

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CIVIL REVISION NO. 1 OF 2020

(From the Ruling of Tanga District Court

in Matrimonial Cause No. 5 of 2019)

MWANAMKISI PAKU1ST APPLICANT

ANGEL VENANCE NGELENYA2ND APPLICANT

VERSUS

SALMA MPANDA1ST RESPONDENT

OMARI MWAMBASHI2ND RESPONDENT

RULING

MKASIMONGWA, J

This is an application for an Order revising the Ruling of Tanga District Court in Matrimonial Cause No. 5 of 2019 dated 7th January, 2020. The Application is brought by Mwanahamisi Paku and Angel Venance Ngelenya (1st and 2nd Applicant, respectively) against Salma Mpanda and Omari Mwambashi (1st and 2nd Respondent, respectively) and it is by way of Chamber Summons filed under Sections 44 (1) (b) of the Magistrates Court Act [Cap. 11 R. E. 2002], 57 and 82 of the Law of Marriage Act [Cap.

29 R. E. 2002] and Rule 32 (2) of the Law of Marriage (Matrimonial Proceedings) Rules, 1971. The Chamber Summons is supported by a joint affidavit of Applicants.

The Application is contested by the first Respondent and to that effect the later filed a Counter Affidavit. The second Respondent on his part did not file a Counter Affidavit.

On the date the matter came for hearing before me, the Applicants and the Second Respondent appeared in person whereas the first Respondent was represented by Mr. Jally Mongo (Advocate). When were invited by the Court to argue their case, the Applicants agreed that the first Applicant submits in the case for herself and on behalf of the fellow applicant. In her submission the first Applicant adopted all the contents of the Affidavit filed in support of the Chamber Summons. She added that the Applicants are the legal wives of the Second Respondent in marriages celebrated sometime in 2017 and 2002 respectively. The marriages are blessed with children. Whereas the first Applicant works with the Diamond Trust Bank the second Applicant operated a Jewelry shop, after she had resigned work with Takrim Bus Service Company where she worked from 1995 to 2008. Sometime in 2004 when the first Applicant was two years in

her marriage with the second Respondent she later acquired a house on Plot No 326 Block "B" located at Bomang'ombe Street. Later in 2018 the second Applicant and second Respondent purchased a plot at Kange (Plot No. 815 Block ...) at Tshs. 8,000,000/= price out of which she contributed a sum of Tshs. 3,500,000/=. They again in the same year acquired a plot at Sahare at a price of Tshs. 19,000,000/= out of which she contributed a sum of Tshs. 3,200,000/=. On 7/1/2020 the Applicants became aware of the judgment of the District Court of Tanga in Matrimonial Cause No. 5 of 2019 to which the Respondents were the contending parties. They learnt from the judgment which was delivered on 7/1/2020 that among the Matrimonial assets subjected to division among the parties to Matrimonial Cause No. 5 of 2019 were those the Applicants had jointly acquired with the second Respondent. As the properties were not jointly owned by the Respondents, it was not proper when the Court treated and distributed them among the respondents as Matrimonial ones. As such the order for division of matrimonial assets made in the case which involved the above referred to properties was illegal hence this application for revision which the Applicants pray the Court that it is granted.

On the other hand in his submission Mr. Mongo again adopted the contents of the Counter Affidavit sworn by the first Respondent. He added that, although the Applicants allege that they were the wives of the second Respondent, their marriages were not proved. The Applicants are silent as to how their marriages with the second respondent were celebrated and no marriage certificates were tendered to the Court to prove existence of the marriages. The learned Counsel submitted further that although the second Respondent does not dispute to the application, the admission to the Applications should not be taken. This is because there was no any time the second Respondent had indicated in Matrimonial Cause No. 5 of 2019 that he had either marriages with other wives with whom he acquired the properties in question. In the circumstances therefore, the allegation that the Applicants were again wives of the second Respondent stands unproved contrary to the legal principle which requires that he who alleges must prove the allegations which was well emphasized by the Court in the case of **Geita Gold Mining Limited and Another v. Ignas Athanas:** Civil Application No. 227 of 2017 (CAT) (unreported).

As to the properties the Applicants claim to have interest in, Mr. Mongo contended that they are those mentioned under paragraphs 7 and 8 of the Affidavit that is, that on Plot No. 326 Block "B" and 587 Block "A" Bomang'ombe (2nd Respondent) and a plot situated along Kavishe Street Kange. The affidavit does not state as to when the properties were acquired. However, in the oral submission made to the Court it is said, the Bomang'ombe Plots which are now in dispute were acquired sometime in 2004 – 2006. This has been, however, countered by the First Respondent who told under oath that the plots were acquired in 2012 and 2015, respectively and she proved the contention by providing Letter of offer which were made part of the Counter Affidavit which contention was not countered by the Applicants as it ought to be in terms of the decision in the case of **Bruno Wenceslaus Nyalifa v. PS, Ministry of Home Affairs and Another**: Civil Appeal No. 82 of 2017, CAT (unreported).

