

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

(PC) MATRIMONIAL APPEAL NO. 6 OF 2022

(Arising from Matrimonial Appeal No. 6 of 2022; in the District Court of Kilombero, at Ifakara; Originating from Matrimonial Cause No.73 of 2021 at Mngeta Primary Court).

BETWEEN

DEODATUS MHUVI.....APPELLANT

VERSUS

VEREDIANA MSANJALA..... RESPONDENT

JUDGMENT

14th Dec, 2023

CHABA, J.

This second appeal arose from the decision of the District Court of Kilombero, at Ifakara (the first Appellate Court) in Matrimonial Appeal No. 6 of 2022 which stemmed from Matrimonial Cause No. 73 of 2021 at Mngeta Primary Court(the trial Court).The gist of the matter is centered on the issue of 153 sacks of paddy and inclusion of the third house into the matrimonial properties as enshrined in the decision of the first Appellate Court delivered on the 2nd June, 2022 which overturned the decision of the trial Primary Court on such particular issue. The decision favored the respondent herein, Verdiana Msanjala.



Aggrieved by the decision of the first Appellate Court which favored the respondent, Verediana Msanjala, the appellant, Deodatus Mhuvi lodged his petition of appeal in this Court on 27th June, 2022 armed with four grounds of appeal, and implored this Court to allow this appeal and uphold the decision of the trial Court, quash and set aside the decision of the first Appellate District Court; to exclude the said 153 sacks of paddy and the third house from matrimonial properties, sale and division; and the costs to follow the event. The grounds of appeal preferred by the appellant, Deodatus Mhuvi are as follows: -

- (i) That, the first Appellate Court erred in law and facts for failure to consider and rely upon the trial Court records, hence reached into erroneous decision.
- (ii) That, the first Appellate Court erred in law and facts by failing to completely re-analyze and re-evaluate the evidence of both parties found in the records of the trial Court and as a result ended up granting the respondent what she doesn't deserve.
- (iii) That, the First Appellate Court erred in law and facts for including 153 sacks of paddy as part of matrimonial assets and subjecting the same for division while the records shows openly that the respondent failed to prove its existence.
- (iv) That, the first Appellate Court erred in law and facts for subjecting the third house for sale and division and disregarding its



own decision which approved the same house not being part of the matrimonial assets.

During hearing of the appeal, the appellant was represented by Ms. Stumai Moshi, learned advocate whereas the respondent appeared in person, and unrepresented. Both parties agreed to dispose of the appeal by way of written submissions.

Arguing in support of the appeal, Ms. Stumai Moshi consolidated the 1st and 2nd grounds of appeal proceeded to argue that, the first Appellate Court relied on its brief background of the case of which most of its contents contained new facts which were not adduced in the trial before the trial court hence resulted to the failure to take proper re-analysis of trial Court's records. She accentuated further that, the first Appellate Court failed to take into consideration the fact that, the testimony of the respondent (Verediana Msanjala) was contradictory and even the testimony of her key witnesses got no evidential value to prove the said 153 sacks of paddy as part of matrimonial assets, the fact which was highly disputed by the appellant at the trial court and understood by the same but never taken into consideration by the first Appellate Court, something which necessitated failure of justice to the appellant.

To cement her arguments, the counsel invited this Court to take heed of pages 9 para 3 particularly at 5th and 6th lines read together with page 10 para 1



of the impugned decision of the first Appellate Court. She also urges the Court to pass through the trial Court proceedings at pages 3 and 4.

On the 3rd ground, Ms. Moshi averred that, respondent and her witnesses failed to prove her allegation at the trial Court that, the alleged 153 sacks of paddy were part of matrimonial assets. She argued that, she astonished to see that the first Appellate Court found the respondent's allegations solid, something which contravened the provision of sections 110 and 112 of the Evidence Act [CAP. 6 R.E. 2019].

She highlighted that, the respondent's testimony at trial was doubtful and unreliable because she failed to state the number of sacks she claimed and how they were acquired, save for testimony of her second witness (Abdul Kondo, SM2) who depicted the owner of the sacks of paddy to be one 'Hamad', while her third witness testified nothing rather than giving hearsay evidence. She submitted that, even the respondent's submissions before the first Appellate Court contained new fact as she contended to have collectively acquired the said 153 sacks of paddy during farming season of 2016 to 2017, the fact which was silent during the trial.

