

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MATRIMONIAL APPEAL NO. 5311 OF 2024

*(Originating from Matrimonial Cause No 153 of 2023 of the district court of Temeke at
One stop judicial Centre)*

JOHN DAMAS NDUMBARO.....APPELLANT

VERSUS

BEATHA KIFARU.....RESPONDENT

JUDGMENT

09th April, 2024 & 14th June, 2024

M.MNYUKWA, J.

Parties in this appeal were husband and wife who contracted their marriage on 21/06/1990. They lived together as married couple for more than 30 years before the respondent (the then petitioner) filed Matrimonial Cause No. 153 of 2023. Their marriage was blessed with six children who are adult. The matrimonial dispute started between the year 2002 and 2008. The main source of their dispute as per the court's record is adultery and cruelty. Appellant claimed that respondent's behaviour changed after he retired from work since he was not stable financially. He testified that their problem persist to the extent that respondent refused to consummate the



marriage. Regardless of these problem, still the appellant was in dilemma as he did not want his marriage to be dissolved though ultimately, he prayed for respondent's prayer to be granted.

On her part, respondent mainly claimed on adultery and cruelty on the part of the appellant to be the main reasons moved her to petition for a marriage to be dissolved. In her evidence at the trial court she testified that, they have tried to resolve the matrimonial dispute to the church and marriage conciliatory board but in vain. Thus, apart from dissolving marriage, she also prayed for an order on division of matrimonial assets and costs of the suit.

In order to be focused, the trial court framed three issues for determination. The issues were

1. *Whether the marriage is broken down irreparably.*
2. *Whether the parties have acquired jointly any matrimonial properties.*
3. *What are the relief the parties are entitled to.*

At the trial, parties also adduced evidence on how they acquired matrimonial properties. Respondent testified that, she was a business woman and agriculturalist. In her evidence, respondent painted herself as not a mere house wife but a wife who contributed to the acquisition of the

properties through her business and agricultural activities. As reflected on page 6 of the trial court's proceedings, respondent testified that they have jointly acquired three houses at Kiwalani and the house at Morogoro.

On the other hand, appellant's evidence in respect to the matrimonial properties is to the effect that, the parties acquired jointly two houses and sugar cane farm at Morogoro, plot at Ruaha, Nyamvisi within Morogoro region. This evidence can be clearly seen on page 10 of the trial court's proceedings. However, he testified that, he owned the mentioned properties by 100% as he was employed and his salary was used to build the houses at Dar es Salaam. He went on testifying that, he took loan from credit union where he bought a house to his employer, TAZARA. Concerning the sugar cane farm, he said that the same were given to them by respondent's parents as a gift.

After a full trial, the trial court dissolved the marriage and issued a decree of divorce. The matrimonial assets that were proved to have been acquired by the parties during the subsistence of marriage were divided to wit; a house of Morogoro and three house of Kiwalani were divided in the ratio of 60% to appellant and 40% to respondent. The sugar cane farm was not declared as a matrimonial property and therefore it was not subject to

division. The trial court also declared that a plot at Nyamvisi was sold and therefore it was not subject to division too. Finally, the trial court ordered the appellant to pay school fees for their child who was at college.

An order of dissolving the marriage did not bother the parties since no one preferred an appeal on it. However, non-inclusion of the sugar cane farm and a house at Nyamvisi as among the matrimonial properties disgruntled appellant who knocked the door of this court to register his dissatisfaction. Also, appellant was not happy with a division of the matrimonial assets. He thus, presented grounds of appeal as reproduced hereunder:

1. *That the trial magistrate erred in law and fact in holding that the respondent was a substantial person who highly contributed to the acquisition of the assets.*
2. *That the trial magistrate erred in law and fact in awarding the respondent 40% of the shares in the matrimonial assets.*
3. *That the trial magistrate erred in law and fact in holding that the sugarcane farm to remain the property of the Respondent.*
4. *That the trial magistrate erred in law and fact in holding Plot at Nyamvisi was sold hence not subject to division.*
5. *That the trial magistrate erred in law and fact in holding that the respondent shall pay school fees for the child that is currently in the collage.*
6. *That the trial magistrate erred in law and fact in failing to properly analyze the evidences thus arriving to wrong decision on matrimonial properties and their division thereof.*



At the hearing. Parties appeared in person, unrepresented. Through parties' prayer and with the leave of this court, the appeal was argued by way of written submissions.

Supporting the appeal, the appellant started his submission on the first ground of appeal in which he said that, in her evidence as reflected on page 5 and 6 of the trial court's proceedings, respondent testified that she was doing a business of selling rice and second hand clothes and that she was agriculturist, but nothing was exhibited to prove the same. He claimed that, respondent uttered mere words without any proof. And therefore, she did not contribute in the acquisition of the properties.

