

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC MATRIMONIAL APPEAL NO. 01 OF 2021

(Arising from Nyamagana District Court in Matrimonial Appeal No. 11/2020)

Original Mwanza Urban Primary Court in Matrimonial Cause No. 15/2020)

SCOLASTICA SHAYO APPELLANT

VERSUS

TUMAINI MAGIBO RESPONDENT

JUDGMENT

8th & 13th April, 2021

RUMANYIKA, J.:

The 2nd appeal is against the concurrent findings and orders of Mwanza Urban Primary (the trial court) dated 30/04/2020 and Nyamagana district court's (dated 23/10/2020) not on the decree of divorce but on division of the matrimonial asset (a house at Ndofe – Kishiri) also Tumaini Magibo (the respondent) having had custody of the two Doris (16) and Diana (11) (the children).

As the parties were, by way of audio teleconferencing through Mobile numbers 0764353331 and 0743768142 heard respectively on 08/04/2021, whereas the respondent appeared in person, Mr. M.J. Giboga learned counsel appeared for Scolastica Shayo (the appellant).

Mr. Giboga learned counsel submitted; **(1)** that by ordering the matrimonial house property for the children, erroneously though, also contrary to Section 114 (1) of the Law of Marriage Act Cap 29 R.E. 2019 (the Act) the 1st appeal court sort of mistook the matrimonial to probate proceedings **(2)** that like the trial court the 1st appeal court ignored the issue and the appellant's prayer for custody of the children the matrimonial house be divided to the spouses only. The learned counsel further contended.

Having adopted contents of the reply to the petition of the appeal, the respondent submitted that the two courts could not be defaulted because it was the appellant who solely caused dissolution of the marriage then petitioned for the divorce successfully that as the court ordered, the children would have chosen the side much as he was the one who now took care and paid them school fees.

From the record, but very briefly, it is as evident as follows;

The appellant (SM1) stated that they married in 2003 then she purchased a plot (copy of the contract –Exhibit "B") and they acquired the house at Ndofe – Kishiri but in 2006, and out of wedlock the respondent

brought in a new girl child leave alone regular cruelty as at times he deadly assaulted her and she reported the case to police (copy of the PF3 – Exhibit "A"). That on her own she paid school fees for the two children both in boarding schools now one in form ii, the house be rented for the children's school fees. That too out of wedlock she had given birth to a child (now 2 months old).

The respondent is on record having had testified that indeed he contracted a Christian marriage in 2003 and were blessed with the children. That as, still was driver at the time employed by TFDA, Dar es Salaam he sponsored the Form IV leaver wife up to the Diploma level at the Dar es Salaam Institute of Social Welfare) only that the latter wished not to pursue a degree and, that during his good times all the time he provided money even for some other family developments as they acquired the house in 2016 but when his contract of service was terminated in 2017, in 2018 she turned hostile as she ran extra marital relations and became drunkard again that as he was away earing bread, the respondent abandoned the children at home also brought in a man . That she could spend even 3-7 days away leave alone, at times for no reasons having had fled the master bed room to the house girl's then in 2019, but again out of

the wedlock she conceived and fled the matrimonial home for good that if anything, she contributed only 10% to the house. That is all.

The issue actually it is no longer whether the marriage had broken irreparably but whether, with respect to the matrimonial house the appellant was entitled to share.

Like any other woman from a typical African family, from the respondent the appellant may have had persistently experienced regular domestic violence yes, but the latter did not sufficiently dispute the husband's serious allegations that she had some regular and day light extra marital relations much as, in express terms she admitted out of wedlock having had conceived and delivered whether or not on that one the respondent had not petitioned for divorce it is immaterial much as like it was not enough the appellant petitioned for divorce and succeeded. At least it can not 100% be denied that the appellant had contributed to the dissolution of the marriage therefore under Section 114(1) of the Act one of the factors the court to consider with regard to the house when apportioning shares that subsequently the parties were entitled (case of **Robert Aranjo v. Zena Mwajuma** (1986) TLR 2 (CA)). In other words however strongly the spouse might have had contributed to acquisition of

the matrimonial property, with regard to the share one was entitled to it is his/her conduct leading to dissolution of the marriage that counted a lot.

However, although I would not simply in favor of the appellant determine it on the TIT FOR TAT or in Kiswahili terms "Ukimwaga mboga namwaga ugali" basis, the respondent did not sufficiently dispute the allegation that also out of wedlock having had in the year 2018 he had brought in and introduced a new girl as daughter.

Be it as it may, the fact remained that whether she contributed only 10% as alleged by the responded or even lesser, the appellant should not have left both the matrimonial home and the court empty handed under the circumstances much as I am mindful also of the ancient legal principle that in order to avoid wrongful enrichment no party shall benefit from his/her own wrongs. The interest of justice demands that out of the house the appellant gets eighteen (18%).

Moreover, the issue of custody of children it needs not to detain me because like the trial court did, quietly though but rightly on the same terms the respondent shall have custody of the children. Ground one

of the appeal is dismissed. Each party shall bear their costs. The appeal is only to that extent allowed. It is so ordered.

Right of appeal explained.


S. M. RUMANYIKA

JUDGE

10/04/2021

The judgment is delivered under my hand and seal of the court in chambers this 13/04/2021 in the absence of the parties.




S. M. RUMANYIKA

JUDGE

13/04/2021