

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA

PC CIVIL APPEAL NO. 110 OF 2022

FREDY MACHUNDE.....APPELLANT

VERSUS

DOROTHEA DEUS..... RESPONDENT

JUDGMENT

Last Order: 07/03/2023

Judgment date: 19/04/2023

M. MNYUKWA, J.

Freddy Machunde and Dorothea Deus contracted Christian marriage on 8/8/1998 and they were blessed with four issues. The parties were husband and wife respectively. It was the wife who petitioned for a decree of divorce and the division of matrimonial properties acquired during the subsistence of their marriage before Ilemela Primary Court. It is on record that, the parties were separated since 2010 as they were no longer lived together under the same roof. During the hearing of the petition, the petitioner called one witness, Anneth Makutane while the respondent did

not call any witness apart from himself. The respondent adduced evidence on how they acquired matrimonial properties such as house, plots, motor vehicle and how they jointly run the business of hardware. After hearing both parties, the parties' marriage was dissolved on 10/01/2022 after the trial court Magistrate satisfied that the marriage was broken down beyond repair and proceeded to order the appellant to compensate the respondent Tshs. 3,000,000/= as her share in the acquisition of the matrimonial properties because the respondent failed to prove direct contribution.

Dissatisfied with the decision of the trial court, the respondent filed an appeal before Ilemela District Court in Civil Appeal No 04 of 2022 to challenge the decision of the trial court. She advanced two grounds of appeal. One ground challenged the trial court's decision for not considering the statutory factors when distributing the matrimonial assets and the other ground faulted the trial court's decision for failure to take into account the evidence on record.

After hearing both parties, the District Court allowed the appeal and it ordered the appellant to pay the respondent compensation of Tsh. 10,000,000/=.



Aggrieved by the above decision, the appellant approached this Court with three grounds of appeal as reproduced hereunder:

- 1. That the trial court and the district court were not vested with the power to order the respondent to be paid compensation of Tsh. 3,000,000/= and Tsh. 10,000,000/= while the respondent failed to prove his claim.*
- 2. Alternatively, the district court erred in law and in fact for failure to rule out that the respondent failed to prove the existence of the matrimonial properties which are two Toyota hiace, Toyota escudo, the poultry business and hardware shop.*
- 3. That the 1st appellate court erred in law to rule out that the appellant did not file his reply to the petition of appeal.*

During the hearing of the appeal, the appellant was represented by Mussa Nyamwelo, the learned counsel and the respondent appeared in person, unrepresented. The appeal was argued orally.

It is the appellant who kicked the ball rolling by quickly prayed to abandon the third ground of appeal and he adopted the petition of appeal filed in this Court to form part of his submissions.

On the first ground of appeal, he argued that, both the trial court and the 1st appellate court erred by awarding the respondent Tsh.

3,000,000/= and Tsh. 10,000,000/= as a compensation while they rule out that, the respondent failed to prove her contribution in the acquisition of the matrimonial assets. He was of the view that both courts did not follow the guiding principle on division of the matrimonial assets as it is provided for under section 114 of the Law of Marriage Act, Cap 29 R.E 2019.

He added that, since the respondent failed to prove her claim before the court, it was not proper for the court to award her compensation. He supported his argument by referring the decision of the Court of Appeal in the case of **Dr. Abraham Israel Shuma Muro v National Institute for Medical Research and Another**, Civil Appeal No 68 of 2020 which held that, the Court has to grant the relief that was prayed for. Therefore, he prays the appeal to be allowed.

On the second ground, the counsel for the appellant claimed that, the respondent failed to prove the existence of two Toyota hiace, Toyota escudo and hardware shop, she was not entitled to get anything. He went on that, in his evidence, the appellant denied the existence of those properties and the respondent did not cross examine him. He was of the view that, failure of the respondent to cross examine the appellant on those properties is the admission on the nonexistence of those properties.

