

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

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**MATRIMONIAL APPEAL NO. 6 OF 2021**

*(Arising from Matrimonial cause No. 5 of 2019 of the Resident Magistrates' Court  
of Mwanza at Mwanza)*

**SAID HUSSEIN KAPINGA----- APPELLANT**

**VERSUS**

**NDOWO JUMA MAWALLA----- RESPONDENT**

**JUDGMENT**

*18<sup>th</sup> August & 28<sup>th</sup> October, 2022*

**Kahyoza, J.**

This is a first appeal from the decision of the Court of the Resident Magistrates of Mwanza. **Said Hussein Kapinga**, (Kapinga), the appellant aggrieved by the decision of the trial court preferred this appeal with three grounds which raise three issue for determination by this Court, to wit;

1. Did the trial court err not to consider embezzlement of Tzs. 207,604 848/= alleged to be committed by the respondent?
2. Did the trial court err on division of house located at Plot No. 346 Block 'A' Bwiru, regarding the contribution of the parties?
3. Did the trial court err in division of a vehicle with registration number T685 CJU make Toyota Prado?

The background of this matter is that Kapinga petitioned before the Resident Magistrates' Court of Mwanza at Mwanza for decree of divorce and

division of matrimonial assets against Ndowo Juma Mawalla (Mawalla). From the trial court's record, it is undisputed fact that parties contracted a civil marriage on 20/12/2010. They were not blessed with a child. They were fostering Isack Kapinga as their own child though he was not officially adopted.

Kapinga and Mawalla acquired several assets, the list of which is undisputed by both parties although they are in disagreement towards division of one house located at Plot No. 346 Block 'A' Bwiru and the motor vehicle with registration number T685 CJU make Toyota Prado.

It is also on record that parties on 27/1/2014 under the umbrella of World Connector and Travel Limited, a registered company with three directors (the parties and the respondent's mother) applied for and obtained a loan of Tzs. 200,000,000/= from EXIM BANK for business purposes. It was alleged by the appellant that the respondent withdrew all the monies and embezzled the same. On the part of the respondent she disputed to have misused the loaned money and contended to have applied partly to repay the loan, save that she was precluded from continuing repaying after falling sick and went to United Kingdom for treatment.

Given the facts above, I set to determine the issues raised above. The appeal was ordered to be heard by way of written submissions of which the parties complied accordingly. The appellant enjoyed the services of Mr. Kassim Gilla advocate whereas Mr. Steven Makwega advocate represented the respondent.

Before, I determine the raised issues, I find it wanting to point out that this being the first appeal it takes a form of rehearing. The first appellate court has mandate to re-appraise, re-assess and re-analyse the evidence on the record before it arrive at its own conclusion on the matter and give reasons either way. [See **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017 (Unreported)** and in the Case of **Kaimu Said vs. Republic**, Criminal Appeal No. 391 of 2019 (Unreported)]

Being guided by the above principle, this court will re-evaluate the evidence of the trial court on reaching to its findings as it shall deem proper.

**Did the trial court err not to consider embezzlement of Tzs. 207,604 848/= alleged to be committed by the respondent?**

It was the submission of the appellant's counsel that, the trial court erred not to consider the embezzlement of Tzs. 207,604 848/= committed

by the respondent on division of matrimonial properties. According to him the embezzled money amounting to Tzs. 207,604 848/= ought to have been deducted from her share of the matrimonial assets. He is of the view that the money was used in the manner detrimental to the appellant and not for the family intended purposes; thus, the respondent's action amounted to matrimonial misconduct and therefore not entitled to a share of the property. To support his contention, he cited the case of **Bi. Hawa Mohamed vs. Ally Sefu** [1993] TLR 32.

On his part the counsel for the respondent was of the view that the loan was advanced to the incorporated company with three directors. The company has its legal personality different from its directors with capacity to sue and be sued as held in the case of **Solomoni vs. Solomoni & Co. Ltd** [1896] UKHL 1. According to him, if there was any embezzlement and misuse of the said loan, the company ought to sue the respondent.

