

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CIVIL APPEAL NO. 48 OF 2019

(Arising from Matrimonial Cause No.02 of 2018)

GEORGE MAYA APPELLANT

VERSUS

CATHERINE PETER RESPONDENT

JUDGMENT

Last Order: 01.06.2020

Judgment date: 08.06.2020

A.Z.MGEYEKWA, J

The appellant George Maya has lodged this appeal to challenge the decision of the Resident Magistrate's Court of Mwanza which was

issued on 30th September, 2019 in respect of Matrimonial Cause No.02 of 2018. The appellant has filed his reply accompanied by cross appeal.

For purposes of understanding the gist of this appeal, it is necessary to give the following background. The appellant and respondent contracted a Christian marriage in 2006 and are blessed with two children; twin sisters of 16 years old. The record reveal that the appellant and respondent lived peacefully and harmonious life until 2003, when misunderstandings between the started. The main reason for their misunderstanding is due to the fact that the appellant was terminated from employment which resulted to a misunderstanding each party shifted the blame to the other party. The couple purchased unfinished house locate in Plot No.9 Block D NYAKATO whereas the respondent contributed to the construction which was going on and supported paying school fees.

In 2003, the respondent was transferred to Tabora and left the children in custody of appellant. The appellant consequently referred the Marriage Conciliation Board which failed to decide their dispute thus the appellant decided to file a suit before the Resident Magistrate Court of Mwanza at Mwanza, whereby after a full trial the trial court was of the view that the marriage between the appellant and the respondent had irreparably broken down and granted; a divorce thereto. The trial court further ordered each party to pay maintenance

to both children's the custody order was left to be discretionary upon the children's wishes since both were above 18 years old and the matrimonial house located at Plot No.9 Block D situated at Nyakato in Mwanza be auctioned and the appellant to receive a share of 70% and the respondent 30% shares.

Being aggrieved by Resident Magistrate's Court of Mwanza decision, the appellant filed the instant appeal, which consist five grounds of appeal as follows:-

- 1. That had the trial Magistrate properly evaluated the evidence on record particularly the testimony of PW1, PW2 and Exh.P1, Exh.P2 and Exh.P3 would have found that the property on Plot No.9 Block D Nyakato was the sole property of the appellant acquired before the marriage with the respondent.*
- 2. ALTERNATIVELY but without prejudice to the above the order of distribution of the purported matrimonial asset was inequitable and did not take into consideration statutory factors prescribed by law.*
- 3. That the order of custody of the children of the Marriage did not take into consideration the relevant factors and took into consideration irrelevant factors thus arrived at erroneous decision.*

4. *That the trial Magistrate erred in fact and law in rejecting to admit payment of school fees receipt tendered by the petitioner which document was admissible.*
5. *That the trial Magistrate erred in fact and law in admitting Exh.D1 and ExhD2 which document were inadmissible.*

In cross appeal, Catherine Peter (the appellant) had three grounds of appeal as follows:-

1. *That the divisions of matrimonial property by the trial Magistrate was not fair as both the petitioner and the respondent have contributed to the construction of the house that it was unfair for the division to 70% to the appellant and 30% to the respondent.*
2. *That the trial Magistrate erred in law and in fact by not considering and disregarding the evidence adduced by the respondent herein of other matrimonial properties such as two motor vehicles that is one lorry and another vehicle Toyota Samray, one house and two plots one located at Nyegezi and another located at Nyakato.*
3. *That the trial Magistrate erred in law and fact in his decision of custody of the children as the children clearly stated that it was convenient for them to stay with their mother and it was for the best interest of the children that the trial Magistrate could have*

ordered directly that for the best interest of the children that custody to be granted to the matter of the children.

The hearing was done by way of written submission whereas, the applicants filed the written submission as early as 22nd May, 2020 and the respondent filed a reply as early as 27th May, 2020. Both parties complied with court order.

In support of the appeal, Mr. Felix opted to abandon the 2nd, 3rd and 5th grounds of appeal. Arguing for the 1st ground of appeal, Mr. Felix argued that the trial Magistrate misdirected himself and misconceived the issue thus he arrived at a wrong decision and ordered auction of the said house and parties to divide the shares while the same was not pleaded for. He went on to state that the issue which was discussed by the trial Magistrate in his judgment was *what is the percentage where of the distribution to the acquisition of matrimonial property which is the house at Nyakato Plot No.3 Block D.*

Mr. Felix referred this court to page 8 of the court proceedings where PW1 testified that in June, 1999 he purchased a Plot No. 9 Block D - Nyakato, it was at foundation stage and finished construction in 1999. To substantiate his submission he referred this court to Exh.P2 and Exh.P3 a building permit and planning consent respectively. He went on to submit that the said evidence was supposed by the testimony of PW3 who witnessed the completion of the construction of

the said house and PW3 was commissioned by the appellant to find tenants.