On the second ground, appellant continued to attack respondent's evidence for what he believed that she was entitled to give evidence to prove how much she earned from the said business of selling second hand clothes, rice and being a farmer. He complained that, the trial court awarded respondent 40% while she did not pray so since in her evidence she just prayed for an order of division of matrimonial assets. To support his argument that respondent was not entitled to 40% of the division, he cited section 114 of the Law of Marriage Act, Cap 29 R.E 2019 (the Act). He retires on this ground by stated that, appellant's evidence was very clear that he

was employed by TAZARA and he used his salary to build the houses in dispute. He added that, his evidence was collaborated with DW2.

Appellant attacked trial court decision in respect to the sugar cane farm. He said that, the sugar cane farm was given to parties by respondent's parents, therefore it is part of the matrimonial assets subject to division. He claimed that it was wrong for the trial court to hold that the sugarcane farm was given to respondent alone. He retires by stated that, respondent did not state anywhere if the sugar cane was given to her alone and she did not deny if the sugar cane does not exist. He concluded that, it was wrong for a trial court to state that the sugarcane farm is not a matrimonial property.

On a property of Nyamvisi, he challenged the trial court's finding's which hold that the said property was sold. He submitted that, it was wrong for a trial court to hold that the said property was sold while there was no evidence tendered as to when it was sold, to whom and to what consideration.

Lastly, appellant submitted on ground five by faulting the trial court decision ordering appellant to pay school fees for a child who is studying at college for a reason that, in the entire petition there is no issue of paying school fees. He end up his submissions by stated that, the evidence on record

and the petition did not state about payment of school fees. He thus prayed for the appeal to be allowed.

Contesting, respondent argued jointly the first and second ground of appeal. She fully supported the trial court's decision on the distribution as she submitted that respondent contributed to the acquisition of the assets as she was earning income through business but also she was performing domestic duties for 33 years where she gave comfort to appellant. She added that, respondent used her income to maintain and take care of the family for she used her income to cover family expenses. To support the trial court's findings on a share awarded to her, she cited section 114 of the Act and the case of **Bi. Hawa Mohamed v Ally Seifu** 1983 TLR 32 and the case of **Kivuita v Kivuita** (1990-1994) EA 27. She added that, respondent played a big role in the acquisition of the matrimonial properties as she contributed in both, money and works. And, therefore, she deserved that share from the matrimonial assets acquired by them.

Submitting on a third ground she said that, the sugarcane farm was given to her by her late father even before he passed away. She claimed that, after the death of her father, she became the absolute owner of the said farm. She remarked that, appellant's submissions is baseless when he

said that there is no evidence which shows that the said farm was given to respondent alone while there is no evidence also which show that the said farm was given to both.

On fourth ground, she submitted that the plot at Nyamvisi is not a matrimonial property since the said plot belonged to respondent and the same was sold on 7th March 2022 to one Ester Lameck Chilugu and that the appellant did not oppose sale of the said plot.

Lastly, on fifth ground, she said that, the trial court did not make any finding on who should pay the school fees since the school fees for that child is paid by her brother and it was not even part of the dispute. She thus prayed the appeal to be dismissed.

Re-joining, appellant did not submit anything new, he mainly reiterated what he had submitted in his submissions in chief.

After considering submissions of the parties and the record from the trial court, the main issue for consideration and determination is whether the appeal is merited. In answering the above issue, I shall determine the 1st and 2nd grounds jointly as they are related, I will then determine the 3rd, 4th and 5th grounds separately. The 6th ground will not be determined since



parties did not submit on it. This implies that appellant abandoned it that's why even respondent did not bother to submit on the same and therefore, I am following the suit of not discussing and determining it.

It is a fact that grounds 1 and 2 raises the issue of whether the trial court erred in awarded respondent 40% of the houses of Morogoro and three houses of Kiwalani.

It is categorically settled that division of matrimonial assets is guided by the law under the provision of section 114 of the Act. Whereas, assets which are subject of division are those which were acquired by the parties during the subsistence of marriage or those which were acquired by one spouse but substantially improved during marriage by their joint efforts.

The law is also settled under section 114(2)(b) of the Act that division of matrimonial assets depends on, among other things the extent of contribution of the parties in money, property or work towards acquisition of the assets. This is stated in a plethora of authorities like the case of **Bibie Maulid vs Mohamed Ibrahim** [1989] TLR 162 where the court said;

'Among the factors to be considered in deciding how much parties should get from the matrimonial assets when the marriage is dissolved are the extent of the contribution by



each party and debts owing as well as the customs of the community and needs of the infant children.

(See also the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Mwalongo** Civil Appeal No. 102 of 2018 (unreported))

It follows therefore that the extent of contribution has to be proved by the parties to the case. The Court of Appeal in the case of **Gabriel Nimrod Kurwijila** (supra) stated that courts will rely on the evidence adduced by the parties to prove the extent of contribution.

