

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC MATRIMONIAL APPEAL NO. 27 OF 2020

(Arising from Matrimonial Appeal No. 09 of 2020 in the District Court of Nyamagana District
(Hon. G.K. Sumaye, SRM) dated 01/06/2020 Original Matrimonial Cause No. 79 of 2020 at
Mkuyuni Primary Court (Hon. N.L. Shija, RM)

SAMWEL RAMADHANI APPELLANT

VERSUS

ESTER PETER RESPONDENT

EXPARTE JUDGMENT

16th & 26th February, 2021

RUMANYIKA, J.:

The 2nd appeal is against judgment and decree of divorce of Nyamagana district court dated 01/06/2020 more so with respect to status of the marriage and division of matrimonial assets, the later having had revised decision of Mkuyuni primary court (the court) dated 31/03/2020 (the trial court).

Unlike Samwel Ramadhani (the appellant) had service of Mr. Musa Muhingo learned counsel, Ester Peter (the respondent) appeared in person. However, when the appeal was, according to records of 16/11/2010 by consent called on 16/02/2020 for hearing, the respondent prayed and she

insisted for adjournment to prepare his advocate whose name however she did not disclose. As due to outbreak of COVID-19 Pandemic the matter was by way of Audio Teleconferencing heard, and the respondent simply muted, I considered one having had waived her right to be heard for that reason therefore, by order of the court her appearance was dispensed with hence the exparte judgment.

Very briefly, Mr. Musa Muhingo learned counsel submitted:- (a) that the 1st appeal court erred in law and fact not holding that without matter having had not been referred to the marriage Reconciliation Board the trial court entertained it improperly and prematurely (b) that with the evidence of Sm1 and Sm3 the 1st appeal court it should not have held that the house was matrimonial. The learned counsel dropped the other grounds of the appeal.

Questioned by the court for more clarity, the learned counsel submitted that with respect to how was the house, no "fundi" testified in court except the two appellant's relatives.

Applying for divorce, division of matrimonial assets and custody of the child Prisca Samwel Sm1 Ester Peter is on record having had stated

that she married the appellant in church on 12/12/2015, they were blessed with one child also jointly they acquired two houses on the plot. According to her, the grounds for application were; regular and repeated domestic violence/appellant's cruelty and extra marital relations leading to a 2nd marriage. That is all.

Sm2 Ernest Marioa stated that following disputes at times he reconciled the spouses at the latter's two bed room and a sitting room initially. That is it.

Sm3 Golan Lucas stated that on a date he couldn't remember, the parties having quarrelled and the appellant chased her away, he (sm3) attempted but he failed to reconcile them.

Su1 Samwel Ramadhani stated that immediately after marriage the respondent was always kept away supported by in laws therefore their quarrels never stopped therefore he never ever assaulted her or at all.

Su2 Shaban Musa, Su3 Ali Idi, and Su4 Idi Jafari testified closely the same as Su1 did but additionally, that the three were the ones who supervised construction of the alleged house(s).

It appears on the balance of probabilities convinced, the trial court found the marriage intact but due to some matrimonial problems since June 2018 the spouses having had separated with the hope that they would settle on that basis therefore wisely so the learned trial resident magistrate ordered no division of assets instead the appellant was only ordered to pay her shs. 30,000/= monthly being maintenance allowance for the child. As said, on appeal the decision was reversed and substituted with a decree of divorce, half-half division of the asset and shs. 50,000/= per month being maintenance allowance for the child.

The pivotal issues are **(1)** whether the parties' marriage was broken irreparably **(2)** whether the house(s) was matrimonial property. The answer is yes for the following reasons:-

One; at least there was no dispute that due to some matrimonial misunderstandings the parties had parted company say for 1½ years previously that is below a threshold of three (3) years required under Section 107 (2) (f) of the Law of Marriage Act to warrant grant of divorce yes, but the appellant did not even attempt to dispute the fact that regardless of existence of the Christian marriage therein between he got a second wife. Whether or not cruelty was proved on the part of the

appellant it was immaterial under the circumstances. It may have had, by way of evidence not been shown how was a certificate of failure to reconcile dated 22/10/2019 from Buhongwa Board get its way onto the record yes, but as said sufficed, with 1½ years involuntary separation and, with those grounds the respondent's petition for divorce notwithstanding the provisions of Section 101 of the Law of Marriage Act Cap 29 R.E. 2019 (the Act) given the obtaining circumstances and evidence, like the 1st appeal court held, on that one I would not have any point upon which to fault the learned resident magistrate. It needs no over emphasis that with the evidence of Sm1 and Su1 no way the spouses were going to revive their marriage life with regard to the requirement of reference to the Board as requisite, exceptional to the general rule I would construe Section 107(1) (b) of the Act to mean that in its considered discretion, the court shall consider both the conduct of either party and the prevailing circumstances whether it brought them together or it further promoted the matrimonial dispute.

Two; with regard to the issue of division of matrimonial property, nowhere on record the appellant proved that the house(s) was his personal and self-acquired. It wasn't enough the appellant to simply allege that the


S. M. RUMANYIKA

JUDGE

21/02/2021

The judgment is delivered under my hand seal of the court in chambers this 26/02/2021 in the absence of the parties.




S. M. RUMANYIKA

JUDGE

26/02/2021