

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 10 OF 2019

(Originating from Kinondoni District Court Matrimonial Cause No. 66 of 2017)

TUWAHA SAMSON MUZE.....APPELLANT

VERSUS

MAIMUNA RAJABU SOKA.....RESPONDENT

JUDGEMENT

Date of Last Order: 4/10/2019

Date of Judgment: 21/10/2019

MLYAMBINA, J.

The Appellant and the Respondent contracted a Civil Marriage sometimes in 2009. In their marriage, they were blessed with two issues namely; Tain Tuwaha Muze (aged 6) and Trisha Tuwaha Muze (aged 4). The couple acquired one motor vehicle, make Toyota carina with Registration No. T617 CBN and two plots of land. In the year 2017, the Appellant petitioned for the decree of divorce against the Respondent, custody of the issues of marriage, costs and any other relief (s).

In reply, the Respondent objected the petition and filed a cross appeal praying for the custody and maintenance of the issues of the marriage, equal division of the matrimonial assets including a house at Mbezi Luis on Plot No. 320, costs and any other relief (s). Upon conclusive trial, the court granted the Appellant's petition with the following orders:

- i. Dissolution of marriage and issuance of the decree of divorce to the parties.*
- ii. The Respondent to take custody of the two of marriage.*
- iii. The Petitioner should be responsible for the maintenance of Tshs. 400,000/= monthly for the two issues of marriage together with their education and medical costs.*
- iv. The Petitioner is allowed visitation to the children during noon hours except during emergencies like sickness.*
- v. The house at Mbezi Louis declared a matrimonial house and matrimonial home of both parties.*
- vi. Distribution of matrimonial assets between the Petitioner and the Respondent on 50/50 sharing after valuation by authorized Government Valuer.*
- vii. Payment by the Petitioner of Tshs. 5,600,000.00 at the rate of Tshs 400,000.000 a month to the Respondent as compensation for her maintenance and that of the children from the date the Respondent and two children were chased from matrimonial home.*
- viii. The Respondent to take all her personal effects.*
- ix. Each party to bear his/her own costs.*

The Appellant being aggrieved by the afore decision of the Kinondoni District Court Matrimonial Cause no. 77 of 2017 lodged this appeal containing six grounds, namely:

1. ***That,*** the Trial Magistrate erred in law and fact for failure to evaluate the evidence on record that led to erroneous decision.

2. **That**, the Trial Magistrate erred in law and fact and failed to consider the evidence of PW1 and PW5 and tendered exhibits and ruled that a house situated at Mbezi Louis is a matrimonial asset subject to distribution.
3. **That**, the Trial Magistrate erred in law and fact in deciding that the Appellant herein should pay maintenance of TZS 400,000/= without considering his income and other family to maintain.
4. **That**, the Trial Magistrate erred in law and fact in deciding for visitation of children only.
5. **That**, the Trial Magistrate erred in law and fact when ordered for payment of compensation of TZS 5,600,000/=
6. **That**, the Trial Magistrate erred in law and fact in admitting additional document filed by the Respondent.

Wherefore, the Appellant prayed that the appeal be allowed in its entirety with costs.

The appeal has been argued by way of written submissions. The Appellant enjoyed the legal service of Idd Msawanga Advocate. The Respondent was legally represented by Fulgence T. Massawe advocate from Legal and Human Rights Centre Kinondoni.

In his written submission to support the appeal, the Appellant opted to drop the first ground of appeal. On the second ground of appeal, it was argued by the Appellant *inter alia* that the Trial Magistrate did not consider the testimony of PW1, PW2 and PW5 on record.

According to the Appellant, PW1 (at page 6) testified that he knew the Appellant since 1999 and in 2008 he was living together with the Appellant at Mikocheni. By that time, the Appellant who was a student at IFM had not married. The Respondent was a girl friend to the Appellant.

The Appellant submitted that the evidence of PW1 was in line with that of PW5 at page 20 of the typed proceedings. The submission of the Appellant on the second ground goes further to state that PW5 testified further that the couple contracted marriage in 2009. Before marriage he was residing at Mikocheni in 2009 and that he bought the disputed plot on behalf of PW2 in 2007.

It was the Respondent submission that, the evidence on record shows further that construction of the disputed house started in 2007 and completed in 2009 as per the testimony of PW2 and PW5. Thus, by that time the Appellant had not contracted marriage with the Respondent.

It was therefore the submission of the Appellant that the Mbezi Louis house was not acquired during marriage of the parties herein through their joint efforts.

The Appellant went on to submit that the Respondent lived at Mbezi Louis prior contracting marriage. Thus, they lived separately. Further, the Appellant asserted that, in event this Court finds that the house in question is a matrimonial one, the same had not been substantially improved during marriage and by joint efforts of the parties in terms of **Section 114 (3) of the Marriage Act, 1971**. Two reasons were advanced by the Appellant on this point. **One**, according to testimony of PW2 and PW5 at page 14 and 23

of the typed proceedings an improvement done was digging a well some time in 2013. **Two**, exhibits DE3 at page 49 of the typed proceedings which are receipts purported to show that some construction materials were bought in 2011 for improvement of the house in question is nothing but an afterthought brought in after the Appellant had closed his case and contradict the testimony by PW2 and PW5 that the house was completed in 2009. Exhibit DE-7 are of the year 2013 and 2016. The salary slips show that the Respondent had loan-1 from TANESCO SACCOS. In view of the Appellant, this is true because prior 2011 the Respondent had no any income to contribute and had not been employed by TANESCO.