According to the evidence on record, the appellant was added as a director in a previously registered company. The company successfully applied for and obtained a loan of Tzs. 200,000,000/= from Exim Bank using the house located at plot No. 346 block 'A' Bwiru as collateral. The respondent without neither resolution of the company nor the consent of the

appellant withdrew the money. (See page 7, 13, 43 and 44, of the proceedings of the trial court). The respondent repaid Tzs. 58,000,000/= whereas the appellant repaid Tzs. 207,604,848/= after the former defaulted. (see page 7, 8, 37 and 44 of the trial court proceedings).

As rightly observed by the counsel for the respondent the company once registered, has distinct legal personality different from its owners in accordance with s. 15(2) of the **Companies Act, [Cap 212 R.E.2002]**. In its capacity, it can sue and be sued. Regardless of the ownership, the company owns its properties and the interest of the parties owning the company is limited to the extent of share taken by shareholders. This position was held in two celebrated cases of **Solomoni vs. Solomoni & Co Ltd (supra)** and the case of **Macaure vs Northern Assurance Co Ltd** [1925] AC 619.

The Court of Appeal recently held *inter alia*, that a limited liability company becomes a legal personality of its own, separate and distinct from its directors at page 34 of the case of the **Private Agricultural Sector Support Trust and Another vs Kilimanjaro Cooperative Bank Ltd**, Consolidated Civil Appeal Nos. 171 & 172 of 2019 (unreported).

It is not disputed from the record that the said Tzs. 200,000,000/= belonged to the company and the obligation to repay the same was solely vested to the company. The house of the parties was just a collateral and therefore they were guarantors to such loan. The respondent by withdrawing the money she acted not as a wife of the appellant but as a director of the company.

The appellant herein repaid the loan not as the husband but as a guarantor. In the case of **Evarist John Kawishe vs. CRDB Bank Ltd, Civil Appeal No 123 of 2015 (Unreported)**, the court of appeal held inter alia that,

*"where repayment of loan which is guaranteed is not made, the guarantor becomes liable not only for the amount of the loan guaranteed but also for any interests and charges which may have become due on it."*

The trial court sat to determine matrimonial issues between the parties. The trial Magistrate was not in any way enjoined to discuss company's affairs. I will also refrain from discussing the same. The court ought to distribute assets between parties' properties, which are matrimonial assets, that is, they were either acquired by their joint efforts or acquired by one of them and improved by their joint efforts.

In addition, the Court of Appeal observed in of **Nacky Esther Nyange vs. Mihayo Manjani Wilmore, Civil Appeal No. 169 of 2019 (unreported)** at page 23 that

*“The fact that the title to the motor vehicle is not in the name of any of the parties to the instant appeal means at this juncture there can be no determination on whether it was a matrimonial asset acquired during pendency of the marriage and thus subject to distribution to the parties”*

Indisputably, the company owned by the parties and another person is not a matrimonial property. I was not persuaded by the appellant’s advocate’s submission that the respondent’s act of embezzling loaned money amounted to matrimonial misconduct in line of the case of **Bi. Hawa Mohamed vs. Ally Sefu (supra)**. The applicant has recourse against the company for the sum of money embezzled in accordance with the Companies Act. In particular s. 233 (1) of the Companies Act provides for the rights of the member of the company to commence proceedings against unfair prejudice to his interests.

Guided by the above authorities and evidence on record it is my considered conclusion that the trial court did not err not to consider embezzlement of Tzs. 207,604 848/= alleged to be committed by the respondent.

**Did the trial court err on division of house located at plot No. 346 block 'A' Bwiru, regarding the contribution of the parties?**

It was the submission of appellant's the counsel that, the respondent contributed nothing in terms of finances or works towards the acquisition or construction of the said house. Also, that the respondent admitted that her contribution was minimal compared to that of the appellant. Therefore, taking into account the embezzlement she had committed it was improper to award her 30% of the value of house.

On part of the respondent, her advocate submitted that, the house was acquired during subsistence of parties' marriage, the respondent supervised masonry and she contributed some money to the construction of the said house although her contribution was minimal compared to that of the appellant.

I have keenly considered the submissions of advocates of the parties. There is no dispute that the house is a matrimonial property but it is contended by the appellant that the respondent contributed nothing or less than him, the fact which was also admitted in the submission of the respondent. The appellant further disagreed with the division of 30% given to the respondent in that respect.