The learned counsel for the appellant further argued that the respondent admitted that the appellant acquired the said Plot. He went on to argue that the two were married way back in 2006 after acquisition and completion of construction of the said house by the appellant. He referred this court to section 58 of the Law of Marriage Act, Cap. 29 [R.E 2019] and argued that the said house is a separate property. He continued to argue that the respondent testified that she build a fence and gate and extended three bedroom house by purchasing blocks, iron sheet, files and cement in 2008. Mr. Felix argued that the respondent contradicted herself as she has mentioned different years when she started constructing and the exhibit was uncertified. He argued that Exh.D2 was supposed not to be admitted because it is in contravention with section 66 and 67 (1),(a) of the Evidence Act since the said document was in possession of the appellant.

He went on to state that the letter of payment of dowry was admitted contrary to Order XII Rule 1 (1) of the Civil Procedure Code Cap.33 [R.E 2019] because the same was introduced after the closure of the plaintiff's case and the same is not an evidence of marriage but payment of dowry. He prays this court to consider the Exh.D1 and Exh.

D2 because they were improperly admitted contrary to section 178 of the Evidence Act, Cap.6 [R.E 2019].

In conclusion, the appellant's Advocate prays this court to reverse the trial court decision and order court proceedings in particular on item 4 at page 12 of the proceedings and declare the house on Plot. No.9 Block C located at Nyakato a property of the appellant.

In conclusion, the learned counsel urged this court to allow this appeal and allow the children to live with the appellant and order the respondent to provide maintenance.

Responding, Ms. Dorothea admitted that the trial Magistrate determined an issue which was not framed in the proceedings, while it is the requirement of the law that the judgment must be confined to the framed issues. She went on to argue that the consequence was for the trial Magistrate not to consider other properties which were acquired during the subsistence of marriage. She invited this court to evaluate the evidence on record in the ambit of the issue framed.

The learned counsel for the respondent refuted that the house located on Plot No.9 Block D – Nyakato was a sole property. She referred this court to the case of **Bi. Hawa Mohamed v Ally Sefu** (1983) TLR 32, the Court of Appeal of Tanzania defined a matrimonial property. She also referred this court to the case of **Gabriel Nimrod**

Kurwijila v Theresia Hassani Malongo, Civil Appeal No. 102 of 2018 (unreported) the Court of Appeal of Tanzania among other things it referred the matrimonial property as property acquired by one or other spouse before or during their marriage with the intention that there should be continuing provisions for them and their children property during their joint lives.

It was Ms. Dorothea's further submission that as per section 114 (3) of the Law of Marriage Act Cap.29 [R.E 2019] assets acquired during marriage includes properties owned before marriage by one spouse but have been substantially improved during the marriage by the other party or jointly. She went on to submit that evidence on record reveals that the house was acquired during subsistence of marriage for the use of the whole family although the appellant bought the said Plot in 1999. She added that the appellant and respondent jointly build the house. Ms. Dorothea argued that the trial court was correct to decide that the house located at Plot No. 9 D Nyakato is a matrimonial property but they reserved an objection in respect of division of percentage of shares in cross appeal.

Submitting on the 5th ground of appeal, Ms. Dorothea argued that the document which is alleged to have been wrongly admitted was not relied upon by the trial court when composing his judgment.

In respect to the cross appeal, Ms. Dorothea submitting in support of the first ground of appeal the appellant's counsel contended that the division of 70% shares against 30% shares of the house located at Plot No.9 D Nyakato was unfair. She went on to argue that the respondent contributed more than the respondent. She went on to argue that the respondent did not prove his source of income which was used for construction of the house. She argued that DW1 proved that she was employed as a cashier to Mohamed Trans the same proves that she contribute more in acquisition of matrimonial properties.

She went on to argue that the appellant constructed a small house close to the big house by herself. She went on to state that the acquisition of matrimonial properties needs to be given wider interpretation to include domestic efforts. She referred this court to the case of **Bi. Hawa Mohamed** (supra) she added that it was proved that the respondent apart from domestic work she was taking good care of her sick husband and contributed to the welfare of the family.

As to the second ground of cross appeal, Ms. Dorothea argued that the trial court left undivided properties which were acquired during subsistence's of the marriage. She went on to state that the respondent mentioned two motor vehicle, one plot at Nyegezi. She went on to state that the trial court did not include the said plots and moto vehicle. She prays for a division of 80% to the appellant, wife

and 20% to the respondent, husband since she contributed more. She also added the small house which was built by the wife in Plot No.9 Block D – Nyakato be divided.

Concerning the 3rd ground of cross appeal, Ms. Dorothea faulted the trial court for not deciding the custody of the children. She added that the fact that they are above 18 years but they are still students and they need close supervision and care of their mother. She prays this court to issue custody of the two girls to their mother for the best interest and the father to be ordered to maintain them.

