IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

CONSOLIDATED (PC) MATRIMONIAL APPEAL NO. 3 & 7 OF 2021

(Arising from the Judgement in the Consolidated Matrimonial Appeal No. 12 & 13 of 2020 in the District Court of Kigoma Before Hon. K. V. Mwakitalu (RM) and originating from Matrimonial Cause No. 06/2020 in Mwandiga Primary Court, Before Hon. F. P. Ikorongo RM)

ATHUMANI OMARY ATHUMANI.....APPELLANT/RESPONDENT

VERSUS

KASHINDI HAMISI ZAIDI .....RESPONDENT/APPELLANT

JUDGMENT

11/08/2021 & 04/10/2021

A. MATUMA, J

The appellant/respondent and the respondent/appellant were husband and wife whose marriage was contracted under Islamic rites on the 16th day of June, 2006 and were blessed with four issues.

After some time, the couples developed some misunderstandings between them which did not cool until when the appellant/respondent decided to sue the respondent/appellant at Mwandiga Primary Court for divorce. The Appellant/Respondent alleged that the misunderstandings arose several times and he tried his level best to settle the same unsuccessfully thus necessitated him to take the matter to court to have them formerly divorced. He stated on record during trial that;

"Ndoa yangu na mdaiwa imekuwa na migogoro mara kwa mara kwani mdaiwa amekuwa akininyima haki yangu ya tendo la ndoa na pia amekuwa akijichukulia maamuzi ya kusafiri kwenda mikoa mingine pasipo kunishirikisha mimi kama mume wake...."

On her party, the respondent/appellant alleged to have been the one who fought for the survival of their marriage but all ended in vain. Therefore, she was and is ready for the divorce and subsequently distribution of the acquired properties during their marriage.

The primary court having heard the parties granted the decree for divorce, ordered custody of four issues to the Respondent/Appellant and the Appellant/respondent to provide maintenance for the four issues at a tune of Tshs. 150,000/= per month and also be responsible for their health care together with their education, and ordered division of Matrimonial properties in that: -

"Nyumba ya Mwasenga ifanyiwe tathmini na mtathimini wa serikali kisha iuzwe kwa mnada pesa itakayopatikana igawanywe nusu kwa nusu kwa wadaawa, kiwanja cha Dar es salaam ni mali ya mdaiwa, kiwanja cha Buronge ni mali ya mdai na pikipiki aina ya boxer MC 440 APM iuzwe na pesa wadaawa wagawane nusu kwa nusu"

Both parties were aggrieved with the trial court's decision and thus appealed to the District Court of Kigoma where Kashindi Hamis Zaidi the

respondent/appellant filed matrimonial appeal No. 12/2020 while Athumani Omary Athumani the Appellant/respondent filed matrimonial appeal no 13/2020 which were determined in Consolidated Matrimonial Appeal No. 12 and 13 of 2020 whereas the Respondent/Appellant herein was the Appellant and the Appellant/Respondent was the Respondent. The District Court in its decision held;

> *"1. The matrimonial house at Mwasenga and a motor cycle be valued by the Government Valuer and be sold and the appellant be given 40% of the sale proceeds and the respondent be given 60 percent.*
> *2. The respondent is ordered to pay Tshs 8,372,000/= to the appellant which is 40% of the money she deposited in the respondents account for their joints savings.*
> *3. The respondent to pay the appellants Tshs 80,0000/= per month for the maintenance of their children.*
> *4. Other orders of the trial courts remain intact.""*

This decision again aggrieved both parties whereas each decided to appeal to this court under separate appeals as herein above stated. The appellant/respondent had seven grounds whereas the respondent/appellant had four grounds but during the hearing of this appeal, the parties jointly agreed that their appeals be consolidated and be heard together. I thus consolidated the two appeals as Consolidated **(PC) Matrimonial Appeal No 3 & 7** of 2021. It was further agreed that, since the parties have common grievances against the decision of the

lower court, issues for determination by this court which would take on board the complaints of each party in their respective petition of appeals be drawn and the Consolidated appeal be determined on them.

