

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB – REGISTRY)
(ONE STOP JUDICIAL CENTRE)**

AT TEMEKE

CIVIL APPEAL NO. 5598 OF 2024

(Originating from the Judgment of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 148 of 2022)

STEPHEN LUKINDO.....APPELLANT

VERSUS

MARY JAMES.....RESPONDENT

JUDGEMENT

23/04//2024 & 13/06/2024

M.MNYUKWA, J.

Parties to this appeal were husband and wife who started their marriage after they celebrated their Christian marriage on 06/08/2005. They are blessed with two children whom, at the time their marriage was dissolved, their age were 17 ad 13 years respectively. The available record shows that parties lived happy marriage for some few years and the dispute arose when respondent became aware that appellant had adulterous relationship with another woman to whom they were blessed with one child. The records also revealed that, each party alleged his partner to be cruel which made their marriage life intolerable and that was one of the source of their matrimonial dispute.

It is also in record that both parties were once employed. While appellant was employed as a driver, the respondent worked with DESI.

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The records further reveals that during the subsistence of their marriage, the respondent was doing a business of poultry farming and timber while the appellant was a businessman and he was operating radio business on behalf of his family.

It is undisputed that parties' marriage became more intolerable which compelled the respondent to petition at Temeke District Court One Stop Judicial Centre (the trial court) for the marriage to be dissolved. She also prayed an order for equal division of matrimonial assets acquired by parties during the subsistence of marriage, custody of children and maintenance of children to the tune of Tsh 2, 000,000 per month.

At the trial court, parties adduced their respective evidence on how the marriage is broken down beyond repair. As prayed, the marriage was dissolved after the trial court satisfied that it was broken down irreparably. As it was painted in their respective petitions and the evidence on record, the contentious issue before the trial court was on what were the matrimonial assets acquired by the parties during the subsistence of their marriage and its division thereof, and the amount of monthly maintenance to the issues of marriage. Both parties called one witness who mainly testified on the assets acquired by the parties.

In her evidence, the respondent (the then petitioner) adduced that when they contracted marriage with appellant they started to live in a

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single rented room where the appellant was a driver and the respondent worked in a church's kiosk. Then respondent was employed by DESI. Respondent's evidence was to the effect that they acquired a plot at Goba, Kinzugi and started construction of the house. In her testimony respondent also adduced that she was also doing a business of selling timber and poultry farming.

Respondent further testified before the trial court that, they owned a radio station with appellant and her evidence was corroborated with PW2. She went on to adduce that, they also acquired a plot at Morogoro and she tendered sale agreement and the same was admitted as Exhibit P2. In her evidence, she also testified to have acquired jointly with appellant a farm at Bagamoyo and they bought a motor vehicle, Nissan model.

On his part, appellant called his father as a witness to prove that a radio station is not a matrimonial property as the same is owned by him and it was entrusted to the appellant to supervise its operation for the benefit of his family since he was incapable of doing so due to his old age. The witness, DW2 tendered a hand over letter which was admitted as Exhibit D5. In his evidence, DW2 disputed Exhibit P2 and claimed that, the property mentioned in that exhibit is not a parties' matrimonial



property as the same was bought by radio station and appellant executed sale as a manager of the radio station.

When testifying, appellant's evidence was to the effect that he deposited into respondent's account Tsh 21, 000,000 to enable her to do business, He proved his assertion with a deposit slip which was admitted as exhibit D3. He went on testifying that in their marriage life they acquired a house at Goba, two farms at Bagamoyo and a poultry farm business. He also adduced that, his monthly income ranges from Tsh 400,000/- to Tsh 600,000/-. And therefore, he is incapable to pay Tsh 2,000,000 as monthly maintenance.

Upon hearing both parties the trial court dissolved the marriage and issued a decree of divorce. It also made a finding that radio station is not a matrimonial property and there is no proof that a motor vehicle, Nissan model belonged to the parties and therefore it refrained to make any division thereof. The trial court was satisfied that a house at Goba, Morogoro and a farm at Bagamoyo are matrimonial properties and the same were subject to division.

