

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

PC MATRIMONIAL APPEAL NO. 3 OF 2019

*(Arising from Matrimonial Appeal No. 05 of 2019 of Tunduru District Court
and original Matrimonial Cause No. 14 of 2019 of Mlingoti Primary Court)*

FRANCIS JOSEPH @ MUSHI APPELLANT

VERSUS

MODESTA O/D NAMKUNGA RESPONDENT

Date of last Hearing; 31/03/2020

Date of Judgment; 04/08/2020

JUDGMENT

I. ARUFANI, J.

This is a second appeal whereby the appellant is challenging the decision of the District Court of Tunduru which altered the decision made by Mlingoti Primary Court. The background of the matter as appearing in the records of the lower courts is to the effect that, the appellant, Francis Joseph @ Mushi and the respondent, Modesta Namkunga were husband and wife respectively. They contracted civil marriage in 2006 and blessed to have twin issues namely Peris Francis Mushi and Apolonia Francis Mushi whose age is now twelve years.

After misunderstanding ensued in their marriage, the respondent instituted matrimonial cause in Mlingoti Primary Court (hereinafter referred as the trial court) which was registered as Matrimonial Cause No. 14 of 2019 seeking for dissolution of their marriage. After full hearing of the matter the trial court granted the parties decree of divorce sought by the respondent and ordered the properties acquired during subsistence of their marriage to be divided equally to the parties save for livestock which the appellant was given 30% of its value.

The respondent was dissatisfied by the decision of the trial court and appealed to the District Court of Tunduru (hereinafter referred as the appellate court) vide Matrimonial Appeal No. 05 of 2019 which altered the order of division of the matrimonial properties made by the trial court. The appellate court ordered the parties' house and business kiosk to remain with the respondent. It also ordered the appellant to get 20% of the value of their livestock instead of 30% made by the trial court and division of the rest of the properties were left to be as divided by the trial court. The appellant was dissatisfied by the decision of the first appellate court and appealed to this court basing on the grounds listed hereunder:-

- 1. The learned appellate Magistrate erred in law to deny the appellant share in the matrimonial house which was acquired during marriage by joint efforts of both parties.*
- 2. The learned appellate Magistrate erred in law by granting the shop frame (Kibanda cha duka) to the respondent which is the personal property of the appellant acquired by him in 2005 before marriage and is not part of matrimonial assets.*

3. *The learned appellate magistrate erred in law by ordering unequal division of livestock. **Mifugo** (16 goats 4 heads of cattle) and granted the appellant only 20% of the share while they were acquired during marriage by joint efforts of both parties.*
4. *The learned appellate Magistrate erred in law by granting custody of children to the respondent who is the cause of all problems in the matrimonial home and difficulties in the marriage.*

During hearing of the appeal the parties appeared in court in person and argued the appeal *viva voce* (with a living voice). The appellant told the court that, he decided to appeal to this court after seeing the appellate court magistrate made a decision which is different from the decision made by the trial court. He denied to have stated he will kill his children and said he has never been charged in court with any criminal offence. He challenged the decision of the appellate court which denied him share in the house he built jointly with the respondent. He argued that, the business kiosk ordered by the trial court to remain as a property of their children he acquired the same before marrying the respondent.

He argued in relation to the distribution of the livestock that, although he was the one initiated the project of keeping livestock but he was awarded only twenty percent of the value of that project. He submitted that, as the respondent is the one initiated the proceedings claiming for divorce he want farms, motor cycle, livestock and the house built during subsistence of their marriage to be divided equally. As for the business kiosk he prayed that, as he acquired the same before marrying the respondent the same be given to

him as his personal property. He also prayed the court to grant him custody of the children so that he can take care of them.

In reply the respondent told the court that, she appealed to the appellate court after being dissatisfied by the decision of the trial court. She argued that, the house which was ordered to be divided to them equally she built it herself by using her salaries and the loan she obtained from different financial institutions like NMB Bank and different people. She said the appellant did not contribute anything in acquiring the said house. She argued that, when she was married by the appellant she found him with a house which he sold at the price of Tshs. 3,500,000/=. She said after the appellant selling the house he travelled to Moshi and he didn't give her even a single cent for maintenance of their children.

