

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

CIVIL APPEAL NO: 109 OF 2019

(Arising from Matrimonial Cause No: 10 of 2019 District Court of Kinondoni)

GEORGE GANCHEV GANCHEV.....APPELLANT

VERSUS

HOPE ELIZABETH YUSSUF ABBEBE.....RESPONDENT

JUDGMENT

MASABO J.:

This is the first appeal from the decision of Kinondoni District Court in Matrimonial Cause No. 10 of 2019. In the said case, Hope Elizabeth Yussuf Abbebe, the respondent herein, petitioned for dissolution of marriage. After a full trial, on 9th June 2019 the court dissolved the couple's marriage which had subsisted since 2008. Furtherance to dissolution of marriage, the court vested the custody of the issues of marriage (Dizhordan Heri Geogieve Ganchev and Radi Ahadi Geogieve Ganchev) into the respondent with visitation right for the respondent upon giving a 14 days' notice. It further ordered the appellant to pay a monthly maintenance fee of 1000.00 USD for the issues, their education fee at the International French School in Dar es Salaam, and a medical insurance cover at a tune of USD 2000 per annum. The appellant was further ordered to pay a monthly maintenance fee of 200 USD for the responded for one year.

With regard to distribution of assets the couple had two assets, a house at Mikocheni area Kinondoni Municipality in Dar es Salaam and a farm at Kisarawe area. For these two properties it was ordered that the house title be transferred in the favour of the two issues who shall hold the same under the trust of the respondent. As for the farm, it was ordered that it be sold and 75% of the proceeds go to the issues and 25% to the respondent. Moreover, it was ordered that since the house at Mikocheni is subject to a mortgage which has not been fully paid, the appellant should continue to service the mortgage until its final settlement. It is this decision which had disgruntled the Appellant. He is now appealing in this court armed with four grounds of appeal;

1. That the trial court erred in law and fact in ordering the Appellant to pay for the mortgage for his young children who do not qualify to own landed property;
2. That the trial court erred in law and fact in ordering the Appellant to pay (US Dollars 2000.00) per annum for medical insurance cover;
3. The trial court erred in fact in ordering an extremely limited visitation rights to the Appellant; and
4. That the trial court erred in fact in ordering the Appellant to pay US Dollars 1000.00 per month for maintenance of the issues of marriage.

Hearing proceeded in writing. Both parties had representation. Mr. Senen E. Mponda, learned counsel appeared for the Appellant and Mr. Frank Mujaya Nkanda, Advocate represented the Respondent.

Submitting on the 1st ground of appeal the Mr. Mponda argued that the appellant was ready to relinquish his interest in the landed property in favour of his children and proposed before the court that the property be sold and the proceeds used to repay the loan and the balance be deposited in the issues' account. He reasoned that the order that he should continue servicing the mortgage has burdened the appellant. Mr. Mponda further urged this court to consider the issue of citizenship of the two issues in that, pursuant to section 9(2) of the Citizenship Act [Cap 357 R.E. 2002], at the material time they have a dual nationality and upon attaining the 18 years they will choose either to be Tanzanians or Burgarians. If they choose to be Burgarians, they will no longer be eligible for ownership of the house. Thus, under the circumstances the best option is to sell the house and pay the outstanding mortgage and the balance be kept for the benefit of the children.

On the 2nd ground it was submitted that the order for payment of 2000 USD per annum for medical insurance is not only excessive but was not pleaded. He argued that, the amount is far above the family package offered by the National Health Insurance Fund (NHIF) which is Tshs1,500,000.00/=. It was argued further that, the Appellant willing offered to pay USD 800 to cover the respondent and the two issues but the court chose to impose a higher sum with no justification.

Submitting on the 3rd ground that the trial court erred in ordering an extremely visitation rights to the Appellant, Mr. Mponda argued that the

order of 14 days' notice prior to visitation of the two issues is stringent and inhibits the appellants right to have access to and quality time with his children. He argued that, the appellant currently lives in United Arab Emirates but frequently travels to Dar es Salaam on official trips which are sometimes not planned. Thus, should the notice of 14 days be sustained it will be difficult for him to have access to his children when he travels to Dar es Salaam in such trips. He concluded that while notice is of essence, it must be reasonable and convenient to allow flexibility and good relationship between the parties.

On the last ground of appeal Mr. Mponda submitted that the order that the Appellant pay a monthly maintenance fee of 200 USD for one year for the respondent and a monthly maintenance of 1000 USD for the two issues casts a financial burden to the Appellant considering also that he is responsible for their school fees. Mr. Mponda argued further that the amount is excessive because under normal circumstances, a monthly fee of Tshs 1,000,000/= is sufficient to sustain the issues.

