

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

AT TEMEKE

CIVIL APPEAL NO 27944 OF 2023

*(Originating from the District Court of Temeke at One Stop Judicial Centre in
Matrimonial Cause No. 308/2022)*

PATRICK NYAKEKE.....APPELLANT,

VERSUS

EVARISTA NYAKEKERESPONDENT

JUDGMENT

09/04/2024 & 06/05/2024

SARWATT, J.;

The parties to the present appeal were husband and wife after contracting their civil marriage in September 1992 and were blessed with four issues the youngest being 12 years. Their marriage was a happy one until 2003 when a misunderstanding arose between them, and according to the respondent, the appellant developed a tendency to chase her from their

matrimonial home and later on ask her to return. In 2022, the respondent, through matrimonial cause no 308 of 2022, decided to petition for a decree of divorce, custody of children, maintenance and division of their matrimonial properties.

Upon full trial, the court issued the decree of divorce, placed their youngest child in the custody of the appellant, and ordered the division of their matrimonial properties, whereby the respondent was ordered to get 50% of their house located at Bunju and 30% share of their motor vehicles with registration no. T981 DMU and T117 DVN. Dissatisfied with the said decision, the appellant lodged the present appeal with three grounds of appeal, which are;

- 1. That the trial court erred in law and, in fact, in holding that the Motor Vehicle Toyota Coaster with registration number T.981 DMU is a matrimonial property in total disregard of evidence to the contrary adduced by DW1 and DW2, respectively.*
- 2. That the trial court erred in law and, in fact, to grant the respondent a share of 30% in a motor vehicle with*

registration number T981 DMU and T117 DVN, respectively, in total disregard of the evidence showing that no contribution whatsoever was made by the respondent toward the acquisition of the said properties.

3. That the trial court erred in law and, in fact, to hold that the plot at Utegi Tarime, which is not known to the appellant, is a matrimonial property.

During the hearing of the appeal, the appellant was represented by Michael Kamba, Learned advocate, while the respondent's pleadings were drawn in gratis by the Legal and Human Rights Centre, and by agreement of both parties, the appeal was heard by way of written submissions.

Submitting in support of the appeal, the appellant counsel started by praying to effect the correction with regard to witnesses as they appear in the ground number one of the memorandum of appeal by deleting DW1 and substituting thereof DW3 as it was a typing error. On ground number one, the appellant's counsel submitted that according to the evidence of DW2, as it appears in the proceeding, he bought a vehicle with registration number T 981 DMU through a loan he secured through ABSA Bank and

registered the same in his name. It was the counsel's further argument that, according to section 15 of the Road Traffic Act, the person whose name appears on the registration card is presumed to be the owner. It was the counsel's contention that DW2 remained to be the owner until he sold the same to DW3.

According to the appellant counsel, during the trial, DW3 wanted to tender the sale agreement as an exhibit, but the same was objected to as it had no stamp duty, and the trial Court refused to admit it and ordered the payment of stamp duty for it to be admitted. When the trial resumed, and DW3 continued with his testimony, he wanted to produce a registration card as evidence on account that stamp duty paid would be evidenced on the registration card, but the Court refused to admit a registration card as evidence because the order was to pay for stamp duty so as to justify its reception as evidence. The other reason provided by the trial Court for its in-admission is because it was not annexed to the pleadings. Therefore, it ruled that the motor vehicle is a marital property and divided the same.

It was the learned counsel's view that the refusal of the trial Court to admit

the registration card was an error that affected the appellant; in the circumstances, he prayed for this Court to remit back the file to the trial Magistrate with directives that he should consider the unstamped sale agreement which was made admissible through by payment of stamp duty through the issuance of registration card by the Tanzania Revenue Authority. Once that is done, the records should be sent to this Court to determine if the trial Court findings were correct on the strength of the said document, together with other evidence.

In relation to the second ground, the appellant counsel referred this Court to sections 114(2) (b) and (3) of the Law of Marriage Act and the decisions of the Court in the case of **Mohamed Abdallah v Halima Lisangwe** [1988] TLR197, **Gabriel Nimrod Kurwijila v Theresia Hassan Malongo**, which provided that the underscore principle behind section 114 is that, division of matrimonial properties acts as compensation on contribution rendered towards the acquisition of matrimonial property, and it is a matter of evidence to prove extent of contribution.

It was the learned counsel's contention that, based on the evidence on record, it is clear that the respondent had failed to prove her contribution

towards the acquisition of a motor vehicle with registration numbers T981 DMU and T117 DVN. Thus, she is not entitled to a share of those properties.

On the third ground of appeal, the learned counsel submitted that the trial Magistrate erred in law and, in fact, when declared a plot located in Utegi to be matrimonial property and divided the same because there is nowhere in pleadings a plot situated in Utegi was mentioned, while it is a known principle in law that parties are bound by their pleadings and they cannot deviate from the same unless amendments are effected. According to the counsel, the appellant, in his reply to the petition, denied having any landed property located at Tarime, and the respondent was put into strict proof; thus, the respondent had the burden of proof on the balance of probability.