It is important here to note that, in our case at hand, parties' adduced oral testimony on how they acquired the properties. The only documentary evidence that was tendered during the trial was the certificate from the marriage conciliation board which was admitted as Exhibit A1. That is to say, the appeal at hand will be determined based on the credible oral evidence adduced by both parties since it is settled that evidence can be given through oral testimony. Admittedly, upon perusal of the trial court record, I find the documents that were annexed, but the law is settled that annexure are not evidence. See the case of **Sabry Hafidh Khalifa v Zanzibar Telecom Ltd (Zantel) Zanzibar**, Civil Appeal No. 47 of 2009).

Coming now to the issues raised on the 1st and 2nd ground of appeal, it is on record that respondent was not a stay home wife. It was testified and proved by her that she was doing a business of selling second hand clothes and rice as well as a farming. It is on record that appellant was employed by TAZARA, but this alone is not enough to prove that he solely acquired the houses in dispute by 100% as he claimed. Since the evidence on record shows that respondent was an entrepreneur and being a wife to whom she lived with appellant for 33 years as married couple, her contribution in domestic chores cannot be undermined.

Further to that, the evidence on record shows that both parties contributed to the acquisition of the houses. In his evidence as reflected on 10 of the trial court's proceedings, appellant mentioned the properties acquired with respondent as married couple, though he added that he contributed by 100%. But, considering the evidence on record, it is my view that, there is no evidence which shows that he contributed 100% to disentitle respondent to a share on the matrimonial properties acquired.

Equally significant, it is a settled principle that every witness is entitled to credence and must be believed. (See the case of **Goodluck Kyando v Republic**, Criminal Appeal No 118 of 2003). Therefore, it is my considered



view that respondent is a credible witness and must be believed. Her contribution in both, money and works must be considered. Therefore, considering the respondent's evidence in the trial court, I am convinced that she is entitled the share awarded by the trial court.

That being said, I didn't see any justifiable reason to fault the decision of the trial court on the 1st and 2nd ground of appeal. This grounds of appeal lacks merit and they are dismissed.

In ground 3 of appeal, the appellant blamed the trial magistrate for his failure to include sugar cane farm as one among the matrimonial properties acquired by the parties during the subsistence of their marriage. It is in record that a sugarcane farm was mentioned by appellant in his testimony. However, his evidence concerning the same is contradictory due to the reasons that; in his answer to the petition at para 9.2 he averred that conflicts in their marriage was due to his financial constraints while respondent had money from her sugarcane farm, which she inherited from her parents. The same statements was also stated during his testimony at page 9 of trial court's typed proceedings, but his testimony changed on the same farm at page 10 when he said, the farm was given to them as a gift from the respondent's parents. It is therefore my view that, depending on

the rule that whoever alleges must prove, and as far as there is a contradictory in the evidence of the appellant on the same, I see no reason to fault the trial magistrate on his decision on the same. Therefore, this ground fails.

In regards to the fourth ground which is the plot at Nyamvisi as to whether the same is sold or not. In determining this issues, I have revisited the record of the trial court. In record, there is no evidence which proved that the said plot was sold. After my perusal to the record, I realized that, at page 7 of the trial court's proceedings when respondent was cross examined, she testified that a plot at Kilombero was sold and she was given 170,000/.

To my understanding the plot is not the same as the one at Nyamvisi, Morogoro. That is why at the same page 7, respondent testified to have bought a plot in Morogoro (which I think is the one at Nyamvisi) referred to in this ground. And, it is the same which is referred to by the appellant at page 10 of trial court's typed proceedings, when appellant said he bought and wrote appellant's name. It is my firm view that, the plot exists.

Now, the issue is, whether the same is matrimonial a property? Since respondent testified to have bought it, it is presumed that, the said plot is her own property. However, appellant claimed to have bought the said plot



in respondent's name but he failed to state if he bought for her to be her property or as a family property but used her name as a sham. Since their facts were not adduced by appellant during trial, I refrain myself from grouping the said plot as matrimonial property. Therefore, this ground is allowed to the extent explained therein.

On fifth ground, appellant complained on the order of the trial court on payment of college fees for a child. In its judgment, the trial court ordered so, though the same order is not seen in the decree of the trial court. At any rate, this issue should not detain me much. It is settled that parties are bound by their pleadings. (See the case of **Peter Ng'homabgo v the Attorney General**, Civil Appeal No 11 of 2011). Thus, it is my considered view that this order is unjustifiable since this relief was not pleaded in pleadings. Again, in his submissions, respondent stated that the school fees is paid by his brother and it was not part of the dispute. To that end, this ground of appeal is allowed.

Consequently, this appeal is partly allowed to the extent explained therein. No orders as to costs since the parties were spouses.

It is so ordered.



Right of appeal explained to the parties.




M.MNYUKWA

JUDGE

14/06/2024

Court: Judgement delivered in the presence of the parties.


M.MNYUKWA

JUDGE

14/06/2024