To buttress his stand he refers to the case of **Juma Kasema @ Nhumbu v Republic**, Criminal Appeal No 550 of 2016. He therefore prays the appeal to be allowed and the decision of the lower court to be nullified and set aside.

Contesting, the respondent being a layman was very straight. She opposed the appeal by submitted that, she had contributed to the acquisition of the matrimonial properties as they built the house together with the respondent at Pasiansi and that he was selling construction materials. She added that, the appellant sold the motor vehicles, Toyota hiace and Toyota escudo bought during the subsistence of their marriage.

In rejoining, the appellant' counsel reiterates what he had submitted in chief.

Upon hearing the rival submission from both parties, the main issue for consideration and determination is whether the respondent is entitled to any share as a compensation in the acquisition of the matrimonial properties.

It is a settled position of law that in exercising its power when ordering the division of the matrimonial property acquired by the parties during the subsistence of their marriage, among other factors the court shall take into account the provision of section 114(2)(b) of the Law of

Marriage Act, Cap 29 R.E 2019, by considering the extent of contributions made by each party in money, property or works towards the acquisition of assets.

The assets which is referred here is the matrimonial assets which is not defined by the Law of Marriage Act, Cap 29 R.E 2019 in the interpretation section. I hold the view that, the assets referred in that section is the matrimonial assets because it is the assets which derives its origin from the matrimony relationship of the parties as recognized by the law.

In our country, the apex court of the land through the landmark case of **Bi Hawa Mohamed v Ally Sefu** [1983] TLR 32 defines what constitutes matrimonial assets in reference to section 114 of the Law of Marriage Act, Cap 29 R.E 2019 says that:

"The first important point of law for consideration in this case is what constitutes matrimonial assets for purpose of section 114. In our considered view the term "matrimonial assets" means the same thing as what is otherwise as family assets."

As a name itself sound, it is my understanding that, family assets include all properties acquired by the spouses separately or jointly which



is enjoyed by the spouse(s) for the welfare of the family which includes but not limited to the spouses themselves and their children.

Nevertheless, it is a trite law that, the contributions of the spouse in acquisition of the matrimonial property can be in form of money, property or works. The Court of Appeal in **Bi Hawa Mohamed** (supra) and in **Bibie Mauridi v Mohamed Ibrahim**, [1989] TLR 162 categorically held that, performance of domestic work amounts to contributions towards the acquisition of the matrimonial assets. Thus, the work canvassed under section 114 of the Law of Marriage Act, Cap 29 R.E 2019, covers both, the formal and informal work that can be done by the spouse for the welfare of the family.

Coming now to the appeal at hand, the two grounds of appeal argued by the appellant in this Court faulted the decision of the trial court and the 1st appellate court to have ordered the respondent to be paid compensation while the extent of her contribution in the acquisitions of the matrimonial assets was not proved and that she was granted a compensation while she did not pray for it.

On the other hand, it is the submissions of the respondent that she did contribute to the acquisition of the matrimonial property as they jointly built the matrimonial home at Pasiansi, Mwanza, she was selling



construction materials in the hardware and that the appellant sold the motor vehicle purchased during their marriage life.

To begin with, it goes without say that the contribution towards acquisition of the matrimonial assets is a matter of evidence. It is upon the party who alleges to prove his allegation and that the standard of proof in this kind of cases is on the balance of probabilities. (See the case of **Godfrey Sayi vs Anna Siame as Legal Representative of The Late Mary Mndolwa**, Civil Appeal No. 114 of 2012). Therefore, it is upon the court to weigh out the evidence adduced by both parties and sustain the evidence which is heavier than the other.

In our case at hand, the evidence on record shows that, the respondent alleged that she contributed in the acquisition of the matrimonial assets as they jointly bought the plot at Pasiansi and they built a house therein. She also alleged that, she was selling construction materials in their hardware shop and that she was doing poultry business, and that they bought motor vehicle make Toyota hiace and Toyota escudo.