It was the counsel's further contention that the respondent evidence with regard to the plot at Utegi was given during cross-examination without disclosing exactly the place within Tarime District. The counsel further submitted that the respondent produced no evidence that would entitle her to a share of 30% of the motor vehicle and a plot at Utegi. Hence, he

prayed before this Court for the appeal to be allowed, and the decision and orders of the trial court be quashed.

On her part, the respondent, in opposing the appeal, supported the findings of the trial Court and argued that matrimonial properties are those which are jointly acquired and on contribution which may be based on work, monetary or property as provided under section 114(2)(b) and (c) of the Law of Marriage Act. According to the respondent, the Court correctly analyzed all facts as to the extent of contribution. Regarding the loan, it was the respondent's contention that the appellant took the loan for the benefit of the whole family and since his role as a husband was to provide for the family as a result of that loan.

Further, the respondent cited the case of **Samwel Moyo v Mary Cassian Kayombo**[1999] TLR 197, which provided the conditions that must exist before the Court could divide a matrimonial asset, that is, firstly, it must be a matrimonial asset, secondly, it must have been acquired during the marriage, and thirdly, it must be acquired by joint effort, according to the respondent, all these conditions exist thus the correct was right in holding that the vehicles were matrimonial properties.

On the second ground of appeal, the respondent submitted that the appellant did not deny the existence of that property before the Court as he was silent, which can be taken to mean that it exists. It was the respondent's further argument that since the appellant never disputed the existence of those properties during the trial, he could not raise this point during the appeal as it is a new fact that was never highlighted in the original proceedings.

Having gone through the submission of both parties and the records of the lower Court, I'm tasked to determine if the present appeal is meritorious. On the first ground of appeal, the appellant faults the trial Court's decision for declaring a motor vehicle with registration no. T981 DMU is a matrimonial property. According to the learned counsel, the act of the trial Court refusing to admit the registration card was detrimental to the appellant. Thus, he prayed for this Court to remit back the file so that the registration card be admitted.

As per the record the trial Court at first refused to admit the sale agreement because the stamp duty had not been paid. With regard to this issue, the law is clear that where unstamped document cannot be admitted

in evidence. Section 47(1) of the Stamp Duty Act provides;

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered in evidence authenticated by any such person or by any public officer unless such instrument is duly stamped."

In the case of **Zakaria Barie Bura v Theresia Maria John Mubiru** [1995] TLR 211, the Court of Appeal of Tanzania when faced with a similar situation where a document containing an agreement did not indicate payment of stamp duty. It cited with approval the decisions in the case of **Nizam Din Chur v Devonshire Stores Limited** [1958] 1 EA 729 and **Sunderji Nanji Limited v Mohamedali Kassam Bhaloo** [1958] 1 EA 762, where the Court stated;

"By law, such omission renders the sale agreement inadmissible as evidence in court unless the party concerned pays the stamp duty before the document is admitted as evidence."

In view of the above, I agree with the trial Court when it rejected the admission of the document without payment of stamp duty. However, on the strength of the case of **Zakaria Burie Bura (supra)** before holding that the document is inadmissible as evidence on the sole ground that it is not properly stamped, the Court ought to give an opportunity to the party producing it to pay the stamp duty, which was the case in the present case. The trial Court, after observing that stamp duty had not been paid, gave a chance to the witness to pay the same; however, when the trial resumed, the witness, instead of producing the stamped document, produced registration card, which was rejected because it was not attached to the pleadings.

It was the appellant counsel's prayer that since the payment of stamp duty is evidenced in the registration card, then the file should be remitted back to the trial Court for it to be admitted then this Court, on the strength of that evidence and other evidence on record, should see if the Court was correct in holding as he did. For the file to be remitted back to the trial Court so as to admit a document, it must be shown that the trial Court improperly rejected the admission of the said document. The reasons advanced by the trial court for the non-admission of the registration card

are well-founded because the motor vehicle registration card was not attached to the pleadings. It is a well-known principle of the law that a document that is not pleaded cannot be used as evidence. For those reasons, I find that the appellant counsel's prayer that the file should be remitted so that the registration card could be admitted is unfounded and I hereby reject it.

Having rejected the prayer, I'm now in a position to determine if the said motor vehicles are matrimonial property and whether the trial Court was justified in awarding the respondent a 30% share of those properties. What amounts to matrimonial property has been defined by the Court in numerous decisions. For instance, in the case of **Bi Hawa Mohamed v Ally Seif** [1983] TLR 32, the Court defined matrimonial property to mean those property that are acquired by one or both of the parties with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole.

For a matrimonial property to be a subject of division, the **Law of Marriage Act**, Cap 29 under section 114(1) provides that properties that

are subject to division are those that are acquired during marriage by their joint efforts. The provision reads;

"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 the sale."

Since there is no doubt that the said vehicles were acquired during their marriage what follows is to determine if they were acquired by their joint efforts so as to qualify to be subject for division. It was the appellant's counsel submission that the respondent gave no evidence of her contribution to the acquisition of the motor vehicles, as they were bought after the appellant took a loan from ABSA Bank.