The issues proposed, drawn and agreed are;

i. *Whether there was sufficient evidence during trial to establish that there were other matrimonial assets alleged and proved but not included in the order of distribution to the parties.*

ii. *Whether the distribution of established matrimonial assets was justifiably distributed to the parties by the district court at 40% to the Respondent/Appellant and 60% to the Appellant/Respondent.*

iii. *Whether the order of the District Court against the Appellant/Respondent to pay the Respondent/Appellant Tshs. 8,372,000/= as 40% of the total amount in the bank Accounts without evidence that at the time of the Distribution such money was available and if not how was the same spent, was justifiable.*

iv. *Whether the order for sale of matrimonial house and distribution of the proceeds thereof is in the interest of the best welfare of the children.*

v. *Whether the order of custody to the Respondent/Appellant was given in consideration of the best interest of the children.*

vi. *In ordering the maintenance of children, whether the amount of Tshs.80,000/=which was ordered against the Appellant/Respondent considered the actual income and expenditure of the Appellant/Respondent.*

When this appeal came before me for hearing, the appellant/respondent was present in person and was represented by Mr. Sadiki Aliki learned Advocate while the respondent/appellant appeared in person unrepresented. For easy of reference, I shall be referring the Appellant/Respondent Athumani Omary Athumani as the Appellant, and Kashindi Hamisi Zaidi as the Respondent.

Mr. Sadiki Aliki leaned Advocate submitting on the first issue contended that, the District Court was right to confirm the decision of the trial court that the only established matrimonial properties between the parties were one house at Mwasenga, one motor cycle, one plot in Dar es salaam and one plot at Buronge, he further submitted that, the District court was right to confirm the trial court's decision in the distribution of the plot in Dar es salaam to the respondent and that of Buronge to the appellant.

The leaned advocate further submitted that apart from those established properties, the Respondent mentioned so many other properties without any evidence as to when they were acquired and by who. The learned advocate argued that some of the mentioned properties by the

Respondent were owned by Omary Athuman (SM2) who is the appellant's father and sufficient documentary evidences as to ownership thereof were tendered (exhibits P5, P6, P7, P8 and P9). He cited the law under Section 114(1) of the Law of Marriage Act, Cap 29 R.E 2019, that the court may order distribution of the properties when it is authenticated and established that those properties are matrimonial assets and subsection (2)(b) thereof, to the effect that the court in distributing the matrimonial assets the extent of contribution by each party must be established towards the acquisition of the said property. He also referred me to the case of ***Samwel Moyo vs Marry Cassian Kayambo*** *(1999) TLR 197.*

Responding on the first issue, the Respondent submitted that, matrimonial properties which were not divided were one house in Dar es Salaam and one house at Lugufu, four plots in which one of them is that of Buronge which the appellant was given. She was of the view that even the plot in Dar es salaam which was given to her was her own property given to her by her father, exhibit P3.

She disputed some properties to be owned by her father-in-law (SM2) as contended by the Appellant.

She also claimed a plot at Mpanda which was bought by the Appellant in which Tshs 1,000,000/= was paid as advance payment.

Other properties that the respondent asserts to have not been distributed are farms; 15 acres at Rugufu, at Majegemba 7 acres, two farms of palm trees at Ruiche Ujiji, 7 acres at Usinge although she has declared to have not seen them physically but through some purchase documents by the appellant. She contends that it is not true that the farms belonged to SM2. Other properties were three motor vehicles that were registered in the name of Panya, her name and another in the name which she does not know its registration but she only knew that it belonged to the appellant because he once named it in criminal trial against her that it is T 699 ACG. Three motor cycles (bajaji ya mizigo moja na za abiria mbili) but she preferred to talk about motorcycle MC 171 AVC because the two others were sold to Daniel Paul respectively.

Again, the respondent claimed for 14 cows, 43 goats, 11 sheep, 20 hens and 9 ducks, two business stalls at Mwasenga which are yet finished;

> *"Tulivijenga lakini hatukuvimalizia. Havijaanza kutumika). Vibanda hivyo viko kwenye eneo la soko. Tulikuwa tunatoa hela tunakatiwa eneo tupu tukajenga"*

Four Bank accounts NMB, CRDB, EXIM and Postal Bank. She explained that in the accounts they deposited money which she didn't know its total. All those properties, she said that they are matrimonial assets because they were acquired during subsistence of their marriage.

In reaching to its decision on this issue which was then upheld by the first appellate court, the trial magistrate was not satisfied with the respondent's claims to some other properties she listed as there was no sufficient proof. Only the house at Mwasenga, one plot at Buronge, one plot at Dar es salaam and one motor cycle were found to have been established as matrimonial properties and distributed them accordingly.