Mr. Nkanda vehemently resisted the grounds of appeal submitting that the Appellant's prayer that this court allow the sale of the matrimonial house and the proceeds be divided in shares 25% to the respondent and 75% to the children will leave the children homeless and will make them victims of the irreconcilable marriage of their parents. On the issue of citizenship Mr. Nkanda submitted that the same has well been dealt with by the trial court that the issues passport will be renewed upon expiration at the expenses of

the respondent and upon reaching the age of 18, they will decide on the citizenship of their choice.

In regard to the 2nd ground of appeal Mr. Nkanda submitted that the issue that the children be covered under the National Health Insurance Fund Family Package of Tshs 1,500,000/= is a new fact. It was not raised during the trial and the Appellant has not proved the same contrary to the provision of Section 110 of the Evidence Act [Cap. 6 R,E 2019] which requires that whoever desire any court to give judgment as to any legal rights or liability must prove the existence of those facts. He further proceeded that it is important that the issues of marriage are insured with insurance covering treatment not only in Tanzania but also in other countries.

Regarding the maintenance fee of USD 1000, Mr. Nkanda submitted that the appellant's submission that the order to pay 1000 USD per month casts a financial burden on him did not put into consideration the life style the children have been living.

I have carefully considered the grounds of appeal together with the submissions from both parties and the original records which I have thoroughly read. I find that there are three issues for determination:

- i. Whether the court properly distributed the matrimonial assets;
 - ii. Whether maintenance fee for the issues (monthly maintenance fee of USD 1000 and the annual insurance cover of USD 2000) is excessive;
- and

iii. Whether the visitation right is encumbered by stringent conditions.

Regarding the first issue, upon dissolution of marriage, the court is empowered to order division of matrimonial assets (section 114(1) of the Law of the Marriage Act [Cap 29 RE 2019]. Assessment of the shares to be awarded to the parties falls under the discretionary powers of the court. The exercise of this discretion is predicated on paying due regard to the factors provided for under sub-section 2 which states as follows:

“In exercising the power conferred by sub section 1, the court shall have regard;

- a) To the custom 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.

In the instant appeal it was not disputed that the parties have two properties, a farm and a house. The appellant has no discontentment over the farm. His contention is on the house which was acquired through a bank mortgage of USD 150,000 of which only USD 50,000 has been paid. The remaining USD 100,000 is outstanding. Having gone through the records, I have observed that the respondent requested that the house which is in her name

should not be sold. She prayed that it be transferred to the children and she be appointed as their guardian so that she can hold the house as their trustee until when they attain the age of majority. On his part the appellant prayed that the house be sold.

Having considered the welfare of the issues and especially the need to have a permanent and stable accommodation, the trial court agreed with the respondent and ordered that the house should not be sold. It subsequently ordered that the title of the said house be transferred to children who shall hold the same under the trust of the respondent. In granting these orders the trial magistrate remarked that the children should not be victims of their parent's irreconcilable marriage.

The remark by the trial magistrate is indeed sound. Most often, when the parents' divorce or separate it is the children who suffer the most. It is therefore important for the courts to protect their welfare and minimize their suffering and, in so doing, ensure that the best interest of the child is protected. It is in this context, consideration of the welfare of the children is listed as one of the factors that the courts should have due regard in distribution of matrimonial assets. This is in addition to the provisions of section 125 to 136 of the Act which contain extensive coverage on issue of custody and maintenance of children in divorce, separation and annulment cases.

Consideration of the welfare of the issues is however not an overriding factor in division of matrimonial assets. The law is very clear on this issue. Section 114(1) explicitly states that the division of assets envisaged is between the parties as opposed to the issues or any other party. Therefore, consideration of the welfare of the issues cannot operate to deprive a party of his/her respective share in the matrimonial asset. More so in this case where it is undisputed that the disputed house is under a mortgage which is still outstanding.

As it was stated earlier there are other factors for consideration and one such factor is debts contracted for the joint benefit of the parties. Since it was not contested that the mortgage was contracted for the joint benefits of the parties and that only a third of which has been paid, ordering that the house should not be sold while condemning the appellant to settle the mortgage unilaterally was obviously erroneous, unjust and contrary to section 114 (2) (c) of the Law of Marriage Act (Supra). In my settled view, the rightful approach under the circumstances was to divide the debt between the parties or order sale of the house so that the proceeds be used to settle the outstanding loan while the remainder be shared between the parties and whoever wishes to give the proceeds to the issues of marriage can do so. On these grounds, I find merit in the first ground of appeal, and proceed to answer the first issue in the negative.