The trial court then ordered the respondent to have full ownership of the house of Goba Kinzudi (100%) while the appellant was given a full ownership on the house of Morogoro (100%) and appellant was ordered to pay monthly maintenance of Tsh 500,000 to the issue of marriage.

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The above orders aggrieved the appellant who preferred the present appeal armed with three grounds of appeal as reproduced hereunder;

- 1. That the trial court erred in law and facts for failure to consider contribution of the appellant in the distribution of the properties jointly acquired by the parties during the subsistence of the marriage.*
- 2. That the trial court erred in law and fact by failing to properly evaluate evidence thereby ordering division of matrimonial properties and children without considering the evidence adduced by the appellant.*
- 3. That the trial court erred in law and fact by failing to take into account the amount stated for maintenance, which should be in accordance with the appellant's income and how should be paid to the respondent for the children maintenance.*

During the hearing of appeal, both parties were represented. By the prayer of the parties and through the leave of the court, the appeal was argued by way of written submissions.

Arguing in support of the grounds of appeal, the appellant's learned counsel submitted jointly the 1st and 2nd ground of appeal and he submitted separately the 3rd ground. On a joint ground of appeal, the counsel referred to section 114 of the Law of Marriage Act, Cap 29 R.E 2019 (herein to be referred as the Act) and the case of **Samwel Moyo v Mary Cassian Kayombo** (1999) TLR 197.



In elaborating more, the counsel submitted that the above cited section and case law requires the court to satisfy itself if the property subject to division is a matrimonial property and if the answer is affirmative, the court must consider the extent of contribution made by each party in money, property or work toward its acquisition.

Attacking the decision of the trial court, the learned counsel for appellant argued that, the trial court erred to consider the house in Morogoro as a matrimonial assets while there is plenty of evidence proving the same to be a property of Top Radio FM. He remarked that, in its Judgment the trial court ruled out that the Top Radio FM is not a matrimonial property but he is wondering as to why the trial court considered a house at Morogoro bought by the Top Radio FM as a matrimonial property. He added that, Top Radio FM is registered as a business name as evidenced in Exhibit D4 and that the appellant was appointed just to supervise its operation. He thus prayed this court to quash the decision of the trial court in respect of the house of Morogoro which he asserted that the same is not a matrimonial property.

Further to that, appellant's counsel submitted that, the properties which were termed by the trial court as a matrimonial properties that is a house at Goba Kinzudi and a farm at Bagamoyo were acquired by the name of the appellant. And, therefore, by using section 60 of the Act, they

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are solely belonged to appellant. He claimed that, even though these properties were acquired during the subsistence of the marriage, it does not mean that respondent contributed to its acquisition to entitle her half of a share. He referred to the case of **Bibie Maulidi v Mohamed Ibrahim** (1989) TLR 162 to say that respondent is not entitled to get half of the share.

The counsel went on to submit on its dissatisfaction on the division of the matrimonial assets by stating that, the distribution done by the trial court was not fair since, even if the house of Morogoro was a matrimonial property, still the value of the house of Morogoro and Goba, Dar es Salaam is different. He thus prayed the distribution to be done fairly though he insisted that the house of Morogoro does not belong to the parties.

The appellant's counsel also submitted on poultry farming and timber business operated by the respondent. It is his complaint that, the said business was subject to division since appellant contributed about Tsh 21, 000,000/- in that business as it was exhibited by Exhibit D3. He thus prayed for this court to divide the business to appellant as per his contribution.

Submitting on a third ground, the appellant's counsel averred that the trial court did not consider appellant's evidence particularly his

monthly income when granting an order for maintenance. He claimed that, appellant's evidence was unchallenged in the trial court and it was clearly established that his monthly income ranging from Tsh 400,000 to Tsh 600,000. He therefore argued that, the trial court erred to order the appellant to pay monthly maintenance to the tune of Tsh 500,000. He thus prayed this ground to be allowed too.

