

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

PC. CIVIL APPEAL NO. 75 OF 2023

(Arising from the District Court of Bariadi as Matrimonial appeal No. 6 of 2023 and the same originating from Bunamhala Primary Court as matrimonial Cause No28/2019)

KIJA NDEGE APPELLANT
VERSUS
ELIZABETH MAGEMBE RESPONDENT

JUDGMENT

20th February & 08th March, 2024.

MASSAM, J.:

This is a second bite of an appeal preferred by Kija Ndege the Appellant herein challenging the decision of the District Court of Bariadi at Bariadi in Matrimonial Appeal No. 06 of 2023 (the first appellate court) which varied with the decision of Bunamhala Primary Court (the trial court) which awarded Elizabeth Magembe the Respondent herein, the unfinished house located at Mahaha Sentani while the Appellant was granted their matrimonial house.

The Brief background of the matter is that, the Respondent before the trial court petitioned for a decree of divorce and division of the matrimonial properties against the Appellant. After a full trial was

conducted, the trial court granted decree of divorce and ordered for distribution of the matrimonial properties between parties as well as custody and maintenance of the offspring.

Dissatisfied, the Respondent preferred the first appeal to the District Court of Bariadi where the award was varied that the matrimonial house awarded to the Respondent was reverted back to the Appellant and that allocated to the Appellant was given to the respondent on ground that the said house was built on the Appellants father's plot hence not justifiable to distribute the same to the Respondent, the division of other matrimonial properties was left undisturbed as what was ordered by the trial primary court. Again, the Appellant was aggrieved and preferred the second appeal to this court on the following grounds: -

- 1) That, the Appellate Magistrate misdirected herself by making a decision contrary to the evidence on record especially house forgetting that the same was named by the respondent as matrimonial property and the respondent together with the children are living thereto.*
- 2) That, the Appellate Magistrate erred in law and in fact by holding that the matrimonial house is placed on the appellants father plot without such evidence or proof from the record.*

3) *That, the Appellate magistrate erred in law by failure to tackle properly the grounds of appeal as it looks especially the first ground of appeal.*

During the hearing of the appeal which proceeded orally, it is only the Appellant who entered appearance in person while the matter proceeded *ex parte* against the Respondent. Based on the Appellants' grounds of appeal and submissions by the parties the main contention in this appeal is whether there is fair division of the matrimonial property in considering the contribution of each spouse towards acquisition of the properties.

In his submission in support of appeal the Appellant argued that, he was dissatisfied with the distribution granted by the first appellate court on ground that the house he was allocated by the trial primary court was given to the Respondent and the house that was allocated to the Respondent was given to the Appellants parents while the Appellant being left with nothing.

Basing on that submission the Appellant prays that the Appeal to allowed setting aside the 1st Appellate Court decision and upheld the trial court's decision.

I have considered the records, grounds of appeal and the submissions by the Appellant. There is no dispute regarding the marriage status of the parties and the fact that the marriage is irreparably broken down. The facts which can be glanced from the records of the lower courts reveals that, before the trial court the Respondent petitioned for a decree of divorce against the Appellant and the same was granted despite the fact that there was no any proof to substantiate the claim that the Appellant and the Respondent had a valid marriage be it customary, Islamic or Christianity marriage.

It is however undisputed fact that, after a decree of divorce was issued between parties and ordered for the division of matrimonial properties and maintenance of the issues of marriage. Much as the issue of marriage status between the parties was not appealed against before the first appellate court and before this court, I will direct myself to the disputed issues which is based on division of matrimonial properties.

The records shows that parties lived together from 1996 until 2019 when the Appellant chased away the respondent while on the side of the Appellant he confessed to have left the Respondent in year 2001 to search for a better life.

That, During the subsistence of their marriage, they acquired various properties including among other two matrimonial houses in dispute. What is disputed between parties herein is that, the house allocated to the Respondent by the trial court is a matrimonial property or it belongs to the parents of the Appellant herein. And whether the 1st Appellate court was proper to re allocate the properties awarded by the trial court.

I have read the trial courts record, specifically the evidence adduced by the Appellant herein who was the respondent before the trial court. It is the Appellants claim that the 1st Appellate court erred in holding that the house allocated to the Respondent was not built on their parents' land.

The evidence in record reveals that the Appellant SU1 adduced evidence before the trial court and stated that,

" Mwaka 2001 niliondoka nyumbani na kumuacha mdai nyumbani na SM2 alinipigia simu akisema mdai anataka kuondoka maana hakuoni, hivyo akaniambia wazazi wangu wamekataa asiondoke ila yeye SM2 alimruhusu, baadaya muda nilirudi nikakuta kumbe amesharudi kwao, nilimfuata akarudi kwetu..."

With this piece of evidence in record, it is a true fact that the house that the parties refer to as their dwelling house is located within the family of the Appellant. The trial court reasoning in allocating the said house to the Respondent was to allocate the house within she was living in. Much as the parties marital relationship came to an end then, allocating the said house to the Appellant by the first appellate court was a rightful approach. The reason for saying so in encroached on the fact that, since the matrimonial house is located near the Appellants family then allocating the same to the Respondent would not in real essence achieve the purpose of distribution of matrimonial assets as the respondent could not be comfortable to access the said house which is allocated within the appellants family while there no longer married with appellant and because there was another house which is not allocated within the appellants family ,this court is in support of the findings of the 1st appellate court that the same to stay with the appellant as it is within his family place and the other even though it is unfinished one to be given to the respondent.

On the claim that, the matrimonial house was given to the Appellants parents by the 1st Appellate court, I find this claim wanting in merit and not supported by the available evidence on record. Upon

reading the 1st Appellant's court judgment on page 4 the court made its decision and stated that,

" Consequently, as there are two matrimonial house subject to the division, this court finds it proper to each one (parties) to get one house to wit: Appellant to get unfinished house located at Mahaha Sentani and the Respondent to remain with a matrimonial house placed at his father's plot."

It is a trite law that the fundamental principle guiding division of matrimonial property is contribution of each spouse towards the acquisition of the property. That is, if the parties acquired together any asset or property it will be subject to division based on proof of each one's contribution. Before the 1st Appellate court the Appellant while arguing in opposition of the appeal he stated that and i quote for easy of reference,

" The house which appellant is given is located in their own plot at Mahaha and his parents are living in a different place far from the house given to the Appellant..."

For easy of clarity the statement adduced by the Appellant before the first appellate court is an after thought as it differs with the

evidence given under oath before the trial court which reveals that the matrimonial house is located near or within the Appellants parents place hence allocating the same to the Appellant is a proper approach.

In the upshot, I find this appeal devoid of merit, therefore dismissed. No order for costs considering the nature of the case and the relationship between the parties to this matter.

It is so ordered.

DATED at **SHINYANGA** this 8th day of March 2024.



A handwritten signature in dark ink, appearing to read "R.B. Massam", is written over the printed name.

R.B.Massam
JUDGE
8/3/2024