IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 38 OF 2019

(Arising from the Judgment and Decree of the Resident Magistrates' court of Arusha in Matrimonial Cause No. 5 of 2018)

DR. WILLIAM GODFREY NYAGWA ..... APPELLANT

VERSUS

HELLEN ISAACK NYAGWA ..... RESPONDENT

JUDGEMENT

ROBERT, J:

This appeal arises from the Judgment and decree of the Resident Magistrates' court of Arusha in Matrimonial Cause No. 5 of 2018 where the Respondent, Helen Isaack Nyagwa sought dissolution of marriage, division of matrimonial assets, an order for maintenance of the children, compensation for adultery and costs of the suit. After a full trial, the court declared the marriage between parties to have been broken down beyond repair and granted prayers sought by the Respondent herein. Aggrieved, the Appellant appealed to this court against the entire judgment and decree.

A brief factual background of this matter reveals that the Appellant and Respondent contracted a civil marriage on 23rd September, 1993 at Nzega District in Tabora region and lived together as husband and wife respectively until 2006 when the Appellant allegedly deserted his matrimonial home and decided to live adulterous life. During the existence of their marriage, the Appellant and Respondent were blessed with five issues. The Appellant allegedly left his family and got married to Ethiopian woman known by the name of Zebiba Meka Abdo on 26th June, 2013 in Addis Ababa, Ethiopia. In 2016 he allegedly got married to Doreen Mahoro in Kampala, Uganda and the two of them shifted to Dar es salaam where they decided to live together as husband and wife in a house located at Kunduchi RTD, Plot No. 28/2 Block F, Kinondoni Municipality.

The Respondent decided to file a petition in the Resident Magistrates' Court of Arusha praying for the following orders: One, a declaration that their marriage is broken down beyond repair. Two, an order to dissolve the marriage and a decree for divorce to be granted. Three, Division of matrimonial assets equally between parties herein. Four, Court order that maintenance of the children be done by the Respondent. Five, Court order for compensation and damages for the breakdown of the marriage resulting

into the loss of petitioner's love and affection for the Respondent and lowering her reputation for the reasons of adultery and acts of marrying other women during the existence of their marriage. Six, Costs of the suit.

Parties herein filed a memorandum of agreed facts to the effect that; one, the Petitioner (Respondent herein) is a resident of Sekei Ward within the city of Arusha. Two, the two parties were husband and wife since 23/09/1993 having contracted a civil marriage in Nzega District, Tabora Region. Three, the two parties were blessed with five issues namely, Symreng Ben Nyagwa born on 4/11/1992, Glory Janet Nyagwa born on 15/08/1994, Lilian Jane Nyagwa born on 29/05/1996, Linnah Judith Nyagwa 30/7/2001 and Synsedge Beryl Nyagwa born on 11/06/2006. Four, the two parties have been living separately since 2006. Five, there is no collusion existing between the parties for the purpose of obtaining dissolution of their marriage.

The trial court framed four issues for the determination of this dispute: One, whether the petitioner (Respondent herein) is entitled to division of the assets listed in the petition; two, whether there are grounds for issuance of an order for maintenance of the children against the Respondent; three, whether the Petitioner (Respondent herein) is entitled to an order for

compensation for adultery against Respondent; and four, to what reliefs are the parties entitled to.

After a full trial, the trial court declared the marriage between the parties to have been broken down beyond repair and ordered for the dissolution of marriage between parties and divorce decree to be issued; division of matrimonial property to the tune of 50% share of the Residential House located at Plot No. 26 Block III Sekei, Arusha City between parties, the Respondent (Appellant herein) to be given the Residential house located at Plot No. 26 Block "F" Kinondoni Municipality, Dar es salaam; the Petitioner (Respondent herein) to be given 30% share of the Residential house located at Mutukula village, Misenyi District in Kagera region and 15% share of the four acres of land (farm) located at Mtukula village, Misenyi District in Kagera region.