It is plainly true that, the respondent did not prove the ownership of many of the properties which she alleged to be matrimonial properties. Her evidence on those properties is very much challenged by documentary evidence adduced by (SM2) the father of appellant who tendered documents as exhibits to prove that he was the owner of the properties in question. Thus, for example exhibit P9 is a Sale Agreement in which SM2 bought a plot in Dar es salaam from the Respondent's father and the respondent has admitted before me that the signature of the seller thereof is a true signature of her father. She however allege that the buyer thereof was initially the Appellant but the document has been forged by removing the name of the Appellant and inserting that of SM2. The Respondent's claims are without any merit. Exhibit P9 in which the Respondent admits the seller's signature to be genuine is not altered anyhow. No cancellation, no rubbing, no

insertion of any letter or names or any other sign of the document being tampered anyhow. That plot cannot therefore be included in the matrimonial assets by the parties. Exhibit P8 also show that SM2 bought a plot from Mohamed Abdallah Mbiku on 7/8/2011 even prior to the eruption of the conflicts between the couples herein. The Appellant was a mere witness thereof and thus such plot cannot be included into the matrimonial assets. Exhibit P7 collectively are Motor vehicle Registration Cards of SM2 in respect of Bajaj MC 171 AVC and TVS MC 348 AGN. All these motor cycles were registered with Tanzania Revenue Authority (TRA) in the name of SM2 on 19/03/2014 and 01/08/2014 respectively, so many years prior to the conflict of the parties herein. Exhibit P6 is the sale deed in which SM2 bought six cows from Aloizi Antoni on 27/04/2016 and exhibit P5 collectively are the Sale agreements for the shamba he bought at Luiche from Hamisi Jumanne Rashid and Baningo Jumanne Rashid on 20/02/2015 and that which he bought at Ruiche from Shabani Ally and 11 others being heirs of Ally Nyembwe on 22/09/2015. That transaction was even witnessed by F.U. Shayo learned Resident Magistrate. All these documentary evidence by SM2 cannot be ignored by mere claims of the Respondent that those properties are not of SM2 but matrimonial properties liable to be distributed.

Since the Appellant has exonerated himself from ownership or interest on those properties, the Respondent is at liberty to sue SM2 if she really has any interest thereof. She will establish her claim and if the Court will be satisfied, she will be decreed accordingly. SM2 is not a Party in these matrimonial proceedings and cannot be condemned unheard. At the trial court he attended as a mere witness technically as an objector to exonerate his properties. He successfully exonerated them. Thereafter he was not subjected on the consolidated appeals at the District Court and also in this Court. It would be unfair and unjust to dispossess him the properties which are registered in his name without affording him opportunity to defend them in the appropriate forum.

There was no evidence relating to the house in Dar es Salaam, one house at Lugufu, 15 acres of farms at Rugufu, 7 acres at Usinge and 7 others at Majegemba. Concerning 43 goats, 11 sheep, and 9 ducks which the respondent asserts them to be matrimonial assets, there is no evidence to prove their existence. It was a mere mentioning by the Respondent which is not enough in the administration of Civil justice. There must be sufficient evidence not only that the properties are in existence but also that the same are matrimonial properties for them to be liable for distribution upon the divorce at the extent of the contribution by each party.

About two business stalls at Mwasenga, the appellant denied ownership thereof and stated that if they are there, then the Respondent should take them. In the circumstances that there is no explicit evidence on them, I join hands with the Appellant that if the Respondent is speaking the truth for the presence and existence of those stalls, let her take them but I don't decree them for want of evidence to their existence as matrimonial assets.

About the plot at Mpanda, it is in evidence that the couples attempted to buy it but did not finally buy the same. That is why exhibit D2 which was the sale agreement was not fully endorsed. Since there is no evidence to prove that the purchase was complete, it is obvious that the contract for sale failed. I agree with the appellant's advocate that Exhibit D2 does not prove the full purchase. Exhibit D2 has an explicit term that;

> *"Kwamba mnunuzi akishindwa kumaliza kulipa deni lake ndani ya siku mia moja themanini (180) atarejeshewa pesa zake baada ya kukatwa asilimia thelathini (30%) na muuzaji na kiwanja kitauzwa kwa mnunuzi mwingine."*

The Appellant contended that his attempt to buy such plot failed. The Respondent did not prove that the purchase was finally completed nor alleged that the advanced payment thereof was returned and the same existed at the time of the divorce. She did not even explain her contribution to the said advanced payment. The claim on that plot thus

fails in total. The first issue is therefore concluded that there is no evidence on record to establish that there were other matrimonial assets which were not included in the order of Distribution by the two lower courts. The properties sufficiently established were all distributed accordingly.