The respondent told the court that, she used to look for the food of feeding the children herself and said she was not giving food to the appellant. She stated that, although the appellant promised to give her Tshs. 1,500,000/= but he has not given her anything. She argued that, when she was married by the appellant she found him with three goats and a cashew nuts farm but he sold them and he didn't give anything to her and the children. The respondent said that, after the appellant sold his goats she purchased a cow from a retired teacher namely Ally Chiuta and another one from one Sadiki. The respondent said that, the livestock she has mentioned are the one the appellant is claiming were acquired jointly.

She argued in relation to the business kiosk given to her that, it is not true that the appellant purchased the same before marrying her. She said

she purchased the business kiosk from the relative of the appellant namely Gorogojo in 2006 at the price of Tshs. 80,000/=. She said the business kiosk was not purchased in 2005 as alleged by the appellant but in 2006 and said they didn't put in writing the transaction of purchasing the business kiosk. She said the seller of the business kiosk was looking for money of fare as he wanted to go to Mozambique.

With regards to the maintenance of the children she told the court that, the appellant has deserted her family and went to live with another woman and he has not given anything to her for maintenance of the children for three years. She said the appellant has not even gone to see how the children are doing. She said the children do not want to see the appellant and whenever they saw him they used to run. She argued further that, despite the fact the appellant said he would have purchased the children's school shoes but he has not done so.

In his rejoinder the appellant told the court that, both of them contributed in building the house ordered to remain with the respondent. He said he was a miner and he gave the respondent money for purchasing the plot where they built their matrimonial house. He also said to have given the respondent money for purchasing three farms which they used for cultivation of paddy. He said the respondent wrote a name of her child in one of the farm they purchased as the owner of the farm and that was the source of conflict in their marriage.

The appellant said that, although the cows were purchased by the money of transfer paid to the respondent but other money was obtained

from the paddy they cultivated. He said the cows have increased to six and the goats are now 16. He reiterated what he argued in his examination in chief that, he purchased the business kiosk from his relative namely Flugence Tesha who is now at Mozambique. He said their matrimonial house was built in 2012 and said he don't know if the respondent has ever obtained loan from any bank institution or anybody as she alleged.

After going through the records of the lower courts and carefully considered what is stated in the grounds of appeal filed in this court by the appellant and the rival submissions made to the court by the parties the court has found that, there is no dispute in respect of the order of divorce granted by the trial court to dissolve the marriage of the parties which the appellant is praying the court to uphold it. The germane issues for determination in this appeal are whether the appellate court erred in altering division of the parties' matrimonial assets done by the trial court and whether the appellant was entitled to be granted custody of the children.

Starting with the issue of division of the matrimonial assets the court has found proper to state at this stage that, the law governing division of matrimonial assets after the marriage being dissolved is section 114 (1) to (3) of the Law of Marriage Act, Cap 29 R.E 2002. This provision of the law gives the court power to order division of any asset acquired by the parties during the marriage by their joint efforts and set out the factors which the court is required to take into consideration when exercising the said powers. To make it clear section 114 (1) states that:-

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.

That being the position of the law the court has found the assets the parties states were acquired during subsistence of their marriage which the appellant is challenging its division done by the appellate court are the house, shop kiosk, motorcycle, livestock (i.e six cows and sixteen goats), paddy farms and household utensils. The court has found that, the division which was done by the trial court and challenged by the respondent before the appellate court was to the effect that, with exception of the livestock which the trial court ordered the appellant to be given thirty percent of the value of the livestock the rest of the properties were ordered to be divided equally to the parties.

The court has found that, as appearing in the typed judgment of the appellate court, it altered the division of the aforementioned properties of the parties done by the trial court by ordering the house and shop kiosk to remain with the respondent. The appellate court ordered further that, the appellant will get twenty percent of the livestock and the motorcycle should be sold and the money obtained thereof should be divided equally to the parties. The court has found the appellate court ordered the house to remain as the property of the respondent after being satisfied the respondent's

evidence managed to establish she bought the plot and built the house through her own money and is living in that house with their children.

