IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 148 OF 2006

ABDALLAH SAID.....APPELLANT

VERSUS

SHARIFA MOHAMED .....RESPONDENT
Date of last Order 17/10/08
Date of Judgment 17/10/09

JUDGMENT

MWARIJA, J.

This appeal originates from the decision of the District Court of Ilala, at Samora Avenue. The respondent had petitioned that court for divorce. The trial court granted the divorce prayed for by the respondent and proceeded to order division of matrimonial assets for which the respondent was to get 40% of the assets. Aggrieved by the order of division of matrimonial assets, the appellant has preferred this appeal.

In his memorandum of appeal, the appellant has raised four grounds;

(1) That the learned trial magistrate erred in law and fact in failing to evaluate the evidence on record and awarding the petitioner 40% of the properties without taking in consideration the fact that the petitioner/respondent has already been given a plot situated at Tabata Kimanga, one acre farm at Morogoro, 3,000 bricks and other household properties including sewing machines in 1998 before her second marriage and before the matter was reported to BAKWATA seven years before the institution of the petition in the District Court.

2. That the learned trial Magistrate erred in law and fact for not awarding damages for adultery as per the appellant's counter claims despite the respondent's refusal to file reply to counter claim and ample evidence available on record [which] proved to the required standards of the law that the respondent has been married to another man, the fact which was the cause of the breakdown of the marriage.

3.That the trial magistrate erred in law and in fact in concluding that as far as the marriage subsisted for 21 years, what was acquired was a matrimonial assets without any supporting evidence from the respondent as to her share of contribution given the fact that the appellant had acquired the [plot in question] long time before the marriage or in the alternative, the learned trial magistrate erred in awarding 40% to the respondent which is in the higher side without considering other properties given to her since 1998 as part of his share in matrimonial property and that the only property remaining with the appellant was the matrimonial home which was completed by the appellant after the respondent has been married to another man in 1998.

(1) That the trial magistrate erred in law and fact for not taking evidence of [DW3] which was sufficient to prove that the respondent, upon Islamic talak and in the presence of his parent was given her share and what remained was the share and property of the appellant."

In deciding this appeal, I propose to start with the second ground of appeal. The learned counsel for the appellant has submitted that as the respondent did not file a reply to the counterclaim, the trial magistrate erred in failing to enter a default judgment. The respondent did not make any response on that ground regarding the consequences of failure to reply to the counterclaim. According to the proceedings, the trial magistrate made a ruling to that effect. In her ruling, she decided that despite the failure by the respondent to file reply, the counterclaim would be decided after a hearing. The appellant was therefore supposed to prove his counterclaim. That order by the trial Magistrate was in accordance with O.VIII r. 14 (2) (a) and (b) of the Civil Procedure Code, Cap. 33 R.E. 2002 (hereinafter referred to as "the CPC"). The provision states as follows

" 14-

(1) .....

(2) (a) where the claim is for liquidated sum not exceeding one thousand shillings, upon proof by

affidavit or oral evidence of service of summons, enter judgment in favour of the plaintiff without requiring him to prove the claim.

(3) (b) In any other case, fix a day for ex-parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.

The above provisions apply to the counterclaim because under O.VIII r. 11 (2) " the rules relating to a written statement of defence by a defendant shall apply to reply by the plaintiff or a person joined as a party against whom a counterclaim is made".

As the trial proceeded however, the appellant was not given an opportunity to prove his counterclaim. That was an error on the part of the trial magistrate because the counterclaim remained undecided.

The next grounds of appeal which I intend to turn to are grounds No. 1 and 3. As stated above, they concern

distribution of matrimonial assets. The appellant has challenged the trial magistrate's decisions stating that she failed to consider the adduced evidence regarding contention that distribution of matrimonial properties was done by BAKWATA when "talak" was issued to the respondent. It is true that the issue of distribution of the properties was raised and evidence was led by the parties but again, no finding was made by the trial magistrate.

There was further another issue concerning the matrimonial house which was subject to distribution. It was contended that construction of the house was completed by the respondent while the appellant had already left the matrimonial home and went to live with another man with whom she had beared a child. No finding was made on whether that was true or not and its effect on the question of distribution of that matrimonial asset.

In sum, the judgment left many issues undecided apart from lacking reasoning especially with regard to distribution of

matrimonial assets. In the judgment, the trial magistrate, without an analysis of the tendered evidence, briefly stated that the parties' marriage has broken down for reasons of adultery and sexual perversion. As to the division of matrimonial assets, the trial magistrate simply stated as follows;

> *" The petitioner deserves her share of the matrimonial assets. It is so ordered the assets be subject to division (sic) between the petitioner and respondent as per section 114(1) and 2 (b) and (d) of the Law of Marriage Act..., and that the petitioner have fourty percent (40%) of the assets"*

Surely, the respondent is entitled to a share of matrimonial assets upon breakage of marriage but reasons must be given regarding the extent of her contribution, whether by way of domestic services, actual contribution through her earnings or any other contribution. The properties for distribution must

also be specified so as to exclude each couple's private properties.

The irregularities in the judgment is further manifest from the fact that the prayers made by the respondent in her petition were not decided. She had prayed for custody of the issues of marriage, their maintenance at Shs. 100,000/= per month and arrears thereof from July, 1998 but the judgment is silent on those prayers.

On the basic of the above stated defects in the trial court's judgment, this appeal must succeed. Accordingly, the proceedings are hereby quashed and the judgment is set aside. It is ordered that the petition be heard denovo by another magistrate of competent jurisdiction. Each party to bear own costs.

A.G MWARIJA

JUDGE

11/12/09

11/12/09

Coram: Mwarija, J.

For the Appellant – Present in person

For the Respondent – Present in person

CC: Nester.

Judgment delivered

A.G.MWARIJA

JUDGE

11/12/09