IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 246 of 2020

(Arising from the decision of Kinondoni District Court in Matrimonial Cause No. 98/2019 dated 10.07.2020)

EPIPHANIA JACOB MAPUNDA ----------APPELLANT

VERSUS

HERMAN H MSHIU ----------RESPONDENT

JUDGEMENT

Date of last order: 03.03.2021
Date of Judgement: 09.04.2021

Ebrahim, J.:

The Appellant was dissatisfied with the decision of the trial court. She thus lodged an appeal in this court raising three grounds of appeal, however in her submission she prayed to abandon the third ground. Therefore the grounds of appeal for consideration by the courts are as follows:

1. That, the trial court erred in law and fact by giving judgement without considering the division of matrimonial assets which was obtained by joint efforts
2. That, the trial court erred in law and fact by ordering that the Respondent to pay Tshs.200,000/- per month as maintenance

allowance without considering that the appellant has been given the custody of three children and the said amount is not sufficient to pay rent and daily maintenance since the appellant do not have a house.

The background of the matter resulting to the instant appeal is that parties herein began cohabiting in 2012. They were blessed with three children. The squabbles in their relationship began at the end of year 2017 on their religion beliefs of which the Respondent herein (Petitioner at the trial) is KKKT and the Appellant – EFATHA. The Respondent testified **(PW1)** at the trial court that soon after the Appellant started worshipping EFATHA Ministry she changed children's diet and the whole family to include EFATHA products which she believed to be nutrients from word of God. The Respondent claimed also that at one time, the Appellant did not take their second born to the hospital after he had been burned because she was praying for him. In another incident she locked herself inside the room with the child without eating for the whole day praying until the Respondent called the Appellant's pastor and decided to break the door. The Respondent testified further at the trial that he tried to stop the Appellant from going to EFATHA to no avail and they had been sleeping in separate rooms since 2017. He

said when the Appellant was pregnant with their 3rd born, she did not go to the hospital and had home delivery. The Respondent told the court that he is currently paying Tshs. 5,000,000/- for the children as school fees, Tshs. 800,000/- transportation cost, paying rent and all living cost of the family. The Respondent prayed for custody of children as he is the one who cares for their welfare including preparing and taking them to school. The Respondent called another witness, **PW2** who testified to have reconciled the parties following the Appellant's religious belief to no avail.

The Appellant (DW1) on her part told the court that their problems began because of believing in different denominations. She said that she was the house wife and during the sustenance of their relationship, they acquired farms and a motor vehicle. She testified also that the Respondent has a business of compressor machines which he is getting money from. She therefore prayed to be given capital from Tshs 300,000/- generated from business per day; half the amount generated per day, custody of children and maintenance.

In this Appeal, the Appellant appeared in person unrepresented but was receiving legal assistance from TAWLA. The Respondent was represented by advocate Masinga. The appeal was argued by the way of written submission as per the schedule of the court.

In her submission in respect of the 1st ground of appeal, the appellant told the court that the trial court did not order the division of the matrimonial properties jointly acquired by parties during the subsistence of their marriage. She cited the provision of **section 114(2)(a)(b)(c) and (d) of the Law of the of the Marriage Act, Cap 29 RE 2019** on the powers of the court when granting decree of divorce to order the division of assets jointly acquired. She referred to the case of **Scolastica Sipendi V Ulimbakisya Ambokile Sipendi and Another,** Matrimonial Cause No. 2 of 2012, where the court ordered division of the matrimonial property after granting a decree of divorce.

On the second ground of appeal, the Appellant insisted that the trial court was wrong to order the Respondent to pay Tshs.200,000/- as maintenance allowance while the Appellant has the custody of

three issues and the said amount is not sufficient to pay rent and daily maintenance. She referred to **section 44(1) of the Law of the Child Act, CAP 13 RE 2019** where the court is obliged to consider the income and wealth of both parents when making maintenance order. She stated that the Respondent is running a butcher and compressor business earning Tshs.300.000/- per week which is enough for the Respondent to provide Tshs. 500,000/- as maintenance allowance. She prayed for the division of all matrimonial assets and Respondent be ordered to pay Tshs. 500,000/- as maintenance allowance.

Responding to the submission by Appellant, the Respondent quoted the claim by the appellant in saying that during the subsistence of their marriage they acquired a residential house at Moshi, a Motor Vehicle Noah T.666 CUN, Volt T. 319 DMU and the farm at Kibaha-Zumba Mulunga (20 acres). He argued on the claim of the Appellant that the same does not feature anywhere in the trial court proceedings and that the Appellant is bringing new evidence at the appellate stage. The Respondent contended that the Appellant testimonies at the trial court were mere words with no evidential

value and there was no mention of a house at Kilimanjaro or any indication of number plates of the motor vehicles. He contended further that the trial magistrate made reference to her evidence and held that there was no proof of the properties jointly acquired save for the pork butchery business. He concluded on the point that there was no such property to be divided and urged the court to dismiss the first ground of objection.

In responding to the second ground of appeal, the Respondent submitted that the appellant has failed to prove that the compressor business exists and that the Respondent earns Tshs.300,000/- per week for her claim of Tshs.500,000/- as maintenance allowance. He cited the provision of **section 110(1) and (2) of the Law of Evidence Act, Cap 6 RE 2019** on the principle that *"he who alleges must prove"* and that *"burden of proof lies on a person bound to prove the existence of a fact"*.