She averred that, the decision of the first Appellate Court ordering division of 153 sacks of paddy while the respondent failed to manifest her contribution on how she acquired the alleged 153 sacks of paddy, was erroneous and contrary to



section 114 of the Law of Marriage Act, [CAP. 29 R.E. 2019], because the District Court failed to consider the extent of contribution made by the appellant.

She invited this Court to take cognizance of the testimony adduced by the second witness of the respondent (the storekeeper) at trial to be reliable, when he told the trial Court that, the said 153 sacks of paddy did belong to one "Hamad" and it was marked "MCH", the mark which was neither the names of the appellant nor the respondent. To cement her argument, she referred the Court to the decision of **Nacky Esther Nyange Vs. Mihayo Marijani Wilmore**, Civil Appeal No. 169 of 2019 (unreported).

As to the 4th ground, the counsel highlighted that, the first Appellate Court gave a misleading decision and contradicted itself when it ordered the third house had to form part of matrimonial properties since it stated prior that, the same was never proved to be amongst the matrimonial assets by the respondent and her witnesses during trial. However, the counsel for the appellant did not hesitate to manifest her belief that, the first Appellate Court's inclusion of the third house as part of matrimonial assets was an alternative option after its failure to divide 153 sacks of paddy without considering the fact that, the third house was a matrimonial asset belongs to the appellant and her third wife, one "Juliana Daudi".



In conclusion, Ms. Moshi submitted that, on the basis of her submission and the authorities she cited herein above, prayed the Court to allow the appeal, quash and set aside the decision of the first Appellate Court and uphold both the proceedings and decision of the trial Court.

In reply, the respondent argued in pattern. She vehemently disputed the first and second grounds of appeal. She submitted that, the first Appellate Court did not err to rely on the decision of the trial Court since the basis of judgment totally reflected what actually transpired and recorded by the trial Court both in proceedings and judgment not the way it was stated and depicted by the counsel for the appellant.

On the third ground, respondent encountered that, together with her witnesses, they managed to prove the existence of 153 sacks of paddy as being part of matrimonial assets at the trial Court and the appellant never contested such a fact. Respondent invited this Court to take heed of her witnesses' testimony. She contended further that, she made her contribution in terms of money that she obtained when working as councilor for special seats at Kilombero District Council for the period between 2015 and 2020. Moreover, she stated that, her effort to hire laborers to cultivate the farm, in the course of acquisition of the 153 sacks of paddy, is another factor which shows that she made her contribution to the acquisition of family assets.



On the fourth ground, the respondent contended that, the first Appellate Court was right to include in its decision the third house as it was only subjected for sale and division of family assets if the appellant would fail to provide 153 sacks of paddy which were supposed to be divided equally between them. So, the house would only be sold for compensating the said 153 sacks of paddy if the same would have not been provided by the appellant. To bolster her submission, the respondent referred this Court to Latin maxim, which states that, "*Nullus commodum capere potest de injuria sua propria*", fairly translating to mean that; "*No one can make gains from their own wrongs*" or "*No man can take advantage of his own wrong*". Placing reliance on this Latin maxim, respondent underlined that, since the appellant is the one who benefited from 153 sacks of paddy, therefore he is required to return the same as ordered by the first Appellate Court.

In the end, respondent prayed the Court not to allow the appellant's appeal and uphold the decision of the first Appellate Court.

In rejoinder, the counsel for the appellant highlighted that, nothing has been stated by the respondent to discredit his submission in chief on the first and second grounds of appeal. He said, his submission in chief speaks for itself as it contains proof of every accusation and/or allegations made by pointing out each paragraph and the mistakes depicted in the decision of the first Appellate Court.



In respect of the third ground, the counsel for the appellant rejoined that the respondent's blame regarding the finding of the trial Court for the omission and misconstruction of some material evidence as depicted on her reply submission of which she failed to prove, cannot stand against the principle enshrined under sections 110 and 112 of the Evidence Act (supra) and the meaning of hearsay evidence. She underlined that, clearly the respondent and her witnesses failed completely to prove the existence, acquisition and contribution of 153 sacks of paddy.

On the fourth ground, Ms. Moshi encountered the Latin maxim mentioned by the respondent and submitted that, the appellant does not dispute the same but emphasized that all wrongs must be proved in Court pursuant to the respective standard of proof. She submitted that, since the respondent failed completely to prove her allegation on 153 sacks of paddy against the appellant, then in the circumstance, the Court cannot grant what have never been proved at the trial.

Finally, the appellant reiterated his prayers and urged the Court to allow the appeal with costs.

