IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO 156 OF 2019

(Arising from the Resident Magistrate's Court of Dar es Salaam at Kinondoni in Matrimonial Appeal No. 36 of 2018 [Hon B. Lihamwike RM] which emanates from Kimara Primary Court in Matrimonial Case No. 56 of 2018 [Honorable H. J. Mbaga, PCM)

PERIDA KIVAMBA.....APPELLANT

VERSUS

LUCAS MNGUMI.....RESPONDENT

JUDGEMENT

Date of last Order: 29/04/2020
Date of Judgment: 09/07/2020

MLYAMBINA, J.

This is a second appeal. The matter traces its origin from Talaka No. 56 of 2018 before the Kimara Primary Court where it was found that the marriage between the parties had broken irreparably, the issues be under custody of the respondent herein, after return of the issues to the respondent they continue with their studies forthwith. After unsuccessful appeal to the Kinondoni District Court in Matrimonial Appeal No. 36 of 2018, the appellant lodged this appeal on the following grounds:

1. That, the trial Magistrate miserably erred in law and fact by deliberately failing to evaluate the evidence adduced by the

appellant thus ordering the marriage between the parties to have been broken down irreparably.

2. That, the trial Magistrate erred in law and fact by deliberately awarding to the respondent custody of issues of the marriage.
3. That, the trial Magistrate erred in law and fact by deliberately failing to order for maintenance of the appellant by the respondent.
4. That, the trial Magistrate erred in law and fact by deliberately failing to order for equal division of matrimonial properties between the appellant and the respondent.

Wherefore, the appellant prayed for the order that the whole judgement, decree and order of the Kimara Primary Court be quashed and set aside with costs and the trial *de-novo* be held; in the alternative and without prejudice, to the above, the appellant prayed for the order that:

1. Custody of issues of the marriage be given to the appellant.
2. Maintenance of the appellant and issues of the marriage by the respondent.
3. Equal division of matrimonial properties between the appellant and the respondent, and;
4. Cost of this appeal and the lower court be granted to the appellant.

The appeal was argued by way of written submission. From the record, it is not denied that the parties herein contracted Christian marriage ever since 2005. They lived together and they were blessed with two issues up to 2018 when the respondent herein petitioned for divorce and custody of issues before the Primary Court for Kimara.

It is very unfortunate the courts below did not address the issue of division of matrimonial properties. *Section 114 (2) of the Law of Marriage Act Cap 29 (R.E. 2019)* lays down the principles which guide courts of law in ascertaining and determining the division of shares of spouses in matrimonial assets. *Section 114 (2) (b) of Cap 29 (supra)* provides for the considerations to be made, thus:

> *To the extent of the contributions made by each party in money, property or work towards the acquiring of the assets (emphasis added)*

On the fourth ground of appeal, the appellant through representation of Counsel Francis Mgare submitted *inter alia* that the court established beyond reasonable doubt the respondent has locked the matrimonial home of the parties. But abdicated its duty to enquire on the welfare of both parties.

The trial court had further been told on oath by all witnesses that the Plaintiff closed the door since 2015 "*mdai alifunga mlango kutoka 2015*" only later to rent collect, and use rent.

The respondent in reply submitted through Counsel G.N Saidi, that the appellant did not mention anywhere or prayed for division of matrimonial properties. Worse, the appellant did not prove existence of matrimonial property. The respondent went on to submit that the house was acquired by him prior marriage to the appellant.

As correctly rejoined by the appellant, the spouses lived together as husband and wife for about 13 years. They worked, contributed and raised issues together. The respondents' position that the appellant did not contribute anything to acquire matrimonial asset is unjust and does not reflect the truth. Though, I agree that the respondent stated at page 6 of the typed proceedings that the house they lived was his personal property acquired prior marriage, such evidence along with the evidence of the appellant was not analyzed and determined by the trial court. The trial court merely determined the issues of irreparable break down of the marriage and the custody of the issues while forgetting that division of matrimonial properties is an integral part of the process in adjudicating divorce petitions. I therefore agree with the appellant

that the trial court and the first appellate court abdicated their duties to inquire as which properties were jointly acquired during their marriage life and make division thereof basing on money, joint efforts and work. In the case of **Bi Hawa Mohamed v. Ally Sefu,** [1983] TLR 32 the Court of Appeal discussed at length the import of the above provision and held, *inter alia*:

i) Since the welfare of the family is an essential component of the economic activities of family man or woman, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets.

ii) The joint efforts" and work towards the acquiring of the assets have to be construed as embracing the domestic "efforts" or "work" of husband and wife.

