IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 89 OF 2020

(Originating from Matrimonial Cause No. 114 of 2018 in the District Court of Kinondoni)

CELESTINA MAKULA .....APPELLANT

VERSUS

JAMES KOBINA COLEMAN.....RESPONDENT

JUDGMENT

2nd October & 23rd November, 2020

BANZI, J.:

James Kobina Coleman, the Respondent and Celestina Makula, the Appellant contracted a Customary marriage on 30th December 2007. Their marriage was blessed with two issues, George Ekow Coleman and Hape Kobina Coleman who were born on 5th July, 2007 and 23rd November, 2010, respectively. Following the misunderstanding between them, in 2018, the Appellant filed for divorce claiming among other things, equal division of matrimonial properties, custody of children, maintenance of children at Tshs.500,000/= per month and maintenance arrears for herself of Tshs.100,000/= per month from 2013 to the date of judgment.

The trial court upon being satisfied that the marriage was broken down irreparably, granted the divorce and divided all assets which were proved to form part of matrimonial properties. In addition, the Respondent was awarded custody of children with free visitation right to the Appellant. The

Appellant being dissatisfied with the decision of the trial court preferred this appeal with five grounds which may be crystallised as hereunder;

1. *That, the District Court erred in law and fact by failing to declare the Motor vehicle Toyota Rush with Reg. No. T381 DFG, a house at Morogoro, a plot at Kigamboni Dar es Salaam, a farm of 50 acres at Ibadakuli area, Sumbawanga and a plot at Majengo Manyoni are matrimonial properties and failed to divide them accordingly.*
2. *That, the District Court erred in law and facts by ordering the issues of marriage to be under custody of the Respondent without considering their best interest and welfare.*
3. *That, the District Court erred in law and facts for failing to order the Respondent to pay Tshs.200,000/= per month from August 2017 to the judgment date as maintenance for the Appellant.*
4. *That, the District Court erred in law and facts for failing to order the Respondent to pay for maintenance of the issues of marriage.*

At the hearing, the Appellant appeared in person and unrepresented whereas, Mr. Sosten Mbedule, learned counsel represented the Respondent. By consent, the appeal was argued by way of written submissions and the same were duly filed as per Court's order.

Arguing in support of the first ground, the Appellant submitted that, she is entitled to an equal share (50%) of the matrimonial assets which were acquired jointly by the parties during subsistence of their marriage. The properties are; a motor vehicle make Toyota Rush with Reg. No. T381 DFG, a house at Morogoro, a plot located at Kigamboni Dar es Salaam, a farm of 50 acres at Ibadakuli area Sumbawanga and a plot located at Majengo, Manyoni. The basis of her submission is that, she contributed to the acquisition of those properties because apart from performing household

chores, she contributed in terms of monetary towards acquisition, construction and improvement on the properties in question. To rule out that the aforementioned properties are not part of matrimonial properties, the trial court acted contrary to the provisions of section 114 (1), (2) and (3) of the Law of Marriage Act [Cap. 29 R.E 2002] ("the LMA"). Although she did not attach the copies but she cited unreported decisions of this Court in the cases of **Eliester Philemon Lipangahela v. Daud Makuhuna**, Civil Appeal No. 139 of 2002 and **Lawrence Mtefu v. Germana Mtefu**, Civil Appeal No. 214 of 2014 to support her argument.

In respect of custody of children, she submitted that, the court should consider the provisions of section 4(2) of the Law of Child Act, 2009 and UN Convention on the Rights of the Child, to assess and decide on the best interest of the child. The Court was invited to look at pleasant environment and comfortable standard of living as it has been held in the case of **Celestine Kilala and Halima Yusufu v. Restituta Celestine Kilala** [1980] TLR 76. Therefore, she prayed to be given the custody of their children since she is physically fit, willing, devoted and capable of handling and raising them properly considering the fact that, the Respondent is a busy person and always away from his home thus he cannot pay attention to the welfare of the children.

Concerning the last two grounds in respect of maintenance, she submitted that, the Respondent is duty bound to provide maintenance for her, being his wife as provided under section 115 of LMA. It is also his duty to provide maintenance to the children as required under section 129 (1) of the LMA. Therefore, the Respondent should be ordered to pay for maintenance of the Appellant and children in terms of sections 130 (1) and

125 of the LMA as well as to provide necessary needs to the children pursuant to sections 8 (2) and 42 (2) of the Law of the Child Act, 2009. In those premises, he should pay the sum of Tshs.200,000/= per month from August 2017 to the judgment date as maintenance to the Appellant and Tshs.500,000/= as maintenance of the children plus other needs like medical and education expenses. Thus, she prayed for appeal to be allowed with costs.

