IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 7 OF 2019

(*Originating from the decision of the District court of Kigamboni in Matrimonial Cause No. 1 of 2019*)

ROBERT MARTIN THOBIAS.....APPLICANT
VERSUS
RHODA STEPHEN CHACHA.....RESPONDENT

JUDGEMENT

MASABO, J.

The parties had their marriage solemnized on 30/9/2001. On 11th December 2018, the Appellant herein petitioned for divorce. At this time the couple had three issues: Rosemary Robert (born in 2002); Aloyce Robert (born in 2004) and Eunice Robert (born in 2013). The appellant also prayed for custody of these issues. Upon a full trial the court found that the marriage between the parties had not broken down irreparably. The prayer for divorce was declined and in substitute an order of separation was awarded. Custody of the issues was granted to the respondent whereas the appellant was granted visitation rights.

The appellant is not amused. He has knocked the door of this court in appeal armed with seven grounds of appeal which can be summarized as follows: **First,** the court erred in holding that the marriage between the parties had not broken down irreparably whereas there was sufficient evidence for the same to wit, separation, adultery committed by the respondent and in

addition, the prayer for divorce was not objected by the respondent. **Second**, the court erred in placing the issues under the custody of the respondent. **Third**, maintenance fee was erroneously awarded without consideration that the respondent has a higher income compared to the appellant. **Fourth**, the court erred in failing to order division of matrimonial assets.

Hearing proceeded in writing. Both parties were represented. The Applicant was represented by Mr. Alexander Kyaruzi, learned counsel whereas the Respondent enjoyed the service of Mr. Tonny Richard Mushi, learned counsel. Both counsels filed their submissions timely. I have keenly read them and I commend both counsels for their industry.

The grounds of appeal and the submissions, as will be summarized in due course, revolve around four issues: **First,** whether the marriage between the parties had broken down irreparably and they were entitled to the decree of divorce; **Second:** Whether the order to place the issues under the custody of the respondent was lawful; **third,** whether the order for maintenance was just and **lastly,** whether the court erred in refraining to order division of matrimonial proceedings.

Regarding the first issue which combines the 1st, 2nd, 3rd and 4th grounds of appeal, the appellant's argument is that there was sufficient evidence on record that the marriage between the parties had broken down irreparably because the appellant rendered evidence in proof of the grounds of divorce.

He narrated that, evidence was rendered to show that the respondent was committing adultery with different men, to wit, one Kelvin, Erick and Jumanne Kairo and that she continued with such behaviour even after she was warned several times and even after several attempts to resolve the dispute through parents, church and social welfare officers.

The learned counsel argued that, even though the respondent was not found in flagrante with her lovers there was enough circumstantial evidence in proof of adultery because, the appellant found her kissing with another man and he also found her chatting with those men. Thus, the requirement of section 107(2)(a) of the Law of marriage Act, Cap 29 was established. It was argued further that for 3 consecutive years between 2016 and 2019, the parties were sleeping in different rooms and no conjugal rights were shared between them. Also, it was submitted that the respondent never contested the prayer for divorce thus it was erroneous for the court to hold that the marriage was still subsistent.

In response to this issue, the Respondent did not have a long rebuttal. Her counsel, having summarized the submission made by the appellant's counsel, submitted briefly that the decision of the court was correct as the conduct and circumstances between the parties does not warrant dissolution of marriage. He argued that the appellant had neglected conjugal rights. He is the one who forced her out of the bedroom and even though she has been constantly begging to return, the appellant had denied him that right. The counsel urged further that the respondent utterly refuted all allegations of

adultery and argued that had the allegations been true the appellant could provide proof but no proof was rendered in court.

On the second issue as to custody of the issues, it was argued that the decision of the court was wrong because the paramount consideration of the welfare of the child dictated that the issues be placed under the custody of the appellant as they would have benefited from the appellant's emoluments under his new job which would have given them an opportunity to study in South Korea at the government's expenses. On her party, the respondent submitted that the order made by the court was in line with the provision of section 125(2) of the Law of Marriage Act. It was argued that it is in the best interest of the issues that they remain under the custody of the respondent. Further, it was submitted that one of the issues have health problems thus she requires constant medical attention and care to which the respondent as a mother is better placed to offer. Moreover, it was argued that, placement of the issues under the custody of the appellant was in tandem with the independent views of the issues which was sought by the court.

