IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(PC) MATRIMONIAL APPEAL NO. 01 OF 2021

(Arising from Matrimonial Appeal No. 8/2020 in the District Court of Kigoma Before Hon Eva B. Mushi RM, Originating from Matrimonial Cause No. 18/2018 at Uvinza Primary Court Before Hon V.R Nombo RM)

MACKSON KABULA..... APPELLANT

VERSUS

TEDI SADOCK.....RESPONDENT

JUDGMENT

23rd April. & 01st June, 2021

A. MATUMA, J.

The Appellant and the respondent were husband and wife whose marriage was contracted on the 18th day of September, 2004 and were blessed with seven issues of the marriage however only six are alive. Sometime in 2016 they developed some misunderstandings which did not cool until 2018 when the Respondent decided to sue the Appellant at Uvinza Primary Court for divorce, maintenance of children and division of their matrimonial properties. The respondent alleged adultery

and cruelty against the appellant while the appellant alleged that the problem arose after his decision to marry a second wife for the respondent refused to assist him in farm activities, the core economic activity for his family affairs. That the marrying of another woman worsened the relationship between the parties as the respondent considered that such was an adultery because they had celebrated a Christian marriage which does not allow polygamous. The Primary Court having heard the parties granted the decree for divorce, ordered custody of four issues to the Appellant and two issues to the respondent with a maintenance order of the two issues at the tune of Tshs. 100,000/= per month against the appellant, and ordered division of Matrimonial properties in that:-

> *'Mdaiwa abaki na baiskeli na mdai apewe cherehani 2, nyumba iuzwe ili kila mmoja apate nusu ya fedha itakayopatikana baada ya kuuzwa, thamani ya mali za kwenye duka wagawane nusu kwa nusu, mazao waliyopata wagawane nusu kwa nusu Pamoja na mashamba, vyombo vya ndani wagawane nusu kwa nusu'*

The appellant was aggrieved with the trial court's decision and thus unsuccessfully appealed to the District Court of Kigoma hence this appeal with a total of 5 grounds of appeal but during the hearing of this

appeal, some grounds were abandoned and the remaining were argued into only two major complaints in regard to the distribution of matrimonial assets and maintenance order of the issues in that:-

1. *The distribution of matrimonial assets was done in a total disregard to the extent of contribution thereby giving the respondent undue advantage, and that some distributed properties did not belong to the parties.*

2. *The maintenance order against the appellant was issued in a total disregard of his economic means.*

When this appeal came before me for hearing, the appellant was present in person and represented by Mr. Ignatius R. Kagashe learned Advocate while the respondent appeared in person.

The learned advocate submitting on the custody of children and maintenance order argued that the appellant was given custody of four children while the respondent was given only two, yet the appellant was condemned Tshs 100,000/= as a monthly maintenance for the two issues placed into custody of the Respondent without there being any evidence of the appellant's income to fulfill the order. He submitted that the appellant cannot afford to pay such amount monthly as he is a small

peasant according to the evidence on record and depends on seasonal incomes.

The Respondent on the maintenance order maintained that the same is fair for the two children.

In reaching to its decision which was then upheld by the first appellate court, the trial Magistrate relied on section 129 of the Law of Marriage Act, Cap. 29 R.E 2002 to the effect that it is the duty of a father to maintain the children.

It is plainly true that the trial court did not consider the economic means of the appellant nor the respondent established the economic means of the appellant to afford monthly maintenance order as herein above issued.

It is unfortunate that we still have some officers with misapprehended notions that it is always a man to suffer for maintenance regardless his economic status. The law in place puts due consideration to the income status of either parent and his or her station of life. Thus, for instance section 129 of the Law of Marriage Act which was relied by the trial court is very clear that in reaching to the maintenance order against the man his means and station of life is paramount. The same reads;

'129 (1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant 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.'***

Not only that but also subsection 2 thereof puts the same duty to a woman in case the man or father of the children is among other reasons, unable to maintain the issues. The same provides;

'(2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her infant children if their father is dead or his whereabouts are unknown or ***if and so far, as he is unable to maintain them'.***

But again, we have in place the Law of the child Act Cap 13 R.E 2019 which is very clear as far as maintenance is concerned. It provides under section 44 (a) that a court shall when making a maintenance order, consider the **income and wealth of both parents** of the child or of the person legally liable to maintain the child.

