

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MOROGORO)**  
**AT MOROGORO**

**MATRIMONIAL APPEAL NO. 9 OF 2022**

*(Arising from Matrimonial Appeal No. 15 of 2022 of Morogoro District Court; originating from Morogoro Urban Primary Court in Matrimonial Case No. 32 of 2020)*

**AZIZA IBRAHIM ..... APPELLANT**

**VERSUS**

**SELESTINA SANGAGA (An Administrator of the estate of ISSA  
KUDRA) ..... RESPONDENT**

**JUDGEMENT**

*Hearing date on: 27/10/2022*

*Judgement date on: 01 /12/2022*

**NGWEMBE, J:**

This is the second appeal from the judgement of Primary Court of Morogoro Urban whereby the parties who were husband and wife petitioned for divorce and division of their matrimonial properties. Their marriage took a wrong turn, which led them to court seeking annulment of the same. Both are not contesting the issue of divorce rather the

loggerheads between them is on whether a house built at Lukobe area within Morogoro region is among the matrimonial properties subject to division. Rightly the Urban Primary Court of Morogoro excluded the said house from the matrimonial properties. That it was not among the properties jointly acquired during existence of their marriage. Even the first appellate court (District Court) arrived to the same that the house is not matrimonial property and that it belonged to one Abdul Kudra.

Such decision fueled the appellant to venture into this court armed with five grievances namely:

1. that, the District Court (Appellate Court) erred on law and fact by failure to analyse the evidence adduced in Primary Court hence reached in impugned decision;
2. that, the district court erred in law and fact for discrediting the appellant's witnesses whose testimonies on how the appellant made contribution on the Matrimonial property (House);
3. that, the District Court erred in law and fact to disregard strong evidence adduced by the appellant herein and his witnesses;
4. that, the District Court erred in law and fact by failure to consider the evidence of the respondent and his witness in the trial court who admitted the contribution made by the appellant on the Matrimonial House; and
5. that the appellate District Court erred in law and fact by failure to apply the Doctrine of Trust between the respondent and his witness whereby one ABDUL KUDRA testified to claim the outstanding



amount of Tanzania Shilling Eight Million from the respondent after he remained with Tanzania Shilling Eight Million as respondent share over the disputed Matrimonial House.

The appellant prayed that the appeal be allowed by quashing the judgement and decree of the District Court and trial Primary Court with costs.

Appellant in this appeal was unrepresented, while the respondent procured the services of Mr. Kitale, learned advocate. This court ordered parties to dispose this appeal by way of written submissions as was scheduled on 6<sup>th</sup> November, 2022. Both parties have complied with the scheduling ordered.

In support to the appeal, the appellant submitted jointly grounds 1, 2, 3, & 4 that, the appellate District Court failed to analyze the evidence adduced in Primary Court, hence reached in impugned decision. She cited the case of **Ndizu Ngasa Vs. Masisa Magasha [1999] T.L.R 202** where it was held that; *the first appellate court has a duty to re-asses the evidence of the trial court.*

She further submitted that, the appellant and her witnesses adduced evidence to show the contribution made to the disputed land and the appellant narrated very well as how the same house was obtained, hence became matrimonial property whereby some of the evidences were supported by the evidence of the respondent and his witness. As such the appellant quoted phrases of the trial court's judgement at pages 3, 5, & 6 respectively as follows: -



..... baada ya biashara kuwa mbaya waliamua kuuza nyumba na ilinunuliwa na ABDU KUDRA. Ndipo mdaiwa alirudisha nyumba hiyo mikononi mwake kwa kurudisha fedha kwa kaka yake.....

...biashara haikuwa nzuri walipata hasara ambapo waliuza nyumba ili wagawane. Na nyumba iliuzwa kwa ABDU KUDRA kwa bei ya Tshs. 20,000,000/= na alikuwa anadaiwa kiasi cha Tsh. 4,000,000/= hivyo Tshs 16,000,000/= waligawana Zacharia kiasi cha Tsh. 8,000,000/= kila mmoja. Na yeye hakupewa kiasi cha Tsh. 8,000,000/= ili abaki na nyumba Zacharia alipewa kiasi cha Tsh. 8,000,000/=

*Walifunga ndoa na walihamia kwenye nyumba hiyo na walishirikiana kuweka milango na umeme kwenye nyumba. Mpaka sasa bado wanadaiwa na ABDULI KUDRA Tsh. 8,000,000/=*

She further submitted that the evidence of the respondent and his witnesses was not consistente at all, she referred to the case of Mohamed **Said Matula Vs. R [1995] T.L.R 3** where it was held that: -

*Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter.*



On ground number five, argued that the appellate District Court erred in law and fact by failure to apply the Doctrine of Trust between the respondent and his witness whereby one ABDUL KUDRA testified on the claim of outstanding amount of Tanzania Shilling Eight Million from the respondent after he remained with Tanzania Shillings Eight Million as respondent share over the disputed Matrimonial House. The appellant submitted that, the gist of the doctrine of trust is not a new fact as it was stated in the respondent's reply on the memorandum of appeal. The agreement of the respondent to repossess the said house was not documented anywhere, but it was admitted by the respondent and his witness who is his brother, therefore the gist of doctrine of trust was established.

