

**IN THE HIGH COURT OF TANZANIA  
AT ARUSHA**

**(PC) CIVIL APPEAL NO. 28 OF 2011**

(C/F the District Court of Arusha at Arusha in Civil Appeal No. 20 of  
2011 Originating from Arusha Urban Primary Court in Matrimonial  
Civil Cause No. 57 of 2011)

**BETWEEN**

**SALEHE ABDALLAH ..... APPELLANT**

AND

**MWAJABU ABDI KIURE ..... RESPONDENT**

**Date of Last Order:** 04/09/2012

**Date of Judgment:** 18/10/2012

**JUDGMENT**

**A.C. NYERERE, J.**

Aggrieved by the Judgment delivered on 13/10/2011 by  
F.R. Mhina, RM; the appellant filed the present appeal on the  
following three (3) grounds that;

1. The learned appellate District Court Magistrate erred both in  
law and in fact in reversing the trial Court findings by declaring  
the respondent to be entitled to the matrimonial home thus  
leaving the appellant homeless.
2. The appellate District Court Magistrate erred both in law and in  
fact in reversing the trial Court findings while the decree of

divorce granted by the trial Court was a consent decree and that the division of matrimonial properties was fair and just.

3. The appellate District Court Magistrate erred both in law and in fact in declaring the appellant homeless though the respondent was given her share amounting to Tshs. 5,500,000/= and that the Court did not consider the appellant's other liabilities of paying debts which are part of the matrimonial assets.

This appeal was ordered to be argued by way of written submissions whereas the appellant was ordered to file his submission by 18/09/2012, the respondent to file hers by 02/10/2012 and reply by the appellant (if any) by 09/10/2012 the order which was adhered to by the parties herein hence this Judgment. In this appeal, the appellant was represented by A.A. Shakale Chambers, Advocates whereas the respondent had the services of BS Associates Advocates in representation.

Arguing for the appeal, the appellant's learned counsel narrated the historical background of the matter that initially; the parties in this appeal consented for a divorce the consent which was later followed by the Arusha Primary Court granting a decree of divorce with custody of their only begotten child vested to the respondent herein but maintenance of the said child that also include education been vested to the appellant herein.

The said trial Court also ordered division of matrimonial properties in which the appellant was ordered to have the matrimonial house in

division with an order for the respondent herein to be paid by the appellant herein a sum of Tshs. 5,500,000/= as her share towards acquisition of the said matrimonial house. The appellant's learned counsel added in submission that the trial Court ordered the appellant also to remain with a car made Land Cruiser with further orders to the appellant to pay an unpaid outstanding debt amounting to Tshs. 20,000,000/=.

It was further submission by the appellant's learned counsel that being dissatisfied with the said decision, the respondent herein preferred an appeal before the District Court whereas basing on the welfare of the child, the District Court ordered vacant possession of the matrimonial house by the appellant herein and by ordering the said house in favour of the respondent herein. Aggrieved by the decision of the 1<sup>st</sup> appellate Court, the appellant lodged an appeal before this Court.

Now; arguing for the appeal at hand generally, the appellant's learned counsel submitted that in ordering possession of the matrimonial house to the respondent, the appellant failed to take into consideration the long lasting obligation vested to the appellant in maintaining and educating the child adding that by ordering the house to the respondent, the 1<sup>st</sup> appellate Court erred in law as that order would cause some difficulties in case the respondent herein opts to get married to another man as the said house will then belong to that other family after marriage.

As to division of the matrimonial assets, the appellant's learned counsel made reference to the provisions of section 114(2) of the Law of Marriage Act, [CAP. 29 R.E, 2002] that read;

*"(2) in exercising the power conferred by subsection (1), the court shall have regard–*

*(a) To the customs of the community to which the parties belong;*

*(b) To the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*

*(c) To any debts owing by either party which were contracted for their joint benefit; and*

*(d) To the needs of the infant children, if any, of the marriage,*

*and subject to those considerations, shall incline towards equality of division".*

It was the argument by the appellant's learned counsel that the one who is responsible for the child's education must have a fixed abode in order to efficiently discharge that obligation vested to him including that of paying the outstanding debts as ordered by the trial Primary Court adding that the 1<sup>st</sup> appellant Court did not even apportion the said matrimonial house to the appellant herein as demanded for by the provisions of section 114 of the Law of Marriage Act (supra) unlike the Primary Court which ordered payment of Tshs. 5,500,000/= to the respondent herein as her portion over the said jointly acquired matrimonial house.

