

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC. CIVIL APPEAL NO. 29 OF 2023

*(Arising from Civil Appeal No. 99 of 2020 of the District Court of Temeke, One Stop Judicial
Centre at Temeke)*

ABDUL SALUM SINDE..... APPELLANT

VERSUS

TATU ABDALLAH MGOMBELA.....RESPONDENT

JUDGMENT

09th May & 12th June, 2024

BARTHY, J.:

The parties in this matter celebrated their marriage under Islamic rites on 22nd January, 1995. They lived together for about 25 years. However, their union ultimately faced irreconcilable differences, prompting the respondent to petition for a decree of divorce in the Primary Court of Temeke through Matrimonial Cause No. 65 of 2020. The court declared the marriage irretrievably broken and issued the decree of divorce, but it made no order for the division of matrimonial properties, instead it awarded the respondent compensation of Tsh. 500,000/-.

Dissatisfied with this decision, the respondent appealed to the District Court of Temeke through Civil Appeal No. 99 of 2020. In this first



appeal, the court ordered that both parties to get equal shares of 50% each of the house situated at Yombo Vituka. Unamused by this ruling, the appellant decided to challenge the decision by filing the current appeal.

Thus, the appellant brings this appeal to the court against the said Judgment and Decree on the following grounds:

- 1. That, the honourable Magistrate erred in law and in facts in holding that the house located at Machimbo Yombo Vituka was matrimonial property despite abundancy evidence of evidence adduced by the appellant that the house was built out of proceeds from the appellant's father inheritance (sic)*
- 2. That, the honourable Magistrate erred in law and in facts for failure to take into consideration that the appellant evidence tendered in trial court established on the required standard that the house was not jointly matrimonial property (sic)*
- 3. That, the honourable Magistrate crossly erred to revise the Primary Court decision by shifting the burden of proof to the appellant while it was the duty of the respondent to adduce sufficient evidence on how she participated in acquisition of the said house and what extent of her contribution, (sic)*
- 4. That, the honourable Magistrate erred both in law basing his judgment on a mere narration of the respondent without any supporting evidence to establish the contribution of the*

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*respondent in the acquisition of the house situated at
Machimbo Yombo Vituka.*

*5. That this honourable court extend time to file this appeal on
20/2/2023(sic)*

Wherefore, the appellant prays that the appeal be allowed, the judgment and decree of the District Court be set aside, the Primary Court judgment be restored, and any other relief deemed fit and just be awarded by this court.

The hearing of this matter was disposed of by way of written submission. Learned counsel Living Raphael prepared the appellant's submissions, while the respondent's reply to the submission was provided by the Women's Legal Aid Centre (WLAC). Both parties adhered to the schedule set by this court; however, the appellant did not file a rejoinder submission.

Submitting in favor of the grounds of this appeal, Mr. Raphael stated that after the Primary Court of Temeke (the trial court) dissolved their marriage through "Talaka No. 65 of 2020," it did not give an order as to the division of matrimonial properties. This was because there was insufficient evidence adduced by the respondent regarding the property she claimed (a house) to be the matrimonial property, as it was established that the house was inherited and therefore did not form part of the matrimonial property.



Dissatisfied with the decision, the respondent appealed to the District Court of Temeke (the first appellate court), via Civil Appeal No. 99 of 2020. The first appellate court ordered the appellant and respondent to receive an equal share (50% each) of the house situated at Yombo Vituka. Unamused by the said decision the appellant preferred the instant appeal.

Submitting on the first ground, Mr. Raphael stated that sufficient evidence was tendered before the trial court to prove that the house was acquired through inheritance. The appellant called four witnesses to testify to that effect, while the respondent failed to provide any evidence regarding her contribution to the said house.

Mr. Raphael further submitted that for the court to grant the division of matrimonial properties, there must be evidence that the property is matrimonial asset which was jointly acquired. In the case at hand, the respondent failed to provide sufficient evidence to prove that the said house situated at Machimbo Yombo Vituka is the matrimonial property. He referenced the case of **Athumani Omary Athuman vs. Kashindi Hamisi Zaidi** (consolidated PC Matrimonial Appeal 3 of 2021) High Court, at page 10.

