

**IN THE HIGH COURT OF TANZANIA**  
**TEMEKE SUB-REGISTRY**  
**(ONE STOP JUDICIAL CENTRE)**  
**AT TEMEKE**  
**CIVIL APPEAL NO. 13 OF 2023**

*(Originating from Matrimonial Cause No.184 of 2022 in the District Court of Temeke at One Stop Judicial Centre)*

**LANTAEDNA DIYAMET.....APPELLANT**

***VERSUS***

**TUMAINI N. MNONDWA.....RESPONDENT**

**JUDGMENT**

Date of last order: 29/02/2024

Date of Judgment: 04/03/2024

**OMARI J.,**

The Respondent in this Appeal was the Petitioner in Matrimonial Cause No. 184 of 2022 of the District Court of Temeke at the One Stop Judicial Centre in which he sought for a dissolution of marriage, custody of the children and division of the couples' matrimonial properties. The Appellant who was then Respondent did not dispute the prayers by the Petitioner.

At the hearing the parties were the only witnesses and it is recorded in the Judgment of the trial court that; they contracted a marriage in the Christian



form on 7 August, 2010, they have three children who are born on 19 November, 2010 8 June,2013 and 23 August,2014 respectively was undisputed during the trial. It is also observed that they agree that during the subsistence of the marriage they acquired a one storey house at Gosheni Street, Mbezi Luis (the matrimonial residence) and a house at Kitopeni, Bagamoyo. There is also a third house at Majimatitu, Mbagala that was built by the Respondent herein to the stage of the upper beams before the marriage and was later was completed during the marriage. The parties herein had also agreed that they own two motor vehicles both registered in their respective names. They also to a great extend agreed that their marriage was troubled; they were only in dispute as regards the reasons for their marital troubles.

Upon finding that the parties' marriage is broken down beyond repair the trial magistrate ordered that it be dissolved and a decree be issued. He also made an order for custody and access for the children and their maintenance. The Respondent herein is to pay TZS 240,000 a month so long as the children are with the Appellant as well as the school fees and all other related costs as well as medical insurance and clothing.



As to the matrimonial properties, after considering the evidence of both parties, section 60 and section 114, of the Law of Marriage Act, CAP 29 RE 2019 (the LMA) and the case of **Bi Hawa Mohamed v. Ally Sefu**, Civil Appeal No. 9 of 1983 the trial court ordered the one storey house at Gosheni street to go to the Respondent and the one in Kitopeni Bagamoyo to the Appellant. The trial court also awarded 10% of the market value of Mbagala house to the Appellant. The motor vehicles were ordered to stay with whosever's name they were registered in.

Dissatisfied with the above state of affairs the Appellant knocked on the doors of this court armed with three grounds to wit:

1. That, the District Court Magistrate erred in Law and fact in failing to consider property the Appellants contribution in the division of matrimonial properties.
2. That, the District Court Magistrate erred in law and facts when deciding on the division of matrimonial properties.
3. That, the district Court Magistrate erred in law by not considering the best interests of the issues to this marriage when dividing the matrimonial assets.



It is on the above grounds that she prays that the judgment and decree of Temeke District Court at One Stop Centre regarding matrimonial assets be quashed or set aside and the appeal be allowed.

The matter was disposed by way of written submission. The parties complied to the scheduling order. The Appellant's submission was drawn and filed by Stephen Ally Mwakibolwa of Alley and Associates while that of the Respondent was drawn and filed by Emmanuel H. Hyera of Hyera Law Chambers.

In the submission in support of the Appeal Mr. Mwakibolwa sought to abandon the third ground of appeal and argue the remaining grounds of appeal collectively. In his submission counsel began with the facts of the case stating in the 8 years before hitting a rough patch the parties equally contributed in acquiring assets something that is not in dispute. What is in dispute is that the trial court while distributing the matrimonial assets did not award the distribution of the matrimonial home that the parties and their issues resided in, that is the house at Gosheni Street, Mbezi Luis. The said house according to counsel was not divided in accordance to the contribution of each party which is an error in law and fact that the Appellant prays for this court to remedy. Counsel argued that in not dividing the house the trial



court did not take into consideration the provisions of section 114(2) of the LMA and the case of **Bi Hawa Mohamed v. Ally Sefu** (*supra*), which accepts domestic work as an acceptable form of contribution towards the acquisition and development of matrimonial property. Mr. Mwakibolwa referred to section 2 of the LMA which defines a matrimonial home; which is this case the Appellant worked and contributed for to her entire married life. He argued further that, this is a fact that the Respondent did not dispute thus, the court should not have ignored since while the Appellant provided for the household requirements and needs, she also made contribution of funds into the account of the Respondent the sum that was used to acquire and construct the matrimonial properties of the parties that is, the matrimonial home.

