

**IN THE HIGH COURT OF TANZANIA
(TEMEKE HIGH COURT SUB- REGISTRY)
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE
CIVIL APPEAL NO. 62 OF 2023**

(Originating from Matrimonial Cause No. 110 of 2022 of the District Court of Temeke at One Stop Judicial Centre at Temeke)

MUTLU AHMET KORKMAZAPPELLANT

VERSUS

REHEMA PAULO KULABARESPONDENT

JUDGMENT

Date of last order: 28/05/2024
Date of Judgment: 06/06/2024

OMARI, J.

The Appellant is aggrieved by the judgment and decree of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 110 so he came to this court armed with four grounds of appeal as are listed in the amended Memorandum of Appeal in the following manner:

1. That, the trial magistrate erred in law and facts for failure to involve and hold the house/plot at Bunju as matrimonial property after having satisfied himself that the Appellant was deceived and induced through deceit by the Respondent to buy a plot and build the house in the name of TMK thought to be a daughter of the Appellant thereby reaching



erroneous conclusion that the said house does not form part of matrimonial properties while in essence the Appellant is not the biological father of the child in question.

2. That, the trial magistrate erred in law and fact for having relied on the judgment of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 112 of 2018 whose facts were irrelevant as the Appellant is not the biological father of the child in question and the purported fatherhood and parentage were procured dishonestly by the Respondent.
3. The court entertained the issue of ownership in which the Appellant challenged it as the matrimonial property issues to a child, the Appellant is satisfied that he is not the biological father of the issues of the Respondent hence the title granted to his child should be revoked challenged to (*sic*).
4. That, the trial magistrate erred in law and facts by not taking into consideration the heavy and credible evidence of the Appellant which was proved beyond reasonable doubt for a legal reason judgment(*sic*)

It is on the basis of the above grounds that the Appellant prays for the judgment and decree of the trial court in respect of the house/plot at Bunju



to be reversed, quashed and set aside. He is also praying that upon reversal quashing and setting aside the orders of the trial court, the house/plot at Bunju be declared a matrimonial property and division of the same be ordered subject to each party's contribution.

When this appeal was called for hearing the Appellant was represented by Ms. Regina Herman while the Respondent had the services of Mr. Meswin Masinga both are learned advocates.

In the submission in support of the appeal Ms. Herman gave a brief background of the appeal then proceeded to submit on the first and second grounds of appeal jointly. She argues that based on equity, no one should benefit from their own wrongs. He went on to submit that when addressing the issue as to whether the house registered fraudulently under the name of the Respondent's child forms marital assets failed to analyse and evaluate the evidence properly thus reached an erroneous decision. The Appellant's counsel cited the **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (*supra*) which was relied on by the trial court stating that the present case was different since while it is true as held in the case, a property registered in a child's name cannot be included in matrimonial assets in this



case the child was fathered by a different person, not the Appellant thus the court erred to rely on the case.

Referring to the case of **Judge (RTD) Edward Antony Mwesimo and 7 Others v. Joel Samumba**, Civil Appeal No. 9 of 2021 Ms. Herman argued that each case must be decided on its set of facts and obtaining circumstances. She further submitted that although the land was registered in the child's name a child he thought was his as adduced in evidence the same was because he does not have the right to own land. The trial court ignored all of this. Counsel claimed that since there was fraud then the title can be reversed by a competent court as was held in the case of **Bilali Ally Kinguti v. Ahadi Lulela Said and 30 Others**, Civil Appeal No. 500 of 2021. Citing another case of **Michael Mwakalula Njumba and Another v. Republic**, Criminal Appeal No. 376 of 2022 the Appellant prayed for this court to re-evaluate the evidence adduced and give a proper direction by reversing the trial court's decision.

Submitting on the third ground of appeal, counsel briefly reiterated what he had already stated for the first two grounds. On the last ground of appeal the Appellant's counsel submitted that the trial court erred in not taking into consideration the fact that the child was not the Appellant's child. She



submitted that rules of evidence require not only summarization of the evidence but also scrutiny and evaluation of the same. According to counsel the trial court received evidence that disputed the legality of ownership, acknowledged it and ruled otherwise. And, this is where the Appellant's grievance is. Counsel then concluded by praying that this court re-evaluate the evidence and allow the appeal.

When it was his turn, the Respondent's advocate began by stating that at the trial there were only four issues of which the second issue was whether there are matrimonial properties jointly acquired by the parties. He stated that the Appellant's submission brings an issue which was not among those framed during trial that is; whether the house registered fraudulently under the name of the Respondent's child form matrimonial assets. He then went on to submit that as per section 114 of the Law of Marriage Act, Cap 29 R.E 2019 (the LMA) the assets are to subjected to division are only those which are properties of the parties. Counsel argued that Exhibit P6 which is a certificate of title with No. 114267 for the property in dispute is in the name of Rehema Paulo Kulaba as the guardian of TMK which makes its property of TMK.



Mr. Masinga argued that it is the position of law that land registered in the name other than that of the parties to a marriage cannot qualify to be matrimonial property as rightly held by the trial court at page 5 of the judgment that the house is out of the purview of section 114 of the LMA. He then went on to explain the applicability of the **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (*supra*) case stating that the house belonged to a third party a child and not the Respondent or Appellant and the said child is not a party to these proceedings thus, this court cannot determine the Respondent's interests if any in the house through matrimonial proceedings.