I agree with the appellant's counsel that the underlying principle in the division of matrimonial property is that division must regard the contribution one rendered towards its acquisition. Section 114(2) of the Law of Marriage Act provides for matters to consider before the Court

makes an order for division; the section provides;

"(2) In exercising the power conferred by subsection (1), the

Court shall have regards

a. To the customs of the community to which the parties belong

b.to the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets,

c.to any debts owing by either party which were contracted for their joint benefit and

d.to the needs of the infant children, if any, of the marriage."

In the present case, it is shown in evidence that the respondent claimed to have contributed to the acquisition of their matrimonial properties as she was working at a neutral therapy, performing various business activities, such as catering business, selling multiple commodities, selling clothes and having a poultry business, whose money she was using to buy food for the family. Despite performing these activities, the respondent was also a wife and a mother to four children; thus, it goes without saying that she was

responsible for taking care of the family, which in law can be regarded as the contribution towards acquisition of matrimonial property and entitle her to a share though not necessary 50% as it was held in the case of **Bibie Mauridi vs Mohamed Ibrahim**[1989] TLR 162(see also the case Bi. Hawa Mohamed, Supra,)

In case of **Amoni Benedictor Buchwa v Aisha Shabani Hamisi**, Pc. Civil appeal no 11 of 2019, the Court cited with approval the decision in the case of Kagga v Kagga, High Court divorce case No. 11 of 2005, where the Court had this to say;

"Our courts have established a principle that recognizes each spouse's contribution to the acquisition of property, and this contribution may be direct or monetary. When distributing the property of such a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other, as this case clearly show that the first respondent was the financier and provider behind all the wealth acquired. In this case, the contribution of the petitioner is not less important than that made by the respondent."

Basing on the above reasoning, I find that the respondent contributed towards the acquisition of the motor vehicles and thus deserves a share, and I see no reason to interfere with the 30% share on the motor vehicles as granted by the trial and for that reason I find these grounds lack merit.

Regarding the third ground of appeal, the appellant's counsel faulted the trial Court for giving a 30% share of the plot at Utegi while the same was not pleaded in the pleadings. According to the learned counsel, the only evidence that the respondent gave with regard to the plot at Utegi was during the cross-examination and without specifying exactly where within Tarime District Utegi is located. The respondent, on her part, provided that since the appellant didn't deny that property exists, then it means that that property exists.

It is a well-known principle of the law that the one who alleges a particular matter must prove. It is also a trite law that in civil cases, the burden of proof is on the one who alleges, and the standard of proof is on the balance of probability. In the present case, since the respondent was the one who alleged the existence of the plot and ownership as matrimonial assets, then the law requires her to prove their existence by producing

evidence.

The above position of the law is in view of the provisions of sections 110 and 111 of the Law of Evidence Act, Cap 6, which provides;

"110. whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts that he asserts must prove that those facts exist.

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

The Court of Appeal of Tanzania subscribed to the commentaries from decided cases in India referred to in the book of Sarkars Law of Evidence, 18th Edition in the case of **Charles Christopher Humphrey Richard Kombe t/a Humphery Building Material vs Kinondoni Municipal Council**, Civil Appeal No. 125 of 2016 where it said;

"..the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is usually incapable of

proof... the court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden until he arrives at such a conclusion he cannot proceed on the basis of weakness of the other party."

In the present case, the next question I'm asking myself is whether the respondent had successfully discharged her duty of proving that the said property exists and is a matrimonial property. I have gone through the entire record and found that with regard to the plot, the only evidence regarding the existence of the same is found on page 7 of the typed proceeding and when she was asked about the plot during cross-examination. The respondent, when giving her evidence, said, and I quote;

"There is another plot at Utegi Tarime regarding that Patrick's aunt called us and said that there would be district head courters, so we should buy a plot and we brought."

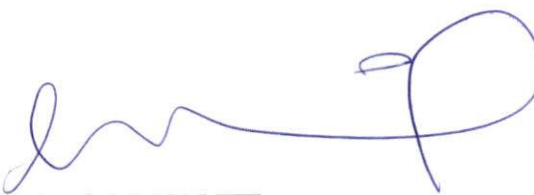
Looking at the above evidence, I'm inclined to hold a firm view that the plot exists and it is a matrimonial property. This is particularly so because

the appellant, in his reply, denied owning any property at Tarime. The respondent could have been lucky if the respondent didn't dispute owning the same, but this was not the case in the present case. Basing on the above reasons, I agree with the appellant's counsel that the respondent failed to prove that the property exists and it is a matrimonial property, and I hereby set aside the order of the trial court distributing the same.

For the reasons stated above, this appeal is partly allowed to the extent provided above, and since this is a matrimonial case I make no order as to costs.

Dated at Dar es Salaam this 06th day of May, 2024.




S. S. SARWATT

JUDGE

Delivered in the presence of Michael Kamba advocate for the appellant and the respondent in person.

Right of appeal is fully explained.