IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 15 OF 2019

(Arising from Civil Appeal No. 105 of 2017, Decision of the District Court of Temeke-Mwaikambo Esq-RM)

MARIAM HIMUDU MTULYA ..... APPELLANT

VERSUS

HASSAN ATHUMANI SHESHE..... RESPONDENT

JUDGEMENT

18th February & 4th March 2020

ACK. Rwizile, J

This appeal emanates from the decision of the District Court of Temeke. The appellant is challenging the decision of the Court on three grounds;

i. That the appellate Magistrate erred in law and in fact by failing to order division of matrimonial property as provided under the law justly and equitably,
ii. That the appellate Magistrate erred in law and in fact in granting custody of the issues of marriage to the respondent ,
iii. That the appellate Magistrate erred in law and in fact by failure to evaluate the evidence on record and failure to appreciate the appellant's evidence on custody of children

Before delving into the merits of the appeal, it is important, albeit brief, to show the background of this appeal. The appellant was once married to the respondent. Their Islamic marriage that did not last long, started in 2011. Some few years later the appellant discovered the respondent was not faithful to their marriage vows. During their marriage, the parties were blessed with two children and properties including houses and plots of land. Their marriage conflict, was not resolved. When the appellant felt could no more stomach her marriage dissatisfactions, she petitioned for divorce, division of matrimonial properties, maintenance and custody of the two children at Temeke Primary Court. Apart from the fact that the decree of divorce was issued as she prayed. Other resultant orders to wit custody of the two children of marriage, division of matrimonial properties were not to her satisfaction.

She was aggrieved by the Primary Court decision. She challenged the same at the District court of Temeke. After hearing the appeal, the District Court decided to place custody of the two children to the respondent, one house at Mkolemba Mombasa was held not subject of division since it was not a matrimonial property, it remained in the sole ownership of the appellant, the house at Chamanzi and a plot of land at Kigamboni be shared at 30% to the appellant and 70% to the respondent. Again, the appellant was dissatisfied by the decision of the District Court, hence this appeal, the grounds of which are as set above.

The appellant appeared in person, while the respondent was represented by Miss Kapufi learned advocate. The appeal was orally argued.

It was the appellant who stood to deal with the grounds of appeal. She started with the second ground and had this to say; that she has to be given custody of her children. She lamented that she was formerly an employee, but in 2013, left her job to take care of her children. It is this time when the respondent had abandoned her with children. She submitted that the respondent has to provide for maintenance for her and her children.

On the second ground, the appellant was of the submission that the house at Chamanzi was built by their joint efforts. She submitted that division of matrimonial properties at 30% out 100% given to her was not fair and the same should be equally divided. She further submitted that when the judgment was pronounced, it ruled out that she gets 40% to 60% given to the respondent, but that was not the case when the judgment was supplied to her. Finally, on the last ground, she asked this court to re-evaluate the evidence and give a judgment in her favour.

The learned counsel for the respondent was of the view that evidence produced in court was clear that both houses, were jointly acquired. It was submitted that the house at Mkolemba was out of joint efforts because the appellant bought land. The respondent assisted her, also built together the other house at Chamanzi. It was her submission further that the District court did not provide 30% to 70% division as the appellant has submitted. According to the learned counsel, the appellant did not produce evidence to prove the house at Mkolemba was not a matrimonial one. As to the house at Chamanzi, it was proved according to her, that the respondent obtained a loan and there is not dispute from the appellant that it was not so.

She prayed that section 114(2)(b) and (c) of the Law of Marriage Act (LMA) be used to confirm the decision of the District Court basing on the contribution of each party.

On the second ground of appeal, Miss Kapufi, submitted that the trial court gave custody of the issues of marriage to the appellant. She was aggrieved and challenged the decision of the court in the District court on ground that the child above seven years should not remain in her custody because by operation of the law, can live with the respondent. She submitted that basing on her submissions the judgment of the District Court at page 4 placed custody to the respondent. It was her submission that since the appellant so desired before, this court should not revert to the decision of the trial court which she is challenging to date. It was her submission further that section 125(3) LMA, is clear that custody can be given to the respondent. She prayed that the same remains so because the respondent is capable of staying with them, since they are 8 and 6 years.

When given a chance to rejoin, the appellant was vehement that let the house at Mkolemba be held as her property not subject of division but the house at chamanzi be shared equally. She further said, there is no evidence on record where it was said, she does not like custody of the children. She asked this court to grant custody and maintenance, but as well hold that 30% to her and 70% to the respondent on division of the matrimonial properties is unfair.

Basing on the first ground of appeal, the appellant has vehemently complained about unequal division of matrimonial properties.

The record shows, the source of the complaint is based on two houses one at Mkolemba Mombasa and another at Chamanzi as well as the plot of land at Kigamboni. Division of matrimonial assets is a legal issue. It is governed by the law of Marriage Act. Section 114 of the Act, as submitted by the respondent's counsel is good to that effect. While section 114(1) of the Act empowers court to divide the assets, subsection 2 of the Act directs courts on what to consider when dealing with division of those properties. In order to do that, it is important to first identify from evidence what are the assets qualifying to be called matrimonial properties. According to the same section, two ingredients must be complied with. *First*, they must be acquired by the joint efforts of the spouses and *second*, if acquired before their union, they must have been substantially improved during the pendency of their marriage either by one of the parties or jointly.