Contesting, the respondent's counsel attacked appellant's submissions on division of matrimonial properties. He started his submissions with a landed property of Morogoro for which he stated that, ownership of the radio and the landed property in question are two distinct things. He said that, the establishment of Top Radio FM was in the year 2004 while the landed property of Morogoro was acquired in 2014 as evidenced in Exhibit P2. He remarked that, appellant did not dispute on division of the said property as prayed by the respondent rather, he claimed that they owned a commercial house at Morogoro and the same was sold out. He contended that, the mere fact that the sale agreement of the landed property was executed in a headed letter of Top Radio FM, it is not a conclusive proof that the same is owned by it. He relies on the landed property of Morogoro by arguing that, if at all the said property was bought by Top Radio FM, proof of the board's resolution by the business owners ought to be tendered to prove that assertion. He said

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that, it is a cardinal principle that the one who alleges must prove. He formed the view that, appellant was duty bound to prove ownership of the property of Morogoro by Top Radio FM through board resolution.

On the issue of division of the properties done by the trial court, respondent's counsel submitted that there is no evidence showing that appellant contributed in the acquisition of the farm at Bagamoyo, a house at Goba Kinzudi and a landed property at Morogoro as per the requirement of section 114 of the Act. He thus prayed the court to assess whether the distribution is fair taking into consideration that, respondent was granted custody of two children and she lived with them in that house while appellant is solely given a commercial property at Morogoro.

Responding on a division of two business; poultry farming and timber business he contended that, this argument is baseless since at the time when parties lived together as spouses, the timber business was not flourished while poultry farming was done by respondent as a means of livelihood in which she started that business since 2005 and it was not active as such when they lived with appellant as a married couple. On the issue of Tsh 21, 000,000 being deposited into respondent's bank account as a capital in a timber business, the counsel stated that appellant's evidence is contradictory since in his paragraph 9 of an answer to the petition, he indicated that the money was intended for paying school fees

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of their children. He was of the view that, the inconsistency of appellant's in regards to that money undermined the credibility of his argument. He thus prayed the court to disallow appeal on division of matrimonial properties.

In respect to the order of monthly maintenance of Tsh 500,000, respondent's counsel stated that the claim by the appellant that the amount is excessive lacks merit considering the fact that, appellant owns a radio and he failed to disclose his monthly income during his testimony. Therefore, according to him, it was proper for a trial court to order the appellant to pay that amount as a monthly maintenance. He added that, considering the costs of living, that amount is sufficient. The counsel went on that, it is the duty of the parents to maintain their children as it is provided for under section 129 of the Act, section 9(3) and 44 of the Law of the Child Act, Cap 13 R.E 2019. To support more his argument, the counsel referred the case of **Festina Kibutu v Mbaya Ngajima** [1985] TLR 42. He thus prayed the appeal to be dismissed.

In a rejoinder, appellant did not submit something new as he mainly reiterate his submission in chief.

After considering parties' submissions and the records of the trial court, it is upon this court now to determine whether the appeal is merited. In determining the above issue, this court will address the issues

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raised on the grounds of appeal which is the division of the matrimonial assets acquired by the parties during the subsistence of marriage and if at all the properties which were divided were subject to division and whether there is a property which is subject to division that was left out. Also, this court will determine on the amount of monthly maintenance ordered by the trial court for appellant to pay. I will therefore, determine the grounds of appeal as argued by the parties.

To start with, I am aware that this is the first appellate court. The law is settled that a judge in the first appeal should reappraise the evidence on record because an appeal is in effect a rehearing of the case. Therefore, the first appellate court has a duty to re-evaluate the entire evidence on record and subjecting it to a critical scrutiny. (See the case of **Herman Faida v The Republic**, Criminal Appeal No 479 of 2019).

Further to that, based on the parties' assertion to this case, I find it necessary to appreciate the settled position of law that the one who alleges must prove as it is provided for under section 110 and section 112 of the Law of Evidence Act, Cap 6 R.E 2019 which places a burden of proof of a particular fact to a person who wishes the court to believe in its existence. And, proof in civil cases is on the balance of probability. (See the case of **Godfrey Sayi vs. Anna Siame (as legal representative of the late Mary Mndolwa)** Civil Appeal No. 114 of 2012).

