IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL No. 72 OF 2020

MWAMOI SHEHE MTIKUU... APPELLANT

VERSUS

ISSA MATALA MDUMA.......................... ....RESPONDENT

(Appeal from the decision of the District Court of Mkuranga at Mkuranga)

(Kaswaga- Esq, RM.)

dated 20th January, 2020

in

Matrimonial Cause No. 2 of 2019

JUDGEMENT

2nd December 2020 & 2nd March 2021

AK. Rwizile, J

Parties to this appeal were once husband and wife. Their happy polygamous marriage lasted from 2012 to 2020 when a decree of divorce was issued by the District court of Mkuranga. It should be recalled that parties were married under Islamic law. When their marriage was no longer bearable, due to desertion among other causes, the appellant petitioned for dissolution of

their marriage, division of their matrimonial assets, custody of their only child of marriage and costs of the petition. Before the District, a hearing was conducted and the court dissolved their marriage, gave custody of the issue to the appellant, the appellant also got 15% share of the house at Kilimahewa and 3 cares of a farm land at kilimahewa and made a maintenance order of 50,000/= per month of the said child, as well, it was ordered that the social welfare officer has to supervise custody and maintenance orders. This, did not please the appellant, she decided to file this appeal on 5 grounds, coached in the following terms;

i. That the trial court grossly erred in law and facts by holding that 50,000/= be paid to the appellant trough District Social Welfare officer for maintenance of the child

ii. That the trial court grossly erred in law and facts by ordering the respondent only to provide 50,000/= for maintenance without considering provision of education, health, clothes and better shelter to the child

iii. That the trial court erred in law and facts by failure to include a Fuso and tax- corolla, block-brick making machine, a small bicycle and four shops which are matrimonial assets in the division

iv. That the trial court grossly erred in law and facts by failure to divide the matrimonial properties with the view that the respondent has more wives without considering each wife separately acquired the matrimonial property and live separately

v. That the trial court grossly erred in law and facts by ordering only 15% of the matrimonial house to the appellant while 85% remains with the respondent.

At the hearing of this appeal, the appellant who was not represented submitted on grounds of appeal generally. She was of the submission that she was not satisfied with the manner in which division of the assets was done. She complained that a great chunk of the assets jointly acquired such as two motor vehicles, (Fuso and a corolla) shop rooms for rent, brick making machine were left out of division. As well, she was not happy with the division done on 13 acres of land at Kilimahewa and a house where she got only 15%. She asked this court to allow this appeal and let get her a fair share.

The respondent was represented Mr. Akiza learned advocate. He submitted on the grounds of appeal as follows; on the first ground,he said that, since the appellant did not complain that the amount of 50,000/= payable as maintenance is not a little amount but should not be paid through the Social Welfare Officer (SWO), let this ground be dismissed.

Arguing the second ground, Mr. Akiza was of the submission that the maintenance order was clear. Because the appellant is a retired officer and has three families to take care of. The amount given is fair.

On the third ground of appeal, the learned advocate stated that the respondent has never owned cars as alleged. For him, there is no evidence proving so and the appellant is under section 110 to 112 of Evidence Act, required to prove same which she did not.

On rented shops, it was her submission that exhibit IMM2 shows the same were purchased in 2011, 3rd November which is before marriage which occurred in 2012. It was his submission that the properties to be divided are matrimonial assets as per section 114 of the Law of Marriage Act.

Dealing with the fourth ground, Mr. Akiza was of the submission that, the respondent has wives and each has a share in the matrimonial assets. It was his submission further that division was done based on evidence. According to him, through exhibit IMM1, the house in question was built by the respondent with his first wife who is now deceased. He submitted that they were blessed with 4 children and each has a room in the 4 rooms house. It was his opinion that the amount of 15% was proper as it based on section 59 of the Law of Marriage Act. He said section 57 of the Act, states that each woman should have an equal share. On plots owned by the appellant at Kimanzichana all were not subjected to division because of her resistance. The learned advocate then asked this court to dismiss this ground of appeal.

On the last ground of appeal, it was submitted that the 15% share of the house is fair since she brought no evidence showing she deserves more. According to him, there is a 10-acre farm land which she has got 3 acres. The learned advocate asked this court to dismiss this appeal.

By way of rejoinder, the appellant was of the submission that the shop rooms for rent were bought in 2016. She is the one who bought them and witnessed so. She admits that other houses were built before marriage. She went on submitting that she had all evidence on how land was purchased but it was lost on her phone.

As to the house, she submitted that she is the only woman in that house and this is because she contributed. On maintenance, she said, nothing has been paid so far by the respondent.