Mr. Mwakilobwa prayed that this being a first appellate court, the proceedings of the trial court be looked at a fresh and matrimonial home located at Mbezi Goshen Street equally divided between the parties.

When it was his twin Mr. Hyera began his submission by pointing out that the Appellant's advocate tried to mislead this court concerning the distribution of the house located at Goshen Street, Mbezi Luis. Quoting item (i), (j) and (k) of the decree of the trial court counsel then went on to argue



that according to section 114(2) of the LMA cited by the Appellant's Advocate the trial court considered the law, divided accordingly with percentage as contributed legally. This, counsel argued, is stipulated in **Bi Hawa Mohamed v. Ally Sefu** (*supra*) as well as section 114 of the LMA.

Counsel then went on to point out that there is nowhere in the parties' testimony that the house on Gosheni Street Mbezi Luis and the one in Kitopeni Bagamoyo are contributed to equally or that the Appellant contributed more than the Respondent. He argued that when one reads the proceedings the and the trial courts judgment they can see that the Appellant got what she got simply because she was the wife of the Respondent rather than because of her contribution as her contribution was nothing more than matrimonial obligations.

Counsel went on to state that the Appellant failed to prove if she had a greater contribution in respect of the contribution money in the Respondent account contributing to the acquisition of matrimonial property. And, since it is trite law that who alleges must prove Mr. Hyera emphasized his point by citing the case of **Berelia Karangirangi v. Asterial Nyalwamba**, Civil Appeal No. 237 of 2017.





He concluded his submission by citing section 110(1) and (2) of the Tanzania Evidence Act, CAP RE 2022 which requires anyone who desires a court to give judgment as regards a right or liability dependent on the existence of facts which he asserts must prove that those facts exists and the burden of proof lies on the person who would fail if no evidence at all were given on other side.

Having considered the opposing submissions in support and against the appeal that counsel have aptly made it is now opportune to determine whether the appeal is meritorious and if so what be the way forward. Like counsel I shall also determine the two grounds collectively as they were argued in submission.

Before I proceed to the grounds of appeal and in response to the Respondent counsel's prayer it would also be proper to state that I am alive to the principle that the first appellate court is obliged to re-evaluate the evidence adduced in the trial court and this has been the subject of many decisions see for instance; **Hassan Mohammed Mfaume v. Republic**, (1981) T.L.R 167 and **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another**, Civil Appeal No. 421 of 2021. See also **Faki Said Mtanda v. Republic**, Criminal Application No.249 of 2014 where the Court of Appeal cited the decision of then East



quoting the same where it was stated that:

*'It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion'*

This being a first appeal, I am therefore mandated to go back to the evidence that is available on the record and re-evaluate the same and arrive at a conclusion, if need be.

The Appellant is basically complaining that the trial court erroneously did not equally distribute the house located at Gosheni Streen, Mbezi Luis, which was the couple's matrimonial home. As already explained above, I am mandated to go back to the record and re-evaluate the entire evidence in order to arrive at a conclusion.

As rightly pointed out by the Appellant, the relevant law as regards to division of matrimonial property is section 114 of the LMA. For ease of reference I reproduce the section 114 of the LMA as follows:

*'(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 the 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-* (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, 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'*** (emphasis supplied)

The above section has recently received interpretation of the Court of Appeal in the case of **Shakila Lucas v. Ramadhani Sadiki** (Civil Appeal no. 349 of 2020) [2024] TZCA 36 wherein the court had this to say:

*'According to the above excerpt, it is clear that section 114 (1) of the Act vests power to a court hearing a matrimonial dispute to order division of assets which were obtained by married people during*



*the subsistence of the marriage through their joint efforts when granting or subsequent to the grant of a decree of separation or divorce.'*

In the present appeal the trial court acting on the evidence adduced by the parties and considering the provisions of section 114 (1) of the LMA ordered what it considered the matrimonial assets or properties. It awarded the Appellant the House at Kitopeni Bagamoyo, 10% of the market value of the house at Mbagala and a vehicle which was already registered in her name. The Respondent was awarded the house at Gosheni street Mbezi Lius, the remaining 90% of the house at Mbagala and a vehicle that was already registered in his name.

