

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO. 1 OF 2023

*(Originating from Probate/Matrimonial Appeal No. 37 of 2021 of the District Court
One Stop Judicial Center of Temeke)*

MAARIFA SAID ABDALLAH..... APPELLANT

VERSUS

MASUD SELEMANI CUSTOM..... RESPONDENT

JUDGMENT

18th March, 2024 & 20th March, 2024

BARTHY, J.:

The year 1988 marked a joyous beginning for Masud Selemani Custom and Maarifa Said Abdallah, who chose to unite in marriage according to Islamic rites. Their union was blessed with four children. However, by 1993, conflicts arose, becoming intolerable, and by 2002, the couple found themselves seeking to end their union through the BAKWATA conciliatory board.

Subsequently, the appellant herein sought a divorce, leading the respondent to issue a '*talaq*' under Islamic law. The matter was brought before the primary court of Kinondoni, where the marriage was



dissolved, and a decree of divorce was granted and the respondent ordered to pay the appellant Tsh. 5,000,000/- as her share from the matrimonial assets. Dissatisfied with the decision, the appellant pursued an appeal to the district court at Temeke One Stop Justice Centre, which upheld the trial court's ruling, dismissing the compensation order.

Despite these outcomes, the appellant still dissatisfied with the judgment and award of the first appellate court, and sought to challenge its decision with the following grounds;

- 1. That, the district court erred by failing to recognize the appellant's contributions to the acquisition of matrimonial assets, despite a 14-year marriage where joint efforts were made to acquire properties Those matrimonial assets are;*
 - i. Two (2) houses at Boko CCM area, Kinondoni District, Dar es Salaam.*
 - ii. One (1) farm located at Madale, Kinondoni District, Dar es Salaam.*
 - iii. One (1) farm located at Boko Magereza, Kinondoni District, Dar es Salaam.*
- 2. That the District Court Temeke One Stop Centre erred in law and facts by declaring that the consideration of matrimonial properties is based solely on the name in*

which the property is registered, without considering the contributions of both parties toward the acquisition of those marital assets.

3. That the District Court Temeke One Stop Centre erred in law and facts by failing to consider the appellant's contribution towards the acquisition of matrimonial property throughout the 14 years of their marriage. The petitioner made significant contributions through housework, business, and entrepreneurship, which were disregarded, resulting in an unfair and inequitable judgment.

The appellant therefore prays that this appeal be allowed, the judgment of the district court be set aside and dismissed, and this court declare that the assets were jointly acquired between the parties and give 50% shares to each party. Additionally, the costs of this appeal shall be borne by the respondent, along with any other reliefs that this court deems fit to grant.

The court ordered the appeal to be disposed of by way of written submission. For the appellant, the submission in chief was prepared by



the learned advocate Mr. Richard Godlisten from Women's Legal Aid Centre (WLAC).

In his submission in support of the grounds of this appeal, Mr. Kimaro shared the history of the parties who married in 1988 and remained married until 2002. During this period, they built their first house in 1992, where he stated that the appellant participated in the construction. For the second house, they jointly acquired the plot, and by the time of their divorce, they had constructed three bedrooms. Additionally, they owned a farm in Madale, purchased in 1991, and another farm in Boko Magereza, purchased in 1999, which later turned into plots. The appellant then proceeded to sell these plots.

Mr. Kimaro referred to Section 114(1) of the Marriage Act, Cap 29, R.E 2019 (the Law of Marriage Act), which grants the court the power to distribute the assets acquired by spouses through joint efforts. Since the appellant had stated before the trial court that she had contributed to the acquisition of the property through various means, including a business of selling fried fish, bans, kalimati, rice bread, and overseeing construction, Mr. Kimaro argued that the lower court's decisions failed to consider the appellant's contributions adequately.

He emphasized that most family properties are registered under the husband's name, but Section 114 of the Marriage Act recognizes the

contribution of both spouses. He also cited provisions of the Evidence Act, Chapter 6, R.E 2022, which place the burden of proof on the party making allegations.

To support his argument, Mr. Kimaro cited legal precedents from the case of **Bi. Hawa Mohamed v. Ally Sefu** [1983] TLR 32 (CA) and **Eliester Philemon Lipangahela v. Daud Makuhuna**, Civil Appeal No. 139 of 2002, HC at DSM. He urged the court to consider the appellant's contributions and grant the reliefs sought.

Ms. Rehema Mvano, the learned advocate for the respondent, resisted the submissions presented for the appellant, arguing that they introduced new facts not presented before the trial court. She referred to evidence in the court's proceedings and highlighted the failure of the appellant to prove her contributions.