Having heard the submissions of both parties, I propose to determine the issue of maintenance first as coached in the first two grounds of appeal. It seems, the amount of 50,000/= per month did not please the appellant even though she complained about payment of the same through the social welfare officer. I have to state here that maintenance is a crucial issue. It cannot be simply made. According to section 129(2) of the Law of Marriage Act, it is the duty of a man to maintain his child, whether in his custody or in custody of another person. The section provides as follows;

> *129.-(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.*

But before making an order for maintenance, the court is seized with powers to inquiry into the means available for determining the amount payable for maintenance. In this, the Law of Child Act [Cap 13 R.E 2019], makes elaborate provisions on the issue. Section 44 of the law provides for things to consider as follows;

> *44. A court shall consider the following matters when making a maintenance order-*

(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;

(b) any impairment of the earning capacity of the person with a duty to maintain the child;

(c) the financial responsibility of the person with respect to the maintenance of other children;

(d) the cost of living in the area where the child is resident; and

(e) the rights of the child under this Act.

It is therefore trite that income and wealth of the parents, impairment of the child, if any, other responsibilities in respect of other children and of course the costs of living are issue to consider before an order is made. The point to determine here is that the amount of maintenance given as 50,000/= per month, was fair or not. Even if it was not categorically stated by the trial court, the respondent testified and the appellant did not dispute, that the respondent has a good number of wives and children. According to him, he, four children with the first wife while the respondent has one. Still, the respondent as submitted is the retired officer. His means, I think are scarce enough not to warrant an amount more than the awarded. But that does not mean, the respondent is exculpated from providing for better health and education. Those are his responsibility as a father.

The appellant complained that the amount is being paid through the SWO. I do not see anything wrong with that. Under the Juvenile Court Rules, it is clear that payment of maintenance may be made to the parent, to or through the department of Social Welfare, or any other person and the court has

powers to specify the manner in which it should be made as under rule 86 of the rules. (GN.182 of 2016). From the foregoing, I see no merit in the first and second grounds of appeal.

I also have the view that the third, fourth and fifth grounds of appeal should be determined together. It was the complaint of the appellant that some properties such as two motor vehicles, namely a Fuso and corolla were left out along with the brick making machine and a 13-acre farm land at kilimahewa. It was submitted by her that she contributed towards acquisition of the same and so was to be given a share. She as well complained that the court did not consider that all wives were separately living and had their own properties. The respondent was of the view that evidence was enough to prove that there are other wives interested in some properties.

The question of division of matrimonial assets ranks the first in matrimonial disputes. It is therefore crucial to determine the same through evidence. It trite that division of the matrimonial assets follows the law and evidence. In this case, apart from section 57 of the Law of Marriage Act, which provides for equal share among wives of the respondent, division of the same is governed by section 114 of the Act. This is to say, only assets jointly acquired or those acquired before marriage but under went substantial improvement during the marriage.

In this case, there is little evidence from the appellant showing that when the properties were acquired. The appellant simply narrated the presence of the properties to be divided but did not call evidence to prove when and how

the same were acquired. There is evidence that two motor vehicles stated were indeed in existence. Her evidence merely mentioned them but did not provide any detail as to there whereabouts. Mentioning of the same in my view is not enough to prove their existence. She had to do more than that, to prove they are present but hidden somewhere. In the absence of such evidence, one fails to agree with her submission. On other properties, she has submitted that there are 13 acres of farm land. She has been allocated three.

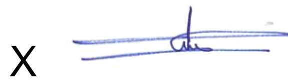
In here, it was her duty to prove that other wives including the first wife (now deceased) do not have a share. It is settled that the respondent has many wives, the appellant was the, most junior wife. This means all others who were married before have interest in the properties unless proved that the same collected the properties alleged with her husband alone and that happened at the time she was in marriage. She, being allocated 3 acres out of the alleged 13, although it has been submitted by the respondent that there are only 10 acres where she has garnered three out of them, is a fair share. I find there is no evidence that she is entitle more than that.

On the house, she was given 15%, there is evidence that it was built before her marriage. She had therefore to prove that she had the same substantially improved during her marriage. The respondent had testified that the same was married to his first wife in 1972. They have four children. In law also division of matrimonial assets is to take into consideration among other children of marriage and other consideration that the court may deem just. In this case other wives of the respondent are also to be considered provided there is evidence they contributed.

To derogate from that principle as in section 114 of the Law of Marriage Act, one has to have evidence. Section 114 states thus;

> *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.*
>
> *(2) In exercising the power conferred by sale of any such asset and the division between the parties of the proceeds of sale. (2) In exercising the power conferred by subsection (1), the court shall have regard to –*
>
> *(a) the customs of the community to which the parties belong;*
> *(b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
>
> *(c) any debts owing by either party which were contracted for their joint benefit; and*
>
> *(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.*
> *(3) For the purposes of this section, references to assets acquired during the 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.*

As to the 15% given, I find it a fair share, since the evidence discloses nothing to the contrary. But on the shops for rent, the appellant has shown the same were bought and done during her period in marriage. I make an order that she is also entitled to 15% share of the same as it is in the house. Having said so, I therefore partly allow the appeal to the extent explained. I make no order as to costs.



Signed by: A.K.RWIZILE