

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 171 OF 2005

*(Originating from the Matrimonial Cause No. 51 of 2000 at Kisutu
by Hon. Mbilinyi – RM)*

ELIZABETH A. KOMAKOMA APPELLANT

VERSUS

ZEPHANIA M. ANDENDEKISYE RESPONDENT

*Date of last order – 16/10/2007
Date of Judgment 15/2/2008*

J U D G M E N T

Shangwa, J.

The Appellant Elizabeth A. Komakoma is appealing against the decision of the Court of the Resident Magistrate at Kisutu in Matrimonial Cause No. 51 of 2000 delivered on 18/4/2005. The said Matrimonial Cause was filed by the Respondent Zephania M. Andendekisye. In its decision, the trial court dissolved the parties' marriage, granted custody of one child called Bryton Andendekisye to the Appellant and

granted custody of two children namely Onni Zephania Andendekisye and Allan Zephania Andendekisye to the Respondent.

In addition to that, the trial court made the following orders:-

1. *That ALT Clinic and motor vehicle with Reg. No. TZP 5080 make Surf is the property of the Respondent.*
2. *That motor vehicle with Reg. No. TZA 7802 make Peugeot, one refrigerator and one clothing cupboard is the property of the Appellant.*
3. *That the business premise at Kimara Kilungule is the property of the Appellant.*

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4. *That the Farm at Kimara and another farm at Mbezi to be divided equally.*
5. *That a set of coaches and one video deck to be divided equally after selling the same.*
6. *That the residential house at Kimara Kilungule to be given to the three issues of the marriage.*

There are four grounds of appeal which have been raised by the Appellant against the decision of the trial court. They are as follows:

1. *That the trial Magistrate erred in law and fact by holding that the denial of conjugal rights was material to the break down of the marriage between*

the parties without condemning the Respondent for the cause of the matrimonial difficulties.

2. *That the trial Magistrate erred in law and fact by holding that the custody of the issues of marriage above 7 years should be in the custody of the Respondent without giving reasons and without considering the welfare of those issues.*

3. *That the trial Magistrate erred in law and fact by holding that the three issues placed under different custodies should acquire the matrimonial house as they will live in the same house something which*

will create more conflicts and hardship to the parties.

4. That the quality and quantity of the evidence tendered in the scale did not warrant the conclusion arrived at by the trial Magistrate.

The Appellant now prays this court to set aside the judgment and decree of the lower court and order that the three issues of marriage should be placed in her custody and that the matrimonial house should be given to her and also that the Respondent who sought for an order of divorce be ordered to vacate.

In my considered opinion, I find no merit in the first ground of appeal. The act of denying conjugal rights to a spouse such as the Respondent used to do to the Appellant is one of the factors that can lead to the break down of the marriage irreparably. The Appellant blamed the trial

Magistrate for not condemning the Respondent for having caused the matrimonial difficulties. For me, I think that the trial Magistrate had no reason to condemn the Respondent. It was quite sufficient for him to dissolve the parties' marriage after finding that it had broken down irreparably without condemning the Respondent. It is true that the matrimonial difficulties were caused by the Respondent who stopped to have sexual intercourse with the Appellant for more than four years. For a long period, the Respondent was not talking to the Appellant. This means that the Respondent had decided to desert her. In view of such facts, I hold that the trial Magistrate was not wrong to dissolve the marriage between the parties on grounds that it had broken down irreparably.

With regard to the second ground of appeal, I think also that it has no merit. It is not in dispute that during the parties' marriage, the parties were blessed with three

children. In my opinion, the trial Magistrate was not wrong to hold that the two issues of the marriage who were above 7 years should be in the custody of their father (Respondent). These are Onni Zephania Andendekisye and Allan Zephania Andendekisye. It is common knowledge that children above 7 years are old enough to be placed under the custody of their father when the marriage has broken down as it happens to be the case here. Although, the Respondent lost his former job by way of redundancy at Mwadui Mining Corporation Ltd, he runs a clinic known as ALT. This means that he is in a position to maintain the two children who were placed under his custody by the trial court. I think therefore that the Appellant's complaint that the trial Magistrate did not take into account the welfare of the two issues who were placed under the Respondent's custody is baseless.

Coming to the third ground of appeal, I wish to state that this ground has merit. The trial Magistrate erred in law by giving the matrimonial house at Kimara Kilungule to the three issues of the marriage. The trial Magistrate had no legal powers to do so. What the trial Magistrate was supposed to do in respect of the said matrimonial house was to order that it should be divided between the parties or be sold so that the proceeds of its sale be divided between them. That would be in line with S.114(1) of the Law of Marriage Act [Cap. 29 R.E. 2002] which confers power to the Court to order the division of matrimonial property upon dissolving the parties' marriage or upon granting a decree of separation. Now, as the trial Magistrate had no legal powers to give the matrimonial house to the issues of marriage, I find that he erred in law in giving it to them. I order that the said house should be sold and the proceeds of its sale be divided between the parties. In so ordering, I have taken

into consideration the fact that the said house was acquired through the parties' joint efforts.

Lastly, I am of opinion that the fourth ground of appeal has no merit. There is sufficient evidence on record upon which the trial Magistrate dissolved the parties' marriage and ordered the two issues of the marriage to be under the Respondent's custody. As I have already mentioned, the Respondent had stopped talking to the Appellant and had even stopped giving conjugal rights to her. I have also mentioned that children above seven years such as the two issues of marriage can stay with their father upon dissolution of the marriage between their parents provided that their father can care for them. In this case, the Respondent is in good financial position to care for his two children who were placed under his custody by the trial court. In my view, except on the issue of how to deal with the matrimonial house after the breakdown of the marriage; the orders made

by the trial magistrate in his decision and the conclusion arrived at by him on the issue of dissolution of the marriage and custody of the three children were quite correct.

In view of what I have stated in this judgment, I allow this appeal on the third ground of appeal and dismiss it on the rest of the grounds of appeal. Each party should bear its own costs.


A. Shangwa

JUDGE

15/2/2008

Delivered in open court this 15th day of February, 2008 in the presence of Mr. Nyangarika for the Appellant and the Respondent appearing in person.


A. Shangwa

JUDGE

15/2/2008