In order to do justice to both parties, I revisited the available record, and for sure, I didn't see any documentary evidence to prove that, the parties in this case acquired the motor vehicles during their marriage nor



any evidence to show that they had poultry business apart from the mere words of the respondent that was not supported even by the independent witness to prove the same. To that end, I find the respondent failed to prove the existence of the motor vehicles and the poultry business.

In the available records, the respondent also alleged that, they jointly bought a plot with the appellant which is described as plot No 471 Block A. Pasiansi Mwanza and constructed the house therein. The respondent claimed that, they bought the said plot on 2003 while the appellant claimed that he bought the disputed plot before he married the respondent and that, when they were living together as husband and wife, they did not develop that piece of land and that he developed the same by building the house on 2012 after taking loan from NMB Bank and by that time the respondent already quitted the matrimonial home. The respondent contested that statement as she alleged that, the property that was kept as a security for loan was the house built on plot No 471 which was acquired by the parties during their marriage.

I had carefully perused the available record to find whether the house that was built on plot No 471, was acquired by the parties' during the subsistence of their marriage or not. First of all, I agree with the appellant that Plot No 471 Block A Pasiansi, was solely purchased by the



appellant as shown in Exhibit P4 which is the sale agreement between the appellant and one Charles Masalakulangwa. The sale was effected on 7/2/1994 before the appellant married the respondent as their marriage was contracted in 1998, four years after the purchase of the plot.

It is also the contention of the respondent that, they built together the house situated on plot No 471 Block A Pasiansi, Mwanza and that during their marriage they lived in that house. Her evidence was supported by the evidence of PW2 in the trial court who testified that, he knew the parties as married couple and that they were living at Pasiansi. On his part, the appellant claimed that, the construction of that house was done after he took loan from The National Microfinance Bank (NMB) in the year 2012 and he tendered loan agreement between NMB and him which was admitted as Exhibit P5.

In finding the truth between the assertion of the appellant and the respondent, I have carefully scrutinized exhibit P5 with the eyes of caution. The exhibit is a security of mortgaging right of occupancy in respect of the matrimonial home built on Plot No 471 Block A Pasiansi, Mwanza. It is on record that, the appellant mortgaged the matrimonial home on 16/4/2012 which is two years after the respondent left the matrimonial home. And that, since the security pledged for loan was a



matrimonial home, one Elizabeth Nigile Mbayo gave her consent as the wife of the appellant.

The question now is that, is it true that the appellant developed Plot No 471 Block A Pasiansi after he had taken loan from NMB Bank as alleged? The answer is definitely in negative, the security for loan was a matrimonial home built on that plot and not a bare plot. Therefore, this court believes that, the loan that was advanced to appellant perhaps has been used to build a storey building on that plot and it is not true that, the plot was a bare land. To that end, it is the finding of this Court that plot No 471 Block A Pasiansi, Mwanza was substantially improved by the joint efforts of the parties during their subsistence of their marriage through the savings obtained from the hardware business.

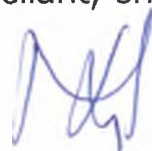
Additionally, I hold that view because the evidence of the respondent corroborated with the evidence of PW2 as she testified before the trial court that she knows the parties as they were living in their matrimonial home at Pasiansi. Likewise, the appellant's testimony contradicts with the documentary evidence tendered by himself to substantiate his claim that he built the house through NMB loan and DTB loan signed on 21/8/2012, when the respondent left the matrimonial home. As I have earlier on indicated, it is the matrimonial home built on



Plot No 471 Block A Pasiansi that was pledged as a security for loan. Therefore, it is far-fetched for this Court to believe appellant's testimony.

The counsel for appellant also stated that, respondent did not cross examine on the existence of the properties, I don't think if this issue should detain me because the records bear testimony that the respondent cross examined the appellant on the house situated on plot No 471 Block A Pasiansi, Mwanza.