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Coming now to the merit of the appeal, one among the disputant issue is division of matrimonial assets alleged to be acquired by the parties during the subsistence of their marriage.

I am alive with the provision of section 114 of the Law of Marriage Act, [Cap 29 R.E 2019] which gives power to courts to order for division of matrimonial assets. However, such power is subject to certain conditions to be considered first as stipulated under sub section 2. The law states;

114.-(1) 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 sale of any such asset and the division between the parties of the proceeds of sale.

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

(a) the customs of the community to which the parties belong;

(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(c) any debts owing by either party which were contracted for their joint benefit; and

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(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Apparently in the foregoing provision, it is settled that the assets which are subject to division are those which were acquired during the subsistence of marriage by joint efforts of the parties. In our case at hand, one among the disputant property is the house of Morogoro. Appellant alleged that the house in question is not a matrimonial property since the same is owned by Top Radio FM as evidenced in Exhibit P2. His evidence was collaborated by his father who testified as DW2 at the trial court. Dissenting, respondent argued that the property in question is a matrimonial property because it was acquired during the subsistence of marriage and the mere fact that a sale agreement was executed under the headed letter of Top Radio FM, does not mean that the same belonged to it.

I have keenly examined the evidence on record, I must say that according to parties' evidence, it is clear that the property of Morogoro exists. The testimony of DW2 who pleaded the said property to be not

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part of the matrimonial properties and appellant's submissions prove so. The question now is whether the same is a matrimonial property or not. My answer to this question is in affirmative that is to say, the said property is a matrimonial property and the appellant's assertion that the same belonged to Top Radio FM is a fallacy. I hold so based on the fact that the said property was first, acquired during the subsistence of parties' marriage. Second, there is no board resolution to prove that the same resolved the purchase of that property and indeed the property belonged to it. Third, if at all the property was bought by Top Radio FM, the company seal to authenticate that the management authorized the purchase of the property could have been seen in Exhibit P2. It is beyond doubt that company seal is a proof showing that a board's resolution authorizing a certain act to be done. Fourth, the appellant, if at all purchased it on behalf of the company, he was expected to sign a sale agreement as Director or Manager or any other rank on his official capacity and the same ought to have been seen in Exhibit P2. Unfortunately, the appellant executed sale agreement in his personal capacity. Therefore, the mere fact that the sale agreement was written in the headed paper is not a conclusive proof that the property belonged to Top Radio FM considering also the fact that the evidence on record is silent as to why the buyer wrote an agreement on the headed letter. To that end, it is my considered view that the trial court

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properly made a finding that the property of Morogoro is a matrimonial property subject to division.

Now, it is settled that a rule on distribution of matrimonial assets is subject to several conditions which amongst them is the extent of contribution made by each party in money, property or work towards acquiring of the same as provided for under section 114(2)(b) of the Act. It is the evidence of the parties which proves the contribution of each party and ultimately determines the percentage of share for each party. Whether it is equal distribution or not, it all depends on the evidence on record. This is in line with the decision of the Court of Appeal in the case of **Gabriel Nimrod Kurwijira vs Theresia Hassani Malongo**, Civil appeal No. 102/2018 where it had this to say;

"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"

On their evidence at the trial court, both parties adduced evidence to the effect that, they were earning income which enabled them to acquire properties during the subsistence of their marriage. While appellant's evidence shows that he is a business man, respondent

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evidence shows that she is a businesswoman and at some point both of them worked for gain as they were employed. While respondent was employed by DESI, appellant was a driver. These facts were not denied by either of them.

Additionally, in their evidence, respondent testified that she was doing a business of poultry farming and timber business. Even though appellant claimed that these business were family business, there is no proof tendered in a trial court to substantiate so. Admittedly, the evidence at the trial court shows that respondent was given Tsh 21, 000,000 to top up in the timber business, but, it is my considered view that as per the evidence on record, the same was intended to boost respondent's business and it was given out of love and affection as well as family support. I hold so because in his answer to petition as reflected on paragraph 9, appellant claimed that the proceeds obtained from timber business was to be used to cover education costs that is payment of school fees to their children. Again, in his testimony at the trial court as reflected on page 24 of the typed proceedings, the appellant's intention is seen as he testified that:

" Nilirudi nyumbani na kumsamehe, nilimpa msingi wa biashara. Niliweka Tsh 21,000,000 kwenye akaunti yake ili kufanya biashara."

