**IN THE HIGH COURT OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM.**

**CIVIL APPEAL No. 45 OF 2019**

(Originating from Matrimonial Cause No. 26 of 2010 at District court of Temeke at Temeke)

**HAMIDU SALEHE MFINANGA.................................APPELLANT**

Versus

**SHAMIMU JOSEPH..................................................RESPONDENT**

# JUDGMENT

30.10.2019 - 10.03.2020

**J. A. DE-MELLO J;**

This is an Appeal from the decision of **District Court of Temeke** in **Matrimonial Cause No. 26 of 2010,** where the Appellant is dissatisfied with decision of the Trial Court on the following grounds;

1. **That, the District Court erred in law and, fact in failing to evaluate and analyze properly the evidence tendered by both parties concerning the division of the matrimonial assets as per section 114 (1) (2) of the law of Marriage Act, Cap. 29 R.E. 2002.**
2. **That, the District court erred in law and, in fact on deciding in favor of Petitioner on the issue of custody and maintenance of**

**the children without taking into consideration the best interest and welfare of the children.**

3. **That, the District Magistrate erred in law and, in fact on admitting the evidence adduced by PW2 without being cross examined by the defense side contrary to the Tanzania Evidence Act, R.E.2002.**

**Catherine Lyasenga** Counsel for Appellant, while the Respondent enjoyed the services of **Idda Lugakingira**, with written submissions ordered and, in compliance. Submitting in respect of the first ground of Appeal that **section 114(1) of Cap. 29** empowers the Court to order division of assets, acquired by joint efforts when granting divorce in exercise conditions as stipulated under **section 114 (2) (a) (b) (c)** and**, (d).** The Respondent, failed to prove her contribution on the two houses situate **at Uchira Moshi and Kichemchem Mbagala** to make them jointly effort acquired assets. He further submitted that, the **Uchira house** is solely owned by the Appellant after selling the shop he owned before marriage, at **Uchira.** He resisted the perception by the Trial Court that, contribution extends to advice by saying the same is contrary to the provision of **section 114 (2) (b)** which requires contribution in money, property, or work towards the acquisition of assets. He cited the case of **Mohamed Abdallah** vs. **Halima Lisangwe [1988] TLR 197** which held that;

**"The principle under the division of property under section 114 of LMA is one of compensation. Whether what is being compensated is direct monetary contribution or domestic service it does not matter"**

Further she submitted, the house of **Kichechem Mbagala** which was distributed to the Respondent has been burnt and, reduced to a bare plot of land. That even the said distribution contradicts **section 114 (1) of LMA** which requires Court to order division between Parties of any assets or order the sale of any such asset and, of the proceeds of the sale. He referred the case of **Elizabeth A. Komakoma** vs. **Zephania M Andendekisye, Civil Appeal No. 171 of 2005,** High Court of Tanzania at Dar Es salaam. The small house at **Mbagala** that, the Trial Court gave to Appellant was not testified its existence by both parties and also, Appellant was denied to call his two witnesses to testify on acquisition of his properties.

In reply, Counsel for Respondent submitted that, much as the Appellant is aware that a spouse is entitled towards a Decree of Divorce but, still is of the belief that, the Respondent was not entitled to a share, which the Court considered the extent of contribution by both. Considering the evidence on records, the Respondent's carried more weight than that of the Appellant. Appellant did nothing than exhibiting man's supremacy as if the Respondent was just a flower for decay and to through away. The Trial Court findings are based on the facts and, credibility of witness that, should be maintained as it was stated in the cases **Abdallah Rajab** vs. **Saada Abdallah Rajab and others (1994) TLR 132** and **George Ismail Kalalu** vs. **George Martin Nachenga, Misc. Land Case Appeal No. 109** of **2015.**

Careful consideration of what submitted by Parties and, specifically the first ground of Appeal, it is obvious that, what is in dispute here is distribution of Matrimonial Assets which the Appellant claims to have ignored the mandatory provision of the law under **section 114 (2) of LMA.** In

addressing this, it is important, to consider what was actually transpired before the Trial Court on acquisition of the said matrimonial assets, more so the two houses, in **Mbagala** and, **Uchira,** which the Appellant claims to have acquired land through loan and, constructed the two with construction of the Uehara as a result of a shop business. All of them developed during the existence of their marriage with the Respondent claiming to have carried buckets of water during construction facts which were testified before the Trial Court by **PW2.** The case of **Bi Hawa Mohamed** vs. **Ali Sefu (1983) TLR 9**, gives clear elaboration on considerations where the Court is making distribution of matrimonial properties, whereas domestic activities poises a significant contribution towards acquisition. However, there is no proof of documents or any relevant materialsto establish that, the said house was solely owned by the Appellant in exclusion of Respondent.

**Section 114 (3) provides**;

**"For the purpose of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts."**

The only consideration is the construction of the tow during the subsistence the marriage, with Respondent largely involved in development activities like running a shop business, taking care of family welfare, even if the plots were obtained before marriage. In the case of **Scolastica Spendi** vs. **Ulimbakisya Ambokile Sipendi and Another, Matrimonial Cause No. 2 of 2012,** the Court stated;

**"Even if it will be said the Appellant did not contribute cash money in acquiring the house sought to be divide but she contributed through doing domestic works and supervising finishing construction of the house".**

In the circumstance, I don't find any justification to hold that the Trial Court's decision contradicted **section 114 (2) of LMA** since the appellant has failed to prove sole ownership as per **section 58 of LMA.** On the 2nd ground of Appeal that the granting of custody of children to the Respondent is illegal and against **section 125 (2) of LMA** he Trial Court took into account the welfare principle based on the truth that he was financially and, socially sound to take care which is not enough. In reply the Respondent stated that, it is not true that she wants to use children as a source of income since for the she has received nothing from the Appellant for the past seven years but she has kept on caring, mothering, while the Appellant has neither time, nor communication but, even worse not paying school fees and, other many amenities. It is not a matter of financial wellbeing but the matter that, is paramount is whether the children feel comfortable and, peaceful.

I have gone through the records of the Trial Court to find no evidence that the Appellant was denied visitation rights. It is only for reason of another marriage the Appellant is into not healthy for the issues. Section **125 (1)** empowers the Court to grant custody to either parent while **125 (2)** requires paramount consideration to be the **Welfare** of the Child. However, **section 125 (2)** the Court shall have regard to wishes of the infant where they will be in position to express their wishes.

In this case, both issues have been living with the Respondent for more than seven years now and, the Appellant has failed to show they have suffered for not living him. It will be undesirable and for that long to disturb and change their pattern and way of life now. For the reasons stated above, the second ground of Appeal lacks merit and is dismissed. In respect to the third ground of Appeal I join hand with the Respondent to the effect that the appellant has shown nothing to substantiate his allegation for not been cross examined as required by law in **section 147 (1) Cap. 6.** The Appellant failed on his part to prove his assertion as per **section 110** of Cap. 6 to convince this Court to decide otherwise. For the reason this ground of appeal fails and the same is dismissed.

In the upshot the Appeal is hereby dismissed in its entirety for want of merit and, this Court is ordering each party to bear his or her own costs, it being a matrimonial matter.

It is so ordered.

**J. A. DE-MELLO.**

**JUDGE**

**10/03/2020**