Submitting on the second ground, Mr. Raphael pointed out that the first appellate magistrate did not consider the appellant's evidence that the house situated at Machimbo Yombo Vituka was acquired through inheritance from his father's estate and was not acquired by joint effort to



form part of the matrimonial property. There was no evidence tendered to prove the respondent had made any improvements to the said house. He referenced the case of **Gabriel Nimrod Kurwijila vs. Theresia Hassan Malongo** (Civil Appeal No. 102 of 2018), Court of Appeal of Tanzania.

Combining the third and fourth grounds of appeal, Mr. Raphael argued that the first appellate magistrate grossly erred in law by shifting the burden of proof to the appellant. It was the respondent's duty to provide sufficient evidence of her participation in the acquisition of the house and her extent of contribution. He claimed that the first appellate court's decision was based on mere narrations without proof of the respondent's contribution. The respondent only tendered a sketch map of the house, which did not prove her contribution to its acquisition.

In conclusion, Mr. Raphael submitted that the first appellate court did not provide reasons for altering the findings of the trial court's judgment and did not explain why it did not believe the appellant's evidence. He urged the court to find merit in the grounds of this appeal and allow it with costs.

Resisting the appeal, Mr. Wigayi Kissandu from WLAC, in his reply to submission he combined the first and second grounds and argued that the first appellate court was correct to order a 50/50% division of the matrimonial property located at Yombo, acquired by parties' joint contributions.



Mr. Kissandu added that the parties contracted an Islamic marriage in 1995 and lived in a rental house for 12 years before starting construction of their matrimonial house at Yombo Machimbo, Dar es Salaam, through their joint efforts. He argued that the claim that the house was acquired from inheritance proceeds was made up to deny her share.

He further stated that the respondent was a businesswoman and had contributed to the house both financially and through domestic work. He referenced to the provision of section 114 of the Law of Marriage Act and the case of Bi. **Hawa Mohamed vs. Ally Sefu** 1983] TLR 32 (CA).

Mr. Kissandu also contended that the respondent's contribution to the acquisition of matrimonial assets included household chores, bearing and rearing children, and making the home comfortable. She was also a food vendor, and her earnings contributed to the family's maintenance and the acquisition of matrimonial assets. He insisted that the house at Kitonga was built during the marriage through joint efforts.

Responding to the third ground of appeal, Mr. Kissandu argued that the respondent managed to prove her case on the balance of probabilities, in accordance with Section 111 of the Evidence Act, Cap 6 R.E. 2002. He prayed that the judgment and decree of the first appellate court be upheld and the appeal dismissed for lacking merit.



The appellant did not file his rejoinder submission. Having gone through the competing arguments of both sides, this court is therefore tasked with determining whether this appeal has merit.

Having thoroughly reviewed the grounds of the present appeal and the arguments presented by both sides, it suffices to state that all grounds of appeal center on the assertion that the first appellate magistrate failed to properly analyze the evidence, resulting in an unfair decision regarding the distribution of matrimonial assets. Therefore, the issue for determination is whether the first appellate court correctly analyzed the evidence presented, leading to the decision to equally divide the matrimonial properties, with each party receiving a 50% share.

Mr. Raphael argued that the first appellate court's decision was based on an erroneous evaluation of the evidence, particularly concerning the nature of the house at Yombo Vituka, which he claims was inherited and not a product of joint matrimonial effort. The appellant contends that the evidence he presented, including testimonies from four witnesses, clearly demonstrated that the property was inherited from the estate of the appellant's father and should not be considered part of the matrimonial assets subject to division.

Conversely, Mr. Kissandu argued that the first appellate court correctly assessed the contributions of both parties to the acquisition and improvement of the house. He stated that despite the appellant's claim of

inheritance, the house was substantially acquired through their joint efforts during the marriage.

