IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

PC.CIVIL APPEAL NO.04 OF 2017

(Appeal From the decision of the Resident Magistrate Court of Babati Matrimonial Appeal No 5/2016 Original from Matrimonial cause No 2/2016 of Magugu Primary court)

SCOLASTICA STANSLAUS .....APPELLANT

VERSUS

BOSCO MAIKO ..... RESPONDENT

JUDGMENT

DR. OPIYO, J.

The appellant SCOLASTICA STANSLAUS has been aggrieved by the decision of the District Court of Babati in Civil Appeal No 04 of 2017 he has preferred her second appeal to this court. The brief facts of the matter were that, the appellant and respondents were husband and wife who started living together in 2004 and in 2007 they officially got married. During the subsistence of their marriage they were blessed with two issues and successfully acquired joint properties which are two houses, one finished and another one unfinished. Two plots (shamba) and various domestic utensils (household items) both are situated at Minjingu village where they lived. The fact goes that, the couple was living in harmony till in 2008 when family quarrels began. The same were tried to be resolved in family level in vain. In 2016 the appellant filed matrimonial cause before Magugu primary court praying for divorce and division of matrimonial properties. The trial court was satisfied that the marriage was broken down

irreparably and proceeded to grant divorce and declared no right to division of matrimonial properties to the appellant.

The appellant was aggrieved with the trial court's decision, she preferred her first appeal to the District Court of Babati which upheld the trial court's decision. Still aggrieved, the appellant preferred the second appeal to this court on the following grounds:-

1. That the honourable Resident Magistrate erred in fact and law for holding the decision of Magugu Primary Court which was entered in favour of respondent that the appellant is not entitled to matrimonial assets acquired by joint efforts.

2. That, the Honourable Resident Magistrate erred in fact and law for not considering the parties were married for ten years and they acquired the joint properties which are results of joint efforts which should be divided between the them.

3. That, the honourable Resident Magistrate erred in fact and law by entering the judgment in favour of the respondent based unproven by the respondent that the appellant failed to run the family shop, thus she had already taken her share of matrimonial assets beforehand.

4. That the honourable Resident Magistrate erred in fact and law awarding the custody of children to the respondent without following the right procedures of obtaining the will of the children themselves choose to whom they wish to remain with among the parties.

Before me the parties appeared in person unrepresented, and the appellant prayed for the appeal to be disposed of by way of written submission. Since there was no objection from the respondent, the court ordered the hearing of the appeal to proceed by way of written submission.

In her written submission, appellant submitted jointly on 1st and 2nd as they are based on appellant's denial for a share in matrimonial assets. She argued that despite the fact that the appellant and respondent lived together for more than 10years as wife and husband, but the lower courts left the appellant empty handed. She continued to submit that, it is undisputed fact that the appellant and the respondent herein had acquired two houses, two plots, house hold items and maintained or developed a medical shop through their joint efforts as per the evidence of both sides.

It was the appellant's further submission that, though the fact and the evidence are clear but the trial court and first appellate court decided the case on the basis of hearsay evidence, where the respondents alleged that some house hold items were in possession of the appellant while she was schooling in Arusha and that she was the one who caused the breakdown of their marriage leading to denying her a share in matrimonial assets acquired jointly. She went on submitting that, it is the position of the law and case laws that, the properties acquired jointly as matrimonial should be divided among the couples upon the marriage being dissolved. She referred to the case of **Robert Aranjo Vs Zena Mwijuma** (1984) where it was held that;

"(i) Section 114 of the Law of Marriage Act, 1971 does not make a distinction for the purpose of division of matrimonial assets between the innocent and guilty party.

(ii) There is no provision in the Law of Marriage Act, 1971 requiring the court to consider to what extent a party has contributed to the breakdown of the marriage for purposes of division of matrimonial assets"

Therefore in the basis of the above authority, she argued that the parliament did not aim to deny either party the right to division of matrimonial properties acquired jointly.

Submitting in respect of the third ground of appeal, it is herargument that, there was no proof of evidence as to what quantum amount did the appellant lost in running the family shop which could amount to be her share to the matrimonial assets. Further, there is no evidence be documentary warranting holding that whatever losses incurred in family business or looseness in her character would disentitle the appellant to her share in the matrimonial assets acquired jointly. She supported her argument by refereeing this court to the case of **Omari Chikamba Vs Fatuma Mohamed Malunga** (1989) TLR 39 TLR 39 , where the court in deciding for the issue of looseness and immoral character it was held inter alia that;

"(i) N/A

(ii) N/A

(iii) Although the evidence in this case shows that respondent was loose and immoral character both Islamic law and section 114 (2) (a) of the Law of Marriage Act, 1971 provided that a divorced woman is entitled to, and does not forfeit her share, in the division of matrimonial property because immoral or loose character.

(iv) Misconduct by a spouse touching to the management of matrimonial property is a relevant factor when the issue of division of matrimonial property upon dissolution of marriage arises. The District Court had rightly awarded the respondent one house out of three.