In conclusion, Ms. Dorothea prays this court to dismiss the appeal and allow the cross appeal,

Having digested the parties' submissions, and the record of the case, I have to say that in determining this appeal, I will consider the appeal and cross appeal. I am settled that, the main issues for determination at this juncture is *whether the subordinate court correctly determined the division of properties and custody of children.*

Before I proceed to determine the appeal I have to say that there is no dispute that both parties have stated that the impugned decision contained an issue which was not featured during trial. I had to peruse the court records and the judgment and found that the trial magistrate determined the 2nd issue which was not part of framed

issue. Parties before the trial court framed their issues and the original records reveals that the 2nd issue was *whether there were properties jointly acquired by the parties during substring marriage*. However, the trial Magistrate when composing his judgment introduced a new issue; 2nd issue what is the percentage share of the distribution of the acquisition of matrimonial property which is the house of Nyakato Plot No. 9 Block D. It if from this second issue the trial magistrate divided the matrimonial house based on percentage, had she determined the issue appearing in the pleadings, she could have decided differently. I am saying so because the 2nd framed issue is broader it includes other matrimonial properties. Failure to do so other matrimonial properties were left undivided. Therefore stepping in the shoes of the first instant court this court proceed to evaluate as follows:-

The records reveal that the respondent testified that they had a customary marriage in 1999 and the same is exhibited by a letter of payment of dowry. On his side, the appellant complaints that they started to live together in 2006. In accordance to the marriage certificate which was tendered in court and admitted as an exhibit the appellant and the respondent were married in 2006 and the case was lodged in 2019. The two have two children who were born in 2002 I want to believe that the two lived together before they got married approximately 18 years. At the time when the two were together they managed to acquire matrimonial properties together. The Plot.No.9 Block D – Nyakato was among the properties which the couple

acquired together and they also acquired together other properties such as a plot located at Kangae and two vehicles. I can see the appellant wants Plot No. 09 to be declared his property but he forgot that the law under section 114 of the Law of Marriage Act recognize assets acquired during the marriage includes assets owned before the marriage by one spouse taking to account that the respondent had her contribution therefore all properties belongs to both parties. Consequence of divorce is not simple as parties think that one party will remain will all the wealthy. The same renders to division of properties now in the case before me both parties were employees and made contributions, therefore both parties deserves a fair contribution.

The concern of the appellant's Advocate was that the trial court determined an issue which was not part of the framed issues thus he reached a wrong decision and ordered auction of the said house at Plot No.3 Block D located at Nyakato. Likewise, Ms. Dorothea on the second and third grounds of cross appeal, argued that the trial court left undivided properties which were acquired during subsistence's of the marriage. I am in accord with both learned counsels submission that the trial court went into error. The couple had other matrimonial assets which they acquired together and the same were left undivided. Starting with Plot No.9 Block D Nyakato, In my view it does not matter that the appellant acquired the Plot No. 09 Block D –Nyakato before he got married but what matters is that both parties have contributed

in acquisition or construction of the said house as stated under section 114 (3) of the Law of Marriage Act, Cap.29 [R.E 2019].

Base on the above provision of law, the properties acquired before marriage are regarded as matrimonial properties and the record reveals that both parties in one way or another have contributed in acquisition or construction of the said house. However, I differ with the learned counsel for the respondent that the appellant contributed more. I am alive that both of them were working and both of them have adduced cogent evidence to satisfy this court that both parties were not idle but took effort to build their family house together. The appellant started to build the main house and the respondent constructed a small house close to the big house by herself. Therefore, there is no need to fight for bigger shares without considering the efforts taken by the other spouse.

Guided by the above findings, I am satisfied that both parties made a contribution in acquiring the matrimonial properties. Therefore, both parties deserve reasonable shares in all matrimonial properties.

Addressing the 3rd ground on cross appeal which relates to maintenance of two children who are above 18 years old. I understand that a child above 18 years does in certain situation have a legal right to be maintained even though the Law of Child Act, No. 21 of 2009

and the Law of Marriage Act, Cap. 29 [R.E 2019] stipulates that maintenance is payable until the age of 18 years old.

Following the legal position, circumstances of the case the two young girls are above 18 years but are still schooling. Although the law is silent on this, but I think it is prudence to provide care to children who are over 18 years old who solely depend on their parents. It is indisputable that the twin girls who are above 18 years are needs maintenance because they depend on their parents. Therefore parents needs to carter for all their basic needs such as to pay school fees and provide them with shelter, food, clothing and medical care.

In the circumstances and for the foregoing reasons, the appeal and cross appeal are partly allowed to the extent as ordered hereunder:-

1. Sub division of Plot No.9 Block D' the area with a main house is placed under the appellant and the area with a small house is placed in the hands of the respondent.
2. The plot situated at Kangae is placed to the appellant (Catherine).
3. One motor vehicle of her choice is placed to the appellant (Catherine).
4. The other motor vehicle is placed to the appellant (George.)
5. The two children are at liberty to live with either of their parents.

6. Both parents to pay school fees, and provide necessities such as shelter, food, clothing and medical care.
7. I make no order as to costs, each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 08th June, 2020.


A.Z.MGEYEKWA

JUDGE

08.06.2020

Judgment delivered on this 08th June, 2020 in remotely presence of both parties.


A.Z.MGEYEKWA

JUDGE

08.06.2020

Right to appeal is fully explained.