Further to that, the court ordered the Respondent (Appellant herein) to maintain his children with all needs discussed in the impugned judgment with a slight support from the petitioner (Respondent herein) only where it is absolutely necessary and the Respondent (Appellant herein) to compensate the Petitioner (Respondent herein) at the tune of Tsh. 5,000,000/- for what the court termed as adultery action against her. The

court gave the Respondent (Appellant herein) the right to visitation to his children at any time so long as no chaotic and unnecessary disturbance is caused as well as the right to fulfill the duty to maintain them as required by the law. The court ordered for the costs to be borne by each party independently.

Aggrieved with the Judgment and decree of the trial court, the Appellant appeals to this court armed with six grounds of appeal that: **One**, the trial court erred in law in holding that the assets claimed by the Respondent in her petition were jointly acquired matrimonial assets. **Two**, the learned trial magistrate erred in law by making an arbitrary award by percentage of the assets before making a specific finding on the Respondents contribution towards the acquisition or improvement of each asset. **Three**, The learned trial magistrate erred on the facts failing to hold that the Respondent could not have made any contribution or improvement to the assets between 2006 and 2018 for reasons contained in paragraphs 5 and 7 of her petition. **Four,** the learned trial magistrate erred in law for the complete omission to consider the reasons advanced by the Appellant for walking out on the Respondent. **Five**, the trial magistrate erred in law in passing an excessive and punitive award of damages against the appellant for constructive

adultery, i.e. the appellant getting married to the two women while his marriage to the Respondent was still subsisting *de jure*. Six, the trial magistrate erred in law in making an order for custody of the children in favour of the Respondent whereas the youngest child is of the apparent age of 13 years having been born on the 11/06/2006.

The Appellant prayed for the appeal to be allowed with cost by quashing and setting aside the entire judgment and decree of the trial court.

When the appeal came up for hearing on 11/5/2020 Mr. Hamis Mkindi, learned counsel for the Respondent held brief for Mr. Method Kimomogoro, learned counsel for the Appellant. Mr. Mkindi prayed successfully for the appeal to be argued by way of written submissions. The court ordered the Appellant's written submissions to be filed on 25/5/2020, the Respondent's written replyto be filed on 8/6/2020 and rejoinder submissions to be filed on 15/6/2020.

In his written submissions filed on 26th May, 2020, counsel for the Appellant considered grounds no. 1, 2, and 3 intertwined and therefore deemed it appropriate to argue them together. He submitted that, the issue of ownership and division of assets acquired during the subsistence of a

marriage is governed by the law of Marriage Act, Cap. 29 of 1971. He made reference to section 60 of the Act which provides:

Where during the subsistence of a marriage any property is acquired:-

(a) In the name of the husband or of the wife there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse.

The learned counsel submitted that the houses at Arusha, Mutukula, and the one in Das es salaam which were acquired during the subsistence of marriage in the name of the Appellant, belong absolutely to the Appellant. The presumption has not been rebutted by the Respondent on whom the duty lies to do so.

As regards to the four acres of land at Mutukula, he simply submitted that the same is governed by section 58 of the Law of Marriage Act, Cap. 29 of 1971 which provides that:

"Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or

the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property".

He continued to argue that the Respondent conceded that she owns a piece of land being Plot No. 165 Block U Bulunde within Nzega township since 1991. The Appellant claimed that he gave it to her when they began the relationship in1989.

He submitted further that while the Respondent was under cross-examination she said that she owns a motor vehicle which she purchased in 2014for shillings 38 million. He continued to argue that these items were not included in the list of assets acquired during the subsistence of the marriage. Hence they were not subject to division.