In response to the appellant's arguments, Mr. Kitale commenced by providing a definition of the term *matrimonial assets* as was eloquently defined by the Court of Appeal of Tanzania in the case of **Bi Hawa Mohamed Vs. Ally Seif [1983] T.L.R 32** as follows: -


*" It refers to those things acquired by one or other or both of the parties with intention that there should be continuing provisions for them and their children during their joint lives and used for the benefit of family as a whole".*

He further submitted that, there is no evidence connecting the house to the matrimonial property neither did the appellant contributed anything towards acquisition of that house. The only evidence is to the effect that, the house was co-owned by the late Issa Kudra and another

person and the house was sold to Abdul Kudra at the price of Tsh. 20,000,000/= and the buyer unobjected tendered two exhibits before the primary court. He cited the case of **Makubi Dogani Vs. Ndodongo Maganga, Civil Appeal No. 78 of 2019** at page 15.

More over he submitted that the evidence suggests that, the purchase amount was paid in full to the owners as per exhibit tendered in court. Mr. Kitale continued to argue that, if there is contradiction between oral evidence and the sale agreement, then the sale agreement should not be superseded by the oral account, to support his argument, he cited section 100 (1) of **The Evidence Act** and the case of **Martin Fredrick Rajab Vs. Ilemela Municipal Council & Another Civil Appeal No. 197 of 2019**. He submitted that the document/exhibit admitted by the trial court are enough to prove that the disputed house belong to Abdul Kudra by virtual of purchase.

Mr. Kitale also submitted that, after the sale of the said house for the consideration of Tsh. 20,000,000/= which was paid in full by Abdul Kudra, the appellant and her husband were given the house for accommodation purposes and that they made some improvement by making electricity wiring and putting doors for the purpose of making the house habitable and such improvements can not change the status of invitees to ownership as it was held in the case **Laurent Mwang'ombe Vs. Tatu Haji Mwambishile, Civil Appeal No. 358 of 2019** at page 10.



He further submitted that, nothing in record vindicates the contribution by the appellant towards the acquisition of the suit house. There is a principle of law that, he who alleges must prove as per section 110 (1) of the **Evidence Act Cap 6 R.E 2022**. As such the appellant was duty bound to prove that the suit house was a matrimonial property, which she failed profoundly.

Insisted that this court being the second appeal, there is an established principle that, the second appellate court can only interfere with the concurrent findings of the two courts below where it is satisfied that the courts below have misapprehended the evidence which led into incorrect conclusion. He rightly cited the case of **Amratlari Damodar Maitaserand another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel [1980] T.L.R 31** at page 32. Strongly insisted that in this appeal there is no misapprehension of evidence.

On the last ground of appeal based on the doctrine of trust, he submitted that, at this juncture it can not knock the real door of this court because the issue was never popped in the lower courts for determination. He cited the case of **Yazid Rajab @ Byamungu and 2 Others Vs. Nakuruoi Investment Company Limited Land Appeal No 118 of 2016, (HC – Dar es Salaam)**.

The advocate argued this court to find the assertion by the appellant on the issue of doctrine of trust implausible and untenable. Prayed this court to join hands with the two courts below on the ownership of the



disputed house that it is not a matrimonial property. Thus, dismiss this appeal with costs.

Having summarized thoroughly the arguments of both disputants, I find the real question for determination is whether this appeal has merits.

Starting with ground one, two, three and four as jointly submitted by the appellant, I am fortified by the provisions of sections 110 and 111 of the **Law of Evidence Act [Cap 6 R.E, 2002]** which among other things state: -

*Section 110. whoever desires any court to give judgement as to any legal righty dependent on existence of facts which he asserts must prove that those facts exist.*

*Section 111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".*

Considering these two sections of law, the Court of Appeal in the case of **Attorney General and two others Vs. Eligi Edward Massawe and others, Civil Appeal No. 86 of 2002** made reference on the same sections. It is a common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities.

The appellant submitted that, the house in dispute is matrimonial house and the District Court failed to re-asses the evidence adduced by the parties before the trial court, and that such evidence shows the contribution made by her in the house in dispute. However, the respondent brought two exhibits which were admitted by the primary court unopposed.