On the second issue on whether the distribution of established matrimonial assets by the District Court at 40% to the respondent and 60% to the Appellant is justifiable, the counsel for the appellant submitted that, the District Court did not consider the extent of contribution by each party. He argued that the District Court at page 14 of the judgement was satisfied that it was the Appellant who had substantial contributions to the acquisition of the properties. That there was no evidence towards the contribution of the respondent in the acquisition of the house at mwasenga and the motor cycle. He was of the view that the only justifiable cause for the respondent to be entitled in the distribution of those properties would be domestic works as it was decided in the case of ***Bi. Hawa Mohamed versus Ally Seifu*** *(1983) TLR 32.* But again, the counsel argued that, even those domestic works were not even proved as it is on record that the respondent used to travel to various regions even without permit of her husband the Appellant herein. He submitted that even the respondent admitted to have gone to Dar es salaam and

stayed there until the school teacher demanded the child back to school. He suggested that, the lower court should have considered that the respondent had committed serious matrimonial misconducts because she contracted her marriage under Islamic Law and they lived under Islamic rites. Her movement was thus restricted to the permit dully sought and obtained from her husband as stated in the Islamic Law (Reinstatement) Act, Cap 375 R.E 2002. He further submitted that, in the case of Bi. Hawa Mohamed supra, the serious Matrimonial misconducts by the wife may reduce her share in the distribution of matrimonial properties. Under the circumstances, the counsel argued that the division of the house and the motor cycle at 40% to the respondent and 60% to the appellant was not fair thus the respondent deserves nothing and if the court necessitates to give her anything then only 10% of the house and the motor cycle would suffice.

Responding to this issue, the respondent submitted that, her contribution in acquisition of those properties was 85% because it was her who was planning what business to be done and making follow ups. She is recorded to have testified that she was going to;

> *"mashambani kulangua biashara, tulikuwa tunalangua mazao baadae tukaacha, tukaanza biashara ya pikipiki tukazipiga bodaboda. Na hizo zote nilikuwa nazisimamia mimi".*

She argued that those motor cycles were the fruits of crops business. She added that she was personally working in those farms and that the appellant was merely a mechanical and they could not depend on his income.

The respondent went on arguing that she performed all domestic duties and even when she was away for her business, she used to bring her relatives like Abdul Mussa or Fitina Omary Athuman. She contends that even in the farms she was being helped by her relatives. She deny to have travelled without her husband's permit because she was permitted to go Dar es salaam for wedding ceremony together with their child one Athuman Athuman and she was even given a bus fare by her husband.

About the distribution at 40% by 60% she lamented that it was not justifiable because she contributed more than her husband to 85%, she therefore suggested that they at least divide 50% to each party of the properties despite that she contributed more than the Appellant/respondent.

Under the evidence on record, page 10 of the trial court proceedings SM1 who is the appellant stated that;

> *"Wakati wote naishi na mdaiwa tumefanikiwa kupata nyumba moja iliyopo Mwasenga, Kiwanja kimoja Buronge, Kiwanja kimoja Dar Es salaam (Sekuumbe) na pikipiki moja aina ya boxer."*

He did not however explain how they acquired such properties and the extent of contribution by each one of them.

On the other hand, the respondent at page 26 stated that;

"kuhusu mali mimi sikumkuta SM1 akiwa na mali yoyote ile"

She also didn't explain the extent of her contribution to the properties they jointly acquired during the existence of their marriage.

Therefore, no one explained the extent of his/her contribution towards the acquisition of those properties. They ended listing the jointly acquired properties. It would thus be unfair to adjudge that either party contributed more than the other. In that respect the distribution would attract equal distribution. That is why I agree with both lower courts below that the plot at Buronge which was acquired by the Appellant during their marriage and registered in his name be taken by him, and that one in Dar es salaam which was acquired by the Respondent during the existence of their marriage be taken by her. That is 50% per 50%. The respondent had argued that the plot in Dar es salaam was her own property given to her by her father and thus not liable to the distribution. Exhibit P3 is however contradicting her. The same provides that she bought such plot from her father at Tshs. 100,000/=. It was not a gift at all. In the circumstances, in the like manner she claims rights in the properties acquired by the Appellant, the Appellant has also equal right to claim in the property she

acquired. The basis of their claim is the same, that the properties were acquired during the subsistence of their marriage.

