IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC MATRIMONIAL APPEAL NO. 9 OF 2019

(Arising from Matrimonial Appeal No. 2 of 2019 in the District Court of Masasi.

Original Matrimonial Cause No.75 of 2019 of Lisekese Primary Court)

ENOST ABAS.....APPELLANT

VERSUS

STELLA JOHN.....RESPONDENT

5 & 10 March, 2020

JUDGMENT

DYANSOBERA, J:

This is a second appeal. The appellant Enost Abas is challenging the correctness of the judgment of the District Court of Masasi in Matrimonial Appeal No. 2 of 2019. The respondent is Stella John.

Briefly, the background of the matter is that the parties herein celebrated customary marriage in 2011 and during their matrimonial life, they jointly acquired some matrimonial assets including a three bed-roomed house and a five acres farm. In 2017 some misunderstandings

cropped up and the respondent successfully petitioned before the Primary Court of Masasi District at Lisekese for dissolution of marriage and division of matrimonial assets. The petition was registered as Matrimonial Cause No. 23 of 2018. The grounds for the divorce was the appellant's beating and threatening with a panga (*kumpiga na kumtishia na panga*). The record of the trial court in that particular petition shows that the respondent's petition was heard ex parte after the appellant defaulted appearance in court. Supporting her claims, the respondent testified at the trial that after the marriage in 2011, they went to live in the house of the respondent's mother. In that year they jointly bought a farm of five acres at Tshs. 200, 000/= and then planted cashewnuts. They also bought a piece of land on which they erected a three roomed house.

After hearing the testimony of the respondent and her witness one Maurus Mmuya (PW 2), the trial court found that marriage by repute under section 160 (1) of the Law of Marriage Act [Cap. 29 R.E.2002] was established. It found as well that the respondent had undergone psychological cruelty/torture and holding that the marriage was irreparably broken down, the court dissolved it. With respect to the division of matrimonial assets, the trial court awarded the respondent two acres of the farm, 50% of the value of the house, half bag of

fertilizer and half bag of Sulphur. The decision was handed down on 4th June 2018by Hon. Masimba, L.A, a Primary Court Magistrate.

The appellant took the decision not to be a triumph of his justice and successfully appealed to the District Court of Masasi vide Matrimonial Appeal No. 7 of 2018. In that appeal, the appellant was complaining that the case against him was heard in his absence and that only his relative received the summons and attended the hearing without being authorised by the appellant through a power of attorney.

The District Court (Hon. Kashusha, RM) found that the case against the appellant was tried under illegal procedure and process hence defeating the appellant's rights. A trial *de novo* was, in consequence, ordered to be before another magistrate.

When the trial Primary Court (Hon. Nyaki, RM) was seized of the matter, it opened Matrimonial Cause No. 75 of 2018 and heard both parties at the re-trial. In her evidence, the respondent, then petitioner, detailed how they jointly bought five acre's farm for cashewnuts and then built a house and moved therein. She also expressed that the appellant changed his mind and claimed that she, the respondent, had no share in that farm (*shamba halimhusu*). The respondent then referred the matter to the Ward Tribunal's office. There, the appellant was required to compensate the respondent for the cashewnuts at the tune

of Tshs. 1, 340, 000/= but the respondent declined the offer. She narrated that they have a child who, by the time, was 4 years old and was under her custody. The first witness she called one Serena Raymond Mpunga told the trial court that she knew nothing. Maurus Mmuya, who testified as PW 3 stated that he worked in that area and the parties told him that they had bought it and it was, therefore, not a family property. He argued that the parties have been in possession of it for seven years.

In his defence, the appellant maintained that the farm in question is a family property and said that he was ready to compensate the respondent in respect of the farm she found him with and agreed to pay Tshs. 1, 340, 000/= and not 2, 000,000/=. He argued that the respondent harvested all crops planted in that farm.

In its judgment, the trial Primary Court at the re-trial, found that the properties the parties testified on were matrimonial assets jointly acquired. It ordered equal division in respect of both the house and the farm. Further, the trial court directed that there should be valuation of the house and the farm so that whoever wished to retain the items, had to compensate his/her fellow half the value of the property; else, the properties be sold and the proceeds of the sale be distributed on equal footing.