On the issue of maintenance, it was submitted that the evidence on record are to the effect that the respondent has a higher monthly earning of Tshs 4,000,000/- whereas the appellant's monthly earning (take home) is Tshs 854,000/= but the court failed to properly tilt the balance. Rebutting on this issue, the respondents counsel cited section 129 (1) and (2) of the Law of Marriage Act [Cap 29 RE 2019] and argued that the decision of the court was well founded. She added that the appellant is a senior government

officer working for the police force and that his placement at the foreign office will reward him handsomely.

Finally, on the issue of division of matrimonial assets it was argued that under section 114(1) of the Law of Marriage Act, the court is tasked, among other to order division of matrimonial assets subsequent to the order of separation thus, it was wrong for the magistrate to refrain from awarding distribution of the seven matrimonial assets whose existence was proved during trial. The respondent rebutted with a long narration of her contribution to matrimonial assets and argued that should the court award distribution of matrimonial assets, it should be pleased to award her the house at Kibada where she is currently domiciled with the issues. This marks the end of the submission by the parties.

With these points in mind, I will now determine the four issues. Regarding the first issue, the decree of divorce can only issue if there is proof that the marriage between the parties has broken down irreparably. According to section 107 (2)(a) and (f) adultery and separation for a period of at least three years suffice to establish that the marriage between the parties has broken down irreparably.

Therefore, the question to be determined is whether adultery and separation were established. Regarding adultery, as argued by the appellant, it is a matter of fact and can be established by direct or circumstantial evidence (**Dadi Saidi Kwanga V. Nurdin Akachapa** [1999] TLR 398. My

painstaking examination of the record to determine if there was sufficient circumstantial evidence to sustain the allegation of adultery, ended in vain. As correctly held by the trial court, the evidence on record reveal that there were allegations of adultery from both sides whereby the appellant alleged that the respondent had adulterous behavior with different men whom he named and the respondent alleged that the Appellants had adulterous relationship with house maids. Other than these allegations, there was no independent evidence, circumstantial or otherwise in proof. Thus, in my settled view, the trial court's finding was justified as there was insufficient evidence to prove to a degree of a reasonable probability that the respondent was committing adultery with the three men mentioned.

Even if we were to assume that the circumstantial evidence sufficiently established that the respondent had adulterous relationships that in itself would not confer on the appellant an absolute right to a decree of divorce (see section 107 (2)).

Regarding separation, the parties herein live under one roof in a matrimonial home at Kibada area in Kigamboni District but they sleep in different rooms. Let me say straight forward that although separation is one of the factors relied upon in determining whether the marriage has irreparably broken down, in the instant case, there was legally no separation. While it is true that in some jurisdiction the concept of 'separated but live together' is accepted as a ground for divorce as it is a case on Australia where Section 49(2) of the [Australian] Family Law Act 1975 (Cth), in our jurisdiction,

separation need be physical. Had the parliament intended to recognize the 'separated but live together' concept, it would have explicitly done so.

Let me add also that, as observed by the trial court not only were the parties living under one roof but also the relationship between them seem not to have become too sower such that they cannot co-exist. I have observed, as correctly observed by the trial court that while the matter was still pending in the trial court, the appellant through his employer applied for diplomatic passports for the respondent and their three children so that they can accompany him to his new duty station in Selous, South Korea. Undeniably, this is a clear demonstration that in spite of the blemish relationship between the parties, there are prospects that they can live together as family. Hence, the decree of separation was befitting under the circumstances. Needless to reiterate, for the decree of divorce to issue the court must be satisfied that the marriage between the parties has not only broken down but that the breakdown of the marriage is irreparable (see section 107(2) and 108(d) of the Law of Marriage Act).

Since no time is appended to the order for separation and since it is not expected that the parties will live indefinitely under separation, I will only add that, the decree of separation to which I fully subscribe shall last for 3 years only.

Regarding the second issue, custody of children is regulated by section 125 (2) (a), (b) of the Law of Marriage Act, [Cap 29 R.E. 2019] and section 39(1)

of the Law of the Child Act [Cap 13 RE 2019]. These two sections provide the factor for consideration in determining in whose custody the issues should be placed. According to section 125 (2) (a), (b) of the Law of Marriage Act:

> "In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant and subject to this the court shall have regard to the wishes of the parent, the wishes of the infant, where he or she is of an age to express an independent opinion and the custom of the community to which the parties belong."

It is also important that due regard be placed on the undesirability of disturbing the life of an infant by changes of custody (section125 (3)). In the same vein, section 39(1) of the Law of the Child Act states the following as regards custody of issues:

> 39.-(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 (1), the court shall also consider
> (a) the rights of the child under section 26;
> (b) the age and sex of the child;
> (c) N/A;
> (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 which mandates the court, while determining issues of custody, to give due consideration to the best interest of the child and the importance of a child being with his mother.