In rebuttal; the respondent's learned counsel submitted that apart from the order as to the matrimonial house, yet; the 1<sup>st</sup> appellate Court was silent as to division of the said Land Cruiser and a jointly acquired tour business. The respondent's learned counsel further informed the Court that the issue of division of matrimonial properties is not based on the patriarchy system and does not depend on whether one remarries or not.

As to what ought to have been taken into consideration in granting a decree of divorce, the respondent's learned counsel referred this Court to the case of **BI HAWA MOHAMED vs. ALLY SEFU [1983] T.L.R 32** where the Court of Appeal of Tanzania observed the matters which a Court has to take into consideration in division of the jointly acquired properties during subsistence of marriage.

The respondent's learned counsel further informed the Court that it is not in dispute that the matrimonial house was jointly acquired by the couple thus properly subjected to division. The respondent's learned counsel added that under normal circumstances, the respondent herein cannot reasonably be expected to rent a house so that she can provide shelter to the infant.

It was further submission by the respondent's learned counsel that the appellant has been left with two vehicles that is a Land Cruiser & a Suzuki Vitara on one hand and a family tours business on the other hand and that the appellant was not even ordered to maintain the respondent who is unemployed.

In rejoinder; the appellant's learned counsel stressed that the matrimonial house was and is still subject to equal division and in respect of the unpaid debt, the appellant's learned counsel contended that the alleged Suzuki Vitara car had been sold to cater for school fees of the child born of the couple and that during division, the 1<sup>st</sup> appellate Court did not apportion liability as to payment of the outstanding debt to the respondent herein.

Having gone through the Court record and the submissions by the counsel for the respective parties, this Court has the following in disposal of the appeal. In the first place, let me hasten to say that as rightly pointed out by both parties herein, the issue of divorce is not at all at stake, rather; the issue of division of matrimonial properties which to some extent touches even the issue of custody of the child born from the couple.

Further; though the appellant's learned counsel has pointed out that the issue of custody and maintenance of the child born from the marriage between the couple is not at issue, to this Court; since it is the issue of custody and maintenance of the said child has even resulted in reversing the decision of the trial Court by the District Court, it will be awkward and unbecoming to exclude the issue of custody and maintenance of the child at this stage. Thus, to this Court; the two issues will be addressed by this Court.

Now, as to the issue of custody and maintenance of the child; it is on record of the trial Court that the said child one SANI SALEHE expressed her wish to live with the respondent (her mother) and it is important to note here that per the records of the trial Court, the appellant had no objection in maintaining the child in terms of school fees, food, clothing to mention some.

Apart from the fact that the appellant herein had no objection to maintenance of the child, it is the position of the law that that duty is solely vested to the father of a child as provided for vide the provisions of section 129(1) of the Law of Marriage Act (supra) that read;

*"Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof".*

The next issue that obviously follow from the immediate above is, does the vesting of responsibilities as to maintenance of a child to a man guarantees a matrimonial house to be given to the husband or rather can it infer that ordering custody of a child to the mother guarantees the said mother to be given the matrimonial house?

To this Court; neither of the two above scenarios stands to guarantee either of the two to have the matrimonial house as it is possible for the welfare of a child to be secured even while living out of a matrimonial home. Further, this Court has asked itself as to what will be the position if the couple at all had no a matrimonial house of their own meaning they were or are just tenants. Will the paramount welfare of a child born from such a couple be unsecured or rather unguaranteed simply because such couple had no a matrimonial house of their own? Certainly, as afore noted; the answer stand to be NO.

Now, let us resort to the issue of division of the jointly acquired properties. As earlier pointed out, it is not disputed that the couple jointly acquired a house during subsistence of their marriage. Further, from the Court records; the couple also acquired some other properties including a plot, a Suzuki Vitara car, Land Cruiser car and a tours business.

Though the appellant in his rejoinder submission asserted to have sold the said plot and the car made Suzuki Vitara for the purposes of paying the child's school fees, the trial Court records shows that the said Suzuki Vitara car was alleged sold to pay for an outstanding debt with the Barclays Bank. Without even going into the truth, such contradictions show how untruthful the appellant is.

In addition to that; bare assertions as to such disposition without concrete support backed by sound reasons as to such



disposition cannot suffice proof of disposition of such valuable properties which the respondent also had her hand towards their acquisition and or their prosperity.

Further, there was an argument as to payment of the outstanding debt amounting to Tshs. 20,000,000/=. This Court has asked itself the following; at what price the said Land Cruiser was bought at? Where did the money alleged to have been paid to Barclays Bank amounting to Tshs. 15,000,000/= meant to clear vide disposition of the said Suzuki Vitara? Further, was the said Land Cruiser meant to run the business of tours owned by the couple? What output or rather benefit did the said Land Cruiser bring to the tour business to the benefit of the couple who jointly own the said tour business?

