IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CIVIL APPEAL NO. 06 OF 2021

(Arising from Matrimonial Cause No. 2 of 2020 of the Kasulu District Court, Before Hon. I.E. Shuli, RM)

RESTINA D/O DAUDI..... APPELLANT

VERSUS

BARAKA S/O KAHULANANGA.....RESPONDENT

J U D G E M E N T

3rd June & 28th July, 2021

I.C. MUGETA, J.

Between 2011 and 2016, the appellant and the respondent cohabited as husband and wife after solemnizing a customary marriage. The respondent paid Tshs 1,095,000/= as pride price to the appellant's father. The proof for this is in exhibit PO3 Customary marriage is a formal form of marriage, therefore, it was an error for the learned trial magistrate to described the parties' relationship as a presurned marriage. The cohabitation was blessed with two issues namely; Melania d/o Baraka and Janet d/o Baraka. As their relationship turned sour instead of being a bed of roses, they separated todate. In July, 2020, the appellant petitioned

for Division of matrimonial assets, custody of the children and maintenance of the issue. She did not pray for dissolution of the marriage. The trial court awarded her custody of the children and ordered the respondent to pay Tshs 150,000/= per month for children's maintenance. The learned trial magistrate did not pronounce herself well on the issue of division of the assets which was a third issue in the list of issues framed for determination. Without a proper analysis of evidence, she simply said:-

> *'the evidence shows that the property were (sic) sold acquired (sic) by the respondent hence the third is also answered in the negatively (sic)'*

I think the word '*sold*' was meant to be '*solely*'. Consequently, this inadequacy in the judgment of the trial court is subject of the complaint in the second ground of appeal namely; that the trial court erred by failure to equally distribute the matrimonial asset. Other grounds of appeal are:-

Firstly, that trial magistrate erred to ignore the appellant's domestic functions as forming part of her contribution towards acquisition of the matrimonial assets.

Thirdly, that exhibit D1 was irregularly admitted.

Fourthly, that the evidence of the respondent had material inconsistences.

Fifthly, that the Tshs 150,000/= maintenance is insufficient and.

Sixthly, that the judgment of the trial court violates order XX rule 4 and 5 of the CPC.

The appellant is represented by Aman Mwamgiga of WLAC and the respondent is served by Abdulkheri Ahmad, learned advocate. I shall considered their submissions in general terms without referring to what they said on each ground of appeal.

Mr. Mwamgiga complained that the parties acquired jointly the properties listed in paragraph 6 of the petition and the trial magistrate failed to consider the fact that by doing domestic chores like cooking for the family, washing clothes, cleaning the compound, taking care of the children and offering conjugal rights, the appellant made a contribution towards acquisition of the assets enough to entitle her the right to equal division. He cited **Bi Hawa Mohamed v. Ally Seif** [1983] T.L.R. 32. He further submitted that since the applicant testified that the properties were acquired during their cohabitation and the respondent failed to prove the contrary, the appellant is entitled to her share. He also complained about the admission of exhibit D1 because it was not annexed to the pleadings

and it was a photocopy. He challenged the reliability of the respondent evidence for containing contradictions, that while the appellant testified that he took care of his family, DW3 testified that he disserted it until when he was sued for that reason. On maintenance he submitted that Tshs. 150,000/= is on the low side considering the income of the respondent, the standard of life at Kasulu and the fact that the two issues are of ill health. The learned counsel challenged the trial magistrate for issuing orders for custody and maintenance without first passing an order and decree for separation of the parties.

In reply, Abdulkheri submitted that the appellant failed to prove his contribution towards acquisition of the listed assets, therefore, the principle in Bi Hawa d/o Mohamed does not apply. On exhibit D1 he submitted that since this is court judgment, it is a public document secondary evidence of which can be tendered under section 67 (1) of the Law of Evidence Act [Cap. 6 R.E. 2019]. Regarding insufficiency of maintenance, he submitted that the issue of ill health of the children is an afterthought and on issuing the order of separation or decree of divorce he submitted that the appellant did not pray for such a relief.

I shall start with the issue of granting custody and maintenance without a formal decree of divorce or separation order. While I agree with Mr.

Abdulkheri that the appellant did not petition for either a decree of divorce or separation, it is the law that where there is a prayer for division of matrimonial assets the court must start with breaking the marriage first. One of the relevant case law is the case of **Richard Majengo v. Specioza Sylvester,** Civil Appeal No. 208/2018, Court of Appeal – Tabora (unreported) which was cited by counsel for the appellant. In this case there is evidence that the parties married a customary marriage. The evidence of the appellant and the respondent admits the fact that they cerebrated a customary marriage. It occurs to me that the appellant did not apply for divorce because they had mutually agreed to end their marriage. This being a first appellate court, I am entitled to step into the shoes of the trial court and do right what is amiss in its judgment. However, despite the fact that the parties no longer intend to live together as husband and wife, I cannot dissolve their marriage because they have not referred the dispute to the Marriage Conciliation Board in terms of section 101 of the Law of Marriage Act [Cap. 29 R.E. 2019]. On that account and since a court of law cannot force married couples to cohabit, I hereby pass an order separating them. I find this order to be necessary and consequential. Even if it was not prayed in the petition, I grant it under the head of any other relief the court deems fit.