He referred the court to the case of Samwel Moyo vs Mary Cassian Kayombo (1999) TLR 200 where the court in interpreteing section 114(1) of the Law Marriage Act, Cap. 29 stated:

"From the citation to, and the wording of, section 114(1) of the Act it is apparent that the assets envisaged must firstly, be matrimonial assets; secondly, they must have been acquired by them during the marriage; and thirdly, they must have been acquired by their own joint

efforts. These three conditions must exist before the courts power to divide matrimonial or family assets under section 114(1) is invoked. In this case, the second and third conditions were not established. The relevant assets were acquired before the marriage by the efforts of the Appellant alone. Under section 114(3) of the Act, reference to assets acquired during a marriage includes assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint effort".

He continued to argue that the next issue for consideration is whether the learned trial magistrate applied the criteria set by this court in her division of the property claimed as matrimonial assets by the Respondent. He argued that the Respondent did not make any contribution to any of the properties listed in the petition. First, she did not make any financial contribution to any of the properties. Secondly, by reason of being a full time public servant, initially as a teacher and later on as an auditor, she had absolutely no time to do any improvements on those properties. Third, with regards to the house in Arusha, she was busy with her teaching work and looking after the children when the Appellant was away on studies at KCMC, Tanga and in the USA. Fourth, what she stated under paragraph 5 and 7 of the petition points

irrestibly to the fact that she had neither the time nor the means to carry out any improvements on any of the property. By the time she acquired the means after 2009 the marriage had fallen apart and there was no room for any joint effort in the acquisition or improvement of any property.

For the reasons stated, he submitted that the trial magistrate erred in holding that the property mentioned were matrimonial assets, she also erred in law in making an arbitrary award in percentage without first determining the percentage of contribution by the Respondent to the acquisition and or improvement of each asset.

Submitting on the 4th and 5th grounds of appeal, the learned counsel argued that the learned trial magistrate did not consider at all the Appellant's pleading and evidence as she failed to appreciate that: first, the Respondent by her conduct was the architect of the breakdown of the marriage due to abusive acts towards him, his mother and daughter Loveness to the first wife and other relatives. Second, she was not interested in the marriage as she took no step to salvage the same. He argued that, according to her petition, the Appellant deserted the family from 2006 up to 2018 yet it took her over 12 years to claim maintenance for herself and the children and to bring a claim for compensation for adultery. The Respondent is an educated woman

who was expected to take action to either salvage her marriage or seek redress. Third, this was a case of technical adultery. The women with whom the Appellant is alleged to have committed adultery were in fact his wives much as purported marriages were void.

He made reference to section 74 of Cap. 29 which provides:

> *(2) In assessing such damages, the court shall have regard:-*
>
> *(b) in cases of adultery, to the question whether husband and wife were living together or apart.*

He argued that since the appellant and Respondent had been living apart from 2006 to 2018 when the petition was filed in court trial court was bound to award nominal damages i.e. a sum not exceeding Tsh. 50,000/=.

On the last ground of appeal, the learned counsel submitted that the Appellant informed the court that the Respondent has been denying appellant access to the two last children. He argued that it would be unfair and unjust to blame the Appellant for failure to maintain the two last children whom he is not allowed to have access to. He maintained that the Respondent is using her current financial position to undermine the Appellant's position as the father of the children. For the stated reasons he

implored the court to hold that there were no grounds for issuance of maintenance order of the children against the Appellant.

In response, counsel for the Respondent started his submissions by drawing the attention of this court on the fact that the Appellant filed his written submissions on 26th day of May, 2020 instead of the date fixed by the court which is 25th May, 2020. He argued that the Appellant failed to seek leave of the court to extend or enlarge time if there was a good cause for failure to adhere to the court orders. He submitted that failure to file written submissions on the date scheduled by the court is as good as non-appearing on the date fixed for hearing. He referred the court to the case of Director of Public Prosecutions versus Said Saleh Ali, Criminal Appeal No. 476 of 2017, the Court of Appeal of Tanzania at Zanzibar (unreported) at pp. 18-19 where the Court of Appeal held that:

> *"Before we conclude our decision, we think, it is worthy note that arguing on application/appeal by way of written submissions is synonymous with presenting oral submissions before the court. Thus, if a party fails to file his/her submissions on a scheduled date it is equated as if he/she failed to appear on a hearing date with a consequence of dismissing the matter before the court"*

He submitted further that the High Court of Tanzania reiterated the above position in the cases of Famari Investment (T) Ltd versus Abdallah Salama, Misc. Civil Appl No. 41 of 2018 (unreported); and in the case of Tabita Maro versus Raddy Fibre Solutions Ltd, Civil Case No. 214 of 2018 (Unreported).

