

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

(CORAM: MSOFFE, J.A., MBAROUK, J.A., And BWANA, J.A.)

CIVIL APPEAL NO. 95 OF 2011

ADRIANO GEDARM KIPALILE APPELLANT

VERSUS

ESTER IGNAS LUAMBANO RESPONDENT

**(Appeal from the Judgment of the Regional Court with Extended Jurisdiction
Holden at Vuga, Zanzibar)**

(Kazi, RM)

**dated the 12th day of April, 2011
in
Civil Case No. 4 of 2011**

JUDGMENT OF THE COURT

6 & 12 December, 2011

MBAROUK, J.A.:

The appellant, Adriano Gedarm Kipalile, lodged this appeal to challenge the decision of the Regional Magistrate with Extended Jurisdiction in Matrimonial Civil Case No. 4 of 2011.

For the purpose of our decision in the matter, it is necessary to give the following background. The appellant and respondent initially lived together in concubinage since 1980. Thereafter on 4/1/1992 they

conducted a christian marriage at Ukalawa Lutheran Parish in Iringa. Due to some misunderstandings they separated sometimes in 2009. During the time they stayed together they were able to build two houses, one in 1994 and the other one was finished in 2006. According to the record, it shows that both the appellant and respondent contributed to the building of those two houses.

Sometimes in 2010, the appellant filed a petition before the High Court of Zanzibar claiming for the following orders: -

- (1) The High Court to issue an order of dissolution of marriage.*
- (2) The High Court to order the sale of one house and divide the proceeds of the sale and give 20% shares to the respondent and the remaining 80% shares to the appellant.*
- (3) The High Court to order custody of children in favour of the appellant.*
- (4) The respondent to pay costs of the case.*
- (5) Any other lawful orders in favour of the appellant.*

After hearing the case the Regional Magistrate conferred with Extended Jurisdiction granted the appellant's prayers and issued the following orders: -

- (1) Marriage between Adriano Gedarm Kipalile and Ester Ignas Luambano is dissolved and divorce order issued.*
- (2) Matrimonial assets are divided as follows; -*
 - (a) The house built in 1994 which the appellant lives therein is given to him as his share.*
 - (b) The house which was finished in 2006 is given to the respondent as her share.*
- (3) As all the children are matured enough, they are at liberty to remain with either the appellant or the respondent.*
- (4) Each party to bear his/her own costs.*

It seems the appellant was aggrieved with that decision of the Regional Magistrate with Extended Jurisdiction, hence this appeal.

In his memorandum of appeal, the appellant preferred six grounds of appeal. At the commencement of the hearing, the appellant opted to

withdraw the sixth ground of appeal, hence remained with five grounds. However, the remaining grounds boil down to the ground that the Regional Magistrate with Extended Jurisdiction erred in law after ordering a division of the houses (matrimonial assets) without considering the physical strength of the houses. The appellant claimed that the house offered to him is an old dilapidated one, whereas the one given to the respondent is a new house. He urged us to fault the decision made by the trial court and order the sale of the house given to the respondent and distribute the proceeds of the sale by 80% to be offered to him and 20% share be offered to the respondent. As for the house given to him, he urged us to find that the proceeds of the sale be distributed equally.

On her part, the respondent submitted that she is the sole owner of the house given to her by the trial court. She further contended that she was the one who bought the plot of the house, and thereafter, built it from the money she got by doing business and taking credit from "*Pride*" institution. The respondent urged us to find that the house offered to her by the Regional Magistrate's Court with Extended Jurisdiction belongs to her alone.

In his rejoinder submission, the appellant submitted that he was the one who bought the plot of the house offered to the respondent by the trial court. He further said that he gave T.Shs. 50,000/= to the respondent to acquire the said plot, but instead of writing his name, the respondent wrote her name as the buyer of the plot. He also contended that, he contributed immensely for the building of the said house. However, he admitted that, the respondent was the one who supervised the whole process from the beginning to the finishing stage of the said house.

The main issue for our consideration is the problem of the division of the matrimonial assets and in our case are the two houses i.e. the 1994 house and the 2006 house. As earlier pointed out, the Regional Magistrate with Extended Jurisdiction reached a decision to divide the matrimonial assets by offering the 1994 house to the appellant and the 2006 house to the respondent.

As claimed by the appellant, the trial magistrate with extended jurisdiction failed to put into consideration that the value of the two houses differ. The one given to the appellant is an old house, whereas the one given to the respondent was a recently built house. However, the trial

magistrate with extended jurisdiction was silent on how he arrived at that conclusion. We are of the considered opinion that, the trial Regional Magistrate with Extended Jurisdiction erred when he distributed the matrimonial houses (assets) as he did without disclosing the reasons thereto.

The record shows that both parties in this appeal contributed in building both houses. We are increasingly of the view that it is prudent for each party in this appeal to have a share in each of the two houses, considering the fact that each party contributed in one way or another as stated in the famous case of **Bi Hawa Mohamed v Ally Sefu** [1983] TLR 32. In other words we think, the two houses were built by the "*joint efforts*" of both parties and enabled the acquisition of those matrimonial assets (the two houses). Apart from that, it is also a fact that the 1994 house is an old house, whereas the 2006 house given to the respondent is a recently built house. Due to those circumstances, and considering the fact that each party contributed in one way or another in building those two houses, we are of the opinion that justice demands each party to have share in each of those two houses.

For the reasons stated herein above, we order that each party to this appeal is entitled to a 50% of the share in each of the two houses. In the event, we allow the appeal to the extent stated above with no order as to costs.

DATED at ZANZIBAR this 8th day of December, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(M. A. Malewo)
DEPUTY REGISTRAR
COURT OF APPEAL