I move to the question of distribution of the matrimonial assets. As I have already stated, the trial magistrate found that there was nothing to distribute because properties had been solely acquired by the respondent. However, this is a general statement not based on a clear analysis of evidence. The properties listed by the appellant in her evidence include landed properties, a motor vehicle and domestic utensils. The landed properties are two plots at Mdyanda, a piece of land located at Mkolani Mwanza and Plot No. 175 block "F", Kumnyika Kasulu. While the appellant testified on how she participated to improve the house at Kumnyika which she admits that she found it having been constructed, the respondent said nothing about this house. This is an admission that this house exists. On the land at Mkolani, Mwanza, the respondent simply said '*the one in Mwanza I bought it earlier*' meaning that he bought it before the marriage. Under the circumstance, the burden lied on the respondent to prove that he got the land before marriage which burden he failed to discharge by not disclosing when he bought it. It follows, therefore, that the properties on Plot No. 175, Plot "F", Kumnyika and the land at Mkolani are matrimonial properties. The plots at Mdyanda, I agree with the respondent that the same has been disposed.

What about the motor vehicle? The sale agreement of that car was tendered by the appellant and was admitted as exhibit PO2. The buyer is Baraka Edward Kayabu whom the appellant described to be the respondent. The respondent denied to own that car. Since proof that those names are of the same person is mere words of the appellant, I find the same to be unsatisfactory proof that Baraka Edward Kayabu is the respondent.

According to the appellant, the other properties owned by the parties are three mobile money agency shops (one located at lightness and two at Dubai Plaza). The respondent testified that the appellant found the mobile shop at lightness operating and the shops at Dubai Plaza were opened in 2017 and 2018 after they separated. On the fact that the shops were opened during subsistence of the marriage, the appellant is supported by Siris Jacob Mahundi (PW2). She was their neighbor and a sister in law of the respondent. She also said that the appellant worked in the shop at Lightness. I see no reason why this witness should lie against the respondent to favour the appellant. Therefore, I hold that the three shops were there when the marriage subsisted. However, the appellant found the shop at lightness running but she worked there to improve it.

The other properties listed by the appellant in her evidence are three TV, one laptop, three subwoofer, one bicycle, one gas cooker, one electric cooker, 2 sofer set, three beds, three mattresses, one electric iron, one blender machine, three table, two plastic chairs, one cupboard, one clothes cabinet, home appliances and two fridges. The respondent did not dispute this evidence at all. Therefore, those properties forms part of the parties' matrimonial assets.

Distribution of matrimonial properties depends on each parties contribution. The appellant was a house wife and she also worked at a shop at lightness. She found the house at Kumnyika already built but it had not been fully finished. She performed domestic chores and she takes care of the children todate. These domestic works count when assessing a couple's contribution towards the acquisition of the matrimonial assets. I also take notice of the fact that the respondent had paid the appellant Tshs 1,000,000/= before Maimuna Abdul (PW5) to enable her start new life upon their separation. All these factors considered, I award the appellant the land at Mkolani Mwanza, one TV, one subwoofer, one bicycle, one gas cooker, one bed and its matress, one fridge and one cupboard.

Regarding the mobile money shops, I find no basis upon which the distribution can be pegged. Shops are properties whose values fluctuates. Therefore, the appellant's entitlement ought to be assessed per the value of the same at the time of their separation. However, the appellant did not give the value of each shop at the time he left the matrimonial home. It is my view that in matrimonial proceedings where properties in dispute involve shops, the petitioner must state the value of the shops at the time when the parties started living or acquiring wealth by joint efforts and when they part company. This is a sure way which guarantee the court certainty in assessing each party's contribution. This evidence is missing. Consequently, in this case, I deem the Tshs 1,000,000/= paid by the respondent to help appellant start the new life to be her share in the shops as there is no basis for assessing her entitlement.

Counsel for the appellant alleged inconsistencies in the respondent's evidence because his evidence on the period he cohabited with the appellant conflicts with that of DW3. With respect, I see no contradictions in their evidence on any material issue. The complaint on admission of exhibit D1 is justified for a reason that it was not pleaded. This exhibit is a judgment of the primary court at Kaoulu in which some properties listed as matrimonial properties in this case were subject of another matrimonial

cause between the respondent and his first wife. I, therefore, expunge it from record. However, as I have already determined, the respondent gave evidence on properties that had been disposed of or distributed in a matrimonial cause involving him and his first wife. I rely on his oral evidence to exclude those properties. These are the plots at Mdyanda.

On insufficiency of the maintenance allowance, the complaint is based on ill-health of the children. However, this fact is not borne by the evidence at the trial court. Further, the income that the respondent earns monthly or annually has not been proved to help determine the standard of life that his family deserves.

In the event, I partly allow the appeal. The appellant is awarded the land at Mkolani, Mwanza, one TV, one subwoofer, one bicycle, one gas cooker, one bed with its matress, one fridge and one cupboard. The orders for custody and maintenance of children are upheld. I give no orders as to costs.

I.C. Mugeta

Judge

28/07/2021

Court: Judgment delivered this 28th July 2021 in presence of the respondent and in absence of the appellant.

A.J. Kirekiano

Deputy Registrar

28/07/2021