I recall that the appellant contended that he was even stopped to continue with the construction on Plot No 471 Pasiansi, Mwanza while the respondent was no longer his wife to strengthen his assertion that the plot was developed after the respondent left out. In his evidence the appellant claimed that, he was stopped by Ilemela Municipal Council on 5/11/2014 to continue with the building subject to submission of the building permit. With due respect, I also find this argument is misplaced and cannot revert my earlier findings that the plot was developed when respondent was the legal wife of the appellant because the appellant was stopped on 5/11/2014 to build the storey building. The record suggests that, the storey building was developed after the respondent left the matrimonial home. I say so because in the trial court's proceedings when respondent was cross examined by the appellant, she testified that, the



appellant wanted to sell the house situated on Plot No 471 Block A Pasiansi, Mwanza after he constructed the storey building. To that end, I still maintain my stand that the respondent had her contribution in developing plot No 471 Block A Pasiansi, Mwanza.

It is a trite law that property independently acquired before marriage is substantially improved by the other spouse during the subsistence of marriage, the said property is considered as part of matrimonial assets and therefore, the same is subject to division in case parties divorces.

The above is the position of the law as it is provided for under section 114(3) of the Law of Marriage Act, Cap 29 R.E 2019. This position is also interpreted through case law, In **Anna Kanungha v Andrea Kanungha** [1996] TLR 195, the Court held that, in terms of section 114(3) of the Law, personal property is liable for distribution when such property has been substantially improved during marriage by joint efforts of the spouse. Therefore, I still maintain my position that, respondent substantially improved the development done on Plot No 471 Block A Pasiansi, Mwanza.

In proving her contribution in the acquisition of matrimonial assets, in her evidence the respondent testified that, during their marriage they

owned hardware business and that she took part in selling constructions materials in that hardware. This evidence is corroborated with the testimony of SM2, and the appellant himself as he testified that, before he met with the respondent he was doing business. His testimony went far since the record shows that, he even took loan to develop hardware business as it is evidenced by Exhibit P8 which proves that, the appellant took loan, though it was ten years later after the respondent left the matrimonial home. But the said loan was taken for the purpose of developing the hardware business since Exhibit P8 is the loan facility letter from CRDB Bank in which the purpose of the loan facility is working capital for hardware business of the borrower, who is the appellant. To this end, I still maintain my findings that, the respondent contributed to flourish hardware business when they lived with the appellant as husband.

The law is settled that, the performance of the domestic work by the wife, or the works performed by either of the spouse which directly or indirectly contributes to the acquisition of the matrimonial property and the contribution in terms of money or supervision in developing a business or any project amount to contribution towards the acquisition of matrimonial property. In our case at hand, the respondent was not a mere house wife who performed the domestic duties for the whole period she



stayed with the appellant, she also took part in the business of the appellant.

Before I conclude, I find it pertinent to state that, the principle envisaged under section 114 of the Law of Marriage Act, Cap 29 R.E 2019 on the division of matrimonial assets is that of compensation regardless as to whether what is compensated is monetary contribution or contribution emanated from the domestic work as it was rightly stated in the case of **Mohamed Abdallah v Halima Lisangwe** [1988] TLR 197.

All said and considered, it is my finding that, the 1st appellate court was justified to order the appellant to compensate the respondent Tsh. 10,000,000/= as her share in acquisition of matrimonial assets.

The appellant's counsel argument that the respondent was awarded compensation which she did not pray for, I find this argument is misplaced because one among the prayer for the respondent was claim for division of the matrimonial assets acquired during the subsistence of the marriage and the lower courts equates the division of the property by awarded her monetary compensation in lieu of property.

Consequently, I uphold the decision of the 1st appellate court. In the final result, I find the appeal is devoid of merit and I hereby dismiss it with no order as to costs.



It is so ordered.




M.MNYUKWA
JUDGE
19/4/2023

Court: Right of appeal explained to the parties.


M.MNYUKWA
JUDGE
19/4/2023

Court: Judgement delivered in the presence of the respondent and in the absent of the appellant.


M.MNYUKWA
JUDGE
19/4/2023