In the circumstances, judicial officers should not issue arbitrary orders against either parent for maintenance of the issues without due regard

to their means of income. I have actually had held on the other case on the similar issue that maintenance order should not be there to suffocate either parent nor instigating him to commit crimes to meet the orders or cause hatred between the parent and the child. That is the case of ***Mwantumu Hamisi Kitemo vs Abdulkadri Mushi***, *Juvenile Civil Appeal No. 01 of 2020,* High Court at Kigoma Registry in which I held;

> *'Maintenance order under the Law of the Child is not there to suffocate either parent nor to act as a source of income to the other parent under whose custody is, purportedly that it is maintenance. It is there just for maintaining the welfare of the child. Harsh orders and or order which cannot be executed might cause hatred of the parent against the child and or forcing the parent to commit crimes for the purposes of earning some income to comply with the maintenance order.'*

In other words, both parents are at equal footing in law to maintain their children and that is the law. The paramount factor is the income and wealthy of either parent.

In the instant matter it is plainly on record by the evidence of both parties that the appellant has no monthly income. He is a mere seasonal peasant in the village. His earning depends on seasonal harvest of some

food crops such as cassava, maize or groundnuts. On the other hand, the respondent is a tailor in the village. They at one time jointly started a kiosk business but it collapsed according to the evidence on record.

Even the seasonal earning of the appellant was not established nor the court sought clarification from the parties to have a clear picture of the economic capabilities of the parties for its appropriate orders.

In that regard it was wrong for the trial court and subsequently the first appellate court to order the appellant to pay Tshs. 100,000/= as maintenance without due regard to his economic status, and the fact that he had other four issues to maintain along with some other dependants.

In fact, according to the respondent's evidence if believed, it is her who ought to have been ordered to maintain the issues not only the two who were placed into her custody but also the four others who were placed into the custody of the appellant. This is because she testified to earn good in her tailoring activities and even supported the appellant by giving him several amounts to support the farm activities. In every week according to her, she gave the appellant Tshs. 30,000/=. She also had given him Tshs.300,000/= and Tshs. 265,000/= respectively. This is in

accordance to her own evidence at page 5 and 6 of the proceedings in the trial court;

> *'Mimi nilikodi cherehani kwa ajili ya kushona. Kila jumamosi nilikuwa nampa Tshs. 30,000/= kwa ajili ya shamba. Wakati wa noeli nilimkabidhi Tshs. 300,000/=.... Su1 aliendelea na shamba mimi niliendelea kushona. Pasaka nilimpa TShs. 265,000/=.'*

From such evidence if believed, it was the respondent the giver, and the appellant the receiver. It was the respondent who was economically stable than the appellant. In that regard it could have been justifiably ordered against him to pay maintenance to the appellant for the four issues placed in his custody. Even though, it is my firm findings that the said economic earnings of the respondent was exaggerated for the purposes of establishing that she was the earning woman and contributed to the acquisition of matrimonial assets. In that respect I refrain from relying on such testimony to condemn her for the maintenance. I only quash the order of maintenance which was issued against the appellant to the tune of **Tshs. 100,000/=** per month. I order each party to contribute in the maintenance of their children in accordance to their capabilities. If either party shall deliberately desert the issues while there is reasonable ground to establish that he or she

could do something needful for their children, then the aggrieved party will be at liberty to move the Juvenile Court to issue appropriate orders at the appropriate moment.

About the matrimonial assets and its distribution, the respondent named the following as their matrimonial assets liable to be distributed;

> *'Tuna duka, nyumba, baiskeli, cherehani 2, moja nilinunua mwenyewe...kitu kingine ni vyombo vya ndani'.*

When the trial magistrate asked her at page 9 of the proceedings to name the jointly acquired properties, she replied;

> *'Mali tulizonazo ni nyumba na nyumba ambayo haijaisha, jiko na sebule, duka, baiskeli kubwa, ekari kumi za mashamba, mahindi, karanga na vyombo vya ndani'*

The trial court division of these assets was as follows;

> *'Mdaiwa abaki na baiskeli na mdai apewe cherehani 2, nyumba iuzwe ili kila mmoja apate nusu ya fedha itakayopatikana baada ya kuuzwa, thamani ya mali za kwenye duka wagawane nusu kwa nusu, mazao waliyopata wagawane nusu kwa nusu Pamoja na mashamba, vyombo vya ndani wagawane nusu kwa nusu'*