This should however not be considered as relieving the Appellant of his obligation to provide a comfortable accommodation for the issues. In cases

of divorce and maintenance, the law imposes an absolute duty for the father to maintain the children whether they are in his custody or under the custody of any other person. Section 129 of the Law of Marriage Act provides that:

“it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.”

Therefore, the trial court was correct in ordering that appellant to pay a monthly maintenance fee, school fees and medical cover. As it could be seen from the provision above determination of the actual amount payable must be done with due regard having regard to the father’s means and station in life. Other factors for consideration are provided for under section 44 of the Law of the Child Act, which states that:

44. The court shall consider the following matters when making a maintenance order-

- (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.

The records reveal that, prior to dissolution of marriage, the appellant was furnishing the respondent a sum of Tshs 700,000/= to 1,000,000/= a week which implies that, in one month (4 weeks), he was furnishing the respondent with a sum of Tshs 2,800,000 to 4,000,000/=. This sum is far higher than the amount of USD 1,000 (approximately 2,300,000) ordered by the court. I am also in agreement with Mr. Nganda that, the facts of this case reveal that the family had a high standard of life and the children were used to that standard. An abrupt change if any will disturb their routine and may affect them physiologically and thereby impair their physical and psychological wellbeing. It also to be noted that, in his testimony the appellant had offered to pay a monthly fee of 800 USD (as seen in the hand written proceedings). The claim that he is only able to pay USD 500 is not only news but contradicts his earlier testimony in court. To this end, I am of the settled view that the amount ordered by the court is reasonable under the circumstances.

As for the medical cover, upon perusal of the lower court proceedings particularly on the petition and their submissions, I found that it is true the issue of medical insurance was not raised by the respondent nor the amount ordered by the trial court pleaded before the trial court as relief sought by the respondent. However, in his testimony the appellant voluntarily offered

to pay a sum of USD 800 per annum for medical cover for both children. Under the premise, I have found merit in Mr. Nganda's argument that the sum of 2000.00 USD was arbitrarily imposed by the court because in imposing such sum the trial magistrate did not give any justification for the amount awarded. I therefore, find merits on the 2nd ground of appeal and hold that since the amount offered by the appellant was not contested and there was no justification was provided for a higher sum, the sum of USD 2000 be substituted with USD 800.

On the third issue, section 26(2) (c) of the Law of Child Act [Cap 13 RE 2019] obliges the courts while granting custody, to make provision for visitation rights for the parent who is deprived of custody. In this regard, a custody order should among other things "*provide for the infant to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody.*" A visitation right simply means that the children should have time to spend and bond with the parent who is deprived of custody. Visitation is critical for both parents and children, to maintaining a sense of connectedness after a divorce and to help the child to adjust to new life setup. It is therefore critical that it is handled with due care to ensure total adherence to the principle of best interest of the child which underscores the importance of the child to live with both parents.

Therefore, the conditions attached to visitation rights should be flexible and capable of providing an opportunity for bonding. Allotment of sufficient time for visitation with no infringement, allowing the child to have activities with

the parent deprived of custody and according the parent the right to be free of the other parent's control during visitation is critical save where there is a history of abuse or non-conducive behaviour on the part of the visiting parent.

In view of this and considering that there is no evidence on record that the appellant was abusive to the children, I find the trial magistrate's order for 14 days' notice to be unreasonable as it infringes the rights of both the children and their father and contravenes the paramount principle of best interest of the child. I therefore, find the appellant's 3rd ground of appeal meritorious and I answer the third ground in the affirmative.

In the final event, I partly allow the appeal and order as follows:

- (i) The matrimonial house be sold. The proceeds of sale be utilized to settle the mortgage and the remainder be distributed at the ratio of 40% for the respondent and 60% for the Appellant. The priority on the sale be given to the party which is interested to retain the matrimonial house.
- (ii) Prior to the sale, the appellant shall assist the respondent to secure a comfortable accommodation for which he will contribute a monthly rental fee of USD 300 until the children turns 18 years.
- (iii) The Appellant shall continue to pay school fees for the two issues, a monthly maintenance fee of USD 1000 and medical insurance cover at the rate of USD 800 per annum.

- iv) The appellant shall have access and unsupervised visitation rights to the issues of marriage during noon hours upon giving a 2 days notice to the respondent. During the visitation, the appellant shall be free to take the children on outing on his own or in the presence of the respondent, if she so wishes.
- v) Other orders of the trial court shall remain intact.

DATED at DAR ES SALAAM this 13th day of July 2020.



A handwritten signature in blue ink, appearing to be "J.L. MASABO", written over a circular stamp.

J.L. MASABO

JUDGE