Above all, section 108 of the Law of Marriage Act, stipulates duties of a court hearing a petition for separation or divorce. One of such duties is provided for under Section 108 (b) as follows;

> *to inquire into the arrangement made or proposed as regards ...division of any matrimonial property and to satisfy itself that such arrangements are reasonable.*

In the premises of the provisions of Section 108 (*supra*) I find the trial court did not perform its duties of inquiring into the division of the matrimonial properties.

As regards the third ground of appeal, the appellant argued that the court gave order of maintenance of children by the respondent under *Section 129 (1) of The Law of Marriage,* but the court without assigning any reason denied the appellant maintenance while well knowing that she had no any sustainable means of livelihood. Thus, the decision of the court contravened Section 63 (a) of the Law of Marriage.

In response, the respondent stated that the appellant cannot be given anything which she did not plead. In view of the respondent, Section 63 of *the Law of Marriage Act* cited by the appellant is not applicable after breaking of marriage especially where there is a court order which did not address maintenance of the spouse. To that effect, the respondent cited the case of **Samwel Moyo v. Mery Cassian Kayombo** 1999 TLR 197.

In the light of the afore submissions, it is the findings of this court that, as long as the marriage of the parties was found to have broken irreparably there was no duty of the respondent to maintain the appellant.

The maintenance duty surviving the divorce was on the issues alone. There was even no any compelling ground stated by the appellant that would require the respondent to keep maintaining her while there no any marriage between them anymore. The duty to maintain the appellant would shift to her next husband (if any).

On the Irreparability of the marriage and custody of the issues, (1st and 2nd grounds of appeal), I have carefully gone through the entire records, I do agree with the respondent that there was enough evidence on continuous neglection and desertion of the appellant to her husband and the entire family. That is what was observed by the trial court at page 7:

> *Kulingana na ushahidi ambao Mahakama hii imeupokea katika kipengeie cha Mdaiwa kumtelekeza mdai mara kwa mara, kulingana na ushahidi uliowasilishwa Mahakamani hapa na upande wa Mdai umethibitisha hivyo. Imekuwa kawaida kwa Mdaiwa kuondoka na kuwaacha watoto pamoja na Mdai peke yao na bila hata kuwepo utaratibu wowote wa kumuaga Mdai.*

(Emphasis added)

Again, as properly argued by the respondent, this court has always maintained that neglection and desertion can cause breakage of

marriage and are good reason for divorce. In the case of **Mwanahawa Hemedi v. Rashid Kulomba** *1999 TLR21, Kyando, J* (as he then was) held:

> *To establish that a marriage is irreparably broken down, the court may accept evidence to show any of the factors mentioned under Section 107 (2) of the Law of Marriage Act, 1971 which mention willful neglect as one of the factors...*

Also, in **Mwanahawa Hemedi case** (*supra*) the court held:

> *In determining whether or not a marriage is irreparably broken down the court must have regard to all relevant factors regarding the conduct and circumstances of the parties.*

There is nothing in record to establish that the parties in this case they can co-exist as spouses. If this court is to force them live together as spouses, their marriage will be out of the dictate of the court and not free will and sacramental volition of the parties.

I have noted that the appellant in her submission maintained that their marriage has not broken irreparably and that she still loves her husband but she concedes to have neglected her husband for seven days. The appellant has also told the court that there was a

pleaded mere misunderstanding about children, locking matrimonial home and purported threats.

The appellant denies such allegation for lack of proof. Even if proved, in her view do not lead to irreparable break down of the marriage.

It is the further findings of this court that the denial by the appellant for neglecting her family do not reflect the truth because at one point of time she conceded to had neglected them for seven days.