In respect of the matrimonial house at Mwasenga and the motor cycle, for the reason that they are registered in the names of the Appellant, there is rebuttable presumption that he had more contribution towards their acquisition. That is why they were registered in his names as against the Respondent. Otherwise, the respondent was duty bound to establish why she had substantial contribution but yet the properties were not registered in her names or under the joint names. In that respect the distribution made by the District Court of 40% per 60% remains undisturbed.

Before embarking into the third issue let me remind learned trial magistrates to exercise their judicial duties accordingly. The core duty of the judicial officer like the magistrate is to administer justice, he or she is not there as a mere observer of litigations. The law has given powers to judicial officers to put some questions to the parties during litigation and at any stage so that they become acquainted fully with all necessary material facts for better and just determination of the real question in controversy between the parties. That is section 176 (1) of the Law of Evidence Act, Cap. 6 R.E. 2019 which provides;

"The court may, in order to discover or to obtain proper proof of relevant facts, ***ask any question it desires, in any form, at any time, of any witness or of the parties about any fact relevant or irrelevant and may order the production of any document or thing;*** *and neither the parties nor their agents shall be entitled to make any objection to any such question or order nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question"*

In that regard and more so when the parties are all lay persons, the court should ask them some questions to obtain clarifications on matters that would necessarily require the court's determination. It is on the basis of this judicial mind I once held in the case of ***Angelina Reubeni Samsoni and Another versus Waysafi Investiment Company,*** *DC Civil Appeal no. 04 of 2020* HC Court at Kigoma that;

"Judicial officers who stands as mere observers of trials without reminding the parties to adhere to certain requirements of the law for their proper presentations of their respective cases would not be discharging their duties for the administration of justice and if that is to happen then good technical litigants would always be using the courts to win cases to the detriment of justice".

In the instant case, both parties were lay persons and unrepresented. They could not know the requirements of the law to prove the extent of

contribution for just distribution of the properties acquired. They should have thus been asked as to how the house at Mwasenga and the Motorcycle were obtained, who contributed more, when and how. All these are silent on record while the trial court knew that at the end of the day it would be necessitated to make an order for the distribution of these properties basing on the extent of contribution by each party. We should stop activism decisions and stand to the law.

In respect of the third (iii) issue as to Whether the order of the District Court against the Appellant/Respondent to pay the Respondent/Appellant Tshs. 8,372,000/= as 40% of the total amount in the bank Accounts without evidence that at the time of the Distribution such money was available and if not how was the same spent, the Respondent contended that during their marriage, they succeeded to open four (4) Bank accounts in which they deposited some money whose total she didn't know. As rightly argued by Mr. Sadiki Aliki learned advocate, it was wrong for the first appellate court to make calculations from deposit slips and thereby distributing the total answer. That was activism decision. The Appellate magistrate was distributing the sum on papers and not actual money in the Bank accounts. As I have said earlier, only the properties whose presence has been established, can be liable for distribution not only upon proof that they are matrimonial assets but also that there was contribution

by both spouses towards their acquisition. In this matter, the Respondent tendered a bunch of Bank slips (exhibit D1). Some of them are too old to the extent that it is doubtful whether the money deposited through them are still existing into those accounts. There are for instance deposit receipts of 2006 up to 2017 more than a decade ago. No explanation was given whether there was no withdraw by the couples for their joint use or for the use of either of the family member during their happy living. Those receipts were evidence to the deposit of the money but not evidence to its existence up to the time of the divorce. The Respondent ought to produce the bank statements and not deposit slips as the same does not prove the balance. The court could have even ordered the production of the Bank statement as per section 176 (1) of the Evidence Act, supra.