Ms. Mvano contended that the appellant's claim of contributions was unsubstantiated by evidence and that the respondent was able to prove his ownership of the property acquired after the petitioner left.

In response to the argument that the lower courts only considered names on the title, Ms. Mvano referred to Section 61 of the Evidence Act [Cap 6 R.E. 2022] (to be referred to as the Evidence Act) stating that the content of documents may be proved by oral evidence. She argued



that the appellant's 14-year marriage did not entitle her to claim properties acquired after she left the matrimonial home.

She also stated that the appellant failed to prove her contributions adequately, rendering the cited legal precedents irrelevant to the appeal. She maintained that the decision of the first appellate court was correct and urged the court to dismiss the appeal with costs.

The appellant failed to file her submission in chief, leaving the court with the responsibility of assessing the merit of the appeal before it. Considering the arguments presented, the court consolidates the grounds of appeal and scrutinizes whether the first appellate court erred in disregarding the appellant's contributions to matrimonial assets.

Acknowledging this as a second appeal, the court's intervention is warranted only in instances of legal violations or substantial misinterpretations of evidence. This principle was aptly articulated in the case of **Neli Manase Foya v. Damian Mlinga**, Civil Appeal No. 25 of 2002, Court of Appeal of Tanzania. Consequently, the court proceeds to deliberate on the merits of the appeal.

Mr. Kimaro was firm that the first appellate court erred in its findings by concluding that the appellant made no contribution to the acquisition of matrimonial assets alongside the respondent. He



emphasized the appellant's contributions, including her involvement in small business endeavours and her nearly 14-year tenure as the wife, warranting her entitlement to a share of those assets.

Contrarily, Ms. Mvano staunchly argued that the appellant's counsel introduced new evidence not presented before the court, and the appellant failed to substantiate her contributions. She highlighted that all titles were registered in the respondent's name, who also acquired the land for constructing the house from his family, supporting the lower court's determination that the appellant was not entitled to any share of those assets.

In determining asset distribution, Section 114(2)(b) of the Law of Marriage Act recognizes various forms of contribution by spouses. The first appellate court considered this provision, stressing the need for evidence of each spouse's contribution concurrent with the findings of the trial court. Stressing on the absence of such evidence, then there is a presumption that the asset belongs to the party whose name is on the title. The court found that the appellant's claim of domestic work was unsubstantiated, leading to the conclusion that she was not entitled to any share.

However, it's crucial to acknowledge that domestic work can indeed be considered a contribution to matrimonial assets, as

established in the case cited by the appellant's counsel, **Bi Hawa Mohamed v. Sefu Ally** (supra), and **Yesse Mrisho v. Sania Abdul** (Civil Appeal 147 of 2016) [2019] TZCA 414. Despite the appellant not explicitly mentioning her involvement in domestic work, she stated in her evidence that she was doing petty businesses and played a role as a wife for nearly 14 years and being the mother of four children inherently involves such chores amounting to her contributions, entitling her to a share of the matrimonial assets.

Regarding the contribution of matrimonial assets, there's no reason to dispute the concurrent findings of the lower courts, which provided overwhelming evidence from the respondent's side. As the appellant could not bring evidence to prove extent of her contribution towards the acquisition of houses, plots and farm. Since the duty to prove such contributions rested with the appellant. Merely mentioning them wouldn't suffice to establish their extent. This duty to prove contributions was emphasized in the case of Gabriel **Nimrod Kurwijila v. Theresia Hassan Malongo** (Civil Appeal 102 of 2018) [2020] TZCA 31.

In light of this analysis, it is evident that the first appellate court erred in completely disregarding domestic work and engagement in small-scale business as contributions to the acquisition of jointly owned

matrimonial assets. The appellant's witnesses corroborated her claim of involvement in petty business activities and overseeing the construction of the house. However, the appellant fell short in providing concrete evidence regarding the extent of her contribution.

For the aforementioned reasons, I find that the appeal partially succeeds. Consequently, the decision of the district court regarding the distribution of assets is varied, and the primary court's decision, awarding the appellant Tsh. 5,000,000/- as her share from the jointly acquired matrimonial assets, is upheld. In consideration of the circumstances surrounding this matter, no order as to costs is issued.

It is so ordered.

Dated at Dar es Salaam this 20th March, 2024.




G. N. BARTHY
JUDGE

Delivered in the presence of the appellant and the respondent in person also Mr. Athuman Athuman learned advocate holding brief of Ms. Rehema Mvano for the respondent.