IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 142 OF 2019

(Arising from the Judgment Ilala District Court in Civil Appeal No. 40 of 2017 dated 23rd May, 2019 before Hon. F. MUJAYA, RM)

ALI ABDULRAHMAN BWANDO ..... APPELLANT

VERSUS

MARIAM YUSUPH MAGANGA ..... RESPONDENT

JUDGMENT

2nd June 2020 & 30th June, 2020.

E. E. KAKOLAKI J

This is an appeal in respect of the decision of Ilala District Court in Matrimonial Cause No. 40 of 2017 which allegedly to a large part was entered in favour of the respondent. The appellant is discontented hence this appeal equipped with four grounds of appeal as registered hereunder:

1. That the trial magistrate erred in law and fact by proceeding to issue order of custody of children without considering the age of the issue.
2. That, the trial Magistrate erred in law and fact by ordering the division of matrimonial property in fair percentage between parties without considering the contribution of each party.
3. That, the trial Magistrate misdirected herself by pronouncing the matrimonial assets biasely and without reasoning.

4. That, the trial Magistrate erred both in law and fact by failing to take and consider the issue of opinion as to the custody of the child.

Briefly the facts that gave rise to this appeal may be narrated as follows. The respondent who had contracted marriage under Islamic rites in 2007 with the appellant, successfully petitioned to the trial court for three reliefs of divorce, division of matrimonial properties and custody and maintenance of the two issues Majid Ally aged 9 years old and Khayrat Ally aged 3 years old, who were born during subsistence of the marriage, before it went into shambles. In division of matrimonial assets it was ordered that the respondent is entitled to 75% of the matrimonial house located at Kivule Majohe within Ilala Municipality and the respondent is entitled to 25%. Equal distribution of value of the assets to parties was ordered in respect of the unsurveyed piece of land at Kivule in Ilala Municipality and unsurveyed farm measured at approximately 6 acres located at Saadan Bagamoyo District. The farm at Masaki in Kisarawe District with 4 acres, two motor vehicles with Reg. No. T846 AGP make Toyota Corona and T. 561 CQA make Corolla Spacio were declared private properties of the respondent and awarded to her. Lastly the appellant was ordered to pay maintenance allowance to the tune of Tshs. 100,000/= per month and provide for education expenses and medical care for the two issues from the judgment date. Aggrieved with part of the trial court's decision he is before this court registering his dissatisfaction in four grounds.

The appellant in this appeal is represented by Mr. Mnyira Mabdallah, learned advocate whereas the respondent is enjoying the services of Mr. M.R Kiondo learned advocate. When the matter came for hearing both parties opted to proceed by way of written submission and the filing order

was complied with save for the appellant who waived his right of filing a rejoinder submission.

In arguing the appeal Mr. Mabdallah seems to have combined the first and fourth ground and argue them jointly and the second and third separately. I will consider and determine the grounds one by another. In the first and fourth grounds Mr. Mabdallah submitted that the trial magistrate erred in law to award custody of both children to the respondent in disregard of the provisions of section 125(2)(3) and (4) of the Law of Marriage Act, [Cap. 29 R.E 2019] which he quoted. He said the law provides that where there two or more children in marriage court shall consider welfare of each independently something he submits the trial court failed to do as no reasons were assigned by the court for arriving to the decision it reached. And further that Majid Ally being of 9 years age, without reasons the trial court failed to conduct any test giving option to the said child to choose whom he would wish to live with. Mr. Kiondo for the respondent strongly contested the appellant's submission on the first and fourth grounds and was of the response that the trial court was correct to enter that order after evaluating the evidence and satisfied itself. I think Mr. Mabdallah has a point in this ground. In deciding on the issue of custody of the child court has to consider the best interest of the child and consider welfare of each child independently. The law is coached in mandatory terms under section 125(2) and (4) of the Law of Marriage Act, that before deciding under whose custody should the child be placed court must to consider wishes of the child. To put to light the gist of this point I find it incumbent to quote the said section 125:

> *125-(l) 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*

custody of the respondent. In this mandatory duty of the court which entails getting opinion of the child who is above the age 7 years, I am persuaded by the opinion of my brother Mruma J when considering court's duty on determination of the best interest of the child in the case of **Neema Kulwa Mvanga Versus Samson Rubele Maira**, Civil Appeal No. 1 of 2018, where he had this to say:

> *"Having this in mind courts should proceed to focus on the best interest of the Child and determine the suitable parent to give the custody. In doing this court has to investigate the circumstances around the case so as to establish whether the child has suffered or is likely to suffer any harm if custody is given to mother or father. Court may also consider the age, gender, religious background of the child, parent-child relationship bond, parenting ability, each parent mental, physical and emotional child's health etc."*

How does the court get to know all those above mentioned facts, I am of the opinion that it has to conduct an inquiry that includes getting opinion of the child and/or social welfare officer as provided under section 125(2)(b) and 136(1) of the Law of Marriage Act, [Cap. 29 R.E 2019]. The social welfare officer after making inquiry of all the circumstances surrounding the child shall opine to court for the court to decide on whose custody should the child be placed to. Since in this case this important procedure was skipped by the trial court I hold the view that omission affects part of its decision. These two grounds have merit.

