IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 79 OF 2019

JUDITH AUGUSTINO SIMON.....APPELLANT

VERSUS

WILLIAM ISAYA MPINGA.....RESPONDENT

(*Arising from Kibaha District Court in Matrimonial Cause No. 8 of 2018)*

JUDGMENT

Date of last order: 16/03/2020

Date of Judgment: 30/6/2020

S.M. KULITA, J.

The appellant one **JUDITH AUGUSTINO SIMON** dissatisfied with the decision of Kibaha District Court in the Matrimonial Cause No. 8 of 2018 lodged this appeal relying on the following four grounds as mentioned hereunder;

1. That the trial court erred in law and in fact for failing to order division of two matrimonial houses located at Mailimoja area, Kibaha District in Coast region to the parties.

2. That the trial court erred in law and fact for failing to declare that a photo studio business located at Mlandizi area, Kibaha district is a matrimonial property acquired jointly during subsistence of the marriage.
3. That the trial court erred in law and fact for ordering the respondent to compensate the appellant Tsh. 5,000,000/= as her share to the jointly acquired business.
4. That the trial court erred in law and fact for ordering the child named Mecklina William to be under the custody of the respondent without considering the best interest of the said child.

During the hearing of this appeal where the parties preferred to argue by the way of written submission the appellant was represented by the Women's Legal Aid Center while the respondent was represented by Mr. Frank Chundu, Learned Advocate.

The appellant jointly submitted with regard to ground one, two and three of appeal that when determining the division of matrimonial property the court is guided by section 114 of the Law of Marriage Act [Cap 29 RE 2002].

The appellant went on to submit that she has contributed in acquiring the matrimonial properties through her business of selling clothes by injecting the money and supervising the constructions.

The appellant insisted that she proved her contribution towards the acquisition of the matrimonial properties but the trial court did not consider it in its decision. She is of the view that the trial court was unfair when it ordered the appellant to be paid Tanzanian shillings five million as her share towards the acquisition of the matrimonial properties without considering that participated fully in the acquisition of the said properties. To support her argument the appellant cited the case of HAWA MOHAMED V. ALLY SEIF, (1983) TLR 32 and the case of ELIESTER PHILEMON LIPANGAHELA V. DAUD MAKUHUNA, Civil Appeal NO. 139 of 2002, High Court at DSM.

With regard to ground four of appeal, the appellant submitted that when deciding as to whom the child should be custoded, the best interest of the child should be of paramount consideration. The appellant submitted that the 1st born namely Mecklina William being placed to the father (Respondent) was a wrong decision because the child is a girl and would have been well

taken care of while she is with her mother (Appellant) and the fact that the respondent use to travel in most of the times he cannot be in a good position to take care of the said child.

The appellant cited section 125 of the Law of Marriage Act [Cap 29 RE 2002] and the case of CELESTINE KILALA and HALIMA YUSUF V. RESTITUTA CELESTINE KILALA (1980) TLR 76, where she insisted that regardless the fact that the law requires the custody of the child below the age of seven be placed under the mother and where the child is above seven years the welfare of the child should be determined by the court when deciding otherwise.

Further, the appellant submitted that the obligation to maintain the child is on the husband, but the respondent has defaulted his obligation to provide for his child despite the fact that she informed the court that the respondent is self-employed and is capable of providing for the child up to 100,000/=.

The appellant concluded her submission by praying for the appeal to be allowed.

Replying to the appellant's submission, the respondent's learned counsel in respect of ground one, two and three of appeal

submitted that the appellant did not contribute towards acquisition of the houses and the photo studio. He said that properties were acquired before the cohabitation with the appellant and one of the houses was acquired by the Respondent in 2017 while the relationship had already collapsed.

He stated that the appellant failed to prove her contribution towards acquiring the said properties, therefore the claim that Tanzanian shillings 5,000,000/= is minimal cannot stand since the said properties were not acquired by the joint efforts between the appellant and him.

Replying to ground four of appeal, the learned counsel submitted that the appellant herself willfully sent the first child to the appellant to live with him. She further submitted that since he is the one who is responsible for maintaining the child and he has never defaulted the same he prefers to continue living with the said child who is their 1st born. He also submitted that the trial court considered the best interest of the child who has been always under the custody of the respondent even before the appellant petitioned for divorce. Therefore the said ground is unfounded.

The respondent's learned counsel further submitted that the respondent is duly complying with the trial court's order of maintenance of Tanzanian shillings 100,000/= per month.

The respondent's learned counsel concluded for the appeal to be dismissed.

In brief rejoinder the appellant maintained the position that the matrimonial assets were acquired during the subsistence of their cohabitation and share of Tanzanian shillings 5,000,000/= was unfair as the trial court did not consider her contribution when arriving into that decision.

With regard to issue of custody of the child, the appellant maintains the position that it not suitable for a girl child to stay with the respondent. It is her submission that she can take care of both issues.

From the above submissions here is my analysis; starting with ground four of the appeal which relates to the custody of the child; I have gone through the records of the trial court and have noticed that the trial magistrate was of the view that since the child is above the age of seven years it was proper for her to stay with the respondent, I am of the view that the trial magistrate

ought to have considered that since the child was in the position to express herself, the court could be in the position to listen to her opinion as to whether she prefers to stay with her father or mother. Section 125(2) of the Law of Marriage Act states that the child who is above 7 years can opt as to which parent he/she prefers to stay with. Section125 of the Law of Marriage Act [Cap 29 RE 2002] gives powers to court to make order for custody of the infants. The section states;

(1) 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 undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare.