The issue to determine here is whether the appellate court erred in dividing the parties' matrimonial assets as demonstrated hereinabove. In order to be able to determine this issue properly the court has found proper to have a look on what is provided under section 114 (2) (b) and (d) of the Law of Marriage Act which provides for some of the factors the court is required to take into account when exercising the power of dividing matrimonial assets conferred to it by subsection (1) of section 114 of the Law of Marriage Act. The cited provision states that:-

"114 (2) In exercising the power conferred by

subsection (1) the court shall have regard-

(a) NA

(b) to the extent of the contributions made by

each party in money, property or work towards

the acquiring of the assets;

(c) NA

(d) to the need of the infant children, if any, of

the marriage, and subject to those

considerations, shall inclined towards equality

of division."

The wording of the above provision of the law shows clearly that, when the court is dividing the properties acquired by the parties during subsistence

of their marriage is required to consider the extent of contribution made by each party in the acquisition of the property together with the need of the infant children of the marriage if any. The contribution which the court is required to take into consideration as provided under subsection (2) (b) of the above quoted provision of the law includes the contribution made in monetary form, property or work done by the party towards acquisition of the property. That being the position of the law the court has found the proper way to determine this appeal is to deal with grounds of appeal filed in this court by the appellant seriatim.

I will start with the first ground of appeal where the appellant states he was denied his share in their matrimonial house. The appellate court ordered that house to be left as the property of the respondent as she is living with the infant children of marriage instead of its value being divided to the parties as ordered by the trial court. The court has considered the argument made to the court by the parties in relation to what was the extent of the appellant's contribution in the acquisition of the said house and come to the finding that, while the appellant is arguing he gave the respondent money for purchasing the plot where the house is built and he supervised construction of the house the respondent said the appellant contributed nothing in acquisition of the said house.

After going through the evidence adduced before the trial court the court has found the respondent told the trial court that, she found the plot and took a loan which she used to build the house which the first appellate court allocated to her. However, despite the fact that the appellant did not dispute the evidence of the respondent that she purchased the plot where

the house is built but he told the trial court that, they jointly prepared 7000 soil bricks for construction of the house on the plot. He stated further in his testimony that, after two years they sold the paddy they had cultivated and get money for construction of the house and said to have supervised construction of the house. To use his own words as appearing in the hand written proceedings of the trial court he stated that:-

"Mimi nashughulika na madini, mpunga ukipatikana anauza. Yeye akapata uwanja sehemu ile akasema tumwombe baba wa Kimakonde auze. Nikaondoka nikakuta ameshanunua ameandika jina lake ila nilpomuuliza akasema hii hati kaa nayo. Nikakaa nayo tukaendelea kulima.

Uwanja ule tukaandaa tofali 7000 za udongo zikakaa miaka miwili hatujajenga. Tulikuwa na mpunga nikasema tuuze tujenge, akauliza ramani ya nyumba nikasema nitachora, tukamtafuta National akanirekebisha nikaomba atujengee nyumba akasema ana tenda Songea. Tukaanza kujenga nikasimamia mpaka kuezeka, yeye mdai akahamia Amani. Tukaomba nyumba ya jirani. Mimi nikaendelea kutengeneza milango. ... nikawa naenda machimbo ikafika kipindi nikaendelea kurekebisha nyumba."

From the above quoted part of the testimony of the appellant the court has found it is crystal clear that the appellant contributed in the acquisition of the house by doing the works of making soil bricks, supervising construction of the house and making its doors. The testimony of the

appellant was supported by the evidence of Alfred Biwi (SU2) who told the trial court that, he was handed to the appellant who supervised him in the construction of the house. That makes the court to come to the finding that, even if the respondent purchased the plot by using her own money and she took loan for the construction of the house but it cannot be said the appellant contributed nothing in acquisition of the house.

The court has arrived to the above finding after seeing that, although the appellant did not say how much cash money he contributed in the acquisition of the house but as provided under subsection 2 (b) of section 114 of the Law of Marriage Act quoted earlier in this judgment, the work of making bricks, cultivating paddy which was sold and realized the money used for construction of the house, supervising its construction, making doors and renovating the house is a contribution towards acquisition of the house which was supposed to be taken into account in division of the house to the parties.

