IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

PC CIVIL APPEAL NO. 10 OF 2019

(C/F Civil Appeal No. 33 of 2018 at the District Court of Arusha, Matrimonial Cause No. 30 of 2018, Arusha Urban Primary Court)

SUZAN ISAAC.....APPELLANT

Versus

ROLAND HENRY KIMARIO.....RESPONDENT

JUDGMENT

26/08/2020 & 30/10/2020

MZUNA, J.:

This is the second appeal. **Suzan Isaac**, hereafter the appellant, instituted a suit in the Arusha urban Primary court (hereafter the trial court) against **Roland Henry Kimario**, the respondent herein, claiming for divorce, custody of children, maintenance and division of matrimonial assets. Parties were married couples before their marriage was unceremoniously dissolved by the Primary court on 20th April 2018 at the time when they were blessed with three issues of the marriage.

The trial court granted the decree for divorce as prayed but refused the order for division of a house located at Mbuga ya Chumvi, at Muriet Ward, Arusha on the ground that there was an agreement styled in *'Tamko*

Rasmi' signed by the parties on 10th March, 2017 in which they agreed to vest the interest in the house (the only property owned jointly by the parties) to the issues of their dissolved marriage. The custody of children was ordered to be placed under the respondent for the reasons that at the time the appellant left from home they were at school and when they closed their school, they continued staying in that house together with the respondent. The court further ordered the respondent to pay the appellant Tshs 2,000,000/-.

The present appellant was dissatisfied. On appeal, the District Court reversed the order of custody and placed them under the appellant for the reasons that they are female children and therefore it was in their best interest and their welfare to stay with their mother. Other orders remained intact.

On further appeal to this court, the appellant who is defended by Ms. Happiness Mfinanga, learned counsel has lodged four grounds of appeal. The respondent who appeared in person and unrepresented strongly opposed the appeal. Grounds one, she says the court never considered the appellant's contribution on the acquisition of the matrimonial house. Ground two, she says the court failed to properly interpret the provisions of

section 114 of the Law of Marriage Act Cap 29 RE 2019 (herein after LMA) on division of matrimonial assets. Ground three, she challenges on the failure to consider the evidence of the appellant supporting the acquisition of the matrimonial house. Lastly on ground four that the decision was without considering properly the best interest of the children of the parties when it gave custody to the respondent (sic).

Hearing proceeded by way of written submissions. Issues for determination are:- **One,** whether the courts below were justified in refusing the order of division of the matrimonial house? **Two,** whether the best interests of the children were considered in granting the order of custody to the respondent (in the trial court) and then to the appellant (in the first appeal court)?

Let me start with the second issue as to whether the best interests of the children were considered by the courts below. The appellant's counsel submitted that under section 125 (1) of the Law of Marriage Act, the court has to take into account the best interests of the child before an order for custody. Ms. Mfinanga also referred to section 4 (2) of the Law of the Child Act, No. 21 of 2009 (herein after the Child Act) to argue the same. In response, the respondent argued that he had been taking care of

the children ever since when they were deserted by the appellant. For the respondent the phrase 'best interest' is relative to every situation. In rejoinder, the appellant insisted that the children being females ought to stay with their mother.

I have considered the submissions by the parties and the law governing custody of children. I have also gone through the record. It is strange that the appellant raised this ground of appeal while the first appellate court reversed the order of custody and placed to the appellant. The respondent did not raise a cross appeal but due to the complexity and necessity of the matter concerning custody, I must make an appropriate order. This is also due to the fact that it is among the grounds of appeal. It is undisputable fact that the first consideration should be the best interests of the children. Under section 39 (2) (d) of the Child Act, "**the views of the child, if the views have been independently given"** must be taken into consideration before making such an order and or under (g) **"any other matter that the court may consider relevant."**

In this case, it is clear that the trial court did not bother to seek the views of the children before granting the order of custody while they are schooling in a boarding school and can independently express their views.

My close reading of the record shows, according to the evidence of SM1 the first pregnancy was in 2006, the second birth was on 16th January, 2009. The record is silent when was the last child born but it was established is above 7 years.

The question now is, is the mere fact that the children are registered in a boarding school entitle the respondent right to have their custody or merely because they are female entitle the appellant custody without requiring them to express their views?

I would say the court skipped a vital point of seeking their opinion. For this reason, I would stay this issue of custody pending until such time when they are brought to court to express their views. This will go hand in hand with the Social Welfare Officer submitting a social inquiry report under Rule 72 (1) and (4) of the Law of the Child (Juvenile Court Procedure) GN No 182 of 20/05/2016. Both courts made the order of custody without complying with this vital prerequisite condition. The order is accordingly stayed.

Now on the first issue as to whether the courts below were justified in refusing the order of division of the matrimonial house? It covers both

the grounds one and two of appeal, though to some extent even ground three which deals with evidence on its acquisition is also covered.