Having summarized the rival submissions by the parties, and upon considering the entire Court records and the grounds of appeal faulting the decision of the first Appellate Court, the central issue is whether this second



appeal has merits or otherwise. However, before embarking on determination of the appeal, I find it worthy to highlight on the well-established principle taking into account this is the second appeal. It is settled law that, the second Appellate Court(s) should be reluctant to interfere with the concurrent findings of two Courts below except in cases where it is obvious that, the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure or have occasioned a miscarriage of justice. **[See: Herode Lucas and Another Vs. Republic, Criminal Appeal No. 407 of 2016, CAT-Mbeya; Machemba Paulo Vs. Republic, Criminal Appeal No. 538 of 2015, CAT-Tabora; and Joel Ngailo Vs. Republic, Criminal Appeal No. 344 of 2017, CAT-Iringa (All unreported), just to mention a few.**

As hinted above, the only issue for determination is whether or not this appeal has merits. In an attempt to answer the grounds of appeal, I will consolidate grounds 1 and 2 and the remaining grounds that is grounds 3 and 4 will be dealt separately.

I have closely re-examined the entire proceedings of the trial Court, first Appellate Court and the decisions thereon, together with the rival submissions made by the parties in support and against the present appeal. Looking at the records of the first Appellate Court in particular the impugned decision, the Court raised three issues for determination, *to wit*; first; whether the spouses contributed to the acquisition of 153 sacks of paddy; second; whether the states



153 sacks of paddy led to the construction of the third house; and thirdly; whether the third house is subject to division of matrimonial assets.

On the first issue, the first Appellate Court had ample time to deliberate on the efforts made by each spouse towards contribution and acquisition of their 153 sacks of paddy. After careful perusal of the proceedings of the trial Court, particularly on pages 3-4, it is evident that respondent, Verediana Msanjala appeared in Court and testified in a bid to establish and prove her claims. She was also cross-examined by the appellant and the trial Court as well. But I noticed that, her testimony did not precisely provide for the following facts which this Court found it to be prudent for her to prove her claims before the trial Court. In my view, the relevant facts which were behind the curtain includes the following: (i); number of sacks of paddy she claimed to have been jointly acquired with the appellant; (ii); place and size of land which they furnished the farming activities; (iii) the farming season which they managed to acquire those sacks of paddy; and (iv) mostly important, the extent of her contribution was never made open so as to justify the acquisition of the 153 sacks of paddy.

It is worth noting that, the order for division of family assets by the Court of competent jurisdiction by virtue of Section 76 of the Law of Marriage Act, [CAP. 29 R.E. 2019] (the LMA), manifests one of the Court's powers in the course of granting or subsequent to the grant of a decree of separation or divorce, whereby such Court is always obliged to consider the issue as to, whether the



parties by joint efforts acquired a certain matrimonial assets (depending on the nature and the circumstance of the case).The discourse has been well stipulated under section 114(1) of the LMA (supra) which provided that: -

*"The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, **to order the division between the parties of any assets acquired by them during the marriage by their joint efforts** or to order the sale of any such assets and the division between the parties of the proceeds of sale".*

[Emphasis Added].

In the celebrated case of **Bi. Hawa Mohamed v. Ally Sefu [1983] TLR 32**, the CAT when interpreting the provision of section 114 of the LMA, attempted to define what comprises of "*matrimonial assets*" and observed that: -

*"In our considered view, the term 'matrimonial assets' means the same thing as what is otherwise described as **family assets**". [Bold is mine].*

Under paragraph 1064 of Lord Hailsham's HALBURY'S LAW OF ENGLAND, 4th Edition; p. 419, it is stated that: -



"The phrase 'family assets' has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives and used for the benefit of the family as whole. The family assets can be divided into two parts (1) those which are of capital nature, such as matrimonial home and the furniture in it (2) those which are of a revenue nature-producing nature such as the earning power of husband and wife".

From the above excerpt of the principle of law, it follows therefore that, for the Court to determine precisely the *"joint efforts"* made by the parties in acquisition of family assets, the Court should also consider and take into account number of factors as stipulated under Sub-section (2)(a)-(d) of Section 114 of the LMA. The law says; in exercising the power conferred by subsection (1), the Court shall have regard to: (a) the customs of the community to which the parties belong; (b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (c) any debts owing by either party which were contracted for their joint benefit; and (d) the needs of



the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

In this case, the determinant factor is the extent of contributions made by each party towards acquisition of the said 153 sacks of paddy and/or the third house as family assets. Whereas the appellant, Deodatus Mhuvi stated that, the respondent, Verediana Msanjala did not disclose the extent and manner in which she made her contribution in acquiring 153 sacks of paddy, in particular regarding cultivation of paddy on the farming season for the year 2016-2017 (although the appellant denoted that this is a new fact), despite her being the councilor for special seats at Kilombero District Council (2015-2020). On the other side, the respondent encountered such argument by narrating that she made her contribution in terms of money obtained from her work (being the councilor for special seats at Kilombero District Council (2015-2020)), and further that she hired laborers who were involved to cultivate their farm.