The Appellant is faulting the trial court for not considering her contribution in the acquisition of the properties and specifically the matrimonial home. In the **Shakila Lucas v. Ramadhani Sadiki** (supra) case, the Court of Appeal also elucidated on the criteria as provided for under section 114 (2) of the LMA a trial court has to consider when dividing the properties between the parties as follows:

*'Section 114 (2) gives the Court the criteria or principles to follow in the division of matrimonial assets: one, the customs of the community; two,*



***the extent of the contributions made by each party in money, property or work towards the acquisition of the assets; three, any debts owing by either party which were contracted for their joint benefit; and four, the needs of the infant children, if any, of the marriage, and five, subject to those considerations, the court to be inclined towards equality of division.*** (emphasis supplied)

This goes to show that there are five criteria that a court has to consider in exercising its powers to divide matrimonial properties. The second criteria, and the one that the Appellant is faulting the trial court's decision is based on the extent of contribution made by each party in money or work towards the acquisition of the said properties. This is a question of evidence as has already been decided by the Court of Appeal in *inter alia* the cases of **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018.

The record of the trial court depicts that on 12 October, 2022 it listed four issues that were agreed to. The third issue was what was each party's contribution in the acquisition of matrimonial properties? On page 6 through



to 7 of typed proceedings the record depicts that Respondent testified as follows:

*"The 2<sup>nd</sup> house is at Kitopeni Bagamoyo. I bought that plot from Marcus Lucas in 2013 at Tshs 3,000,000/= through the local government. I began construction of the house to its finality by using my income from the salary. As proof that I am the owner of the said house, there's a sale agreement to that effect. I can ...."*

The sale agreement that the Respondent was referring to was admitted into evidence as Exhibit P3. As it is depicted on page 7 of the proceedings, he went on to state:

*"I pray the court to leave the house under my ownership. **The 3<sup>d</sup> house is at Mageti Mbezi Luis Gosheni Street. I bought a plot of that house in 2017 from Mushi at Tshs 25 Mil. After that I built a one (sic) house and that's where we currently reside. I took a loan from NBC which helped me in the construction of the said house. I have a sale agreement between myself and Mushi which has our pictures,...**"*(emphasis supplied)



The said sale agreement was admitted into evidence as Exhibit P4 thereafter as is depicted on page 8 through to 9 of the typed proceedings. The Respondent then went on to state:

*"I pray the court appreciate that I am the owner of that house and deserve to retain ownership to the said house. ....I am an employee of the government at DAWASA since 2010. I have a month salary and other benefits/ payments I get when I travel for work. I also took a loan in 2017 from NBC and used the money to build a house at Mbezi Luis Mageti where we live. As proof. I have a bank statement..."*

During cross examination the Respondent is recorded to have said he is the one who bought the properties and the that the Appellant's only contribution is that of a wife, nothing more. He also testified that as a wife, she had her marital responsibilities and works.

As regards to the Appellants testimony, on page 17 of the typed proceedings the record depicts she stated:

*"Previously, we agreed to open a joint account but he said that he had an NMB account which he had not used for long time. He asked to revive it and use it instead. Then our agreement was that his income*



*shall go into the account for development such as purchasing plots, buildings of houses while my salary will cover household expenses such as food, bills and any access (sic) would go into that account. The arrangement continued until 2017 when we emptied the account for the house at Mbezi. Up 2018, I was the one who was paying for clothing, food and school fees of the children. In 2018, I told him to start paying school fees for the two elder daughters ..."*

As depicted on page 19 of the typed proceedings she went on to state:

*"Regarding properties, I pray to remain with the house that we currently reside with the children. That alone."*

Further, during cross examination the Appellant is recorded to have stated that she began contributing to the properties since they got married as they divided responsibilities amongst them. As can be seen on page 21 of the typed proceedings, the Appellant is also on record to have said her husband had bought the Kitopeni property secretly and told her when it was already built to the foundation around 2013. And, that she is choosing the Mbezi house so that the children should not get the effect of their parents' divorce as that's where





they have lived for two years preceding the trial. In addition, she is on record to have said:

