

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 56 OF 2017

IRENE SHAO..... APPELLANT

VS

WILSON NYIGE RESPONDENT

7/5/2018 & 24/5/2018

JUDGMENT

I.P.KITUSI,J.

The respondent Irine Shao petitioned for divorce, division of matrimonial assets, custody of issues of marriage and maintenance, before Kibaha District court. The basis for the petition was alleged cruelty by the appellant Wilson Nyinge with whom she had celebrated a Christian marriage in May 2010. The alleged cruelty was in a form of abusive language, refusal to provide for the wife and children, buttery, adultery and denial of conjugal right.

The appellant disputed the claims by the respondent as regards the cause of the misunderstanding and he accused her of having an affair with a man he was working with.

As regards division of jointly acquired assets the respondent had listed two main assets as being a house at Kibaha kwa Mfipa area within Kibaha District and a Plot of land measuring one acre at the same area. The appellant's response was that the house is not a jointly

acquired asset because he purchased from his salary the Plot of land on which it stands and he constructed it by using funds he got by a bank loan. The appellant averred that the one acre piece of land belongs to the two issues of marriage for he bought it for them.

For the petitioner three witnesses Emmanuel Skelo Mwambilikile (Pw2) Queen Mgoda (Pw3) and Julieth Lasson (PW4) came to support her case. The appellant's case was supported by Peter Henry Masawe (Dw2) Rudovick Mboka (DW3) James Mechod Rugaimukamu (DW4) and Ally Mohamed Mnyukiwa (DW5). At the end of the trial the District Court, Hon. Massati, RM, concluded that the marriage was broken down beyond repair and ordered division of matrimonial assets by giving 60% of all to the appellant and 40% to the respondent. She also made an order placing each of the two children in the custody of the parties, that is Mercy to be under the respondent and Junior to be under the appellant.

The evidence on which the trial court acted was that the appellant married the respondent when she was 14 years immediately after she had finished Primary School. It started by a cohabitation in 2008 and formalized by a Christian marriage in 2010. Pw3, who is the respondent's grandmother is the one who was living with her when she completed Primary School and immediately discovered that the girl was pregnant.

The respondent testified that when her relative discovered that she was pregnant they and appellant's relatives forced him to marry

her. According to the respondent, life was merry for the first two years but thereafter the appellant took to insulting her and telling her that she was not his choice and that he only married her because he was forced to. The marriage was however blessed with two children Junior aged 6 $\frac{1}{2}$ years and Mercy, 3 $\frac{1}{2}$ years. She stated that she petitioned for divorce because she could no longer stand the appellants behavior of insulting and physical assaulting her.

Respondent's story supported by Pw2 his uncle and Pw3 is that at one time in December 2014 the appellant drove her out of the matrimonial home and she went back to her parents. When the appellant visited at a subsequent date he did not offer an olive leaf for her to go back but only demanded his children back. On another date the appellant a trained soldier with Tanzania People's Defence Force (TPDF) threatened to kill her, a version supported by Pw4 who overheard him threatening the respondent that he is trained to kill not to caress. (Sijafundishwa kushika, nimefundishwa kuua).

The appellant did not offer any rebuttal to the allegation that he was assaulting his wife but accused her of extra marital affairs with three other men. In the final submissions that were filed by Mr. Mulungwa learned advocate for the appellant he had invited the trial court not to grant the orders of divorce for it was not in the interest of justice and the issues of marriage.

However in a well-reasoned and elaborate judgment the learned Resident Magistrate concluded that the marriage was in tatters and

could not be repaired. This appeal does not seek to challenge that decision and I do not see how the learned magistrate could be faulted on it. The appeal seeks to challenge the orders as to division of matrimonial assets, custody of the children and maintenance.

What was evidence of the parties on these issues? The appellant's evidence was that the jointly acquired matrimonial assets were a house at kwa Mfipa area, a Plot at kwa Mfipa Galagaza and household equipment like one sofa set, a refrigerator, and a Television set. She further testified that she was not an idle house wife, for she was engaged in money generating business and named liquid soap manufacturing as among them. She said she was financially in a position to contribute directly to the construction of the house and specifically stated that she purchased bricks and participated in the finishing. According to the appellant, she contributed 50% towards the acquisition for the house which was built between 2008 and 2009. She stated that she contributed 50% towards the acquisition of the undeveloped Plot and the house hold equipment too.