Before embarking on the grounds of appeal, this court finds it pertinent to address the question raised by the counsel for the Respondent regarding the Appellant's failure to submit his written submissions on the date fixed by the court.

The Appellant responded on this question through his rejoinder submissions which was equally filed out of the scheduled time but with leave of this court. He submitted that counsel for the Respondent was unaware that he contracted a serious illness which forced him to place himself on lockdown. Subsequently, on 4th June, 2020 he was admitted to Mount Meru Regional hospital until 8th June, 2020 when he was discharged.

He submitted further that he continued to attend hospital as an outpatient until early July, 2020 when he was able to resume work. At the time of resuming duty, the period for filing rejoinder submissions had elapsed. He consulted with counsel for the Respondent and felt that the best approach

would be for the undersigned to make an oral application for extension of time to file the rejoinder submissions.

He submitted further that on the late filing of the written submission in chief, it was left upon him to address the court on the appropriate remedial measures to be taken. He argued that the case of Director of Public Prosecutions versus Said Salehe cited by the learned counsel for the Respondent is inapplicable in this case. He stated that in that case the court of Appeal was dealing with a criminal Appeal. He cited the provisions of Rule 106 (10) of the Court of Appeal Rules, 2009 as amended by GN No. 344 of 2019 in support of his submissions. He maintained that the High Court decisions referred by the learned counsel for the Respondent are distinguishable.

He argued further that in the present case, the submissions in support of the appeal have already been filed in court, though late by a day, no prejudice can be suffered by the Respondent as her submissions in opposition to the appeal have also been filed in court.

The learned counsel argued further that, in the circumstances of this case the court is invited to hold that the delay by a single day was occasioned by

the illness of the counsel for the Appellant which constitutes good cause for enlargement of time retrospectively. He maintained that this position was laid down by the Court of Appeal for East Africa in the case of Shanti vs Hindocha and Others ((1973)EA 207 where the Court held that:

"An extension of time may be granted even where the record

I have given deserving consideration to the rival submissions from both parties. It is not disputed that the Appellant filed his written submissions after the day fixed by the court for such filing without leave of the court. Counsel for the Appellant informed this court that his reason for late filing of written submissions was serious illness which forced him to place himself on lockdown and later admitted to hospital.

This court thinks the argument by the learned counsel for the Appellant on the reasons for his late filing of the written submissions is misplaced. This is not an application for extension of time. The comfort of raising these arguments was available to the learned counsel prior to the filing of the written submissions or at least before the learned counsel for the Respondent had raised this point. This court needed proof to make a

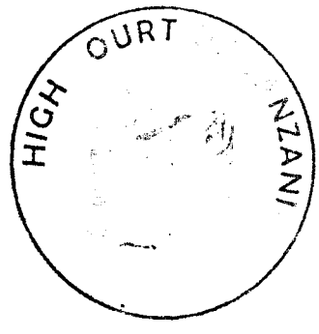
determination on this matter, what I have here is just submissions from the learned counsel which are neither pleadings nor evidence.

In the case of Masunga Mbegete and 2 others vs The Hon. Attorney General and Another, Civil Application No. 68 of 2010 (unreported) the Court of Appeal of Tanzania held that:

> *"failure to file written submission within prescribed time and where there is no Application for extension of time the same has to be dismissed"*

Be that as it may, the Appellant's written submissions having been presented for filing after the date prescribed by the court without leave of the court, this appeal is dismissed for want of prosecution. I give no orders as to cost.

It is so ordered.



K.N. ROBERT
JUDGE
16/11/2020