The question is how much share each party is entitled in the house. The court has found as it has been satisfied the respondent is the one purchased the land upon which the matrimonial house is built and the appellant's contribution to the house is only on construction of the house the respondent deserve more share in the house than the appellant. The court has considered the view taken by the appellate court that the respondent deserve to be granted the whole house as is living with the children but failed to see justification in the said view. The court has found that, although it is true that section 114 (2) (d) of the Law of Marriage Act requires the court to take into consideration the need of the infant children of the marriage

when dividing matrimonial properties to the parties but find that is not enough to say the appellant is not entitled to get any share from the house.

The court has been of the view that, as the age of the parties' infant children by now is twelve years and after six years from now they will no longer be infant it will not be proper to say the appellant is not entitled to get any share from the house. The court has also being of the view that, even if the children will continue with their education after attaining the age of majority which will cause them to continue to depend on their parents but that cannot be enough ground for denying the appellants all of his shares from the house. The above finding of this court is being bolstered by the position of the law laid by the Court of Appeal of Tanzania in the case of **Isidori Balaga V. Chezalina Balaga**, Civil Appeal No. 41 of 1995, CAT at DSM where it was stated that:-

In deciding the question of distribution of matrimonial assets between the spouses children's interest is a subsidiary consideration as the matter only concern the spouses."

The court has also arrived to the above finding after seeing the issue of continuing to maintain the children by providing them with food, shelter, clothes, medical care and education is well covered under section 129 of the Law of Marriage Act which placed that duty to the parents. Therefore as the appellant being a father of the children has a duty under section 129 (1) of the Law of Marriage Act to maintain the infant children up to when they will attain the age of majority or up to when they will finish their education it cannot be said the appellant is not entitled to get any share from the house

on the ground that the house will be used by the respondent and the infant children.

In the light of all what I have stated hereinabove the court has found as rightly argued by the appellant the appellate court erred in granting the whole shares in the matrimonial house to the respondent and denied the appellant any share from the house. Further to that, the court has found the trial court failed to appreciate the evidence adduced by the respondent that, the plot of land where the matrimonial house is built was found and purchased by the respondent by using the money paid to her for her transfer to another station of work and the appellant's contribution to the acquisition of the house is only on construction of the house. In the premises the court has found it is just, fair and proper for the respondent to get more share in the matrimonial house than the appellant.

Coming to the second ground of appeal where the appellant states the appellate court erred in granting business kiosk to the respondent the court has found the issue to determine here is whether the appellant has managed to prove the business kiosk is not a matrimonial property and is his own property. The court has found in the course of proving the business kiosk is his personal property and not a matrimonial property the appellant stated in his evidence that, the respondent found him in possession of the stated business kiosk and said he acquired the same before 2005. On the other hand the respondent stated in her evidence that, she gave the appellant Tshs. 100,000/= for the purpose of going to the mining and when he came back they purchased the business kiosk at the price of Tshs. 80,000/=.

The court has found no any other evidence was adduced before the trial court to establish when the business kiosk was acquired. The court has found while the appellant told this court he purchased the business kiosk in 2005 from his relative called Flugence Tyesha who is now at Mozambique the respondent told this court she purchase the business kiosk from the relative of the appellant called Gorogojo in 2006. Unfortunately, there is no witness called by either party to support what they said before the trial court.

That makes the court to find it cannot be said the appellant managed to prove the business kiosk is his personal property and not a matrimonial property. However, the court has failed to see any justification in granting the business kiosk to the respondent alone and denied the appellant any share from it as done by the appellate court. Under that circumstance the court has found the appellate court erred in granting the business kiosk to the respondent and denied the appellant any share from it. In the premises the court has failed to see any justifiable reason to differ with the finding of the trial court that the business kiosk was a matrimonial property which each party had a right of getting half of its value.