Now the appellant's Advocate argued that this distribution was unfair, giving undue advantage to the respondent against the appellant and that it included the house which the parties had built on the compound

of the appellant's father without due regard to the interest of the third party i.e. the appellant's parents who own the plot and living on the same compound. Generally, the appellant's advocate lamented that the lower courts did not consider the extent of contribution of each party in its orders of the division of the properties nor bothered to be satisfied of the presence of some of the alleged properties. He referred me to the case of ***Neema William Kabote vs. Ngoko Manyi Mirumbe,*** *(DC) Matrimonial Appeal No. 1 of 2019,* High Court of Kigoma to the effect that it is not practicable to distribute the properties which are not existing. The properties allegedly not in existence are the shop/kiosk commodities which are said to have collapsed during grudges of the parties, home appliances which were allegedly taken by the respondent when she quitted the house, the house in question as it was alleged to have been built by the parties on the plot of a third party (the appellant's father), and the two sewing machines which were sold prior to the institution of the suit at the trial court.

Responding on this complaint, the respondent submitted that they jointly built the house on the appellant's own plot. That it is not true that the plot belonged to her father in law as such plot was bought by the appellant himself even before she was married and when she got

married the appellant ensured her that the plot was his, he shown her the purchase agreement which had his own name as a buyer. At the plot she found the appellant's house roofed with grass in which they started to live until when they built the current house in dispute.

The respondent despite of admitting that her parents-in-law are living and residing on the dispute plot, she further submitted that those parents-in-law were not originally residing with them but were living at Chankere Village in Bubango and it was her who solicited the appellant to shift them so that they could live with them for they were living lonely at Chankere village.

About home appliances she denied to have taken them and demanded that she should be given a big table, two office chairs, a plastic bucket (diaba), four sufuria huge size and a thermos.

On the other properties she maintained that they be distributed equally between them.

I will start with the question of a house whether it formed part of matrimonial assets between the parties or not.

It is undisputed fact that when the respondent was married, she found the plot in question already there with a house roofed with grass. She

stated that the appellant informed her that the plot belonged to him and even shown her a purchase deed. On the other hand, the appellant maintained that the plot belonged to his father.

The appellant's father Mr. Kabula Athumani (70) years old came during trial as SU2 and testified to the effect that the plot belonged to him and had positive contribution in constructions of the house in dispute as he issued cash money for the construction at several instaiments; Tshs. 500,000/= and Tshs. 1,500,000/=. This witness was corroborated by SU3 Jumanne Omary who traced the plot from one Ally Poyo in the year 2002 and on 3/4/2002 the appellant's father bought such plot. A purchase contract exhibit A1 was tendered to that effect. There was further corroboration from SU4 Musa Kabula who testified that he participated in the purchase of the plot and it was him who stood on behalf of the appellant's father. And that the said father gave them money for the construction of the house, and him personally joined force in laying bricks which costed Tshs. 1,000,000/= and started the construction of the house in dispute.

It is my firm finding that the respondent had no tangible evidence that the plot belonged to the appellant so long as she admits that during her marriage, she found such plot already owned by someone else be it the

appellant or the appellant's father. The plot was thus not a matrimonial property. I find that there is sufficient evidence on record that the dispute plot is the property of the appellant's father solely owned by him and in fact he is living therein with his family. The same is not liable to distribution between the parties. I find that the house in dispute was built as a family house and the appellant having married resided at his parents' compound. He and his wife, the respondent herein contributed to develop the compound but that does not dispossess their parents of their ownership in the property provided that those parents are not party to the marriage of the parties herein. In the circumstances even the house built thereof would not be subject to distribution to the parties under the legal maxim ***Quicquid Plantatur Solo Solo Cedit,*** that whatever is affixed to the soil belongs to it.

Even if it would have been found that the plot belonged to the appellant still an equal distribution thereof was uncalled for as the respondent during marriage found the appellant in possession of the plot and a house roofed with grass. Thus, any contribution thereof by the respondent started in the construction of the new house. Had there been evidence as to equal contribution towards the construction then the equal distribution would be on the value of the house and not the

value of the plot. The value of the plot would be an added portion to the appellant in the distribution.