In the reply it was the contention of counsel for the Respondent that, the Appellant's submission contains facts which were not pleaded at the lower court as among the issues to be determined. The contents contained under pages 4 and 6 of submission do not reflect the contents of the judgment or proceedings of the trial court. He cited the case of **Gandy v. Gaspar Air Charters Ltd.** (1956) 23 EACA 139 and urged the Court to disregard the same.

Reverting to the first ground, he submitted that, at the trial, no evidence was adduced by either party to prove existence of the house in Morogoro and 50 acres farm in Sumbawanga. He added that, parties have never constructed any matrimonial house in Morogoro. As for the motor vehicle, the same was obtained through a personal loan; therefore, is a separate property as under section 60 (a) of the LMA. To him, the cited cases are distinguishable because in the present matter, the Appellant has never contributed to the acquisition of the motor vehicle in question.

On the second ground, it was submitted that the Appellant failed to demonstrate her physical address and subsistence source of income so as to be granted the custody of issues of marriage. He went on stating that the Respondent is the right person to have full custody of the children as shown

in the evidence at page 24 to 25 of the typed proceedings. Therefore, the trial court was right to grant custody of children to the Respondent in terms of section 125 of the LMA.

Replying to the last two grounds, counsel for the Respondent submitted that, it is the duty of the Respondent to maintain his wife during the subsistence of their marriage, and in the present matter, the Respondent duly discharged his duty by depositing money to the Appellant's bank account and through mobile money as shown at page 25 of the typed proceedings and proved through exhibit D3. On that basis, the trial court disregarded the prayer of spouse maintenance. On the issue of medical and education expenses, he argued that, the children are under National Health Insurance services as shown in Exhibit D4 and the latter was and still is covered by the Respondent. He invited the Court to revisit at page 25 and 26 of the typed proceedings as well as exhibit D4. Finally, he prayed that the appeal be dismissed for lack of merit.

In rejoinder the Appellant reiterated what she has submitted in her submission in chief and prayed for appeal to be allowed.

Having thoroughly considered the evidence on record, grounds of appeal and the submissions of both sides, the issues for determination are;

1. *Whether the Motor vehicle in question, the house at Morogoro, the plot at Kigamboni Dar es Salaam, the farm of 50 acres at Ibadakuli area, Sumbawanga and the plot at Majengo Manyoni are matrimonial assets. If yes, whether the Respondent is entitled to equal share.*

2. *Whether the custody order was properly made. If not, whether it will be proper for the Respondent to pay Tshs.500,000/= per month.*
3. *Whether the Appellant is entitled to maintenance arrears Tshs.200,000/= per month.*

Starting with the first issue, in terms of section 114 (1) of the LMA, matrimonial or family assets are only those assets acquired during the subsistence of marriage by the joint efforts of husband and wife. It refers to those properties which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. See also the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32. Likewise, it is settled law that, performance of domestic duties amounts to contribution towards acquisition of matrimonial asset although not necessarily 50% as it was stated in the cases of **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 [2019] TZCA 414 at www.tanzlii.org and **Bibie Mauridi v. Mohamed Ibrahim** [1989] TLR 162.

The question that follows is whether the properties mentioned in the first issue are matrimonial assets at the time of dissolution of the marriage. The Appellant in her testimony mentioned various properties claiming as matrimonial assets including the motor vehicle, a plot at Mabwepande, the house at Morogoro, two plots at Kigamboni, 50 acres farm located at Sumbawanga, one plot at Shinyanga, the plot located at Manyoni owned by the Respondent and Angela Abraham and two motor vehicles make Scania. However, out of those properties, she admitted to know the plot at Mabwepande only. Apart from that, she did not bring any evidence to prove

either their existence or if the same were acquired during the subsistence of marriage.

On the other hand, the Respondent in his evidence, admitted about existence of plot at Mabwepande, Kigamboni, Shinyanga, Singida and the motor vehicle in question but the house at Morogoro, 50 acres at Sumbawanga, and two Scania have never existed. Nevertheless, he further testified that, the motor vehicle Toyota Rush and plot at Mabwepande were acquired during the subsistence of the marriage by his own efforts after getting loans from CRDB bank and TPB bank as proved by exhibit D2. Besides, the said plot at Mabwepande was acquired for the benefit of their children. As for plot at Shinyanga, the same was acquired in 2005 prior to their marriage and hence not matrimonial asset whereas, he acquired the plot at Singida with his business partner and so, not matrimonial asset. In respect of the two plots at Kigamboni, one was disposed of for Tshs.35,000,000/= and he used Tshs.25,000,000/= for school fees of their issues and he gave the rest to the Appellant as proved by exhibit D1. The remaining plot at Kigamboni was used as security to secure a loan from his friend.