She went on submitting that, from the circumstances of this case there was no proof at all of the alleged mismanagement on the part of the appellant, but the trial and the first appellate court denied the appellant her matrimonial properties with unfounded reasons.

On the fourth ground of appeal, she submitted that, it is based on the custody of children, where both the lower courts placed the custody to the respondent without their expressed willingness. In the case of **Mariam Tumbo Vs Harold Tumbo** (1983) TLR 293 on the issue of welfare of the children the court held that;

"In the matter of custody the welfare of the infant is of paramount consideration, but where the infant is of an age to express an independent opinion, the court is obliged to have regarded to his or her wishes"

Thus, in the bases of the above authority it was her submission that, the trial court did not comply with principle established by the case above while it was aware that, the children are of the age to express themselves as to whom they wished to stay with and first appellate court failed to evaluate and decided this issue not on the basis of the said principle.

Opposing the appeal, it was the respondent's submission on the first and second grounds of appeal that both the trial court and the first Appellate Court was correct to deny the Appellant share in matrimonial assets because the evidence were correctly evaluated by both court and Respondent managed to prove that the Appellant has no share in the matrimonial properties on the fact that during the subsistence of marriage she mismanaged part of the matrimonial properties. Not only that, but the Appellant also had used the jointly acquired money for schooling and she never returned the benefits home, rather she came with conflicts to her family ending in divorce.

The respondent went on submitting that, since the welfare of the family is an essential component of the economic activities of a family, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family properties. That, the Appellant failed to consider such and misused family properties with no sense that respondent had even sacrificed his own career for matrimonial life, supported her education, maintained the family and took custody of children all along. She argued that, in the circumstances the Appellant had used what could have been her contribution for schooling as never return the benefits of the education on which family money was used to her

family. He referred this court to the decision of the Court of Appeal in the case of **Bi Hawa Mohamed v Ally Seif [1983]T.L.R 32. in Nyalali C.J.**(as he then was) speaking wisely through the Court of Appeal of Tanzania held inter alia that:

> *"Where a spouse commits a matrimonial mis-conduct which reduced to nothing here contribution towards the welfare of the family and consequential acquisition of matrimonial or family assets she or he would not be entitled to a share in the property"*

It was his further submission that, based on the principle laid down in the above cases, failure by the appellant to act with due diligence on economic welfare of the family and matrimonial life and failure to return the benefits of her education to the family on which family money was used, she cannot come before this court crying to have her share in the properties. Therefore the 1st and 2nd ground of appeal on distribution of matrimonial assets should be dismissed for lack of merits.

Responding to the 3rd ground of appeal by the Appellant, it was the respondent's submission that, there is ample evidence during trial that the appellant failed to run the family shop due to mismanagement of the family properties. That, the Appellant herself never denied the existence of this and that it was closed for her failure to run the same. He argued that, that shop was also a part of family properties which the appellant mismanage and therefore caused loss to the family and therefore the Court was correct and fair to consider the loss caused by the Appellant to be her share to the matrimonial assets acquired jointly.

Submitting in respect of appellant's fourth ground of appeal in respect of custody of the children, it was the respondents submission that, the Appellant has intentionally declined to accept the fact that there is no problem concerning the custody of their children, who are in safe hand of their reasonable father. That is because the Respondent has been taking good care of them up to now. He argued that, it is clear from the records that the children were under the custody of the Respondent when the Appellant was schooling and even after the quarrel started up to now and they are happy to be in the custody of the Respondent. Also, from the records available, the 1st appellate court and the trial court were right to consider that custody of the children be in the respondent's hand. It was his submission further that, the assertion that the lower court and 1st appellate court did not consider the wishes of the children as to where and with which parent they wished to stay with is an afterthought and it has no base to stand on. The evidence available in records shows that the children are comfortable and confident to stay with the Respondent, their caring father. Therefore, the Appellant's allegations are to be considered baseless, he asserts.

I have taken due consideration of the submission filed by both parties. From what is on record and gist of the arguments in this appeal, he main issues in this appeal are:

i) Whether the properties were matrimonial properties.

ii) If the answer to the first issue is on the affirmative, then whether the said properties were subject to division between the parties as per section 114 (2) (b) of the Law of Marriage Act. In other words, whether the appellant is entitled to a share in matrimonial assets

iii) Whether the lower courts were rights in placing full custody of the children in the hands of the respondent.

Starting with the first issue as to whether the properties were matrimonial, there is evidence from the record that, parties started to cohabit in the year 2004 and then they officially got married on 2007. They were blessed with two issues. They lived happily together for all those years before the quarrels started in 2008 which resulted in the filing of the petition for divorce and division of matrimonial properties in 2016. From the trial court record there is evidence that the parties had various business as the source of their income, they had pharmacy which both of them were working in shifts as a result they were able to acquire the properties which are two houses, one unfinished, two plots and different households utensils. It is also on record that, the appellant had contributed to the acquisition of the said properties for the 10 years of the subsistence of their marriage. Therefore, there is no doubt that the properties were acquired by joint efforts of the parties; the first issue is answered in the affirmative.