(2) In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant and, subject to this, the court shall have regard to–

(a) the wishes of the parents of the infant;

(b) the wishes of the infant, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong.

(3) There shall be a rebuttable presumption that it is for the good of an infant below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the infant by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

The parties herein submitted that their cohabitation was blessed with two issues, I am of the view that it would be proper if the custody both issues would be placed in their mother/appellant since the said child is a girl by gender, and the fact that the other issue is in the custody of the appellant, it is prudent if both children are placed in the custody of the same parent, appellant.

The respondent's submission that the trial court considered the facts that it is him who is responsible for maintenance and therefore he is entitled custody the 1st born is a misconception as basically the duty to maintain the issue is statutorily directed to the father as per Section 129 of the Law of Marriage Act [Cap 29 RE 2002] no matter with whom the child lives.

On top of that the basic ground to which the court relies when placing the custody of the child is the welfare of the said child as per the provision of section 125 of the Law of Marriage Act cited above. Even the Law of the Child Act, 2009 at Section 39 requires the court to consider the best interest of the child in deciding on a place of custody for the infant child. It makes preference that the infant should stay with his/her mother. The said section 39 states;

> *"(1)* ***The court shall consider the best interest of the child and the importance of a child being with his mother when making an order for custody*** *or access.*
>
> *(2) Subject to subsection (1), the court shall also consider;*
>
> *(a) the rights of the child under section 26;*

(b) ***the age and sex of the child;***

(c) that it is preferable for a child to be with his parents except if his right are persistently being abused by his parents;

(d) the views of the child, if the views have been independently given;

(e) ***) that it is desirable to keep siblings together;***

(f) the need for continuity in the care and control of the child; and

(g) ***any other matter that the court may consider relevant."***

The appellant also raised the issue of Tanzanian shillings 100,000/= per month for maintenance. Section 129 of the Law of Marriage Act places the duty to maintain children to the father as ordered by the trial court. The appellant has raised this issue during the submission and never contested on the amount granted by the trial court. Besides she has not shown how the respondent neglects the duty to maintain, but the important thing

to consider here is that it is the trial court which has mandate to enforce its orders.

As for the issue of division of the matrimonial assets it is undisputable that the Appellant and Respondent are said to have been cohabitated each other sometimes in 2007, it is from that time the presumption of marriage starts to be considered. Therefore, whatever property acquired during the period lying from that time to the date of dissolution of their marriage by court on the 28/3/2019 is regarded as a jointly acquired property so long as there is an element of contribution from both parties. The definition of contribution to the matrimonial assets has been stipulated in the Law of Marriage Act [Cap 29 RE 2002] at section 114(2) which states;

> *"(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the* ***division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.***
>
> *(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.

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts".

The fact that the 2nd property/house was acquired in 2017 during the subsistence of the marriage, before it was dissolved by the court on the 28/3/2019 it is regarded a joint property, hence subject to division for the parties. As for the 1st house of which the appellant found the plot already purchased by the respondent there is a rebuttable presumption that the other spouse also contributed to its acquisition for the tasks that she participated

while cohabitated with the respondent. The said house was erected and still unfinished todate which means that it has been developed during the subsistence of marriage. Therefore relying on the same principle there is a contribution by the respondent but from the stage of construction as the plot was already purchase by the Respondent in 2005, before the parties had cohabitated. The appellant's contribution is on the construction stage only, not on the purchase of a plot.

If the domestic activities for the family are regarded as contributions to the acquisition of matrimonial properties during the marriage life as it was so held in the case of **BI HAWA MOHAMED V. ALLY SEFU [1983] TLR 32** the situation is more convenient for the appellant who had provided not only the duty to take care of the family but also the physical monitory contribution to the acquisition of the properties. The Appellant herein stated that she had a business of selling clothes and used to inject some money for construction of those two houses.

The respondent's argument that while in their cohabit life the appellant used to leave their residential premise for their original home place and school at Arusha does not illegalize the presumption of marriage. Be it noted that that had been done at

their own consensus agreement whereby they used to agree that the child who was available by then to stay with the respondent. They were therefore living in the husband and wife mode of life.

The submissions and records also transpire that there is a studio at Maili Moja, Kibaha and there is no dispute that it was also acquired during the subsistence of marriage. It was purchased on 2/11/2011 as per the records. It is also subject to distribution.

All in all I find it unfair for the appellant to be awarded only Tsh. 5,000,000/= as her share for the properties which were jointly acquired by both parties.

In upshot I partly allow the appeal to the following extent;

Apart from dissolution of marriage which is undisputable by the parties I hereby order that both siblings should be kept under custody of their mother (Appellant).

The house whose plot was purchased by the Respondent sometimes in 2015 before the cohabitation but the appellant had a contribution from the stage of its erection should be divided between the parties at the value rate of 1/3 for the Appellant and 2/3 for the Respondent.

The 2nd house in dispute which is alleged to have been acquired in 2017 should be equally divided between the two.

Studio located at Maili Moja, Kibaha should also be equally between the parties.

The respondent has the right to visit the children after prior consultation with the mother.

Rate of money for maintenance of infant children by the respondent remains the same, Tsh. 100,000/= per month as ordered by the lower court.

The general duty of father to maintain the infants as per the Law of Marriage Act stands still.

No order as to costs.

S.M. KULITA

JUDGE

30/6/2020