Cap. 6, R.E 2022 which states that:

*"110.-(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

*111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

Based on the above provision and in civil matters the weight of evidence, be it oral or documentary evidence, plays a great role in determining the case. The appellant herein not only failed to prove that the said house is a matrimonial property but also failed to explain her contribution in acquiring the said house.

On the other hand, the respondent brought witnesses that strengthened his evidence and his contention that the house belonged to his parents and was not matrimonial property.

While submitting on her second ground, the appellant believed that documentary evidence was required to prove ownership of the property. However, as important as documentary evidence is, in its absence, the court uses the available evidence, including oral evidence, to reach its decision, especially if the oral evidence is sufficient to convince the court of the truthfulness of the facts.

Based on the above reasoning, the Trial Court and the District Court correctly decided the matter, and I find no reason for faulting the findings of the two courts below.

The appeal is without merit and is hereby dismissed in its entirety. No order as to cost is made since this is a matrimonial matter.

The right of appeal was explained.

Dated at Mbeya on this 31 day of May 2024.



A handwritten signature in black ink, reading "A. A. Sinda", enclosed in a thin black rectangular box.

**A. A. SINDA**  
**JUDGE**