I will now deal with the second issue which is whether the properties were subject to division between the parties as per the provision of section 114 (2) (b) of LMA or whether the appellant was entitled to a share in the matrimonial properties. The above section provides that;

"In exercising the power conferred by subsection (1), the courts shall have regard-

(a) N/A

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

Applying the principle above to the case at hand, there is evidence on record on the extent of the appellant's contribution towards the acquiring of the said properties. There was contribution in terms of her efforts as a wife in all those 10 years as well as the work she was doing at the pharmacy which was their main source of income. It is trite law that the properties which have been jointly acquired by couples shall be equally divided between the couples upon divorce depending on the extent of contribution.

Although spouse in marriage life are at liberty to own properties in their own names as per provision of section 58 of the LMA which reads:

> *"Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property"*

But, legality of ownership of any property under S.58 of LMA should only subsist if at all the proceeds in acquiring such properties did not emanate from efforts of the other spouse. This means that, none of the parties can claim ownership of a property that was acquired during subsistence of their marriage, if the other spouse contributed his or her efforts on acquiring the said properties. In the case of **MARIAM TUMBO vs. HAROLD TUMBO [1983] T.L.R 293**, the High Court of Tanzania held that:-

"(vi) in accordance with s. 114(2)(b) of the Law of Marriage Act, 1971, the court is required in exercising its power of division of assets ***to have regard to the extent of contributions made by each party in money, property or work towards the acquiring of the assets; ...****".[emphasis supplied]*

In the case at hand, there is evidence showing how the appellant had contributed in acquiring two houses, two plots as well as household utensils. Therefore since the couple acquired the properties during the subsistence of their marriage by their joint effort then the appellant is entitled to the share depending on her contribution, leaving her empty handed is a total injustice to her as she deserved something for her sweat for all those years. The law is very clear that wife's performance of domestic activities amounts to contribution toward acquisition of matrimonial properties, in the matter at hand the appellant was performing both tasks, work on shifts at the pharmacy as well as performing her domestic duties as a wife which was to look after the house, welfare of the children apart from other household chores like cooking, washing the respondents cloths which enabled respondent to live in peace and run the business prosperously. Since the properties were jointly acquired by the efforts of the parties then the appellant is entitled to share, no matter the circumstances.

That being the case, even Respondent's allegation that, he opened the business for the appellant but she failed to maintain the same therefore the loss she encured should be her share of matrimonial properties cannot stand on her way. There was no proof at the trial court as to the quantum

amount of loss which the appellant caused, to be calculated as her share for all her efforts for more than 10 years.

Furthermore, even the issue that the appellant was taken to school using the family income and she never returned the benefit to the family cannot disentitle her to the share in the matrimonial assets in question. The record shows that the appellant was attending the evening classes known as QT, the issue is, does the QT classes school fees for two years enough to be appellant's share to the matrimonial assets acquired for more than 10 years of their marriage. In my considered view this cannot be true, after all when the respondent decided to take his former wife to school, it should have been out of love and affection and there was no agreement that incase she fails to perform in school what was spent in taking her to school will constitute her share in matrimonial assets. My take is that, this was a mere afterthought by the respondent after the marriage broke down, no wonder that is the reason he did not calculate the amount spent in taking her to school during trial.

Having said so, I am of the settled opinion that, the appellant is entitled to a share of the matrimonial properties jointly acquired, in that sense I order the division of matrimonial property in the ratio of 30 by 70 percent to the appellant and respondent respectively.

On the last issue, as to the custody of children, it is always the best interest of the children which is of paramount when the court consider among other factors in granting the custody of the children. The records show the two issues of marriage have always been under the custody of the respondent. This includes the period the appellant had been to school. No any concern was raised on their upkeep. In the circumstances, I find no

reason to disturb this course of living for the two innocent children. I am therefore unwilling to fault the two courts bellow in their finding that the custody of the children remains with the respondent. This is because, I am also convinced that the respondent is in a better position to take good care of them and continue smoothly in providing them with the basic needs such as food, clothing, education, healthcare, to mention a few as he has always done. However, since the children belongs to both parents, I also order that the mother, appellant herein shall have full access to them any time need be and circumstances allow. The children shall be free to visit and stay with the appellant during school vacations and any other time convenience avails a chance for that.

That being said, the appeal is allowed to the extent explained above. From the circumstances of this case, I make no order as to costs.

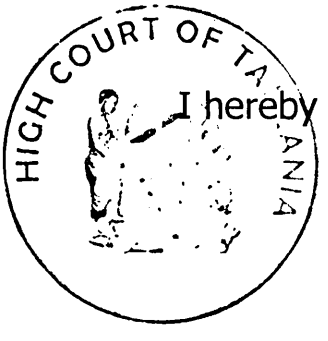
Ordered accordingly,

(Sgd)

DR.M.OPIYO,

JUDGE

19/1/2018



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

A.K. RUMISHA

DEPUTY REGISTRAR

ARUSHA