*'I have good reason to stay there because I have contributed to the house with my effort and I might have injected 40% of the house value financially. I have no proof of the financial contribution. I am not ready to be compensated with the 40% if I am given the custody of the children.'*

The trial court in its judgment observed that the Appellant wanted the one storey house of which she accorded her contribution to be 40%. As regards this said house the trial court had this to say:

*'Nevertheless, I don't agree with the Respondent's claim that she deserves the one storey house at Gosheni Mageti street as her share of the properties. My decision in this regard, is fortified by the following reasons, first, having assessed her evidence, as to the contribution, I think there are lot of discrepancies. For instance, while she claims there was an agreement to use the Petitioner account to save money for developments, she could not even mention the account itself. In addition to that, her claim that she was the one who was paying for school fees for children is also doubtful as there is no explanation as*



*to why she stopped paying the school fees in 2018. Worse still unlike the Petitioner, she has not said how much was her monthly income, and while she admits that's currently the Petitioner is the one paying for the children 'school fees and contributes to house expenses, she has not clarified why did her income drop in 2020 especially because she said she is a trainer used not to travel as the Petitioner had alleged.'*

In my considered view, the above shows the trial magistrate aptly considered the evidence of both parties. In summary he had refused the Appellant's claim to the house in question and had also refused the Respondent's claims that he was the one who single handedly acquired all the properties. The trial magistrate had this to say in the judgment:

*"with these discrepancies I find the petitioner's version of the story that, he was the one paying for the children's education, as well as the house expenses more believable. The second reason is that, even if that was not the case, and I was to believe that she contributed about 40% of the said house as she claims, I still would hand it to her, for a simple reason that, if that was to be the case, then the Petitioner's contribution is 60%. Being a higher*



*contributor, the Petitioner obviously deserves a bigger share."*

The question of contribution being one of evidence, it is important to note that both at trial and in the submission in support of this Appeal the Appellant as well as the Respondent recognize that the Appellant in addition to her contribution, which she failed to substantiate, did her wifely duties in the home and this is not disputed. The trial magistrate took this fact into consideration as he went on to divide the properties in the manner that he did. On page 9 of the judgment, the trial magistrate had this to say:

*"Whereas dividing the houses in terms of percentage may lead to selling them in quest of parties to secure their share which will ultimately deny the children, giving the one storey house which seems to be more valuable appears to be the best solution. I have ruled that it is more valuable because having considered the value of the Plot i.e Tshs 25,000,000/= and the costs for building which includes the 41 Million loan from NBC in relation to the Kitopeni Bagamoyo whose plot was bought at Tshs 3,000,000/=. For those reason, the petitioner will take the onestory house at Gosheni street, whereas the house whereas at Kitopeni Bagamoyo will go to the Respondent. This is*



*coupled with 10% of the value of the Mbagala house."*

The Appellant herein challenges the decision of the trial court in that it did not take into consideration her contribution and failed to equally divide the matrimonial home. The district court based its decision in the principle established in the case of **Bi Hawa Mohamed v. Ally Sefu** (*supra*) as a criterion in awarding the Appellant the Kitopeni property and 10% of the value of the Mbagala house. In the trial court's judgment, it is also clearly stated why the Respondent got the Mbezi Gosheni Street property.

Although the Appellant did not prove her contribution in terms of money the trial court still found that she was entitled to the Kitopeni house, which it gauged to the 40% that the Appellant in her testimony approximated to be her contribution towards the acquisition of the Mbezi Luis property. The trial court also awarded her a 10% value of the Mbagala property.

I am therefore, satisfied that the trial court performed its judicial duty of analysing the evidence, applying the law and coming up with a decision. In the final analysis, basing on the circumstances of this matter I find no reason to depart from the findings of the district court. Therefore, I find this Appeal



unmerited, consequently it is dismissed. Since this is a matrimonial matter,  
I make no order as to costs.



A handwritten signature in blue ink, appearing to read "A.A. Omari".

**A.A. OMARI**

**JUDGE**

**04/03/2024**

Judgment delivered and dated 04<sup>th</sup> day of March, 2024 in the presence of  
Ms. Sarah Wilfred Lusinde who is holding brief for Mr. Stephen Mwakilobwa  
the Appellants advocate and in the presence of Mr. Emmanuel Hyera the  
advocate for the Respondent.

A handwritten signature in blue ink, appearing to read "A.A. Omari".

**A.A. OMARI**

**JUDGE**

**04/03/2024**