IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

Civil Appeal Number 27 of 2010

(Originating from Matrimonial Cause No. 96 of 2008 Kinondoni District Court-L.R. Msanga-RM)

MARIAMU SULEIMANI **APPELLANT**

Vs

SULEIMAN AHMED **RESPONDENT**

Last Order: 09-06-2010
Judgment: 19-08-2010

JUDGMENT

JUMA, J.:

This is an appeal against the ex *parte* judgment of the Resident Magistrate Court at Kinondoni (Matrimonial Cause No. 96 of 2008-**Msanga-RM**) which had granted a decree of divorce without at the same time issuing an order on the division of matrimonial assets. With Suleiman Ahmed as the respondent, appellant (Mariamu Suleiman) filed this appeal under the legal aid assistance certificate of the Women's Legal Aid Centre (WLAC). Records of the trial court shows that on 4th November 2008, appellant petitioned for a divorce at Kinondoni District Court. Despite several summonses inviting his appearance and attendance, respondent did not appear to oppose

the petition at the District court. The ex *parte* hearing of the petition was ordered, the outcome of which resulted in this appeal.

Appellant and respondent started living together in 1990. They were married three years later in 1993. Their marriage was blessed with four children, Amina (born in 1994), Hamad (born in 1997), Ramadhani (born in 2001) and Saidi (born in 2005). Apart from dissolving the marriage, the trial district court had in its judgment dated 31 July 2009 declined to order the division of matrimonial asset, thus leaving open the issue of division of matrimonial assets. The trial court advised the appellant to lodge another application in future where she will prove not only the existence of matrimonial assets, but also prove respective of appellant's and respondent's contributions in the acquisition of the assets.

In so far as maintenance of the children was an issue, the learned trial magistrate found that the appellant did not have the means to maintain the children of marriage. Respondent was as a result awarded the custody of children. Respondent was in addition required to provide the appellant with visitation rights. For her own maintenance, the trial court ordered the respondent to pay the appellant Tshs 50,000/= monthly maintenance expenses to be paid from May 2008 to 31st July 2009 when the judgment of the District was delivered.

Appellant was aggrieved by the decision of the trial court and would like this court on appeal to order equal division of matrimonial assets and also to grant her custody of three of the four younger children of her marriage to respondent.

When this appeal came up for hearing on 9 June 2010, appellant represented herself while Prof. Safari the learned Advocate represented the respondent. Appellant and Prof. Safari requested and this court agreed that hearing of appeal be by way of written submissions. Appellant duly filed her written submissions on 21 June 2010. For the respondent, Prof. Safari was supposed to file his replying submissions by 8th July 2010. Prof. Safari did not lodge respondent's replying submissions as directed by this court.

On the failure of the respondent to lodge his written submissions I will with respect totally agree with my brother Rugazia, J., who in the case of **Fredrick A.M. Mutafurwa Vs. CRDB 1996 Ltd & Others, Land Case No.146 of 2004 (Land Div. DSM)** had observed that times out of number this court has held that the practice of filing submissions is tantamount to a hearing and, therefore, failure to file the submissions has been likened to non-appearance or want of prosecution. Submissions that are not filed as ordered are to be disregarded. I will therefore disregard respondent's failure to present his written submissions and proceed with my determination of this appeal after considering appellant's arguments as contained in her written submissions.

It is clear from the grounds of appeal that the appellant does not contest the conclusion reached by the trial court that the marriage between the appellant and respondent had irretrievably broken down. In my opinion the trial magistrate was on the basis of evidence presented *ex parte* by the appellant, fully entitled to dissolve the marriage between the appellant and respondent.

In her first ground of appeal, appellant contends that after dissolving the marriage between the appellant and respondent the trial court should have also issued orders on division of matrimonial assets. Appellant has submitted that when granting a decree of divorce, courts are enjoined by section 114 of the **Law of Marriage Act, Cap 29** to determine the division of matrimonial properties. Appellant has submitted that on the basis of evidence which she tendered during the ex *parte* hearing, the trial magistrate should have ordered both the dissolve and the division of matrimonial assets.

I took time to consider the issue whether when issuing order to dissolve marriages courts are required at the same time to issue appropriate orders on division of matrimonial assets. My response to this issue must inevitably begin from the provisions of the **Law of Marriage Act, 1971** governing the power of courts to divide matrimonial assets.

The power of courts in Tanzania to divide matrimonial assets is derived from section 114-(1) of the **Law of Marriage Act, 1971**. This provision states:

> *114. (1) 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 asset and the division between the parties of the proceeds of sale.*

The opening phrase "the court shall have power" in section 114-(1) of the **Law of Marriage Act, 1971** does not in my opinion mean that when granting any decree of separation or of divorce courts, must also automatically order division of matrimonial assets of the divorcing couples. In my opinion, courts granting decrees of separation or

divorce can only exercise the power to order division of matrimonial assets when there is sufficient evidence that clearly identifies the matrimonial assets, how and when the identified assets were acquired. There must be sufficient evidence showing that the assets sought to be divided after separation or divorce was acquired by joint efforts during the subsistence of the marriage. In my view the ex *parte* evidence in chief of the appellant did not present to the trial court clear identity of matrimonial assets to enable the trial court to issue an order on division of these assets,

