

IN THE HIGH COURT OF TANZANIA

AT MWANZA

PC. MATRIMONIAL APPEAL NO. 15 OF 2021

(Original Matrimonial Appeal / No. 14/2020 of the District Court of Bukombe, Matrimonial Cause No. 67/2020)

LUCIA MALANDO.....APPELLANT

versus

MIHAYO MAISHA.....RESPONDENT

EXPARTE JUDGMENT

13rd & 22nd July, 2021

RUMANYIKA, J.:

The 2nd appeal is with respect to the judgment and decree dated 30/03/2021 which one, with respect to Bukombe primary court order of fifty - fifty % division of matrimonial property dated 23/11/2020, Bukombe District Court (the 1st appeal court) it nullified and ordered a retrial.

Mr. A. Molandi learned counsel appeared for Lucia Malando (the appellant).

When the appeal was, by way of audio teleconference called on 13/07/2021 for hearing, though duly served (pursuant to order of 5/07/2021) the hearing date was, by consent fixed on 05/07/2021, neither

Maduhu learned counsel nor Mihayo Maisha (the respondent) appeared. For some reasons on record I dispensed with the latter's appearance hence the exparte judgment.

The 6 grounds of appeal revolve around 3 points mainly; **(1)** the issue of the extent of contribution for acquisition of the assets by the parties being introduced but at the appeal level **(2)** the evidence improperly evaluated and the assets were unfairly divided **(3)** the clan property erroneously having been included in the list of matrimonial assets.

Through mobile numbers 0755377720 but in a nutshell Mr. Molandi learned counsel submitted; **(a)** that although it had not been disputed, the 1st appeal court erroneously introduced the issue of the extent of contribution made by the parties **(b)** that the 15 acres parcel of land being matrimonial, personally acquired or of the appellant's clan it was raised only at the appeal stage.

Questioned by court for more clarity, Mr. Molandi learned counsel submitted that although the trial court decided and ordered for fifty – fifty % division, there was no parties evidence to show the extent of each one's contribution to the matrimonial assets. That is all.

The central issue is whether the 1st appeal court's learned resident magistrate was justified in ordering a trial de novo. The answer is no for main reasons:

One; At least, although in the beginning the respondent was optimistic, a decree of divorce was issued and he never challenged it but only the order of 50% share of the matrimonial property.

Two; I entertain no doubts that no one of the witnesses' evidence (leave alone attempts to) was given on the extent of efforts to contribution put by each spouse towards acquisition of the assets. It follows therefore that the trial court's conclusion that the parties had put equal efforts therefore each one of them entitled to 50% share, the findings and orders were respectfully built only on personal sentiments and or extraneous evidence.

I think whether directly or constructively between the spouses who, how and what he contributed to acquisition of the matrimonial property it was not the question of assumption but evidence which needed to be adduced and tested in court just as, say 38 years ago a house wife's contribution was no longer zero rated (see the famous case of **Bi Hawa**

Mohamed v. Ally Sefu, Civil Appeal No. 9 of 1983 (CA) fifty-fifty percent division of matrimonial property therefore it was no longer automatic. Now that as said, no evidence was led and tested on such crucial aspect of it, I shall have no basis upon which to fault the learned resident magistrate.

The meritorious appeal is allowed. Each party shall bear their costs.
It is so ordered.

Right of appeal explained



S.M. RUMANYIKA

JUDGE

16/07/2021

The judgment delivered under my hand and seal of the court in chambers this 22/07/2021 in the absence of the parties.



S.M. RUMANYIKA

JUDGE

22/07/2021