There are also numerous authorities in this issue, including, the case of **Mariam Tumbo v Harold Tumbo** [1983] T.L.R 293 and **RAMESH RAJPUT V MRS S RAJPUT** [1988] TLR 96. The question therefore is whether or not the trial court heeded to these principles. Upon scrutiny of the record,

I have observed that, the trial court's findings demonstrate vividly that the court correctly directed itself to the law.

Commendably, before making determination, the trial court obtained an independent opinion of a Social Welfare Office who recommended that the opinion of the two issues, Rosemary and Aloyce should be solicited as per their age, they are capable of giving independent opinions. As for the youngest issue, it was opined that it is in her best interest that she be placed under the custody of the respondent. Heeding to this opinion, the two issues were summoned and their opinion as seen in page 24 of the proceedings was that they would prefer to remain under the custody of the respondent. In addition to their independent opinion, the court made a firm finding on the advantage of placing the children under the custody of the appellant. The finding of the trial court to which I fully subscribe, was as follows:

> The court had some few concerns on the alleged benefit of these children studying in Korea. First, it is not certain that the curriculum in Korea will be suitable for the children who were studying normal school in Tanzania, but also evidence is not clear if the transfer for Korea will be for which duration of time, will it allow the children to finish any level of

education if started. There are questions which ought to have been addressed by the petition.

Certainly, this was a sound finding and a correct application of the law and especially the principle of best interest of the child as articulated in the two provisions above and the undesirability of disturbing the child academic progress. To this extent, I answer the second issue in the negative and dismiss the 5th ground of appeal.

As for the third issue which revolves around the 6th ground of appeal, the law, as submitted for the respondent, imposes a duty on the father to maintain the children whether they are in his custody or under the custody of any other person. Section 129 of the Law of Marriage Act provides that:

> "it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof."

The quantum payable as maintenance is determined upon consideration of the father's means and station in life; the income and wealth of both parents of the child; impairment of the earning capacity of the person with a duty to maintain the child; the financial responsibility of the person with respect to the maintenance of other children; and the cost of living in the area where the child is resident (section 44 of the Law of the Child Act, Cap 13 RE 2019].

In the instant case the court made a blanket order that the appellant should continue to provide maintenance for his children. The amount payable as maintenance was not specifically pronounced obviously because there was already an order for maintenance made by the district court of Temeke in Misc. Civil Application No. 24 of 2018 in which the appellant was ordered to pay a monthly maintenance fee of Tshs 300,000/-. Considering that there was an unchallenged court order on this issue, it would have been wrong for the trial magistrate to vary the quantum as she would have risked deciding a matter to which she was *functus officio*.

Likewise, this court cannot vary the figures awarded because, the court order in Misc. Civil Application No. 24 of 2018 was never challenged. Varying the quantum would be tantamount to usurping appellate powers over Misc. Civil Application No. 24 of 2018 which has not been placed before me. The appellant and his counsel are advised to invoke the appropriate forum for challenging the court orders in Misc. Civil Application No. 24 of 2018. To this extent, the third issue attracts a negative answer and I accordingly dismiss the 6th ground of appeal.

Coming to the distribution of matrimonial assets, section 114 of the Law of Marriage Act provides that, enjoins this court with the power to order distribution of matrimonial assets axillary to the decree of separation. In the instant case, the trial court having ordered separation it ordered that the *status quo* be maintained with regard to matrimonial assets. In my view, this was partially erroneous. Whereas it may be correct to say that since there

are prospects for reconciliation it is in the best interest of the parties that *status quo* be maintained, the enforcement of decree of separation would certainly render one of the parties homeless or place him/her under undue difficulties. In my view, prudence required that, the two houses, the two vehicles and household furniture be distributed between the parties. Meanwhile, the status quo be maintained on the rest of the assets.

To that extent, I partially allow the appeal and order as follows:

1. The parties shall remain under separation for three years;
2. The appellant shall take occupancy and possession of the house situated at Maweni area and the vehicle make Harrier;
3. The respondent shall retain the matrimonial home at Kibada, and the vehicle make VITZ;
4. The parties shall agree on distribution of household- items;
5. For the rest of the assets, **status quo** is maintained.

Order, Accordingly,

DATED at DAR ES SALAAM this 15th day of December 2020

THE HIGH COURT OF TANZANIA

J.L. MASABO

JUDGE