With regard to the second ground, Mr. Mabdallah faulted the trial court for ordering division of matrimonial properties unfairly and without considering the contribution of each party. He questioned on how the trial

magistrate arrived at the decision of awarding the appellant only 25% of the matrimonial house located at Kivule. He had it that the trial magistrate considered the respondent's employment and the so called private business as well as her averment that the appellant was jobless to arrive to the conclusion she reached. That the respondent's testimony was not credible because she told the court that they started construction of the house together and later on changed that she was the one who finished the construction of the house the statements which contradict each other.

Mr. Mabdallah added further that not only that the respondent's evidence was incredible but also defence witnesses' evidence did not support her claims. That PW3 who alleged to have constructed the house did not tender any employment contract to prove his engagement by the respondent. And the evidence of PW2 did not prove that the respondent owned the house by 75 %. With regard to evidence of PW4 and PW5 who testified that the properties were owned by the respondent before marriage including the Kivule plot in which the house in dispute was built, their testimony is contrary to what the respondent (PW1) said that the plot was bought in 2008 during existence of the marriage, he stated. He was of view that what the court ought to have done was to pay regard to the contribution of each party as provided under section 114(2)(b) of the Law of Marriage Act. In support of this argument he cited the case of **Fatuma Mohamed Vs. Said Chikamba** (1988) TRL where the court held:

> *"It should be noted that the party seeking for division of matrimonial property must plead in his/her petition to that effect and must prove in court by adducing evidence to show that he or she contributed to the acquisition of such property".*

He further cited the case of **Charles s/o Manoo Kasare and Another Vs. Apolina** (2003) TLR and submitted that the issue of contribution is a matter of evidence and the party claiming to have contributed has to prove on the balance of probability. In responding to Mr. Mabdallah's submission Mr. Kiondo averred, it is not true that there was contradiction and the respondent's witnesses were incredible. He contended respondent's evidence was heavier than that of the appellant. He supported his contention with the case of **Hemed Said Vs. Mohamed Mbilu** (1984) TLR 113 to the effect that the person whose evidence is heavier than that of the other is the one who must win. On the demeanour of witnesses he said that is the domain of the trial court and the appellate court should not interfere with. In support of this argument he cited the case of **Ally Abdallah Rajab Vs. Saada Abdallah Rajab** (1994) TLR 132. He urged the court to dismiss the ground.

Having paid regard to the submission by both counsels on this ground I am in agreement with Mr. Mabdallah that under section 114(2)(b) of the Law of Marriage Act, the court in exercising its powers of division of matrimonial properties has to pay due regard to the extent of contribution by each party in money, property or work towards acquisition of the property. In his submission Mr. Mabdallah is saying the respondent failed to prove her contribution as her evidence has contradiction and her witnesses have also failed to corroborate her case while others have contradictory evidence. I am not prepared to accept Mr. Mabdallah's submission. From the record the respondent put it clear in her evidence that when contracted marriage with the appellant was employed by Mohamed Enterprises as Sales woman and produced her identity card No. 35 and introductory letter admitted as Exh. 1 collectively. She added that she has a min-supermarket and was earning more than Tshs. 1,000,000/=

per day. When cross examined she consistently maintained ownership of the said min-supermarket. This evidence was never shaken during cross examination of the respondent nor discounted by the appellant when testifying in his defence. What is alleged by Mr. Mabdallah to be a contradiction by the respondent on the time when construction of the disputed house started I find it to be immaterial. According to her evidence they started construction together after buying the plot and that she was the one who finished the house. This evidence of finishing of the house is corroborated by evidence of PW3 who made finishing of the house and stated that it was the respondent who was paying him. That is a proof that she is the one who contributed more than the appellant in the construction of the house. With regard to the proof by PW2 that respondent contributed by 75% it is true that he did not do so and by any stretch of imagination he was not expected to do so. All what he said with regard to the contribution in the said house is that the appellant was jobless at the time of construction the evidence which was not controverted during cross examination of this witness. On the contradiction of PW4 and PW5 it is also not true that PW4 said the plot at Kivule was bought before marriage. According to her evidence the respondent had a plot near the house built at Kivule. It is only PW5 whose evidence on PW1's ownership of Kivule plot before marriage was contradicting that of the respondent (PW1) hence discrediting her testimony on that fact. Even if this witness's evidence is discounted still other witnesses' evidence remains credible to corroborate the respondent's evidence.