The Respondent's failure to produce in evidence such statements which could be obtained even by court's order, have no any other interpretation than that she knew there was no fund existing in the named accounts. The plot in Dar es salaam and that at Buronge were bought in 2010 and 2013 respectively, there is no explanation whether the money from those accounts were not involved in purchasing those plots. But even if there could have been evidence for the presence of the money, there is no evidence to the Respondent's contribution towards their acquisition. The order of the District Court that the Appellant should pay the Respondent

Tshs. 8,372,000/= as 40% of the total amount in the Bank accounts is therefore unfounded and accordingly quashed.

On the fourth issue both parties argued that; the lower courts erred to order the sale of the only matrimonial home in disregard to the welfare of the children. They argued that ordering the sale is to render the children homeless as they are living in. Both parties in their respective arguments are of the firm stand that the house in question at Mwasenga should not be sold for the best interest of their children.

The only problem is that each one demands to be awarded custody of children and the house in question so that the children are not rendered homeless. The Appellant in the alternative submitted that if the Respondent deserves any share therein, then it should not exceed 10% for which he argued that respondent's contribution thereof was only that of matrimonial duties and not physical or direct contribution.

The Respondent on the other hand is not ready for the distribution of the said house on the argument that they have two other houses at Rugufu and Dar es salaam. She should thus be declared the sole owner of the house in question so that she continues to stay with the children. Her only alternative, is that such house at Mwasenga be declared the property of their four children and the transfer thereof be ordered and if the court

goes further to distribute it against the suggested transfer the appellant be awarded only 20% of its value.

It is true through the evidence on record, the grounds of appeal by both parties and their arguments during the hearing of this appeal that none of them is willing their matrimonial home to be sold but every one wishes to be declared the sole owner of the property.

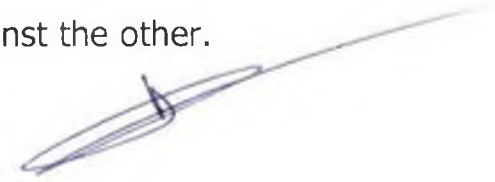
Since the house in question is a matrimonial property as decreed by both lower courts and in this court, the same is subject to distribution per percentage as herein above decreed. Its distribution shall not in any way affect the duty of the parties herein to maintain their children including providing them for shelter as provided for under section 8(1) of the Law of the Child Act (Cap 13 R.E 2019) which provides;

> *"It shall be the duty of* ***a parent,*** *guardian or any other person having custody of a child to maintain that child in particular that duty gives the child the right to- (a) food; (b)* ***shelter****; (c) clothing; (d) medical care including immunization; (e) education and guidance; (f) liberty; and (g) play and leisure."*

The issues (children) of marriage cannot therefore be the basis of either party denying the interests and shares of the other party upon divorce. Whoever shall be given custody of the children shall be obliged to comply with the requirements of the law of the child supra. Therefore, the matrimonial home shall be divided at ~~40%~~ per 60% as decreed in the

District Court. The Appellant herein shall take 60% and the Respondent 40% of its market value. Since it is the Appellant who is registered owner of the property and it is him who has been decreed with a slight big share, the house shall remain to be his own property provided that he pays 40% of the market value thereof to the Respondent. The 40% herein should be paid to the Respondent in three months' time after the market value has been obtained from the relevant authority (Government Valuer). Upon expiry of the three months without effecting payment of the 40%, it would be the turn of the Respondent to pay the Appellant the 60% thereof within the next three months and take the property as her own property. Failure of either party to pay the other in accordance to the orders herein, the property shall be sold at the Public Auction and the distribution of its proceeds made accordingly.

Let me be clear that; the right of each party is to appeal against this order and not to avoid the payments of his or her shares by the other party when the same is due within the appropriate time. Should either one avoids his or her share to let the prescribed time expire against the fellow, he or she shall be deemed to have lost interest in his/her share and the party whose payments are avoided shall be presumed to be the sole owner of the property against the other.



Both parties shall bear expenses for valuation of the house at the percentages herein. That means, the appellant shall pay 60% and the Respondent 40% of the Valuation expenses.

On the fifth issue about custody of children, each party submitted at length with several citations, demanding custody of the four issues of their marriage. The battle for custody of these children was even hotter for each party to get the house herein above discussed, the custody was being used as a shield against the other for purposes of getting the matrimonial house supra. I have done with the house and I will consider the custody of children independent of the purported shelter which as I have said it is the duty of a parent under whose custody the children are placed to provide the children with shelter.