As regards the issues of the marriage, the appellant testified that they were two, namely Junior aged 6 $\frac{1}{2}$ years and Mercy aged 3 $\frac{1}{2}$, born in 2009 and 2013 respectively. She claimed custody of the children until they each reach the age of 14 years at least and prayed for an order of maintenance by payment of education and medical bills.

Appellant's testimony was supported by P3 who said she is the one who taught her how to manufacture liquid soap and that she

was aware of appellant's earnings from her business before and after marriage. P3 was also aware of the appellant's contribution in the acquisition of the assets.

On his part the respondent testified that he acquired the house and the Plot during the subsistence of the marriage but they were a result of his sole efforts. He said that he obtained a loan from National Microfinance Bank and used it to build the house and purchase the Plot from one Vetalis for shs500,000/=. When Cross examined by the Petitioner, (appellant) the respondent admitted that she is entitled to a share of the house because it was built when the marriage subsisted. One Ally Mohamed Minyukwa (DW5) was a witness to the sale transaction of the Plot of land which the respondent Purchased from Vetalis for shs 950,000/=.

The trial court was satisfied that the house was acquired jointly by the parties but none of them tendered evidence to prove how much each contributed. The learned Resident Magistrate took into account that the respondent was a salaried employee and had obtained a loan which he utilized in the construction of the house. She also took into account that contribution may be direct or indirect. Considering the provision of section 114 of the Law of Marriage Act and the celebrated Case of **Bi Hawa Mohamed N. Ally Seif** [1983] TLR 32 the learned Resident Magistrate awarded the appellant 40% of the value of the house and the remaining 60% to the respondent. It is this order that the appellant seeks to challenge mainly on the basis that the trial court erred in its evaluation of the evidence and/or

omission to require her to provide documentary proof of the loan she had obtained.

As regards custody of the children, the trial court awarded the respondent custody of Junior, taking the view that he was seven years therefore above the age which he must mandatorily be under his mother. The appellant was given custody of Mercy who is below seven years. The appellant challenges this decision too on the ground that the respondent has placed the child in the care of other people.

The respondent raised a Cross – appeal challenging the order of maintenance. He also raised a point of preliminary objection in which he challenges the propriety of filling the appeal directly to this court instead of filling it at the District Court as required by section 80(2) of the Law of Marriage Act.

However when the appeal was called on for hearing the parties who were unrepresented did not address the Preliminary Objection although I had earlier ordered that hearing shall be on both the Preliminary Objection and the appeal. The respondent filed written submissions without a prior order by this court, to that effect. I shall however address the point of law that has been raised because it touches on the jurisdiction of the court.

Section 80(2) of the Law of Marriage Act provide;

*" An appeal to the High court shall be
filed in the Magistrate Court within forty*

*five days of the decision or order against
which the appeal is brought"*

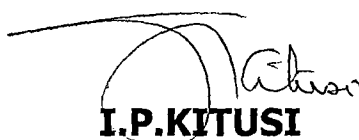
With respect the above provision is capable of only one interpretation and that is that an appeal from a subordinate court in matrimonial proceedings shall be filed in that subordinate court.

This position is also clear in. The Law of Marriage(Matrimonial Proceedings) Rules, GN NO 246 of 1997. Rule 37 (1) which provides;

*" An appeal to the High Court under
section 80 of the Act shall be commenced
by a Memorandum of appeal filed in the
subordinate court which made or passed
the decision, order or decree appealed
against."*

This Rule cross refers to Section 80 of the Law of Marriage Act.

It is therefore clear from both the Law of Marriage Act, Cap 29 and the Law of Marriage (Matrimonial Proceedings) Rules that this appeal has been improperly filed in this court. Accordingly I strike it out with costs .



I.P.KITUSI

JUDGE

24/5/2018