Further, the law says, it is mandatory to take regard to the customs of the community to which parties belong, extent of contribution made by each party in money, property or work, debts by either party owing due to their joint benefit, and to the needs of the infant child, if any. Basing on the above, the parties' customs is difficult to hold because of the cosmopolitan nature of the place they have lived. This means, the finding of the two courts below must have based on the contribution of each party and since the parties have infants of marriage, their best interest. It seems on the issue of debts, there is no evidence that they are still owing at the material time.

In this case, the appellant has claimed that a house at Mkolemba is her own property. She was attacking the decision of the first appellate court that it confirmed the decision of the trial court.

The respondent's lawyer submitted that the decision of the trial court was correct although she did not say anything as to the decision of the District Court in this aspect.

I have gone through the record of both courts below. With respect, the appellant did not grasp the decision of the District Court on the house at Mkolemba Mombasa. Likewise, the learned advocate for respondent did not take serious note on it. The judgment of the District Court has no page numbers, but simple counting shows that at the second paragraph of page 7 has the following extract.

> *"...From the testimony of the parties and exhibits thereon, I think the trial court was wrong to hold a house situated at Mkolemba Mombasa a matrimonial property. During the hearing, at the trial court, every asset was documentarily evidence...* "

From the wording of the extract above, although the learned Resident Magistrate made no further comment in regards this house, she was not sharing the trial court's view. This is perhaps what led her exclude it from division as a matrimonial asset. At page 6 of the trial court's judgment, on the first paragraph, it is stated that;

> *"...Mdaiwa aliieleza kuwa suala la kumkuta mdai na nyumba 2 sio kweli bali alimkuta na nyumba 1, na pembeni kulikuwa na banda na ndipo mdai alitaka wajenge nyumba ya pili..."*

I have gone through the evidence on record and I am not in a position to see what is the appellant's point in this aspect. I therefore see no reason to interfere with the decision of the District Court on the first ground.

I am saying so because, the house at Mkolemba has not been subject of division. It is in the sole ownership of the appellant. Second, basing on the contribution shown in evidence as regards the house at Chamanzi, the plot was bought on loan. The house was built during their marriage. By that time the appellant was not working. Although it was jointly acquired, still, the contribution of the respondent was higher compared to the appellant. The appellant complained as to the percentage she was given.

On this point I agree with her. The amount of contribution may be as it has been held by the District Court if there was evidence that the appellant was not supporting the respondent. There is no evidence which shows that the appellant was not industrious in furthering the projects of the family. In the absence of such clear evidence. It is my view and so hold that the fair share of the appellant ought to have been 40% to her, and 60% to the respondent. This therefore applies in the house at Chamanzi and a plot of land at Kigamboni. From the foregoing reasons, it is enough to dispose of the first ground of appeal.

The second and third grounds of appeal will be dealt together. The main point here is custody of the two children. Custody of children is governed by section 125 of the LMA, section 26 and 37 of the Law of Child Act.

In all cases, before deciding the issue of custody, courts are enjoined to protect the interest of the child. It has been submitted that the appellant did not desire to have their first child in her custody because is above 7 years. This is shown in the judgment of the District Court.

The appellant has disputed this fact and asked this court to place custody of the two children to her. The LMA directs that the children should be at least in the custody of one of their parent in case of divorce. Before doing so, the two courts below did not inquire into the fact that which of the two parents is better placed to have custody. The trial Magistrate directed that the elder child, who was 8 years be placed to the boarding school, while the other child be place in the custody of the appellant.

There is no reason so advanced before reaching at the decisions on custody. The child below seven was just placed in the custody of its mother because is less than 7 years. In my considered view the law has clearly directed what to consider. Under section 125 (2) of Act. The court is to consider the wishes of the parents, opinion of the children if practicable and custom of the community. In the circumstances of the case, all these three points as above cannot be applied. First, because parents are not in any agreement to that effect. Second, there is no indication that the children could be consulted to provide independent opinion and third, the customs of the parties are not certain to that effect. What has been stated under this section can be amplified by section 39 of Law of the Child Act. The same states as here under;

> *(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 (l), 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 has vehemently and with lucidity submitted that she has never disliked living with her children. There is evidence that she even left her job for the purpose of taking care of them. As of now, she is still living with the children. From the above cited provisions, it is important to embrace, the principles stated in the law. That is to say, children should be with their mother, second that courts should effort to protect their rights as under section 26 of the LCA, third that since they are living together, they should not be disturbed. To derogate from these principles, there must be evidence showing that the appellant is unfit to stay with them and so not better placed to protect their best interest. I am therefore of the considered opinion that the decisions denying the right of custody to the appellant is not justified and does not advance protection of the interests of both children.

I therefore, hold that the two children should be placed under the custody of the appellant.

Lastly, although the appellant in her submissions dealt with an issue of maintenance, and the District Court did not discuss it. I do not see any reason to interfere with the decision of the trial court. From the foregoing. I allow the appeal to the extent explained. I make no order as to costs.

ACK. Rwizile, J

04.03.2020

Delivered in the presence in the presence of Miss Jane Kapufi advocate for the respondent, the appellant is present in person, this 4th day of March 2020

ACK. Rwizile, J

04.03.2020