Those exhibits proved that the house was sold to Abdul Kudra by Zakaria John Zakaria. From perusal of the proceedings of the trial court, the appellant failed to prove what she is alleging herein, while the respondent through DW2 proved the contrary by producing documentary evidence.

It is a trite law that when there is documentary evidence, such document should be taken as the best evidence, unless contradicted by another documentary evidence. Oral testimonies against the existing document are unacceptable and inadmissible.

I am attracted to the reasoning of **Sarkar on Evidence, Fifteenth Edition at page 1269**, he discussed in details on the best evidence as exclusion of oral evidence: -

*"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as substitute for such instrument, or to contradict or alter them".*

In brief, the best evidence is the contents of a written instrument itself. Obvious in presence of a written contract of sale entered between Zakaria John Zakaria and Abdul Kudra, such contract should either stand or fall without help of oral evidences. Such principle does not require legal interpretation on its contents, the document speaks itself.



As rightly found by the first appellate court, there is no evidence by the appellant to prove that the suit house is a matrimonial property. Also there is no evidence in the trial court records indicating that parties' contribution towards acquisition of the said house, although two things are not in dispute, that parties herein installed electricity and put doors to make the house habitable and that they paid eight million shillings (8,000,000/=) for the purpose of buying a house in dispute which was sold at Tsh. 16,000,000/= but they did not clear the outstanding amount. The respondent during trial testified that, I quote: -

*"Na mpaka sasa deni bado tunadaiwa-na Abdu Kudra kiasi cha Tsh. 8,000,000/=...."*

The above proves that the house was yet to be bought by her late husband, hence remained in the hands of Abdul Kudra. Therefore, these grounds lack merits.

Coming to ground five, related to the Doctrine of Trust between the respondent and his witness whereby one ABDUL KUDRA testified to claims the outstanding amount of Tanzania Shilling Eight Million from the respondent after he remained with Tanzania Shilling Eight Million as respondent share over the disputed Matrimonial House.

For Consistence, I have decided to determine and ascertain this ground of appeal if at all, were raised in the first appellate court, with understanding that, at the second appeal the court is called upon to determine what the first appellate court so decided. As rightly stated above, grounds of appeal at the District Court were three as follows:- **first,**

the trial primary court erred in law and fact by deciding in favour of the respondent, relying on the shady evidences given by the respondent; **second**, the trial primary court erred in law and fact by deciding and excluding the matrimonial home from being subject of division as matrimonial properties without any legal justification; and **third**, the trial primary court erred in law and fact disregarding the strong evidence of the appellant in the contribution made thereto in the matrimonial properties.

From those grounds of appeal none of them included fifth ground in this second appeal, that is on the issue of "*doctrine of trust*". The fundamental issue is whether this court is ~~seized~~ with jurisdiction to determine new issues or ground of appeal which, were not raised and determined by the district court. At one-time Justice of Appeal **Lugakingira J.A** in the case of **Tanzania Cotton Marketing Board Versus CogeCot Cotton Company S.A [2004] T.L.R 132** was confronted with similar situation and the court held: -

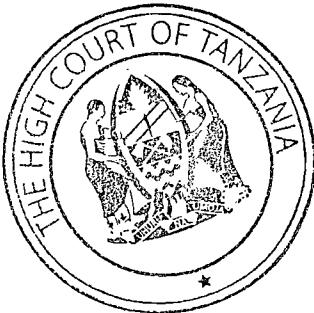
*"The issue about the petition being a suit was never canvassed before the High Court. That Court (High Court) cannot be judged on an issue it never had an opportunity to consider and express an opinion"*

It means, an issue/issues raised and determined in the first appellate court should be similar or alike issues for determination at the second appellate court. Bringing new issues, which were not issues at the first appeal is improper. Hence this ground must also fail.

Having so said and for the foregoing reasons, I find no merit on this appeal, same is dismissed with costs.

Order accordingly.

Dated at Morogoro this 1<sup>st</sup> December, 2022



A handwritten signature in black ink, appearing to be "P. J. Ngwembe", written over a horizontal line.

**P. J. NGWEMBE**

**JUDGE**

**01/12/2022**

**Court:** Judgment delivered at Morogoro in Chambers on this 1<sup>st</sup> day of December, 2022, **Before Hon. A.W. MMBANDO, DR** in the presence of the Applicant in person and in the Presence of Jozebet Kitale, Advocate for the Respondent.

**Right to appeal to the Court of Appeal explained.**

**SGD. HON. A.W. MMBANDO**  
**DEPUTY REGISTRAR**

**01/12/2022**

I Certify that this is a true and correct copy of the original	
A handwritten signature in black ink, appearing to be "A.W. Mmbando", written over a horizontal line.	
Deputy Registrar	
Date	6/12/22 at Morogoro