Having exhausted on the respondent's evidence the remaining question is, is there enough evidence adduced by the appellant to prove his contribution towards acquisition of the said house? In my opinion the

answer is in negative. Mr. Mabdallah in his submission never attempted to explain the appellant's extent of contribution towards acquisition of the said impugned house. He only concentrated to discredit respondent's evidence forgetting the rule that requires the party who alleges to prove that the facts alleged are in fact existing. See section 110 of the Evidence Act, [Cap. 6 R.E 2019] and proof as per the case of **Charles s/o Manoo Kasare** cited by Mr. Mabdallah. I therefore find no convincing reason to fault the trial magistrate's findings on this ground as she clearly and satisfactorily made analysis of the evidence before arriving to the decision she made. However, it cannot be disputed that the appellant being a husband to the respondent who was busy earning money, his presence, love, care and support at all that time gave her pleasure and energy to keep on going to earn more money as a result the house was completed. He therefore he deserves more than what was awarded to him.

On the third and last ground Mr. Mabdallah is faulting the trial magistrate for misdirecting herself by pronouncing matrimonial assets biasely and without proper reasoning. The said assets are the farm at Kisarawe District and two motor vehicles with Reg. No. T846 AGP make Toyota Corona and T. 561 CQA make Corolla Spacio. Starting with the Kisarawe farm he submitted that the same was pleaded and testified by the appellant DW1 that it was acquired during existence of their marriage. That the respondent failed to adduce evidence on the extent of its acquisition and a proof that it was her private property as none amongst PW2, PW3, PW4 and PW5 testified to have witnessed the sale of the said farm and the court did not assign reasons for not including it in the matrimonial properties. He said the court by not making inquiry on the extent of contribution in acquisition of the said farm contravened the provision of section 114 of the Law of Marriage Act.

On the two motor vehicles Mr. Mabdallah said DW1 mentioned them to be matrimonial assets acquired during existence of their marriage as there was no evidence of the respondent purchasing them alone. So this court has to draw inference that the same were acquired under joint efforts. He relied on the case of **Bi Hawa Mohamed Vs. Ally Sefu** (1983) TLR 32 and **Mohamed Abdallah Vs. Halima Lisangwe** (1988) TRL 197 to support the argument on the right to share the matrimonial assets jointly acquired. He was of the submission therefore that the trail court magistrate lacked basis to deny the appellant shares on those assets. In totality he called this court to allow the appeal. On the respondent's part Mr. Kiondo was very brief that trial court was justified to arrive at that conclusion after evaluating the evidence.

I have considered both parties' submission in this ground. It is Mr. Mabdallah's contention that the farm is a matrimonial asset and was mentioned and testified on by the appellant and that the court did not make an inquiry as to the extent of contribution. Mr. Kiondo says it is not a matrimonial asset. With due respect to Mr. Mabdallah the trial court was not bound to establish the extent of contribution after satisfying itself that it was not a matrimonial property the finding which I concur with. When deciding on this asset the trial magistrate noted that the sale agreement that was tendered by DW1 as exhibit showed that it is the petitioner who bought the farm in 2009, the year which the appellant was jobless. And that under section 60 of the Law of Marriage Act, there is a rebuttable presumption that a property in the name of the husband or wife shall absolutely belong to him or her unless otherwise rebutted. The appellant during the trial did not and in submission before this court has not rebutted that presumption. Further to that the respondent in her evidence during the trial claimed that the plot belonged to her mother the fact

which was not controverted by the appellant. By that evidence the said farm is excluded from the matrimonial properties and I would therefore hold that in this asset the trial magistrate was right in arriving to the finding she made and I have no reason to fault her.

With regard to the two motor vehicles. There is no dispute that the same were bought in the year 2011 and 2013 the period during existence of their marriage. Apart from Motor vehicle with Reg. No. T. 561 CQA make Corolla Spacio bearing names of the respondent in its registration card and the fact that part of the money that bought it came from PW2 there is no any evidence tendered in court to prove that it was intended to be personal property. Since the two motor vehicles were acquired for the purposes of serving the family then they qualify to be matrimonial properties and subject of division. I therefore find that the two motor vehicles are matrimonial properties.

In the circumstances and for the foregoing reasons, I would partly allow the appeal as I hereby do. The decision of Ilala District Court is varied on the percentage of the division made to the house and the motor vehicles. I order that the respondent is entitled and is hereby awarded 65% of the value of the house of Kivule and the appellant is to get 35%. The motor vehicle with Reg. No. T846 AGP make Toyota Corona is awarded to the appellant and T. 561 CQA make Corolla Spacio to the Respondent. With regard to custody of the child Majid Ally I order return of the case file to the trial court for it to comply with section 125(2)(b) and 136(1) of the Law of Marriage Act, [Cap. 29 R.E 2019] before deciding on the custody of the child. I further direct that depending on the outcome of the inquiry the child's rights such as maintenance, education, shelter, health and his wellbeing in general should be considered. The rest of the decision of the

trial court remains undisturbed. This being a matrimonial cause I order no costs.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of June, 2020.

E. E. KAKOLAKI

JUDGE

30/06/2020

Delivered at Dar es Salaam this 30th day of June, 2020 in the absence of both appellant and respondent and in the presence of Ms. **Lulu Masasi**, Court clerk.

Right of appeal explained.

E. E. Kakolaki

JUDGE

30/06/2020