IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 69 OF 2021

(Arising from the decision of Temeke District Court in Civil Appeal No. 73 of 2017 delivered by Hon. Mwaikambo, RM on 18th December, 2018)

DAUDI T. NZELEKELA..... APPELLANT

VERSUS

JOSEPHINE G. MBONDE..... RESPONDENT

JUDGMENT

07th October, 2021 – 22nd December, 2021

N.R. MWASEBA, J.

The appellant herein dissatisfied with the judgment of Temeke District Court in Civil Appeal No. 73 of 2017 delivered by Hon. Mwaikambo, RM on 18th December, 2018 appeals to this court basing on two grounds:

1. *That, the appellate magistrate erred both in facts and law in upholding the division of 10% of the matrimonial property to the respondent without any proof of her contribution and in total*

disregard of the fact that the respondent had already been given by the appellant some other valuable matrimonial assets.

2. *That, the appellate magistrate erred both in law and facts in quashing the eviction order against the respondent.*

Consequently, the appellant prays for the appeal to be allowed and the decision of the lower court be quashed and set aside with costs.

In consensus, the parties agreed to dispose of the appeal by written submission of which both parties complied with and there was no rejoinder. The appellant in his written submission beg to argue the two points separately. Starting with the first ground, he stated that, during subsistence of their marriage they were blessed to acquire a matrimonial house, a six-acre farm at Mkinga, one plot of land at Mvuti and a motor vehicle – Toyota Hiace. And it is not in dispute the fact that, save for the house, the rest of the matrimonial properties as listed were given to the respondent by the appellant for her personal ownership before dissolution of their marriage.

The matrimonial assets were given to the respondent by the appellant prior to dissolution of marriage, therefore it is not proper for the

respondent to claim further distribution as if nothing has been distributed to her. It was erroneous for the appellate magistrate to uphold the decision of Primary Court of the division of 10% of the matrimonial house.

On the second ground, the trial magistrate was correct in ordering the eviction of the respondent from the house owing the fact that it was not possible for the parties to continue staying under the same roof after dissolving their marriage. Due to the stated reasons the appellant prayed for the appeal to be allowed.

Resisting the appeal, the respondent stated that, in order for the court to order division of the matrimonial property it has to consider if the properties were acquired by joint effort and the contribution of each party as articulated in **Section 114(1) of the Law of Marriage Act,** Cap 29, R.E 2002. The matter in dispute is the matrimonial house and the respondent has the right to obtain her share and it is not true that the respondent was given part of her shares that is a farm at Mkinga (six acres), a plot at Mvuti, and a motor vehicle as there is no any evidence adduced rather the respondent produced evidence in the Primary Court which shows that, the appellant has sold six acres of a

farm at Mkinga, a plot at Mvuti and a Toyota-Hiace motor vehicle without giving her anything.

The respondent further stated that she managed to prove her case on balance of probabilities and referred to **sections 111 and 112 of the Evidence Act,** Cap 6, R.E 2002. The trial court was correct to order the respondent to get 10% of the matrimonial asset and the appellant 90% and the decision was based on the principles on determination of shares and referred to **Section 114 of the Law of Marriage Act,** Cap 29, R.E 2002 and cited the case of **Bi Hawa Mohamed v Ally Sefu, (1983) TLR 32 (CA).**

On the second ground, it was correct for the court to quash the eviction order as the respondent was not having a place to live but now, she is not living on the same house and thus prays for the court to dismiss the appeal and uphold the decision of the primary court.

In the instant case, it is only the first ground left for discussion as the respondent stipulated that she is out of the matrimonial house and thus leaving the second ground to be overtaken by events.

In his detailed submission, the appellant is contesting against the division of 10% of the matrimonial property which were given out by the Mbagala Primary Court vide Matrimonial Cause No. 67 of 2016. On the ground that, he had already given a farm of six acres at Mkinga, a plot of land at Mvuti and a motor vehicle – Toyota Hiace to the respondent prior to dissolution of their marriage and it is not fair for the only one property left to be divided again among both of them.

The only question left is whether the appellant adduced enough evidence to support his claim of issuing other assets to the respondent. In the case of **Mwanahawa Iddy Mtili v Omary Rajabu Muambo, Pc. Civil Appeal No. 59 of 2019, High Court, at Dar es Salaam (unreported)** *Kulita, J.* stated at page 7, second paragraph that:

> *"...Principle of law requires the one who alleges any fact to prove it."*

This also reflects the burden of proof initiated by the **Law of Evidence Act,** Cap. 6, R.E. 2019 in **Section 110 (1) and (2)** which provides that:

"110. (1) whoever desires any Court to give Judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove those facts exist

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

From perusal of the lower court file, I find no evidence adduced before the court to back up the claims that the respondent was given her share from the acquired matrimonial assets. From the Primary Court's judgment, no any exhibits were tendered or admitted to support the assertion but rather mere words of which this court cannot rely upon in deciding about one's rights. So, this issue is answered in negative.

It is not disputed that, the respondent was a housewife and the matrimonial house under dispute was built with a SACCOS loan from the appellant's salary. The court is empowered to order the division of the matrimonial property during divorce and the test ought to focus on the customs of the community, extent of contribution, debts and needs of infant children as provided under **Section 114(2) (a) to (d) of the**

Law of Marriage Act, Cap 29, R.E 2019. Whereas in our current case what is applicable is the extent of contribution.

The case of **BI HAWA MOHAMED v ALLY SEFU** (1983) TLR 32 directed among other things, that one of the factors to consider on what makes a matrimonial property should be the "joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts" or "work" of husband and wife."
Both lower courts had it under consideration and awarded the appellant to get 90% of the division of matrimonial house basing on his direct contribution in acquiring the house as he was employed and 10% to the respondent being her domestic contribution, efforts and support offered in acquisition of such a property.

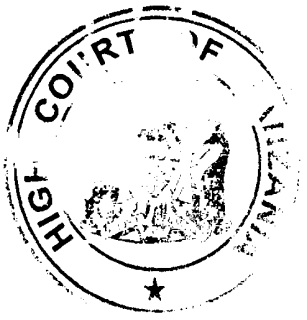
As stated earlier, the respondent on her reply to the submission **on page 4** claimed not to be residing in the said house, thus ground two of the appeal has been overtaken by events and I find no need to labour myself discussing such a matter.

In upshot, I find no need to disturb the lower court's judgment with regard to the division of the matrimonial house and nothing is left with

me rather than dismissing this appeal without cost due to the relationship the parties had before the dispute.

It is so ordered.

DATED at **DAR ES SALAAM** this 22nd day of December, 2021.



N. R. MWASEBA

JUDGE

22nd December, 2021