

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC. CIVIL APPEAL NO. 04 OF 2023

(Originating from Civil Appeal No. 46 of 2022 and Matrimonial Cause No. 29 of 2022 at

Shanwe Primary Court)

FRANK CHARLES KAPUFI APPELLANT

VERSUS

MARY CHARLES KAPAMA RESPONDENT

08/05/2023 & 13/06/2023

JUDGMENT

MWENEMPAZI, J:

The appellant is aggrieved by the decision of the Mpanda District Court dated 31st October, 2022 on the aspect of distribution of matrimonial properties hence he has filed an appeal in his court with only one ground that: -

"The appellate court erred in law and fact in evaluation of evidence on distribution of Matrimonial assets which was unfair and Contrary to the law and without considering the contribution made by the appellant towards acquisition of those properties"

The appellant therefore prays for the judgment and decree, allowing the appeal, setting aside the order for distribution of matrimonial assets and redistribute according to the evidence adduced and law.

At the hearing the appellant was represented by Mr. Peter Kamyalile Advocate and the respondent was unrepresented. Hearing was conducted orally.

Mr. Peter Kamyalile, learned advocate while submitting on the appeal he stated that the first appellate court erred in law and fact in evaluating the evidence which was unfair and contrary to the law. The Court did not consider the contribution made by the appellant toward acquisition of those properties. In this case, it is the houses the parties acquired in their life together as husband and wife.

According to the orders made the court ordered that the house at Makanyagio area be given to the respondent and that the house at Kilimahewa be given to the appellant. Both houses were constructed by the parties by equal or 50/50 contribution, however, the value and size differ.

The house at Makanyagio has 11 rooms and located at Mpanda urban and the house at Kilimahewa has four (4) rooms and located at peripheral area. Its value is small compared to the other house. The counsel argued that it is

the principle of law that where there are two houses differing on value which has been acquired by equal contribution by the parties in a matrimonial dispute and where each deserve a 50% share, a wise decision would be to give 50% of each house (property). The counsel referred the case of **Adriano Gedarm Kipalile Vrs. Esther Ignas Luambano**, Civil Appeal No. 95 of 2011, court of Appeal of Tanzania at Zanzibar. In that case the Court of Appeal allowed the appeal and each party was ordered to receive a 50% share. The counsel for the appellant prayed that the position be followed in the present case.

In reply to the submission by counsel for the appellant's, the respondent submitted that there are three houses and not two houses as submitted by the counsel for the appellant. The appellant was given two houses and she, the Respondent, was given one house.

In the house, she is staying, there are five finished rooms, she occupies two rooms and the other rooms are occupied by tenants. She prayed that the decision of the lower court be upheld. In addition, she submitted that the appellant collected everything and she was contented. She is wondering the appellant is still looking for other properties.

In rejoinder the counsel for the appellant prayed that the court issues an order for each party to have a 50% share and in case the respondent will be willing they should be allowed to swap. It is unfortunate I did not ask the respondent if she will be willing to swap.

In the evidence tendered and or adduced by the respondent, she testified that they started living with the appellant as husband and wife in 2003. The appellant paid dowry to the respondent's parents of Tshs. 70,000/= together with other things. The testimony doesn't show if they had any formal marriage; Both respondent and appellant testified that they started living together as husband and wife.

They were blessed with three issues and only one issue was alive at the time of hearing, 18/08/2022. Among the properties they acquired together were three houses, one at Makanyagio, another at Kilimahewa – Shanwe and the other one at Itenka Village. The house at Itenka village is unfinished. It was testified by the appellant that the house at Itenka was built on the plot belonging to his father.

According to the complaints made, the appellant was not amused with the division of matrimonial properties as decided by the trial magistrate. At this juncture I would like to quote the relevant part of the judgment. In the

division of matrimonial properties the Honourable Magistrate ordered as follows:

"AMRI YA MGAWANYO WA MALI YA PAMOJA BAINA YA WADAAWA:

Katika shauri hili, wadaawa kwa pamoja katika ushahidi wao, walieleza kwamba, mali zote zilipatikana kwa juhudi za pamoja na kila mdaawa anastahili mgawanyo wa mali hizo. Orodha ya mali hizo kama walisema wadaawa ni; nyumba tatu, mtaa wa Makanyagio, Kilimahewa na kijiji cha Itenka, bajaji moja, pikipiki moja, kipimo cha dhahabu, cherehani moja, kibanda cha biashara buzogwe, mahindi gunia 4.

Mali nyingine ni; kochi seti mbili, tv tatu, deki moja, radio mbili, kitanda kimoja na godoro mbili, freji moja, meza tatu, meza moja ya plastiki, meza ya tv, king'amuzi cha Azam, dressing table moja na vyombo vya jikoni.