The respondent presented evidence of her financial contributions through supervision of construction work and funds acquired from Viccoba, which were injected into the construction of the house, as well as her domestic efforts. Emphasizing that the respondent's role as a businesswoman and homemaker was instrumental in the accumulation of matrimonial assets.

The provision of section 114(1) of the Law of Marriage Act empowers the court to order the division of property between the parties when granting a divorce. This provision specifically pertains to properties acquired through the joint efforts of the spouses during the marriage. For clarity, I quote the relevant section of the Act, which provides;

"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."

This legal provision ensures that, upon the dissolution of marriage, the assets acquired through the collaborative efforts of both spouses are fairly distributed. It recognizes the contributions of both parties, whether

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financial or otherwise, to the acquisition of marital property. This helps to ensure an equitable resolution, reflecting the shared responsibilities and investments made during the marriage.

The extent of each spouse's contribution is clearly outlined under section 114(2)(b) of the Law of Marriage Act. In the case at hand, the respondent stated that her contributions included both financial support and domestic work, while the appellant claimed that his contribution was through inheritance from his father's estate.

In determining this issue, the first appellate court properly analyzed the evidence presented by both sides before the trial court, considering the relevant law and legal precedents that guide the division of matrimonial assets based on each spouse's contribution. The court emphasized in its judgment that the appellant failed to clearly prove that the house was built before their marriage or that it was acquired from his father's estate. Given that the couple had been married and living together for not less than 20 years before their separation, it was evident that the respondent had contributed to the acquisition of the matrimonial assets through joint effort.

The court does not weigh evidence based on the number of witnesses but rather on their credibility. This principle was affirmed in the case of **Alhaji Ayubu @ Msumari & Others vs. Republic** (Criminal



Appeal 136 of 2009) [2010] TZCA 20, where it was held that the number of witnesses is irrelevant; what matters is the credibility of each witness.

The first appellate court was satisfied with the evidence that the respondent had contributed to the construction of the house, even though she could not specify the exact monetary value. The court cited the case of **Victoria Sigala vs. Nolasco Kilasi**, PC Matrimonial Appeal No. 1 of 2012, where it was noted that when matrimonial assets are acquired during the marriage, there is no need to show the exact extent of contribution. The distribution of such assets should proceed on equal terms.

The evidence presented before the trial court, as analyzed by the first appellate court, confirmed that the respondent was married to the appellant and performed domestic work for the entire time of her marriage. This evidence was never contradicted by the appellant. It was also not disputed that the house was acquired during the period of their marriage. The Court in **Bi Hawa Mohamed v. Ally Sefu** (supra), held that "joint efforts" and "work towards the acquiring of the assets" include domestic efforts or work by the husband and wife. Given that the respondent was married for more than 20 years and performed domestic chores, she is entitled to a share of the house at Yombo Vituka, especially since there is no evidence proving it was solely the appellant's property.




However, this court finds that, due to the respondent's contributions being a small income from food vending and household work, it was not just for the trial court to distribute the house equally. The division of matrimonial assets should depend on the extent of each spouse's contribution towards the acquisition of the property. This principle was highlighted in the case of **Gabriel Nimrod Kurwijila vs. Theresia Hassan Malongo** (Civil Appeal No. 102 of 2018) [2020] TZCA 31.

Therefore, the distribution of the house at Yombo Vituka, Dar es Salaam, as determined by the first appellate court, is reversed. This court orders that the house be divided as follows: the appellant is awarded 65% and the respondent 35% 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 grounds of appeal have merit to the extent that the shares in the division of the matrimonial assets are adjusted as specified

It is so ordered.

Dated at Dar es Salaam this 12th day of June, 2024.




G. N. BARTHY
JUDGE

Delivered in the presence of Mr. Tony Mushi holding brief of Mr. Living Raphael learned advocate for the appellant and respondent.

SGD: G. N. BARTHY
JUDGE