He contended also that the trial court was justified in awarding Tshs. 200,000/- for maintenance considering that the Respondent is the one who pays for the school fees, medical bills, clothes and the

welfare of the issues. Thus, increasing the amount of maintenance allowance would be arbitrary as held in the case of **Jerome Chilumba Versus Amina Adamu** [1989] TLR 117 that:

"No effort was made by the trial court to find the income of the parties. The amount of shs. 1,000 was awarded arbitrary. In case of maintenance, it is important for a trial court to find out the incomes of the person sued in order to be able to decide the amount to be paid".

He concluded that the Respondent is selling pork meat at a consideration of Tshs. 100 to 200 per kilo and paying the maintenance of Tshs.200,000/- a month plus other responsibilities. Hence, increasing the amount would be arbitrary. He prayed for the appeal to be dismissed.

I have duly considered the rival submissions and dispassionately reviewed the judgement and proceedings of the trial court. In considering the present appeal I am mindful of the principle of the law that the first appellate court is obliged without fail to appraise the evidence on record and come up with its own findings of fact if the evidence so reveals (see the case of **Yohana Dionizi and Shija Simon Vs The Republic**, Criminal Appeal No. 114 of 2015 (CAT)

In addressing the appeal before me, I shall straight away begin with the issue of new evidence featured at the Appellant's submission.

In her submission, the Appellant has mentioned that during the subsistence of their marriage, together with the Respondent they acquired a residential house at Moshi, Noch with registration no T.666 CUN and Volt T.319 DMU and a 20 acres farm at Kibaha. However, going through the Appellant's testimony at page 23 to 24 of the typed proceedings, there is nowhere that the Appellant mentioned a house at Moshi, the registration numbers of the vehicles and a 20-acre Farm at Kibaha. The Appellant was recorded saying that:

"During that all time we were living with Herman we managed to acquire vehicles and shambas. He is the one who is using the said vehicles. And he is the one using the said vehicles. And he is the one who is telling me that we have farms although he doesn't want to be open to me. I am only seeing some documents that there is purchasing of shambas."

Certainly, on the Appellants testimony, she did not mention the particulars of what she submitted in her written submission nor proved through documentary evidence on all that she alleged. Responding to cross examination questions, the Appellant said that

there is a shamba at Msakuzi but she has no documents. She also admitted that she did not say about vehicles and shambas in her answer to petition for divorce. It is obvious therefore that the Appellant has imposed some new evidences in her submission which are not in record at the trial court. It is a cardinal principle of the law that parties are bound by their own pleadings as stated in the case of **James Funke Gwagilo Vs. Attorney General** [2001] T.L.R. 455. Therefore, the Appellant cannot plead at the submission stage what was not pleaded during the trial. Doing so would be bringing new evidence at the appellate stage, the fact that is censored by law. More so the trial magistrate in consicering as to whether there is existence of matrimonial asset, he referred to the testimony of the Respondent who denied that there was any asset that was jointly acquired. He also referred to the testimony of the Appellant who said that they acquired the motor vehicles and shamba but the same were not disclosed at all. The trial magistrate considered that there was no evidence of the existence of the compressor business but referring to **section 2(1) of the Evidence Act** on the proof of fact on the preponderance of probability; he concluded that it is only pig

meat butchery that was initiated when parties' relationship was still subsisting. It was from that finding, the trial court ordered the Respondent to pay the Appellant Tshs. 1,500,000/- as her share of the butchery business. Basing on the same business, the trial court ordered the Respondent to pay Tshs. 200,000/- as maintenance allowance.

It follows therefore that, as correctly argued by the Respondent, there is no proof of such property to be divided between the parties serve for the butchery business. I therefore, dismiss the first ground of appeal.

On the second ground of appeal, outrightly, I find that the Appellant has failed to prove that the compressor business exists and that the Respondent earns Tshs.300,000/- per week as required by law. The same stance was taken by the trial court when considering the evidence presented before him. As intimated earlier he concluded that the only available business was a pig meat butchery. Again, on the said butchery business, the Respondent testified before the court that he would sale the meat by other vendors and gain round Tshs.100/- or 200/- per kilo.

Certainly, there is no hard and fast rule in assessing costs for maintenance in matrimonial issues. The Court has to give regard to the means and station in life of the person so ordered to pay (see the cited case of **Jerome Chilumba V Amina Adamu (supra)**). However, it is not the only criteria to be looked upon. Other factors have also to be considered like cost of living, and/or welfare of the Children and other responsibilities and obligations that the father of the issues shoulders including but not limited to education, health, food, clothing and social welfare. In considering the fact that the Respondent have the responsibility of maintaining the issues and provide education and health services among other obligations, the trial court assessed the maintenance allowance to Tshs. 200,000/-. I am convinced that the trial magistrate had put into consideration the fore-mentioned provisions of the law, the standard living and the prevailing economic situation.

In the upshot and from the above background, I find no reason to disturb the findings of the trial court. I further find it prudent to grant the Respondent with visitation rights to their children upon informing

the other party reasonable time prior to the visit or depending on the circumstances. The Appellant is not allowed to withhold the right of the Respondent to visit their children and have temporary custody during school holidays and the like.

Further, in case of changes of circumstances which render either party unfit to have the custody of the issues; the other party may move the court to rescind its earlier order.

In the end result, I dismiss the appeal for being devoid of merits. Following the relationship of parties that it is a matrimonial matter, I give no order as to costs, each party to bear its own.

Accordingly ordered

R.A. Ebrahim
Judge

Dar Es Salaam
09.04.2021