Again, the appellant was not satisfied with that decision given on 10th December, 2018 by the trial court which conducted the re-trial (Nyaki, B.S., PCM). He appealed to the District Court substantially complaining on the way the matrimonial assets were divided.

Upon hearing the appeal, the District Court (Hon. Kando, RM) on 18th day of April, 2019 upheld the whole decision of the Lisekese Primary Court.

Still aggrieved, the appellant has appealed to this court challenging the District Court's decision given in Matrimonial Appeal No. 2 of 2019. The appeal is premised on the following grounds:-

1. That the learned magistrate erred in law and in fact by failure to see that the trial magistrate failed to comply with the order issued by the District Court of Masasi (B.K. Kashusha, RM) dated 30th August to Matrimonial Appeal No. 23 of 2018 from the Primary Court of Lisekese.

2. That the learned magistrate erred in law and in fact by failure to see that matrimonial properties, if any, cannot be distributed among the parties until when a Decree of divorce has been issued or marriage among the parties has been dissolved.

3. The learned magistrate erred in law and in fact by distributing properties which were not matrimonial properties and or not obtained by joint efforts of the parties.

4. That the learned trial magistrate erred in law and in fact by dividing matrimonial assets without considering the custody of one beautiful marriage issue.

5. That the learned trial magistrate erred in law and in fact by failure to know that matrimonial properties, among other things, are distributed considering the extent each party contributed to the attainment of the same.

The appeal was resisted by the respondent who appeared own her own, unrepresented. The appellant was represented by Mr. Hussein Mtembwa, learned counsel.

Arguing this appeal, learned counsel for the appellant, after detailing the historical background of the whole matter, expounded in detail these grounds of appeal and supported it with some case laws. His main thrust was first that the trial Primary Court which conducted the re-trial went contrary to the decision and directions of the District Court which had ordered trial *de novo* but the court dealt with the division of matrimonial assets leaving aside the issue of dissolution of the marriage and second, the decision contravened the clear provisions of section 114 (1) of the Law of Marriage Act.

In her reply, the respondent, with respect to the 1st ground of appeal, told this court that the order of the District Court was complied with and the case was retried by a different magistrate as ordered by the District Court.

On the 2nd ground of appeal, she said that there was misapprehension of the proceedings on part of counsel for the appellant. She contended that section 114 of the Law of Marriage Act was invoked and there was no dispute that the marriage was irreparably broken down.

Answering the 3rd ground of appeal, the respondent told this court that the evidence showed that the property was matrimonial having been acquired through their joint efforts and that the 150 cashewnut trees were jointly planted.

On the complaint of dividing the matrimonial properties without considering the custody of the beautiful marriage issue which is the 4th ground of appeal, the respondent stated that the presence of the child of the marriage did not affect the fair division and that the appellant did not raise the issue before the first appellate court and, therefore, it was an afterthought.

As far as the issue of extent of contribution is concerned, the respondent's response was that both lower courts considered efforts of contribution made by her.

Counsel for the appellant, in rejoinder, maintained that the decision of 10th December, 2018 contained no order of dissolution of marriage

and stated that if there was a second decree of divorce, then it was not issued by the court.

Having considered the records of both the Primary and District Courts and the grounds of appeal, the reply and oral submissions, the pertinent issue calling for determination is, I think, whether the decision of the first appellate District Court can be sustained.

In the 1st ground of appeal, the appellant is complaining against the trial Magistrate's failure to comply with the order issued by the District Court of Masasi (B.K. Kashusha, RM) dated 30th August, 2018 in Matrimonial Appeal No. 7 of 2018. The record shows that after the District Court found that the case was tried under illegal procedure and process and hence defeating the appellant's rights, it allowed the appellant's appeal, set aside both the decision and orders of the Primary Court and ordered a trial *de novo* but before another magistrate. The respondent's response was that the order of the District Court was complied with in that the re-trial was done by another magistrate (Masimba, L.A.) who is different from the first magistrate one Nyaki, B.S.

I think the appellant is right. After the re-trial resumed in Matrimonial Cause No. 75 of 2019, the issue of the existence of marriage between the parties and whether it was broken down was not canvassed by the subsequent magistrate. Besides, the marriage was not dissolved;

instead, the court proceeded to order division of matrimonial assets as evidenced by the trial court's opening words in its judgment that *"uamuzi huu ni juu ya mgao wa mali ya pamoja"*. The re-trial, therefore, went contrary to the order of the District Court. The first ground has merit.

