

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

(PC) MATRIMONIAL CIVIL APPEAL NO. 15 OF 2019

(C/F Rombo District Court in Matrimonial Appeal No. 3 of 2019 Originated from Matrimonial Case No. 1 of 2019 Mkuu Mjini Primary Court)

LEAH JEREMIAH MLYAHILU APPELLANT

VERSUS

LUCAS MATHIAS KAITIRARESPONDENT

03/03/2020 & 12/05/2020

JUDGMENT

MKAPA, J:

This appeal arises from the decision of the District Court of Rombo in Matrimonial Appeal No. 3 of 2019 (R. R. Futakamba-RM) dated 31th July, 2019. The brief facts that have given rise to this appeal are that, the appellant and respondent were married under a customary marriage since 2006 and later officiated under civil marriage in 2016. During their marriage they were blessed with two children, but due to mental and physical cruelty the respondent instituted a matrimonial case No. 1 of 2019 at Mkuu Mjini Primary Court (the trial court). The trial court among other things declared their marriage irreparably broken followed by an order of divorce.

The trial court also made a division of matrimonial assets. The appellant was awarded custody of the two children namely Juliana Lucas Bwire aged 12 years and Jacob Lucas Bwire 2 years and eight months respectively. The respondent was ordered to pay for their maintenance though the trial court did not specify the amount. Dissatisfied, the appellant appealed to Rombo District Court (the first appellate court) which partly upheld the trial court's decision and ordered the respondent to pay for maintenance of their children at shillings 180,000/= per month. Still aggrieved she preferred this appeal consisting of four grounds:-

1. That the learned Magistrates in the subordinate courts erred both in law and facts in failing to consider legal principles regarding dissolution of marriage and division of matrimonial assets between the parties.
2. That the learned Magistrates in the subordinate courts grossly erred in law and facts in failing to include a motor vehicle with registration number T. 144 DMC in the division of matrimonial assets basing on unproven statements of the Respondent.
3. That the learned Magistrates in subordinate courts erred in law and in facts in failing to properly address and order adequate amount for maintenance of the two children.

4. That the learned Magistrates in the subordinate courts grossly erred in law for completely ignoring the evidence adduced by the respondent at the trial court.

She thus prayed for the appeal to be allowed with costs, and a motor vehicle with registration number T. 144 DMC be included as matrimonial asset jointly acquired and further the court to order the respondent to pay adequate maintenance and other basic needs including house rent for the two children.

At the hearing of the appeal by consent of the parties the appeal was argued by way of written submissions and parties complied with filing schedule. Both the appellant and the respondent appeared in person unrepresented. Arguing in support of the appeal, the appellant submitted that she was in good relationship with the respondent until when the respondent started having extra marital relationship with one Mariana. She further denied the allegations that she denied the respondent conjugal rights but he was the one who refused to use condom for their safety. The appellant went on explaining that the allegation by the respondent that she was cruel to her own children are unfounded.

It was appellant's further submission that among the matrimonial assets which they acquired jointly during their marriage was one

motor vehicle with registration number T. 144 DCM but the same was not considered by the trial magistrate. It was her further argument that respondent's allegations that the said motor vehicle belonged to his office were unfounded since no documentary evidence was tendered before the court by respondent to prove that the said motor vehicle belong to respondent's employer. The appellant contended further that the learned magistrate failed to order adequate amount for maintenance and she elaborated that, prior to divorce respondent was providing ten thousand shillings (10,000/=) per day. She thus prayed for the court to order the respondent to pay shillings five hundred thousand (500,000/=) as monthly maintenance for the two children.

In his reply submission the respondent submitted while opposing the appeal to the effect that their marriage was broken irreparably due to cruelty by the appellant to the respondent and their children. He elaborated further that the appellant had the tendency of hiding their children's health insurance cards which also affected the respondent mentally hence grant of divorce by the trial court was just. Arguing on the issue of the motor vehicle with registration number T.144 DCM the respondent submitted the fact that the same does not form part of matrimonial property as it belongs to the respondent's employer and was given to him to assist him in

discharging his official duties. It was respondent's views that shillings 180,000/= per month for maintenance of the two children is adequate commensurate with his monthly earnings.

Respondent finally submitted that if the appellant is not financially capable of accommodating the two children and other basic needs he prayed for the best interest of the children, be given custody of their two children. He lastly prayed for the appeal to be dismissed with costs. In her brief rejoinder the appellant reiterated her submission in chief and maintained that the respondent failed to prove that the motor vehicle with registration number T. 144 DCM is not a matrimonial property.

