

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**ARUSHA SUB- REGISTRY**

**AT ARUSHA**

**CIVIL APPEAL NO 28 OF 2022**

*( C/F Matrimonial Appeal No. 4/2023 in the District Court of Arumeru at Arumeru  
original in the Primary Court of Maji ya Chai Matrimonial cause No. 62/2022)*

**JULIANA SOLOMONI.....APPELLANT**

**VERSUS**

**WILLIAM LOSRIANI .....RESPONDENT**

**JUDGMENT**

13<sup>th</sup> November, 2023

**D.D. NDUMBARO, J.**

This is the matrimonial appeal of parties cohabiting since 1992. They alleged to have contracted customary marriage and were blessed with 3 children the youngest one with 20 years old. The marriage broke down a few years back as a result appellant filed a petition for divorce at Maji ya Chai Primary Court. The court ordered the dissolution of marriage and distribution of matrimonial properties acquired by fifty per cent of each party. The appellant dissatisfied with the decision appealed to the District Court of

Arumeru claiming the trial court failed to recognize her contribution to 33 acres of Land considered to be matrimonial property and the court could issue a necessary order as to the distribution of property claimed to be sold and hidden by other part. The appeal was dismissed on the ground that the existing 33 acres were not matrimonial property. It was the husband's family property and the husband's mother was still alive and she never distributed it to her son.

Dissatisfied with the decision appellant now is appealing in this court as 3<sup>rd</sup> appeal and raised two grounds, that the court failed to evaluate evidence and the trial court failed to give out an alternative order for the distribution of matrimonial assets claimed to be hidden or sold by respondent and pray this court to set aside decision of Primary Court and District Court that;-

1. That both the trial Primary Court and the Appellate District Court erred in law and it failed to properly evaluate the evidence so tendered before it concerning the matrimonial properties and thus arrived at a wrong decision.
2. That the Appellate Court erred in law and fact when it failed to see that the trial Court abdicated its duty of giving proper alternative orders

after it was informed by the appellant herein that the Respondent had hidden or sold some of the matrimonial assets.

During submission, the appellant was presented by Learned Advocate Sarah Lawena while the respondent enjoyed the service of Learned Advocate Emmanuel Kileo.

The Appellant informed the court that, the appellant and respondent together and jointly acquired property formed as matrimonial property to include 33 acres of Land 97 sheep, 14 goats and 2 cows which were alleged to have been sold by the respondent and other listed property to include motorcycle, 4 drums of water, generator, 1 mother, 1 wheelbarrow, 1 spade, 1 iron rod, 4 axes and 1 house.

The appellant argued that the mentioned properties are Matrimonial property as they were either acquired during marriage or substantially participated in their development to add value. The 33 acres of land were given to parties by respondent's father and the appellant used two acres to cultivate for sustaining the family. The appellant is a housewife who keeps goats, sheep and cows some of them sold to meet daily consumption. The trial court refused to distribute 33 acres of land reasonably because it was not matrimonial property. The applicant raised a question as to what

matrimonial property. Section 114(3) of the law of marriage Act. CAP 29 Re 2019, is defined to be property acquired jointly during marriage by joint efforts. on property owned before marriage by one party but substantially improved(developed) by the other party or joint effort.

The court ordered the distribution of matrimonial assets acquired in fifty percent of each party which the appellant could not access. Therefore, the decree is inapplicable of being realized by the appellant.

On 2<sup>nd</sup> ground, the trial court did not give an alternative necessary order upon the division of Matrimonial property as the respondent had hidden and sold some matrimonial properties. In supporting the argument cited in section 59(1) of Law of Marriage Act cap 29 a case of **Daniel George Birnaal vs Okuly Eli Ufoo Muro**, Civil Appeal No. 10.138/2020 (HC) Dar es Salaam, unreported page 8 -9. Which emphasized that, no disposal of the property before consulting each other.

He prays this court to uphold the appeal and order the matrimonial assets so hidden or sold to be distributed equally to the parties.

In reply respondent on 1<sup>st</sup> ground argued that the 33 acres of land were not matrimonial property, that was the reason the primary court and district court joined hands on their reasoning.

On the second ground, faulted that, parties are bound to establish and prove their case; saying that the trial court erred in law and fact by failing to give alternative necessary order upon the division of matrimonial property is illogical on this matter. The trial court ordered the division of Matrimonial assets mentioned during the trial on page 11 of his judgment. The prayer sought in this case has no merit.

On rejoinder, the applicant submitted that evidence tendered before the trial court showed that the appellant had contributed to the development of the said property. The court should consider giving her a proper share based on the contribution made.

After going through the court records and submissions of parts to the trial court and appellate courts. The trial court magistrate laid down five issues critically analyzed and an order of divorce was issued as per section 110 of Law of Marriage Act Cap 29 to whether there were issues/children below 18 years the answer was negative went further into analyzing whether there are properties and how the distribution of property supposed to be.

The applicant herself mentioned existing properties to include 33 acres of land, 2 cows, 14 goats, and 97 sheep and she declared that she doesn't

know the whereabouts, and further mentioned a house taller, 1 motorcycle, 4 tanks, 2 basins, 1 generator, 1 motor, 1 hand hoe and one house.

It has narrated that 33 acres of land are not matrimonial property but rather family property belonging to the respondent's mother **Belitha Loserian Mollel**, and all witnesses supported that the 33 acres of land belong to the respondent's family. In the appeal court, referred the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Matongo**, Civil App. no. 102 CAT tanga, Unreported trial magistrate went into analyzing how the contribution of a spouse can be taken into consideration to establish matrimonial property. Cited a case of **Mariam Tembo vs Harlod Tumbo (1983) HC. Tanzania TLD 293** and see 114(2) of the Law of Marriage Act. The trial court in consideration the fact that, despite being a housewife engaged herself in farming activities while the respondent was an employee also engaging in farming activities. Therefore, trial court ordered the distribution of the said property halfway to both parties.

The applicant is the one who moved the court to mention the properties. The court made an order to distribute property halfway for each part. The court cannot issue an order on which the existence of property is not proved. The respondent was cross-examined in the trial court and denied

having such property. Sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E 2019 provides that: - "110. Whoever desires any court to give judgment as to any legal liability dependent on the existence of facts which he asserts must prove that those facts exist. The case of **Dr Olivia Michael Kimaro Vs Dr Derick David Nyasebwa Civil Appeal No. 51 OF 2022** H.C Mwanza page 16 supports set clear that;-

*"It is illogical for this Court to order the division of the properties whose existence and ownership is not proved."* which is also elaborated in the **case of Anna Kanungha vs Andrea Kanungha [1996] TLR 195.**

*"Believing the mere words of the appellant without the Court satisfying itself on the existence and ownership of the alleged matrimonial properties, might result in the properties of somebody else being subjected to division which ultimately may result in unnecessary chaos...."*

Based on the above analysis, therefore, I find the appeal to have no merit, hereby dismiss the appeal and uphold the decision of District Court Arumeru Matrimonial Appeal No. 4 of 2023 and Maji ya Chai Arumeru Primary court decision vide matrimonial Civil Application No.62 of 2022.

Each part shall bear its own cost.

It is so ordered

Parties have been informed right to appeal



  
**D.D. NDUMBARO**

**JUDGE**