Even though, it is undisputed fact that both parties herein and the father of the appellant contributed to the construction of the house in question. The respondent participated in such development with a view of staying there for life as one of the family members of the appellant's father. With a divorce, she cannot be left empty handed as her fellow the appellant would still benefit in the house by virtue of the fact that he is still the child of the owner of that plot but the respondent would be required to quit from there. The problem is how to determine the share of the respondent as the value of the house is not certain nor the respondent established her exact contribution. I therefore in consideration of some values mentioned here and there within the records which does not state the exact value of the house, and the fact that the respondent's positive evidence is that she paid Tshs. 150,000/= for electricity installation and also paid costs for the gate, I order the appellant to compensates the respondent Tshs. 1,500,000/= just as general damages for having dragged her in developing the plot which does not belong to them as spouses.

About other properties a settled principle is that the distribution of the matrimonial assets upon divorce would be on the extent of contribution by each party. See ***Bi Hawa Mohamed vs. Ally Sefu*** *[1983] TLR 32.*

Even though, and as rightly submitted by Mr. Kagashe learned advocate, the distribution would only be on the properties which have not only been proved to have been acquired by the joint efforts but also that they are in existence. If they are not in existence but there is evidence that they were misused by either party, they might justifiably be put in consideration against the party who misused them.

In the instant matter, it is not in dispute that the bicycle was a property owned by the appellant even prior to the marriage, at a time the appellant sold it and bought another one with the proceeds he obtained after selling the old one. There is no evidence on record that in purchasing the second bicycle matrimonial money was involved. Therefore, it was wrong to put it as matrimonial property for the distribution to the parties.

About shop items, there was no evidence of its existence nor its value or any misuse by either party. The undisputed fact by both parties is the existence of an empty kiosk which has been referred in this case as a shop. The value of it was not stated during trial, and at the time of

hearing this appeal the appellant alleged that its market value is only Tshs. 1,000,000/= while the respondent alleged that it is Tshs. 3,000,000/=. Both averments are not evidence nor were subject to cross examination by either party. I therefore order the respondent to compensate the appellant half of the amount she claimed i.e Tshs. 1,500,000/= and remain with the kiosk as her solely property if at all the same is valued Tshs. 3,000,000/=. Failure thereof it would be the appellant to compensate the respondent half of the amount he claimed i.e. Tshs 500,000/= and remain with the kiosk as his solely property. That would avoid injuring either party by an order of compensation to the other of unproven value of the kiosk. Alternatively, if none of the parties will be willing to own the kiosk, the same shall be sold at the market value and each part get an equal share of the proceeds thereof.

About the sewing machines, it is on record that there were two but one of them was hired. The appellant in his evidence at page 17 stated;

> *'Nilikodi cherehani afanye shughuli".* At page 18 he stated; *"Nilimkodishia cherehani ili awe anakaa nyumbani. Alikuwa anashona nguo za wateja na zetu... Yule mama alichukua cherehani yake baadaye alinunua cherehani'.*

The respondent on her party at page 5 testified; *"Mimi nilikodi cherehani kwa ajili ya kushona".* At page 6 she further testified that after some

developments they bought a sewing machine. And at page seven she clearly stated that they had two sewing machines but only one she bought by herself; *"Tuna duka, nyumba, baiskeli,* ***cherehani 2 moja nilinunua mwenyewe".***

From the evidence of both parties herein above, it is obvious that the parties are not honest. Each purport to have been the one who hired the machine. But at least from such evidence one fact is clear that the parties had two sewing machines but only one was bought by them and the other was hired. In that regard it is only one sewing machine which ought to have been distributed. Even though it is on record by the words of the respondent herself that up to the time she instituted the suit, there was no existence of even a single sewing machine; *"SU1 ameninyang'anya cherehani zote na ameuza".* The fact here is that there was no even a single machine at the time this dispute was filed in court. As to where the same vanished, I am far to believe the respondent that the appellant sold the same on grudges. This is due to the fact that there are indicators of lies by both parties. Even the appellant in his evidence alleged that the respondent at the time she quitted, she took Tshs. 600,000/= from inside the house; *"SM1 alitakiwa akamatwe na alibeba Tshs. 600,000/= zilizokuwa ndani."* During cross examination;

'*Nilikuwa nakuwekesha Tshs. 600,000/=*" During further examination by the Court assessor Yusuph; *"Niliwekesha kwake kwa kuwa nimezaa naye (Sm1) na kwake kuna usalama. Ile hela ilikuwa ya kufanyia biashara, pesa niliweka chini ya begi'.*

With the caution of these statements by both parties, I find it danger to order distribution of a none existing property. The sewing machine were thus wrongly distributed and even if it would have been in evidence that the same existed or was misappropriated then it was only one and not two. I thus vacate the lower court's order in respect of the distribution of the sewing machines.