Katika orodha hiyo, mali zote zipo na mali pekee inayobishaniwa uwepo wake ni mpunga gunia 69 stoo huko Itenka. SM1 alidai kuwa, mpunga upo mashineni Itenka wakati SU1 alidai kuwa, mpunga ulitumika kulipa deni.

Ushahidi wa SU1 ulitiwa nguvu na ushaidi wa SU2 ambaye alisema kuwa, mpunga ulitumika kulipa deni ambalo walikopa benki, ushahidi wa SU2 ulitiwa nguvu na hati ya kukopeshwa fedha na hati ya kurejesha fedha ambazo ni vielelezo KU1 na KU2.

Katika mazingira hayo, SM1 alitakiwa kuthibitisha uwepo wa mpunga stoo Itenka Zaidi ya kueleza tu kuwa, wana mpunga bila kuleta ushahidi au uthibitisho. Pia, SM1 alikubali kuwa, deni kweli walikuwa wakidaiwa na benki na hajui namna mkopo ulivyolipwa.

Kwa mantiki hiyo, siwezi kuingia katika mtego wa kutoa amri ya kugawa mali amabyo ina utata juu ya uwepo wake. Amri hiyo uwenda ikaleta shida katika utekelezaji wake baina ya wadaawa.

Hivyo, nitajikita kujadili na kugawa orodha ya mali zilizotajwa na wadaawa hapo juu ambazo hazina utata. Kwa kuwa hakuna ubishi kuwa, mali hizo zilipatikana kwa juhudi za pamoja kati ya wadaawa, kwa kutumia Kifungu 160(2) cha Sheria ya Ndoa tajwa, ninaamuru mgawanyo baina ya wadaawa kwa mchanganuo ufuatao: -

Mgao kwa mwombaji talaka (mke), apate nyumba moja ya mtaa wa Makanyagio, bajaji moja yenye usajili namba MC 414 BRR, kochi

seti moja, tv moja, deki moja, redio moja, mahindi gunia 2, dressing table, kitanda kimoja, godoro moja, cherehani moja, freji moja, meza moja, meza moja ya plastiki, stuli 2 na vyombo vya jikoni nusu.

Mgao kwa mdaiwa talaka (mume) apate nyumba moja ya kilimahewa ya shanwe, nyumba au kilindo cha kijiji cha Itenka, kibanda cha biashara buzogwe, (itumike kumdudumia mtoto kwa upande wa ada na mahitaji mengine), pikipiki moja namba ya usajili MC 300 BQC, mahidi gunia 2, kipimo cha dhahabu, kochi seti moja, tv mbili, subwoofer moja, king'amuzi cha Azam, meza moja, stuli mbili, kiti kimoja cha plastiki, meza moja ya plastiki na vyombo vya jikon nusu.

In my opinion, the trial magistrate as well as the 1st appellate magistrate were right in their decision. However, since the appellant is not satisfied, I will decide otherwise as hereunder shown; that given the three houses were built with the contribution of both parties, and in line of the submission by the counsel for the appellant and taking into consideration the decision in the case of **Adriano Gedarm Kipalile Vs. Ester Ignas Luambano**, Civil

Appeal No. 95 of 2021 Court of Appeal of Tanzania at Zanzibar where it was held that:

"The record show that both parties in this appeal contributed in building both houses, we are mereasingly of the view that it is prudent for each party in this appeal to have a share in each of the two houses.

*Considering the fact that each party contributed in one way or another as stated in the famous case of **Bi. Hawa Mohamed Vs. Ally Sefu [1983] TLR 32.** In other words, we think, the two houses were built by the 'joint efforts' of both parties and enabled the acquisition of those matrimonial assets (the two houses). Apart from that, it is also a fact that the 1994 house is old, house, whereas the 2006 house given to the respondent is a recently built house. Due to those circumstances, and considering the fact that each party contributed in one way or another in building those two houses, we are of the opinion that justice demands each party to have share in each of those two houses".*

In the referred case the Court of Appeal ordered that each party to the appeal to be entitled to a 50% of chare in each of the two houses.

In this case, the respondent testified there are three houses which they built together with her husband. That was not controverted by the appellant though the he testified trying to show the house at Itenka was built at the plot belonging to his father. I opine that, the explanation does not exclude the contribution by the respondent since at the time they were in good terms, they must have intended both of them to benefit said house.

Under the circumstances I order that the appellant as well as the respondent each has a 50% share in the three houses, the fruits of their joint effort and contribution. Therefore, the appeal is allowed to the extent explained with no order as to costs.

It is ordered accordingly.

Dated and delivered at **Sumbawanga** this 13th day of June, 2023.




T.M. MWENEMPAZI

JUDGE