Submitting on the third ground of appeal Mr. Masinga argued that the said ground does not qualify to be a point determination as it has not been drawn as required by law. He cited Order XXXIX Rule 1 (2) of the Civil Procedure Code, Cap 33 R.E 2019 which provides that a memorandum shall set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative. He then went on to state that the trial magistrate did not err in holding the house is not matrimonial property for reason of belonging to a third party.



On the fourth and last ground of appeal counsel submitted that the ground is unmeritorious for the judgment is self-evident having given a brief background of the case, the evidence including that of the appellant, deliberated on the issues and reached proper consideration. He cited the case of **Bushangilang'oga v. Mayanda Maige** [2002] TLR 355 where the court should not interfere with factual findings of the trial court if there is no misdirection or misdirection or misapprehension of the evidence. According to counsel the trial court properly evaluated the evidence as per the case of **Seif Shaban v. R** he then concluded by stating the trial court's judgment was correct and the appeal be dismissed for want of merit.

This appeal, in view centres on one thing only, the house in Bunju; whether or not the same is matrimonial property that the Appellant is entitled to. Before going to determine whether the appeal is meritorious, I should state at the outset that I am aware that as a first appellate court, I have a role to re-evaluate the evidence on record in order to reach my own conclusion if need be. This is an established practice having roots in precedent see for example the case of **Kaimu Said v. Republic**, Criminal Appeal No. 391 of 2019, **Hassan Mohammed Mfaume v. Republic**, (1981) T.L.R 167 **Faki Said Mtanda v. Republic**, Criminal Application No.249 of 2014 and **Rashid Abiki**

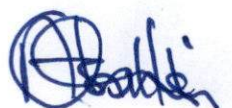


Nguwa v. Ramadhan Hassan Kuteya and Another, Civil Appeal No. 421 of 2021.

That said, I have gone through the record of the trial court and have seen the evidence as regards the house at Bunju. The said house is on registered land as can be depicted by Exhibit P6 which is a certificate of title with No. 114267 for the property in dispute is in the name of Rehema Paulo Kulaba as the guardian of TMK which makes its property of TMK. The said certificate was tendered by the Petitioner at trial. The fact that the said house is in the name of the child TMK was not disputed during the trial. What was in dispute was who bought the plot and eventually built the house on the same.

In his submission, the Appellant's counsel made it clear that since the house had been registered in TMK's name in the pretext of she being the Appellant's daughter which he now knows she is not then it should be returned to him. This assertion was also made during the trial.

The Appellant is complaining that the trial magistrate despite having evidence adduced before him did not apply the same correctly thus reaching an erroneous conclusion. Moreover, the Appellant is complaining that the court applied the **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (*supra*) wrongly since in this case the child is not his. In the trial



courts judgment the said case is brought in the context of explaining why the magistrate could not order the house in dispute to be returned to him. To be exact I quote what the learned magistrate wrote on page 5 of the judgment as follows:

"I am convinced that the Petitioner was the one who had the means, and the one who paid for the plot and constructed the house, I cannot legally order the same to be returned to him. Simply put, since the house is in the name of TMK, it does not form part of the matrimonial properties and therefore out of the purview of this court's powers under section 114 of the Law of Marriage Act, Cap 29 R.E 2019."

The trial court is noting that while the Appellant is the one who bought the plot and even built the house, he is the one with the means to do so. However, he declined to consider the same as matrimonial property as it did not belong to either party, it belonged to TMK making it outside the purview of section 114 of the LMA which empowers a court to order division of matrimonial property and not otherwise. The trial magistrate further stated that:

*"This was also the holding of the Court of Appeal in the case of Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo, Civil Appeal No. 112 of 2018 CAT (unreported), in which it held that; **"...A property in the name of the children despite being bought***

by the parents under the guardianship does not constitute or qualify to be described as a matrimonial property". That being the case, while I agree and in fact sympathize with him for falling in the respondent's trap into buying the plot and building a house for TMK, his wishes will not be granted"(emphasis supplied)

The trial court magistrate, after refraining to consider the property matrimonial property went ahead and referred to the case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (*supra*) to augment his reasoning that the property cannot be matrimonial property for it belongs to a third party. In my view, even if TMK were his daughter the said property would still not be matrimonial property since she is not a party to the marriage; this is the gist of the Court of Appeal's reasoning in the said case. I see nowhere that the trial court failed to consider the evidence and testimony of the Appellant.

Before I pen off, I would like to comment on the alleged deceit by the Respondent that the Appellant is complaining about. As clearly stated by the trial court, the Appellant was deceived, he fell into the treachery and trickery of the Respondent, however the same cannot be remedied through this appeal. Even if one were to sympathize and or empathize with the Appellant,

that would not change the fact that the house in dispute is registered to a third party and cannot be dealt with by a matrimonial court.

From the foregoing analysis I find no fault with the findings of the trial court. I hereby dismiss the appeal and uphold the decision of the trial court. This being the matrimonial matter, I make no orders as to costs. Each party is to bear its own costs.

It is so ordered.

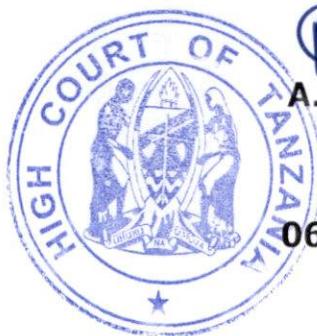



A.A. OMARI

JUDGE

06/06/2024

Judgment delivered and dated 6th day of June, 2024.




A.A. OMARI

JUDGE

06/06/2024