Submitting in support of the said grounds of appeal, the appellant argued that the house in dispute located at Mbuga ya Chumvi Murieti area is liable to division since it was acquired during subsistence of the marriage. She referred to the provisions of section 114 of the Law of Marriage Act, Cap 29. The learned counsel also referred the court to the cases of **Bi. Hawa Mohamed v. Ally Seifu** [1983] TLR 32; **Robert Aranjo v. Zena Mwinjuma** [1984] TLR 7 and **Mohamed Abdallah v. Halima Lisangwe** [1998] TLR 197 to bolster her submissions that even "contribution by the spouse to the welfare of the family is also a contribution to the acquisition of the matrimonial or family asset." In other words, "contribution can either be monetary contribution or domestic service", citing the case of **Abdallah vs. Halima Lisangwe** [1998] TLR 197

In reply, the respondent submitted that the house could not be divided based on the doctrine of estoppel under section 123 of the Evidence Act, Cap 6 which precluded the parties from denying their agreement over the said house styled as '*Tamko Rasmi*'. He also referred

the case of **Gallic v. Lee** [1969] 2 Ch. 17 at pp. 36-7 cited in **Sluis Brothers (E.A.) Ltd v. Mathias & Tawari Kitomari** [1980] TLR 299 to bolster his arguments.

Reading from the submissions and the available evidence, it is undisputable that the house in dispute was jointly acquired and occupied by the parties before the breakdown of the marriage. The appellant said had to sell his plot she bought at Dar es Salaam and built that house jointly with the appellant after securing a loan at the time when she was working at Serena, however her employment was terminated at the time when she had the second pregnancy. She accused the respondent for cruelty among others. The respondent on the other hand accused her for sleeping outside the matrimonial home for two weeks, which however SM1 said slept to SM2 Vena Shirima and to her sister. She further said that even the declaration was made after she had sold a plot of Dar es Salaam.

The said declaration by the parties is dated 10th March, 2007 vesting the interest in the house on the children of their marriage. Article 2 of the same reads thus:-

*"Kwamba endapo **mmoja kati yetu ama sote kwa pamoja hatupo duniani** basi itambulike nyumba hii ni urithi wa watoto tutakaokuwa tumejaliwa kuwapata."* [Emphasis added]

The appellants counsel said that the said declaration by the parties could not bind parties because it contemplated in case there is death of either or both of them, then the house shall vest in their children. That there is no clause suggesting in case of divorce or dissolution of the marriage. The respondent on the other hand relied on section 123 of the Tanzania Evidence Act, on estoppel.

The question is whether the declaration can operate under divorce? In my view it cannot. Parties contemplated in the event of death not at the breakdown of the marriage otherwise ought to have included such term. It cannot be implied. I say so because divorce cannot take away the life of either or both parties as agreed. It was held in the case of **Merali Hirji & Sons v. General Tyre (EA) Ltd** [1983] TLR 175, 179 that:-

> *"... **it is the duty of the court to imply reasonable terms."*** (Emphasis mine).

Reasonable terms in our case suggest that they contemplated "when death do us apart" not when they are divorced. The courts below misconstrued that agreement.

Now, I turn to the applicability of Section 114 of the LMA.

Reading the provisions of section 114 (1) (d) of the LMA, the court is required to consider needs of infants children during the order of custody not division of matrimonial assets. Children have no say over the matrimonial assets unless it had been bequeathed to them, see the case of **Juma Rahisi Nanyanje v. Shekhe Farisi** [1999] TLR 29, (HC) the decision which I fully associate myself with.

This court was urged not to disturb the concurrent findings of the two courts below which found not ideal to sell the matrimonial house. I have a different view. The two courts never took into consideration the dictates of section 114(1) of the LMA which provides among others that:-

114. Power of court to order division of matrimonial assets

(1) 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.

(2) In exercising the power conferred by subsection (1), the court shall have regard–

(a) to the customs 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."

This court being the second appeal court, I am aware, cannot interfere on matters of facts unless there is "*a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure".* That was held in the case of **Samwel Kimaro vs. Hidaya Didas,** Civil Appeal No. 271 of 2018 citing with approval the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores vs. A.H Jariwalla** t/a Zanzibar Hotel [1980] TL31 at page 32 that:-

"Where there are concurrent findings of facts by 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 the case at hand, there is "*a miscarriage of justice or violation of some principle of law or procedure".* I have therefore a right to interfere

because division of matrimonial asset whether by sale or otherwise is a condition precedent after the court has found that the marriage has broken down irreparably. Failure to make such order was a misdirection on the two courts and this came out after misconstruing the alleged *"tamko rasmi".* The allegation by the respondent that intention of the parties was well considered is unfounded. Such decision cannot be allowed to stand.

Having read the available evidence, I hold based on the degree of contribution that the house should be sold and parties shall get 40% in favour of the appellant and 60% in favour of the respondent. The division is based on the fact that the plot where they built a house was given to the respondent by his brother though the appellant contributed to the construction, it cannot be on the 50% basis. The respondent can be given a first option to purchase the said house and give the appellant her 40% share.

There was also an award of shs 2,000,000/- by the Primary court to the appellant being maintenance allowance to enable her pay for house rent and other incidental costs which however was nullified by the first appeal court for the reasons that the respondent is currently paying school

fees to their children. This did not feature in the appeal grounds let alone in the submissions. I need not labor myself on this issue as well.

In conclusion therefore, the appeal so far as division of the matrimonial asset, a house located at Mbuga ya Chumvi, at Muriet Ward, Arusha is concerned, it is granted to the extent of 40% in favour of the appellant and 60% in favour of the respondent. On the issue of custody of their three children, it is stayed pending such time when they are brought to court to express their views after receiving social inquiry report from the Social Welfare Officer. Both courts made the order of custody without complying with this vital prerequisite condition requiring them to express their views. Appeal on such order shall start from the date of the order. The order granting custody to the appellant is accordingly stayed until when I receive such a report.

Appeal partly allowed with no order for costs.

M. G. MZUNA,

JUDGE.

30. 10. 2020