The Respondent in reply told the court, at the outset that the Appellant from the beginning of this matter is not interested with marriage or the issues of the marriage the Appellant's case from the beginning is interested on the matrimonial assets especially the house at Mbezi Louis.

It was the Respondent's reply on ground number two that, it was clear from evidence that the parties started cohabiting in year 2005. The whole evidence tendered in contrary was meant to defeat justice on the part of the Respondent. Thus, even PW1 contradicted himself by admitting that the parties herein lived together only weekend.

DW2 testified that he sold the land to the parties and were neighbors. The Local Government Leader witnessed that the plot was developed by the couple as it then was. That, there is nowhere in the sale agreement showing that the land was bought by the Appellant on behalf of PW2.

The Respondent went on to reply that exhibit DE9 and DE10 show clearly that the evidence of PW2 was fraudulent one. The document prepared were forged ones and witnessed by the lawyer who was not known by the Registrar of The High Court who is the custodian of the roll of the advocates.

It was replied further that the Respondent demonstrated how they acquired the engineer who constructed the house and tendered the house plan which they used at the time of construction. Thus, even if one takes the worst-case scenario that parties were not married under ***Section 11 (3) of the Marriage Act Cap 29 (R. E. 2018)*** the contribution made by the Respondent to the property is substantial to amount to the contribution in acquisition of the Matrimonial property. It is the Respondent who did the wiring and electricity connection in the house and even drilling the clean water well.

I have had time to go through the original records. I noted, as observed by the Trial Court, PW3, PW4, DW1 and DW2 shared testimony that the suit plot at Mbezi Louis was acquired by the Appellant himself. DW2 was the seller and PW5 was the buyer.

Most important, the evidence of the vendor was clear that the plot at Mbezi Louis was sold by him to the parties herein. It therefore, follows that, the suit plot at Mbezi Louis was acquired by the parties during cohabitation and it was developed during marriage time. Exhibit DE4, DE5 and DE6 vividly proves that the Respondent contributed largely towards developing the property at Mbezi Louis.

It is the requirement of law under **Section 114 (1) of the Law of Marriage Act** for the Court to order division of any asset which was acquired by the joint effort of the parties during subsistence of the marriage or as provided under Subsection (3) where the asset though acquired before the marriage but was improved substantially by one of the parties during the marriage or was improved through the joint effort of the parties as such, the assets which were in the existence before the marriage but have substantially been improved by one or both of the parties is also a matrimonial asset.

Even if, I may agree that the Respondent after marriage was a house wife, she assisted the Appellant in doing what he did outside by performing her home duties as a wife of the Appellant. In **Bi Hawa Mohamed v. Ally Seif** (1983) TLR 10 the Court of Appeal of Tanzania recognized domestic services of a wife who is not working in the formal business or employment sectors as part of her contribution.

On the third ground, I have noted the Appellant brought new evidence on appeal as regards his net salary. To that effect, the Appellant faulted the decision of the Trial Court for awarding Tshs 200,000/= for each issue monthly as the cost for maintenance.

The Respondent in reply told the Court that the Court took into consideration of the welfare of the child and their mode of life. Further, the Appellant is the accountant at the multinational company, Worldwide Movers Ltd as the Director of Finance and a Shareholder. The Respondent cited the requirement of **Section 44 of the Law of the Child Act Cap 13 (R.E**

2018) which lists matters to be considered by the Court when making a maintenance order. These are:

- a) The income and wealth of both parents of the child or of the person legally liable to maintain the child.
- b) Any impairment of the earning capacity of the person with a duty to maintain the child.
- c) The financial responsibility of the person with respect to the maintenance of other children.
- d) The cost of living in the area where the child is resident and
- e) The rights of the child under this Act.

In rejoinder the Appellant never denied about his employment status. Taking into consideration of the same reason and the undenied life style of the issues, I lack a good reason to fault the decision of the Trial Court.

As regards the fourth ground, I agree with the Appellant that each parent is entitled to stay with the issues for half of the holiday period. However, the issues of Religion have to be the choice of the issue.

As far as the fifth ground of appeal is concerned, the same has been answered when dealing with the third ground. Though it is true the Respondent did not ask for compensation, the other relief remedy entitled the Court to order such compensation because there is no a single day the Appellant ceased to be the father of the issues. No one could take care of them while the Appellant is alive.

On the last ground, I find the Appellant if had genuine reasons so to do should have objected before the Trial Court. The records reveal that the

procedure of filing list of additional documents and admitting the same at the later stage under **Order XIII (2) of the Civil Procedure Code** was complied with the Appellant had opportunity to cross examine on such documents, bringing that point at this stage is an afterthought.

In the end result I find the appeal is devoid of merits save for one ground of visitation which is modified to the effect that; the Petitioner (the Appellant herein) is allowed to make visitation to the issues during noon hours except during emergencies like sickness. Each of the parties herein are entitled to stay with the issues for half of the holiday period. Each party to bear his/her own costs. Order accordingly.



Y. J. MLYAMBINA
JUDGE
21/10/2019

Judgment pronounced and dated this 21st October, 2019 in the presence of counsel Iddi Msawanga for the Appellant and Onesmo Kinawali for the Respondent.



Y. J. MLYAMBINA
JUDGE
21/10/2019