As for the third ground of appeal whereby the appellant states their livestock were unequally divided to them, the court has found the appellate court did not state any reason as to why the division done by the trial court in respect of the livestock was altered. The court has found while the trial court ordered the appellant to get 30% of the value of the livestock the appellate court altered that division of the livestock and directed the appellant to get 20% of the value of the livestock without stating the reason for altering the decision of the trial court. The court has found the evidence

adduced before the trial court shows the appellant said the livestock was purchased by the money obtained from the respondent's transfer and other respondent's money and the role played by the appellant was to take care of the livestock. To be more precise he said in his evidence as quoted hereunder:-

"Mdai akapata hela ya uhamisho Tshs. 1,500,000/= nikashauri tununue mifugo tukanunua mbuzi Tshs. 50,000/=. Siku nyingine akasema kuna ng'ombe anauzwa tukanunua Tshs. 300,000/= inabaki Tshs. 30,000/=. Nikahudumia yule ng'ombe nikajenga kibanda. Akaja mdai kupata hela nyingine nikasema tuongeze ng'ombe mwingine wakakubaliana na mzee huyo kununua Tshs. 350,000/=. "

Form the above quoted part of the evidence of the appellant it is crystal clear that, the livestock were purchased by using the money obtained from the respondent and the contribution of the appellant was to build the cow shed and taking care of the livestock. That make the court to find that, although it is true as argued by the appellant before this court that he was the one initiated the livestock project but the role played by him in the project was to give an idea of initiating the project, building the cow shed and taking care of the livestock. Under that circumstance the court has found there was no justification for the appellate court to alter the division of the livestock to the parties done by the trial court which ordered the appellant to get 30% of the value of the livestock.

With regards to the fourth ground of appeal where it is stated the appellate court erred in granting custody of the children to the respondent who was the cause of all problems and difficulties in their marriage the appellant told the court at the hearing of his appeal that, he want the children to be placed under his custody for his proper care. The court has found that, despite the fact that the appellant told the court the appellate court erred in placing the children under the custody of the respondent but there is nowhere in the judgment of the appellate court stated the children were placed under whose custody. The court has also found it is not only that the issue as under whose custody the children should have been placed was raised and argued before the appellate court but even the trial court did not place the custody of the children under any parent. What the trial court states in its judgment is that, as the children were above seven years they can live with either parent depending on their welfare.

That being the position the court has found the issue to determine here is whether this court can order the custody of the children of the appellant to be under his custody. The court has found that, despite the fact that this court being the second appellate court is not required to deal with issue which was not raised and determined by the first appellate court but there are factors which are supposed to be considered when deciding about the custody of infant children. The factors to be considered as provided under section 125 (2) of the Law of Marriage Act are welfare of the infant children, wishes of the parents and wishes of the infant children if they can express their opinion.

Looking into the appellant's case the court has found that, although the appellant told the court he want the children to be placed under his custody so that he can take care of them but he didn't tell the court if the children will be placed under his custody their welfare will be better than being under the custody of the respondent. The court has also found the appellant has not told the court the respondent is not taking proper care of the children so that it can be said there is a need of placing them under his custody. In addition to that the court has found even when the children testified before the trial court they did not tell the court they have any problem in being under custody of their mother. The court has also being of the view that, as there is no dispute that the children have been under custody of the respondent for long time it is not proper to disturb them by changing their custody. All of the above stated reasons make the court to fail to see any reason which can make it to differ with the decision of the trial court.

In the final result the court has found as demonstrated hereinabove some of the grounds of appeal filed in this court by the appellant have merit and others have no merit. In the premises the appeal of the appellant is hereby allowed and the whole of the decision of the appellate court is quashed and all the orders made by the appellate court are set aside. The decision of the trial court is restored with some alteration on division of matrimonial house which the court is ordering the appellant to get 40% of the value of the matrimonial house and the respondent to get the remaining 60%. The division of the rest of matrimonial properties is left as divided by the trial court. No order as to costs. It is so ordered.

Dated at Songea this 4th day of August, 2020


I. ARUFANI

JUDGE

04/08/2020

Court:

Judgment delivered today 4th day of August, 2020 in the presence of both parties in person and right of appeal to the court of Appeal is fully explained to the parties.


I. ARUFANI

JUDGE

04/08/2020