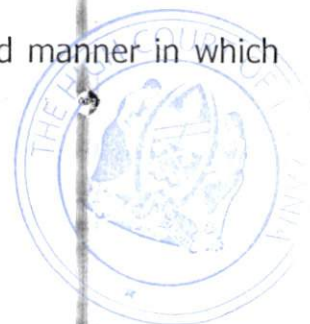
From the above finding and re-evaluation of the records, I find it prudent to rule out that, the respondent failed to elucidate the extent and manner in which she contributed to the acquisition of the alleged 153 sacks of paddy, as the records of the trial Court is silent on this facet. Again, there is nowhere on record at trial indicating that respondent did manage to challenge and/or dispute the evidence of her witnesses, in particular the second witness (keeper of a storage facility described on record as a machine) when he told the trial Court that, he



received the alleged 153 sacks of paddy from the appellant herein, but on different occasions, and the property was marked "MCH" and later on introduced to be owned by one "Hamad".

Looking at the testimony entered by the appellant (respondent at trial), when linked with the 2nd respondent's witness (Abdul Kondo), it is apparent on records that appellant never disputed the fact the alleged 153 sacks of paddy was stored in the facility managed by her witness (Abdul Kondo) as his evidence was silent on the recourse. Moreover, the appellant, Deodatus Mhuvi never disputed the same property to have been marked "MCH", the mark which not dealt by the trial Court to detect its meaning so as to connect with the appellant, respondent or both parties. To resolve the indefinite mark, this Court is of the view that, the indefinite mark must be resolved in favour of the appellant because from the beginning he described himself as the dealer of paddy business since 1995, and that he stored 153 sacks of paddy which belongs to the said "Hamad". As noted above, this fact had never rebutted in anyway by the respondent at this second appeal and before the lower Courts.

From the foregoing, I am inclined to agree with the counsel for the appellant that, the respondent failed to discharge her burden of proof on preponderance of probability to prove that the 153 sacks of paddy were part of the family assets and it deserved to be shared equally by the parties herein. Further, there is no cogent evidence suggesting the extent and manner in which



the respondent made her contribution to the acquisition of 153 sacks of paddy. Her testimony did not conform to the law as provided by the Regulation 1(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations (GN. Nos. 22 of 1964 and 66 of 1972) which is more or less similar to section 110 and 112 of the Evidence Act [CAP. 6 R.E. 2019]. See also the case of **Anthony M. Masanga vs Penina (mama Mgesi) and Another (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015)**.

Having considered and resolved the issue of controversy between the parties, that is 153 sacks of paddy do not form part of family assets, it is my holding that the first Appellate Court grossly erred in law to subject the third house of the appellant and his wife (Juliana Daudi) to be sold as an alternative to the purported 153 sacks of paddy acquired jointly by the parties, which against the spirit of section 114(1) of the LMA.

Assuming that the finding and orders issued by the first Appellate Court could be correct or valid, but still the same could not be executed as law under Rule 63(1) (b) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN. Nos. 310 of 1964 and 119 of 1983 restricts any residential house or building occupied by the judgment debtor, his wife or dependent children for residential purposes to be subjected to attachment in the due cause of executing a court's decree.



For the reasons stated hereinabove, I find this appeal with merits. Consequently, I allow the appeal and uphold the decision of trial Court. The proceedings, judgment, decree and any other orders emanated there from are quashed and set aside with no order as to costs. It is so ordered.

DATED at MOROGORO, this 14th day of December, 2023.



A handwritten signature in blue ink, appearing to read "M.J. Chaba".

M.J. CHABA

JUDGE

14/12/2023

Court:

Judgment delivered under my hand and Seal of the Court in Chambers this 14th day of December, 2023 in the absence of both parties and unrepresented.

A handwritten signature in blue ink, appearing to read "E.C. Lukumai".

E.C. LUKUMAI

Ag. DEPUTY REGISTRAR

14/12/2023

Court:

Right of the parties to Appeal to the CAT fully explained.



E.C. LUKUMAI



Ag. DEPUTY REGISTRAR

14/12/2023