> "...5 houses two at Kinondoni, 1 at Kiwalani, 1 at Tegeta Kibaoni and another is a guest house at Newala ... a shamba at Bagamoyo ... a car Mark II Chaser, a shop at Kariakoo, at Mchikichini and Msimbazi, and a shop at Samora New Sapma. .... an account which we used to put money there. ... 2 salons one at Kinondoni Mkwajuni and another at Kinondoni B.... "**-second paragraph on page ii of the judgment of trial court.**

My evaluation of evidence leaves me in no doubt that the learned trial magistrate properly addressed himself to the issue of division of matrimonial assets. The trial magistrate tried first to seek the proof of identify of the matrimonial assets for purposes of division. The trial magistrate was right in his observation that appellant merely itemised matrimonial assets without offering any further proof on their joint acquisition during the subsistence of her marriage to the respondent. The learned trial magistrate stated,

> "....the petitioner points out that they had acquired several properties in the subsistence of their marriage. The 2 shops at Kariakoo and Samora, 5 houses, a car Mark II. The petitioner has mentioned the same but no proof exists on their existence and their acquisition during the subsistence of their marriage..." [**At page (iii) of the judgment**]

The trial magistrate properly interpreted section 114-(1) of the **Law of Marriage Act** when he advised the appellant to muster up proof and

later file a fresh application on division of matrimonial assets subsequent to the grant of a decree of divorce,

> "..... the petitioner is not barred from bringing an application to prove their existence **[i.e. existence of matrimonial property]**. In the meantime this court cannot distribute something that it is not sure exists and is in the names of the parties thereto..." **[emphasis is added]**

Appellant did not offer any evidence from which the trial court could have properly and adequately establish ownership of matrimonial assets beyond general statements of the appellant to that effect. In the circumstances the trial magistrate had no matrimonial assets before him to carry out the division thereof.

My reading of section 114-(1) of the **Law of Marriage Act** leads me to the conclusion that a decree of separation or that of a divorce does not automatically require the trial court to order division of matrimonial assets where identity of assets and joint acquisition thereof is not clearly established by evidence on record before the court. As stated by Kazimoto, J. (as he then was) in the case of **Fatuma Mohamed V Saidi Chikamba 1988 TLR 129 (HC)**, where a petitioner petitions for a decree of divorce and in the same petition the petitioner also prays for an order for division of matrimonial assets, the same court and the same magistrate should hear and determine both issues in the same file. I must hasten to add that after determination of both issues of divorce and division of assets, the court can only order division of matrimonial assets if there is evidence establishing identity of these assets as acquired during the subsistence of marriage and joint efforts of parties towards acquisition of the assets.

Since the trial court granted a decree of divorce without at the same time issuing an order of division of matrimonial assets, it is open to either the appellant or respondent to lodge another application to seek specifically for the division of matrimonial assets. I will with respect agree with restatement of the law made by Kazimoto, J. in **Fatuma Mohamed V Saidi Chikamba, (supra)** to the effect that where the trial court granted a decree of divorce without at the same time issuing an order of division of matrimonial assets, parties to the dissolved marriage may later lodge an application specifically for division of identified matrimonial assets in the same court but need not be heard by the same magistrate and certainly there must be a different file.

For the foregoing reasons the first ground of appeal fails.

Appellant has in her written submissions elected not to pursue the second ground of appeal wherein she had questioned the rationale of the trial magistrate raising issues at the conclusion of the appellant's case. In her third ground of appeal the appellant raises the issue of custody of children. Appellant prayed for the right of custody and maintenance of the three younger children born from the marriage. The trial court considered this request in light of the welfare principle under section 125-(1) of the **Law of Marriage Act, 1971**. The trial magistrate found that Appellant had no means of supporting these children. The learned magistrate said:

> "....As she prayed to be given one of the house and maintenance of the children and medical and school expenses. This shows that she is not capable of taking care of the said children. This court is of the opinion that the same should be under the custody of their father and their mother be allowed visitation rights."

Appellant has submitted that the welfare of the children will best be served if she was granted the custody and respondent made to provide Tshs. 150,000/= monthly maintenance allowance for the children. Further, by sending the children to a boarding school, appellant submitted that these children are not wanted by respondent's current spouse.

The power of courts to give either the father or mother of child the custody of that child is found under section 125-(1) of the **Law of Marriage Act, 1971.** This section provides,

> **125-(1)** The court may, at any time, by order, place an infant in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare.

Factors which Courts consider before granting custody are disclosed under sub section (2) of section 125 as including wishes of the parents of the infant, the wishes of the infant, where he or she is of an age to express an independent opinion; and the customs of the community to which the parties belong. The trial magistrate was in my opinion entitled to rely on the only evidence which the appellant offered in her *ex parte* proof to find that welfare of children would in the circumstances be better served if the children remained under the custody of their father.

The contention by the appellant that respondent does not spend adequate time to stay with the children as their step mother does not like the children is not borne out by evidence before the trial court. These evidential matters cannot be raised at this level of appeal. I see

no justifiable reason to interfere with the conclusion reached by the learned trial magistrate on custody of the children of the marriage between the appellant and respondent. The third ground of appeal also fails.

For the foregoing reasons this appeal is hereby dismissed. Appellant is at liberty to lodge a fresh application specifically to prove and seek the division of identified matrimonial assets in the same Kinondoni District Court. This appeal having been filed on certificate of legal aid assistance no order is made with respect to costs.

I.H. Juma
JUDGE
19-08-2010

Delivered:

For appellant: Mariam Sulemani (in person)
For respondent: Suleman Ahmed (in person)

I.H. Juma
JUDGE
19-08-2010