According to the evidence on record, the house was built during subsistence of the parties' marriage. It is also undisputed that the respondent was not a housewife. She was doing business under the registered company which the appellant later joined. She said to have contributed paying the masonry, she also said at page 26 that she was cooking, washing and cleaning for the appellant and keeping his family. The fact that the respondent was doing house chores was not disputed during cross-examination as no question was asked in that respect.

It is a trite law that once evidence is left uncross-examined, the other part is taken to have accepted such evidence and cannot later on be allowed to dispute such evidence. This was stated by the Court of Appeal in the case of **Patrick William Magubo vs. Lilian Peter Kitari , Civil appeal No. 41/2019 (unreported)**.

It is cardinal principle that the law requires the court to consider each party's contribution toward acquisition of matrimonial property in line with section 114 of the Law of Marriage Act, [Cap 29 R.E. 2022] the Act. The Court of Appeal in **Helmina Nyoni Vs. Yerima Magoti, Civil Appeal No. 61 of 2020 (Unreported)**, while considering section 114 of the Act, stated at page 13 and 14 that;

*"...The above provision has been subject to interpretation by this court in various cases in particular, **Bi hawa Mohamed** (supra) cited in many subsequent decisions. In **Mohamed Abdallah vs Halima Lisangwe** [1988] T.L.R. 197, the court underscored the principle behind s. 114 of the act as compensation for the contribution toward acquisition of matrimonial property regardless whether the contribution is direct or otherwise..."*

It is on record that the matrimonial house was mortgaged and the respondent spent the loan in exclusion of the appellant who had to repay the loan to retain the house. It just that in considering distribution of the matrimonial house to consider the contribution of the parties not only acquired the matrimonial property but parties' contribution to rescue the house from being auctioned for payment of a loan. As parties the Company's guarantors had a duty to repay the loan after the Company defaulted to the settle it.

It is undisputed that, out of Tzs. 260,000,000/= which was the amount of loan plus accrued interest, the respondent only paid Tzs. 58,000,000/= and the rest was paid by the appellant. The evidence demonstrated that the amount paid to the bank by the respondent was from the Company and not her own contribution. Thus, her contribution to rescue the house located at Bwiru Plot No. 346 Block "A" was only 25% and that is what she was her

contribution to rescued the mortgaged house from being auctioned by the mortgagee. I have already stated that the issue of embezzling the Company's funds be dealt in accordance with the Companies Act.

**Did the trial court err in division of motor vehicle with registration number T685 CJU make Toyota Prado?**

It was the submission of the counsel for appellant as clearly shown from evidence that, the motor vehicle was bought at Tzs. 22,000,000/= the respondent contributed Tzs. 5,000,000/= hence, her contribution was minimal compared to that of the appellant. Therefore, the trial court erred by giving the same to the respondent. The appellant prayed to this Court to re-divide it. On his part, the counsel for the respondent did not submit concerning division of a motor vehicle.

Regarding the motor vehicle, I have come to the conclusion that as rightly submitted by the counsel for the appellant, the trial court erred in giving the motor vehicle solely to the respondent without considering the contribution of both parties on acquiring the same. Therefore, regarding her contribution as stated herein above, I divide the motor vehicle with registration number T685 CJU make Toyota Prado at the extent of 25% to the respondent and 75% to the appellant.

In the upshot, the appeal has succeeded as shown above, the respondent is only entitled to 25% of the house located at Plot No. 346 Block "A" Bwiru and the appellant is entitled to 75% of the motor vehicle with Reg. CJU T685 make Toyota Prado for the reasons stated above. Taking into consideration of the relationship of parties, I make no order as to costs. It is so ordered.

Given under my hand and seal of this court this 28<sup>th</sup> day of October, 2022.



**J.R. Kahyoza**  
**Judge**

**Court:** Judgment delivered in the presence of Mr. Kassim Gilla, the appellant's advocate and holding Mr. Stephen Makwega's brief for the respondent.

**J. R. Kahyoza**  
**Judge**  
**28/10/2022**