Additionally; if at all the tour business generated profit, was the said profit generated from the tour business left in the business of the couple or rather was the same transferred to another channel solely owned by the appellant thus standing to the detriment of the other spouse especially during the period of three years when the couple lived in separation or even some other times secretly?

Next to that, if at all the business does not generate profit, is it possible for the appellant to continue running the same? To this Court, all these unanswered issues demand a lot to be desired as far as the rights of the parties herein are concerned in division of the jointly acquired matrimonial properties during subsistence of their marriage which do not feature in the proceedings of the trial Court.

Likewise; although the Bank Statement shows that the couple had nothing in bank, one may pose to ask; does it mean to imply proof that the appellant was obliged to deposit all the generated profits from the tour business or any other business into the said Bank Account during all the good times of their marriage and else during when the marriage life turned sour? All these issues remain undetermined from the evidence on record.

Further, awkwardly; it has been argued by the appellant that in case the respondent get married to another man, then; the house might turn to belong to the family of the other marriage but it is unfortunate that the appellant did not bother to think of the appellant marrying to another woman (as he has done already) thus likewise turning the matrimonial house to the new marriage of the appellant. Equity demands who goes to equity to be of clean hands.

Again; the appellant's learned counsel has argued that the act of the 1<sup>st</sup> appellate Court declaring the matrimonial house to belong to the respondent has left the appellant homeless but unfortunately, it is on record that the appellant is currently married to another woman. An immediate issue that comes in place is whether the appellant and his then after married wife live in the streets or not. Squarely, this issue remains unanswered.

Surprisingly; there are allegations including that the appellant is maintaining the child born from the couple but the records do not

show if such assertions are true by at least having some comments or rather opinion from the respondent on record. Further, it is not on record as to where the respondent currently lives with her daughter born from their marriage though stated that the couple separated some three (3) years prior to the Petition for divorce.

Above all, though the 1<sup>st</sup> appellate Court ordered the matrimonial house to belong to the respondent herein, yet; the issues of the other properties like the whereabouts of the money held in bank, the said Land Cruiser, the tour business to mention some were not accounted for or rather distributed.

Additionally; though the value of the matrimonial house was not stated on record, yet; apportioning the respondent a sum total of Tshs. 5,500,000/= as her entitlement for the jointly acquired matrimonial house by the trial Court was and or is unfair because even if the respondent's contribution in acquiring the said house was that much at the material time in acquiring that property, still; she could not be apportioned that sum as what matters in division should also be the market price at the time of ordering division that the respondent could also acquire a property for her shelter. Currently; Tshs. 5,500,000/= is insufficient to acquire a small scale plot at a decent area leave alone raising a building. No party should be a victim of circumstances and stereotype. One also may pose to ask if the appellant could acknowledge accepting

the said Tshs. 5,500,000/= from the respondent leaving the said respondent with the house.

Reasons wherefore; unless all the above issues are made clear through proof, the ends of justice as far as the rights of the parties are concerned will definitely remain at a crossroad thus resulting into miscarriage of justice the state of affairs which this Court is not ready to rest a hand in blessing.

From the above; the appeal has merits though from a different angle and it is thus partly allowed. Reasons wherefore; this Court orders for the matter to be heard *de novo* before another trial Magistrate with competent Jurisdiction to try the same as far as the issues of acquisition, disposition and division of the jointly acquired matrimonial properties are concerned thus coming up with a rational and just distribution of the jointly acquired matrimonial properties in the interest of justice with orders for the respondent to stay in the matrimonial house with her daughter one SANI SALEHE pending final determination of the matter which to this Court, will be paramount interest of the child who has found herself at the middle and thus a victim of the misunderstanding of her beloved parents.

Likewise; this Court further orders for whoever is in possession of any of the jointly acquired properties to maintain *status quo* of the said properties until final determination of the matter. Trial Courts are again enjoined to make proper the proceedings of the Court by putting into record what exactly take place in Court that whoever

goes through the Court record may manifestly sense justice not only to have been done but also seen to have been done. From the above circumstances, parties are ordered to bear their own costs.

Order accordingly.

**(SGD)**

**A.C. NYERERE**

**JUDGE**

**18/10/2012**

Judgment delivered in chambers this 18<sup>th</sup> day of October, 2012 in presence of Appellant and his Counsel Mrs. Shakale and in presence of Respondent and in the absence of her Advocate Mrs. Elizabeth Minde

**(SGD)**

**A.C. NYERERE**

**JUDGE**

**18/10/2012**

I hereby certify this to be a true copy of the original.

  
**DISTRICT REGISTRAR**  
**ARUSHA**

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**Dated this 18 day of 10 2012**