As revealed in evidence, out of the four children only one of them is living with the parties herein. Three others are all in boarding schools. Therefore, even the custody which the parties are fighting for is merely for being obligated to make close fall ups of their well-being but not physical living with them except for the one at home.

Now as to who should custody be given; I have seen no peculiar circumstances to deny either of the parties the right to custody of their own children. The allegations made by each party against the other are not so enough to adjudge either of them unfit to take care their children.

I will therefore apply the Islamic law to order custody of the said issues because the parties contracted their marriage under Islamic rites and none of them has converted from Islam nor has lost the pre-requirements under Islamic law for being entrusted to take care the issues of marriage. I will be guided by the Court of Appeal decision on this issue. This is the case of ***Abdulrahman Salim Msangi v. Munira Margaret*** *[1984] TLR 133* which held;

> *"According to Islamic law infants who have not yet attained the age of some understanding, which is usually taken to be seven are left in the custody of their mother".*

In the circumstances, custody of the three elder children Salma Athumani (16 years), Omari Athumani (12 years) and Athumani Athumani (9 years) shall be in the custody of the Appellant while Hamis Athumani (5 years) shall be in the custody of the Respondent.

On the sixth issue, the same is overtaken by event. This is because I have already adjusted the order of custody of children to each party. But also, the parties during hearing of this appeal did not contest much on this issue. The Appellant wanted the court to vacate the monthly maintenance order against him and the Respondent stated clear that she is capable to maintain her children. Because all children are at boarding schools except one, there is no any need for an order of monthly maintenance. Each party shall maintain the children under his/her custody and shall be

obliged to maintain other children in the custody of the other depending to the particular need and income at the moment.

Otherwise, maintenance order would be there as a punishment to the other spouse which would be bad as I once observed in the case of ***Mwantumu Hamisi Kitemo vs Abdulkadri Mushi,*** *Juvenile Civil Appeal No. 01 of 2020,* High Court at Kigoma Registry that;

> *"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"*

Also, in the said case of Mwantumu while citing section 44(a) of the law of the Child supra I further observed;

> *"... both parents are at equal footing in law to maintain their children. There has been a wrong perception that only the father is responsible. All what matters who is capable to take the responsibility. It might be one of the parents or both of them depending to their income and wealthy...."*

I the instant case there is no evidence of the monthly income for each of the parties. Be it from an Employment salary or business. It is thus unfair to condemn either of them to provide monthly maintenance without

investigating his or her earning capacity per month. That would be subjecting the party to an order that would pull him into unexpected contempt of court order in case it turns that he or she is unable to comply. The trial court ordered the appellant to pay Tshs. 150,000/= as maintenance, the District Court varied the order into only Tshs. 80,000/=. Both the two lower courts issued such maintenance order without there being any sort of monthly earning of the Appellant or even the economic status of each parent, the parties herein. If the trial court felt to subject the Appellant into a monthly maintenance order, it should have investigated thoroughly of his monthly income or his monthly earning capacity. Thereafter it should have gone further to investigate the Appellant's personal basic needs, the needs of other dependants, his debts if any which affects his monthly income or monthly earning, and his obligations to the general community such as compulsory monthly contributions among others. Maintenance order should not be issued arbitrarily in total disregard to other obligations of the party in the matrimonial proceedings which would be affecting his or her income. In the instant case, the Respondent has even submitted that the appellant is a mere mechanic whose income could not be depended for a family living. I don't know from which source the trial court condemned the Appellant Tshs. 150,000/= and also the District Court to condemn him

Tshs. 80,000/=. I remind the learned magistrates that in discharging our duties as judicial officers, we are guided by established facts/evidence on record and not on those facts into our minds, mercy, biasness or fear. If we think of anything material, our duty is to probe the parties to adduce evidence on it so that it becomes on record for our determinations.

I therefore quash the order of maintenance which was issued against the appellant to the tune of Tshs. 80,000/= 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 investigate and issue appropriate orders at the appropriate moment.

This appeal is therefore, allowed to the extent herein above stated without costs. Whoever aggrieved with this finding may further appeal to the Court of Appeal of Tanzania subject to the relevant laws governing appeals thereto.

It's so ordered.

A. Matuma

Judge

04/10/2021

Court: Judgment delivered in the presence of both parties in person and Mr. Stephano Malyengeta John for the Appellant/Respondent. Right of Appeal is explained.

It is so ordered.

Sgd: A. Matuma

Judge

04/10/2021