Regarding to Plot No. 47 Block "A" Mtambweni and one at Sahare, these were not pleaded by the Applicants for they do not surface in the Affidavit filed in support of the Application. Going by the principle that parties are bound by their pleadings which was again explained in the case of **Georgio Anagnostou and Another v. Emmanuel Marangakis**

and Another: Civil Application No. 464/01 of 2018, CAT (unreported) the Applicants' submission in this respect shall collapse for they are not based on the pleadings. On the basis of what is he submitted Mr. Mongo prayed the Court that it dismisses the Application with costs.

In a short rejoinder the first Respondent submitted that indeed they did not attach their Marriage certificates with the Affidavit. She prayed for leave of the Court so that they can do so. She reiterated the prayer to have the Application been granted.

That is all what was submitted by the parties. I have considered the submissions along with the record. It is clear from the record that the subject matter/issue in Matrimonial Cause No. 5 of 2019 of Tanga District Court was a declaration of assets as being matrimonial assets among the parties therein. The assets involved were:

1. A house on Plot No. 326 Block "B" Bomang'ombe
2. A house on Plot No. 568 Block "N" Bomang'ombe
3. A house No. 97/1 Block HD Usagara, Tanga.
4. A house at Kavishe Street, Kange, Tanga
5. A Plot situated along Mwahako Kati Street, Tanga
6. A Plot situated along Smart Street Tanga.

7. A Motor Vehicle with Registration No. T 728 DVC, Make Toyota, Harrier.

In deciding the case, the court of first instance found it is established that the properties listed were acquired by the joint efforts of the Respondents as during subsistence of their marriage hence are matrimonial ones. The Court went on distributing them among the parties in which case it awarded the then Applicant (First Respondent in this matter) with a house on Plot No. 326 Block "B" Bomang'ombe and a Plot situated along Smart Street Tanga whereas the then Respondent (2nd Respondent in this matter), was awarded with a house on Plot No. 568 Block "N" Bomang'ombe, a house No. 97 in Block HD, Usagara Tanga, a Plot situated along Mwahako Kati Street, Tanga and the motor vehicle with Registration No. T 728 DCV, Toyota Harrier. That house, at Kavishe Street, Kange, Tanga was left undistributed for its lease proceeds were to cater for children's maintenance. I understand that division did no good to the Respondent (2nd Respondent). As such he preferred an Appeal to this Court challenging it. The Appeal, that is, **(DC) Matrimonial Appeal No. 1 of 2020** is again pending before this Court. In the case at hand the First Respondent seeks for an order revising the decision in respect of the

Bomang'ombe houses. In the circumstance, since there is appeal pending in Court preferred by the 2nd Respondent against the decision again challenged in this matter, determination by this court on whether or not the first Applicant and not the first Respondent who has the right in the houses and therefore they were not among the Matrimonial properties as the Court had determined, will have in essence, the effect of pre-empting the Appeal. As such, I will restrain myself from deciding whether or not the decision of the Court was correct at this stage. This would be different if the first Applicant had instituted a suit against the Respondents in which case she could have adduced evidence showing her interest in the matter as against the Respondents.

As to the second Applicant, going by the Affidavit filed in support of the Application and in particular paragraph 8 of the Affidavit her complaint is based on the claim for a plot situated along Kavishe Street Kange area within Tanga, which she says the same was jointly acquired by her and the second Respondent. According to the second Applicant the Plot was so acquired in 2018. It is not clear as to whether the plot has been developed by them (spouses). Going by paragraph 3 of the Counter Affidavit the marriage between the Respondents was dissolved on 07/11/2017 the time

when the plot at Kavishe Street Kange Tanga was yet to be acquired by the second Applicant and second Respondent (alleged by the second Applicant). In its decision the trial Court stated as follows;

"The house located at Kavishe Street, Kange Area within Tanga Region is hereby awarded to the children of union and the same must be under exclusive control of the Applicant. This is because there is ample evidence on record indicating that the same was acquired for rental purposes and it was not planned by the parties that rent considered thereon be used for payment of school fees or tuition fees for the three children. Since the three children are in applicant's custody there is convenience for the house to be placed under exclusive control and supervision of the Applicant on behalf of the children".

As said whereas the second Applicant speaks of a "Plot" the 1st Respondent, supported by the judgment of the Court, speaks of a "house" at Kavishe Street Kange Tanga. Are the two one and the same, this in my view is ambiguous, in which case, it attracts for no order of revision of the decision of the case. If they are the same again since there is an appeal by which the second Respondent is bidding to challenge the decision the subject of this matter it would be safe if the Appeal is determined first or else any order revising or otherwise the decision will affect the appeal.

Thus notwithstanding the second Applicant could sue the Respondents with a view to establishing her interest in the property.

With all what I have endeavored to say above, I find this Application prematurely made as the decision the subject of this Application is again subjected to appeal preferred by the second Respondent against the first one which appeal is still pending in the Court. In that premise therefore the Application is struck out with no order as to costs.

DATED at TANGA this 30th of December, 2020.




E. J. Mkasimongwa

JUDGE

30/12/2020