Having considered arguments by both parties for and against the appeal I think the main issues for determination are centered on **first**, whether the motor vehicle with registration number T. 144 DCM constitutes matrimonial asset/property thus subject to division, and **secondly** whether the maintenance amount of shillings 180,000/= per month for the two children is adequate.

It is sufficiently evident from lower court's proceedings that the marriage between the appellant and respondent has irreparably broken thus the other grounds of appeal should not detain me much.

From the onset I must point out the fact that this is a second appeal in which there are concurrent findings of facts by the two lower courts. The case of **Amratlal Damodar and Another V. A.H Jariwalla (1980) TLR 31** is informative on this fact when the court had this to say:-

"Where there are concurrent findings of the fact by the two courts, the court of appeal as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."

In **ROBERT ARANJO V ZENA MWIJUMA (1984) TLR 7** the court held that;

*"The order for division of matrimonial asset was made under section 144 of the Law of Marriage Act. The court has powers when granting a decree of divorce or separation to make an order for division of matrimonial assets acquired during the marriage **by the joint efforts of the parties**" [Emphasis mine]*

Turning to the issue whether the motor vehicle with registration number T. 144 DCM constitutes a matrimonial asset thus subject to division it is on record during cross examination at the trial

court's proceedings is when the appellant brought up the issue of the said motor vehicle in her defence. In her own words at page 12 of the typed proceedings she had this to say;

"Mimi na mwenzangu katika maisha yetu tulifanikiwa kununua gari yenye number za usajili T 144 DMC ilinunuliwa tarehe 25/01/2018 kwa gharama ya shilingi milioni 17 alikopa benki ya NMB alinishirikisha mwaka 2018, kwa dhamana ya kazi."

At page 13 of the typed proceedings the appellant further stated;

*"Alileta gari kwa kusema amenunua toka Dar, na kunilipia niende kujifunza kuendesha gari, allniambia atachukua mkopo NMB, **sasa sijui kama alichukua** ila ninachojua gari ni yetu."*

In **Robert Aranjo's** case (*supra*) the court did emphasize the fact that following a decree for divorce the court may order for division of matrimonial assets **acquired by joint efforts of the parties.** [*Emphasis mine*]. It is evident from page 13 of the typed proceedings as mentioned above that, the appellant who alleged the motor vehicle with Registration number T.144 DCM was jointly acquired as a matrimonial asset was unable to state

her efforts in acquiring the same through NMB loan when she said in her own words;-

*".....aliniambia atachukua mkopo NMB, **sasa sijui kama alichukua** ila ninachojua gari ni yetu"*

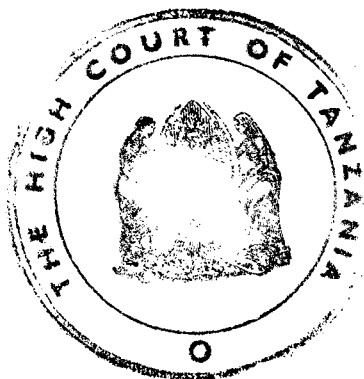
Since what constitutes matrimonial property is also essential in determining the extent of contribution and the fact that the appellant had failed to state her efforts in acquiring the same through NMB loan, I am of the settled view that the motor vehicle does not constitute matrimonial asset jointly acquired neither can the same be subjected to division hence I have no ground to fault the findings on both subordinate courts.

I therefore uphold the decision regarding division of matrimonial properties.

Regarding the maintenance of shillings 180,000/= for the two children whether the same is adequate it is on record the appellant did explain at the trial court the fact that prior to granting of the divorce respondent use to provide shillings 10,000/= per day for the upkeep of the two children the fact which was not disputed by the respondent it means therefore for 30 days the total amount is shillings 300,000/= I think the same should be maintained for the

welfare of the children including food, clothing, shelter and medical expenses given the prevailing economic condition. Although the respondent argued that shillings 180,000/= is enough as it commensurate with his monthly earnings he could not substantiate the same. The said money shall be taken to social welfare office for appellant to collect it. The respondent is also ordered to continue paying for the children's education including school fees. In the final analysis this appeal succeeds only to the extent shown above with no order as to costs.

Dated and delivered at Moshi this 12th day of May, 2020.




S.B.MKAPA
JUDGE
30/04/2020