

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(PC) CIVIL REVISION NO. 13 OF 2018

MOSHI EMMANUEL GASPER..... APPLICANT

VERSUS

HALIMA JONAS NYANDU.....RESPONDENT

(Arising from the judgment of Ilala District Court Matrimonial Cause No. 30 of 2012)

RULING

Date of last order:28/11/2019

Date of Ruling: 31/03/2020

S.M. KULITA, J.

This is an application for revision filed by **MOSHI EMMANUEL GASPER** against the decision of Ilala District Court in Matrimonial Cause No. 30 of 2012. The application is made through chamber summons under section 79(1)(c) of the Civil Procedure Code [Cap 33 RE 2002]. It is supported by an

affidavit sworn by the applicant's Counsel Mr. Mashaka Edgar Mfala.

In the affidavit the applicant prays for this court to revise the above mentioned case for the reasons stated in the affidavit from paragraph 2 to 8. The application was disposed of by way of written submissions.

The applicant through his advocate Joan-Mary Msangi prayed for the affidavit to be adopted as part of her submission.

In her written submission Ms. Joan-Mary Msangi stated that the respondent instituted a Matrimonial Cause No. 30 of 2012 at Ilala District Court praying for divorce, custody of the child and maintenance, as well as equal division of matrimonial properties. The court made orders to the effect that the respondent (now the applicant) has to maintain the petitioner and the child at a tune of Tshs.150,000/= monthly and child be given the peace of Land located at Mbezi Msakuzi. The applicant's advocate went on to submit that section 114(1) of the Law of Marriage Act gives powers to the court to order division of matrimonial properties to the parties but the trial Magistrate erred by awarding the said property to the issue of marriage and termed that act as irregularity.

The applicant's advocate submitted that the respondent did not have any contribution towards the acquisition of the said property thus granting it to her is denying the applicant's enjoyment over his property.

The counsel further stated that the matrimonial cause was supposed to be heard orally as per the provisions of the section 84 of the Law of Marriage Act [Cap 29 RE 2002]. Therefore the act of the trial court to dispose the matter by way of written submission is irregular.

The applicant's concluded his submission by praying for the court to allow this application.

In reply, the respondent HALIMA JONAS NYANDU submitted that the applicant has alleged two issues; the first issue being that the matter was not supposed to be disposed of by way of written submission. Replying this argument about section 84 of the Law of Marriage Act the respondent submitted that the argument has no legs to stand as the interpretation of the provisions of section 84 of the Act gives discretion to the court. The respondent also submitted that the records of the trial court indicate that the act of the applicant to disappear after his reply to the petition made the court to determine the matter in his absence.

With regard to the issue of division of matrimonial properties the respondent submitted that the applicant misconstrued the words in the judgment as the property was awarded to her and not to the issue of marriage, thus the allegation has no legs to stand since the matrimonial properties were divided between the parties in compliance to section 114 of the Law of Marriage Act.

The respondent concluded her submission by submitting that the allegation by the applicant are not errors on the face of records which can be challenged by way of revision and therefore she prayed for dismissal of this matter as it has no merit.

The applicant's advocate in her rejoinder submission stated that the respondent is misleading the court that the matter was heard ex-parte while the applicant proceeded with the case to the end.

He also submitted that the plot of land which was given to issue of marriage was not a matrimonial property.

Upon going through the submissions presented by both parties I have noticed that the applicant has properly moved the court through section 79 of the Civil Procedure Code. In his submission the applicant's counsel raised two issues for determination. The 1st issue is the disposal of the matter at the

trial court through written submissions. The applicant submitted that the matrimonial cause was supposed to be heard orally in open court as per the provisions of section 84 of the Act, not by way of written submissions. I have gone through the provisions of the said section 84 of the Law of Marriage Act and found it stating;

84. Petitions to be heard in open court;

All petitions in matrimonial proceedings shall be heard in open court:

Provided that—

(a) the court shall have power in its discretion, in exceptional circumstances, to order that the public be excluded from any hearing;

(b) where, to comply with the requirements of paragraph (b) of subsection (2) of section 125, the court questions an infant as to his or her wishes regarding custody, it shall do so in chambers.

From the above cited provision you can note the court has discretion to make the petition be heard in public or chamber. The said discretion can be extended to the hearing through written submissions if the court finds it justifiable to do so. As for the matter at hand the issue was 5 years old by the time

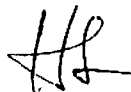
the petition was disposed of on the 29/9/2015. She was born on the 22/6/2007. It means that there is no room to inquire the child on her wish for the parent whom she preferred to stay with, as she was still minor of under 7 years, thus the court's order that she was to stay with her mother was obvious. Though he never stated, the applicant's vision on this matter is for this court to order re-trial but as for the evidence that transpires in the lower courts records there is a great possibility of the decision to remain the same. Otherwise I don't see any miscarriage of justice for the said Matrimonial Cause to be disposed of by way of written submission at the District Court.

I have also gone through the records of the lower and noticed that the matter was not heard ex-parte as claimed by the respondent because the pleadings and the submissions by both parties were there. I am of the settled view that the court acted judiciously in exercising the powers vested to it. I therefore find that reason with no legal weight.

The second issue relates with the division of matrimonial properties. The applicant submitted that the matrimonial property was awarded to the issue of marriage contrary to section 114 of the Act. I have gone through the judgment of the trial court at page 7 and noticed that the trial Magistrate ordered the plot located at Mbezi Msakuzi be given to the

petitioner so as to enable her to build a house and get shelter for her child. Thus it should be cleared that the applicant has overlooked the statement in the judgment. I am of the view that the trial Magistrate properly addressed himself with the provisions of section 114 of the Act while giving orders of division of matrimonial properties. The records of the trial court show that the plot which was given to the respondent is among the properties which were jointly acquired by the parties. The applicant claimed to have acquired the said properties before the marriage but no evidence was given to that effect.

Having said so I find this application with no merit and I hereby dismiss it. As the matter involves family issues I make no order as to costs.



S.M. KULITA

JUDGE

31/03/2020