With regard to division of home appliances, the respondent stated at the hearing of this appeal that she needs to be given a big table, two office chairs, a plastic bucket (diaba), four sufuria huge size and a thermos. These properties were however not mentioned at all during trial to accord opportunity to the opponent party (the appellant) to state anything on them and or cross examine on it. That would assist both the lower courts and this court to determine which of those appliances were matrimonial properties, how were they acquired and how should they be divided.

The appellant speaking through his advocate submitted that the respondent took those appliances away at the time she moved away. That is *mutatis mutandis* to the testimony of the appellant at page 14 of the proceedings; *"SM1 alitoa vyombo vya ndani".* And during cross examination at page 15 he stated; *"Sikuhamisha vitu chumbani kwako, vyombo na nguo ulibeba"* (refer handwritten proceedings).

It is therefore difficult to make a just order in relation to the alleged home appliances as it is not certain what are they, did the respondent take them away or left them to the appellant. Are they there or not? I thus vacate the order for the distribution of the home appliances.

The last claim are the farms. It is undisputed fact that the parties possessed 10 ecres of farms. They are however in dispute whether they were jointly acquired or not. According to the appellant as per the evidence on record, the respondent when married found the shambas already owned by him. He had the following words about shambas;

> *'Haki ya watoto ni* ***mashamba niliyonunua*** *(page 17),* ***mashamba yalikuwepo kabla sijaoa.*** *Nilimuonyesha SM1 ekari 1 1/2 (page 18)'*

On her party the respondent at page 9;

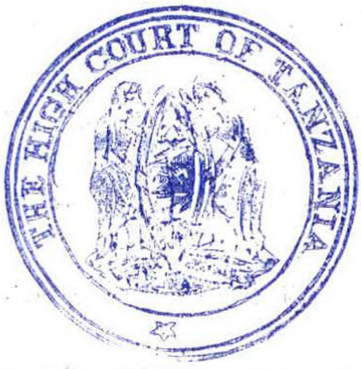
'Mali tulizonazo ni nyumba na nyumba ambayo haijaisha, jiko na sebule, duka, baiskeli kubwa, ***ekari 10 za mashamba,*** *mahindi karanga na vyombo vya ndani'*

The appellant did not however seriously dispute on the farms. At times as herein above explained he testified to have bought some shambas which shall be inherited by his children, at times he alleged that the respondent found the shambas already bought. In that regard I rule out that those shambas are there as matrimonial properties. The extent of contribution is not certain at all and that is the only problem with the matter. I therefore quash the order of the lower court for equal distribution and replace with it an order that the appellant shall take seven ecres and the respondent three ecres. This is due to the fact that it is undisputed fact that it was the appellant who bought them and has children to maintain and the only source of his income are the farms in which he cultivates seasonal crops.

There is no tangible evidence on the alleged *mahindi, mihogo, karanga and maharage.* Even though it is plain on record that one of the causes of the quarrel between the parties was that the respondent did not want to participate into farm activities. That is why the appellant decided to marry another woman who shall assist him into farm activities. The respondent did not dispute the fact that she was not attending farm

activities. She merely alleged that in lieu of her going to farm, she contributed Tshs. 30,000/= to the appellant for farm activities in every week. That was however not authenticated. In that respect, even if there would be those crops, the respondent was not one of the producers and could not thus claim for it.

This appeal is therefore, allowed to the extent herein above stated. Whoever aggrieved with this finding may further appeal to the Court of Appeal of Tanzania subject to the relevant laws governing appeals thereto. It is so ordered.



A. Matuma

Judge

01/06/2021

Court; Judgement delivered in chambers this 1st day of June, 2021 in the presence of the parties in person.

Sgd A. Matuma

Judge

01/06/2021