On custody of the issues, the appellant while arguing the ground on her own custody stated that the trial court gave order of maintenance of children by the respondent as per Section 129 (1) of *the Law of Marriage Act.*

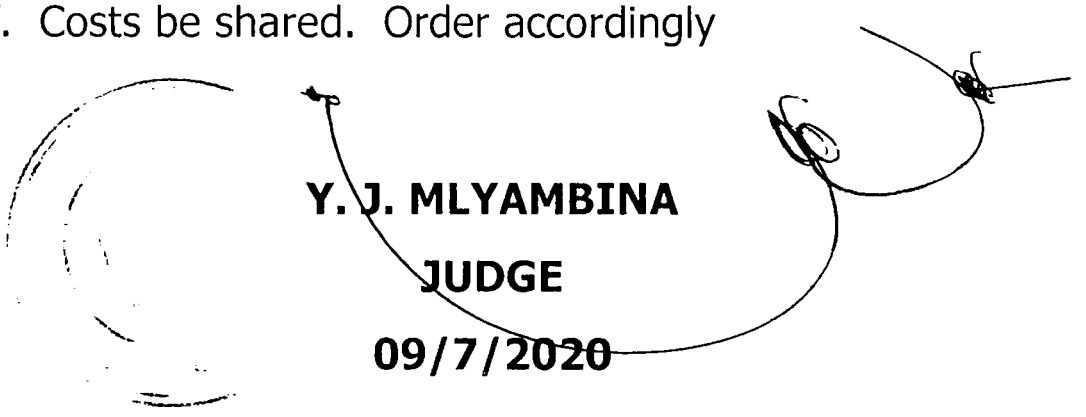
The records clearly show that the trial court gave custody of the issues to the respondent in line with Section 39 (2) (f) of *the Law of a Child Act, 2009* which provides:

> *subject to subsection (i) the court shall also consider: the need for continuity in the care and control of the child.*

In the circumstances of the above, I uphold this appeal basing on the ground of lack of division of the matrimonial properties jointly acquired during marriage. The decision and orders of the two lower

courts on irreparability of the marriage and custody of the issues are sustained.

The records be remitted to the trial court for inquiring into the division of the matrimonial joint properties and make a decision thereof. Costs be shared. Order accordingly

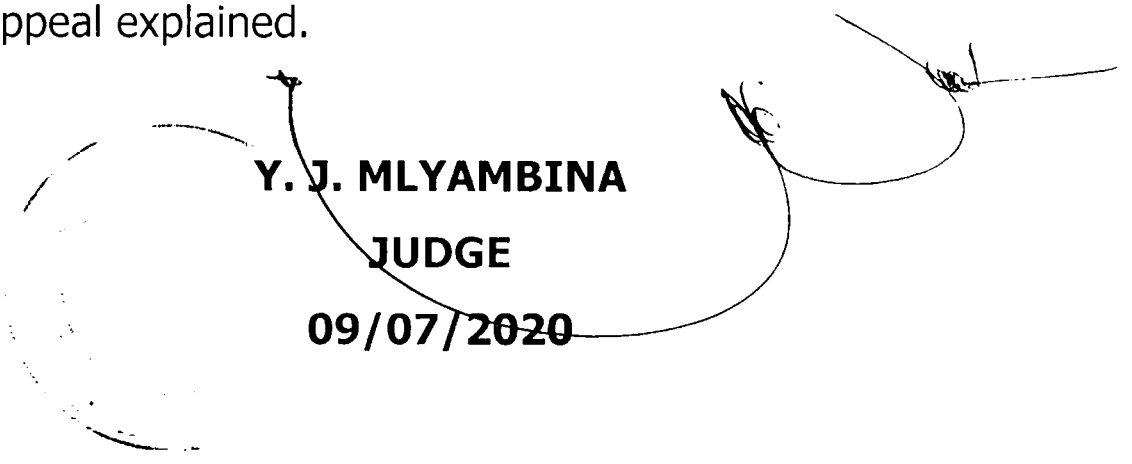


Y. J. MLYAMBINA

JUDGE

09/7/2020

Judgement pronounced and dated 9th July, 2020 in the presence of Counsel Dennis Lyimo holding brief of Counsel Francis Mgare for the appellant and in the presence of the respondent in person. Right of Appeal explained.



Y. J. MLYAMBINA

JUDGE

09/07/2020