From the evidence on record, it is undisputed that the motor vehicle in was acquired by the Respondent through the loan advanced to him by CRDB bank and TPB bank. It was the Respondent who was servicing the said loan. Hence, the motor vehicle in question was a personal property pursuant to section 60 (a) of the LMA as rightly decided by the trial court. Through the same loan, the Respondent acquired the plot at Mabwepande. Although he insisted that the same was acquired for the benefit of their children, but he also admitted that, the title deed bears his name and the name of the

Appellant. So, any disposition thereof ought to have complied with section 161 (3) of the Land Act [Cap. 113 R.E. 2002]. As far as the plot in Singida is concerned, both the Appellant and the Respondent admitted that, the same was acquired by the Respondent and his business partner. That in itself suffices to conclude that, the plot in question is not matrimonial property. In respect of plots at Kigamboni, it is evident that, the same were acquired during the subsistence of marriage. No evidence was adduced to establish how they were acquired. It is also evident that, in the subsistence of marriage, the Appellant was not only working but also performing domestic work which taken all together amount to contribution towards acquisition of the plots in question. However, at the of dissolution of marriage, there was one plot only as the other one has already been disposed of but the Appellant got her shares. Thus, out of all matrimonial properties, the ones that existed at the time of dissolution of marriage were plot at Mabwepande and one plot at Kigamboni. Therefore, although not necessarily 50% but the Appellant is entitled to some share over the two mentioned properties because they were acquired in the subsistence of marriage by the joint efforts of the Appellant and the Respondent. Therefore, considering her contribution, it is the considered view of this court that, the Appellant is entitled to 40% of the total value of the plot at Mabwepande and 40% of the total value of the remained plot at Kigamboni. The remaining 60% for each plot goes to the Respondent. In that regard, the first ground is partly allowed.

Coming to the second issue, it is the trite law that, in matters of custody, the welfare of the child is of paramount consideration. In the case of **Ramesh Rajput v. Mrs. Sunanda Rajput** [1988] TLR 96 it was held that;

"the most important factor in custody proceedings is the welfare of the child; an infant child of two should be with the mother unless there are very strong reasons to the contrary; in the circumstances of this case no strong reasons have been advanced to rebut the presumption that an infant below the age of seven years should be with the mother..."

In the instant case there is no dispute that, the issues of marriage are George Ekow Coleman and Hape Kobina Coleman who at the time of judgment were 12 and 9 years old respectively. Also, the records of the trial court show throughout the time it was the Respondent who was taking care of the children by providing them with all necessary needs. Apart from that it evident that, between 2012 to 2017 the Respondent complained to the social welfare officer on how the Appellant failed to take care of her children as she did not have time for them. Moreover, the evidence further shows that, there was a point she failed to take the child to school when he was under her custody. Therefore, on the basis of such evidence, it is for the best interest of two issues to stay with their father, the Respondent. Since the children were above 7 years old, the trial court acted properly by granted the custody to the Respondent. thus, the second issue is answered in affirmative and hence, the second part of the issue concerning maintenance of children including medical and education expenses dies automatically. Besides, it is evident that, both children are insured with NHIF.

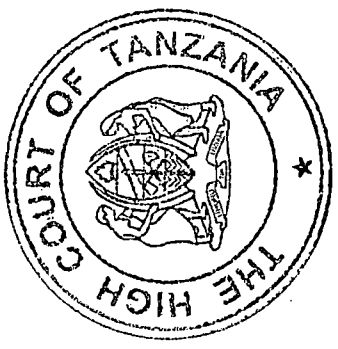
Reverting to the third issue, section 63 (a) provides that;

"Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court it shall be the duty of every husband to maintain his wife

or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life."

It is apparent from the evidence on record that, the Respondent was maintaining the Appellant since 2007 to 2018. He tendered bank deposit slips, Exhibit D3 to prove the same. This fact was not cross examined by the Appellant which implied acceptance of the truth from the witness as it was held in the case of In **Damian Ruhele vs. Republic,** Criminal Appeal No. 501 of 2007 CAT (unreported). Thus, the trial court was right to refuse the prayer of arrears to the tune of Tshs.100,000/= per month. Likewise, I find nothing to substantiate the prayer of Tshs.200,000/= by the Appellant as articulated in her grounds of appeal.

For the foregoing reasons, the appeal is partly allowed to the extent mentioned above. The orders of the trial court are hereby varied to wit; the Appellant is entitled to 40% of the total value of the plot at Mabwepande and 40% of the total value of the remained plot at Kigamboni. The remaining 60% for each plot goes to the Respondent. Since the Respondent is willing to keep the plots, he is hereby ordered to pay the Appellant the amount equivalent to 40% of the total value of the plot at Mabwepande and 40% of the total value of the remained plot at Kigamboni. Owing to the nature of the matter, each party shall bear its own costs. It is so ordered.



I. K. BANZI
JUDGE
23/11/2020