In the 2nd ground of appeal, the appellant complained that the trial court erred in failing to see that matrimonial properties, if any, cannot be distributed among the parties until when a decree of divorce has been issued or marriage between the parties has been dissolved. In rendering support to this ground of appeal, Mr. Hussein Mtembwa cited the cases of **Bi Hawa Mohamed v. Ally Seif** [1983] TLR 32 and **Fatuma Mohamed v. Saidi Chikamba** [1988] TLR 32 on the interpretation and application of section 114 (1) of the Law of Marriage Act. The respondent, on the other hand, stated that the appellant appears to have apprehended the proceedings in that the provisions of section 114 was properly invoked and applied.

There is no dispute and the record is clear that the respondent at the first trial court had petitioned for both dissolution of marriage and division of matrimonial assets. The judgment of the trial court in Matrimonial Cause No. 23 of 2018 is clear that after the trial court held that the marriage between the parties existed by repute under section 160 (1) of the Law of Marriage Act [Cap. 29 R.E.2002] but was

irreparably broken down, it proceeded to dissolve it. With respect to the division of matrimonial assets, the trial court awarded the respondent two acres of the farm, 50% of the value of the house, half bag of fertilizer and half bag of Sulphur. The decision was handed down by Hon. Masimba, RM, and the Primary Court Magistrate on 4th June, 2018.

Since the District Court (Hon. Kashusha, RM) had in Matrimonial Appeal No. 7 of 2018 set aside the trial court's proceedings and orders in Matrimonial Cause No. 23 of 2018, it was wrong for the second magistrate to embark on division of matrimonial assets without first hearing the parties on whether the marriage between them existed in law, and if so, whether it was irretrievably broken down and amenable to be dissolved and then dissolve it. It was a serious error on part of the Primary Court to order the division of matrimonial assets as it did inasmuch as that power could only be exercised by the court when granting or subsequent to the grant of a decree of separation or divorce. This is the gist of the appellant's complaint in grounds numbers 1 and 2 of the appeal.

Indeed, the law is clear on this. Section 114 (1) of the Law of Marriage Act, [Cap. 29 R. E. 2002] on powers of court to order division of matrimonial assets provides.

"114.

(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.

In view of the fact that the dissolution of marriage was a pre-requisite for an order of division of matrimonial assets, the order made by the trial court on the division of matrimonial assets before granting a decree of divorce or separation was contrary to the clear provisions of the law, the decision of the trial Primary Court was a nullity.

The first appellate District Court succumbed to the same error in upholding the decision of the trial court which was a nullity.

This court cannot brook the illegality pass by and as rightly pointed out by counsel for the appellant, there has to be an intervention so as to invalidate it. In this regard, I am inspired by the guidance of the Court of Appeal of Tanzania in the case of **Diamond Trust Bank Tanzania Ltd versus Idrisa Shehe Mohamed**, CAT Civil Appeal No. 262 of 2017 Zanzibar Registry (unreported) where, at p. 12 of the typed judgment, the Court of Appeal, speaking through Hon. Mbaruku, J.A had this to say:

"The superior courts have the additional duty of ensuring proper application of the laws by the courts below".

Further that, "the court cannot normally justifiably close its eyes on a glaring illegality in any particular case because it has a duty to ensuring proper application of the laws by subordinate courts."

It is my finding that both decisions which were nullity and void abinitio cannot be sustained. The determination of these first two grounds in my new disposes of the appeal. The appeal is allowed.

I declare the both decisions a nullity. I quash and set aside the whole proceedings of the District Court in Matrimonial Appeal No. 2 of 2019. Likewise, I quash and set aside the whole proceedings of the Primary Court of Mtwara District at Mtwara Urban in Matrimonial Cause No. 75 of 2018. I declare that the parties are still husband and wife.

I, however, direct that whoever wishes to pursue what he or she thinks to be his or her legal rights in a court of law, he or she should follow the dictates of the laws of the land for the redress.

No order as to costs is made.

Order accordingly.

W.P. Dyansobera
JUDGE
10.3.2020

Dated and delivered at Mtwara this 10th day of March, 2020 in the presence of the appellant and respondent and Ms. Eveta Lukanga, learned counsel for the appellant.

W.P. Dyansobera
JUDGE
10.3.2020