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Therefore, at any rate, no one can say that appellant's intention was to be part of timber business.

Further to that, in relation to parties' properties which is the house of Goba Kinzudi and a farm at Bagamoyo, the appellant's testimony as reflected on page 25 of the trial court's proceedings is to the effect that, they jointly acquired with respondent a house of Goba Kinzudi and a farm of Bagamoyo during the subsistence of their marriage. His evidence collaborated appellant's testimony as reflected on page 6 of the trial court's proceedings.

Surprisingly, in his submissions, appellant's counsel said that the property in question are in appellant's name and therefore this court should take refuge under section 60 of the Act that the properties belonged solely to appellant. As it was rightly held by the trial court, that presumption is rebuttable and the evidence on record proves to the contrary. The Court of Appeal in **Asile Ally Said vs Irene Redentha Emmanuel Soka and Another**, Civil Appeal No. 80 of 2020 (Unreported) at page 7 – 8 held that;

“...a property acquired during marriage is matrimonial property because, even if the same is purchased and registered in the name of an individual spouse, it is taken to be matrimonial property because it was acquired through the

joint efforts of a husband and wife. (emphasis is mine).

Before I wind up on this issue, as I concur with the findings of the trial court on the matrimonial properties acquired by the parties during the subsistence of their marriage, I should now address the issue of distribution. I am of the considered view that this issue should not detain me much, the evidence on record suggest that both parties contributed to the acquisition of the house, and therefore deserves equal distribution of the matrimonial assets. There is no evidence on record which shows that one party contributed more than the other.

It is the appellant's complaint that the value of the house of Dar es Salaam cannot be equal to the value of the house at Morogoro, hence the trial court distribution was not fair. I have keenly analysed this argument and my view is that, this issue is subjective as it depends on many factors including but not limited to the location of the house in a particular region and the structure of the building, to mention a few. However, in order to do justice to the parties of the case, it is my firm view that all properties are equally divided to parties, that is, each party is entitled to 50% of the house at Morogoro and 50% of the house at Goba Kinzugi.



Consequently, I allow these grounds of appeal and varying the distribution made by the trial court and ordered each party to be entitled to 50% of the house of Morogoro and Goba Kinzudi at Dar es Salaam.

The other issue disputed by the appellant is on monthly maintenance awarded to him. It is his complaint that the trial court did not take into consideration the evidence on record particularly his evidence on his monthly income. While I am appreciating the authorities supplied by the respondent counsel, it is my humble view that the court is required to consider the income and wealth of each party towards the child's maintenance.

It is settled that when ordering maintenance of a child, the court shall consider among others, factors provided under section 44 of the Law of the Child Act, Cap 13 R.E 2019 which provides that:

44. A court shall consider the following matters when making a maintenance order:

(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child.

(b) any impairment of the earning capacity of the person with a duty to maintain the child

(c) the financial responsibility of the person with respect to the maintenance of other children

(d) the cost of living in the area where the child is resident, and

(e) the rights of the child under this Act.



Considering the fact that appellant's monthly income as reflected in the trial court's proceedings ranged between Tsh 400,000/- and 600.000/-, I find fair for him to contribute Tsh 400,000/- as monthly maintenance since apart from his monthly income, the evidence on record shows that he is supervising the radio station in which he must gain something from supervision. Also, I have considered that respondent will contribute to children maintenance since she works for gain in her business. Therefore, this ground of appeal is allowed.

In the event, the appeal is partly allowed to the extent explained therein. I refrain to make an order for costs since this is the matrimonial cause and the parties were spouses.

It is so ordered.

Right of appeal explained to the parties.



M.MNYUKWA

JUDGE

13/06/2024

Court: Judgement delivered in the presence of the parties and appellant's counsel.

M.MNYUKWA

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13/06/2024