

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 25 OF 2020

(Originating from Matrimonial Cause No. 20 of 2019 in the Resident Magistrates Court
of Arusha)

MAINGO OLE KILELI.....APPELLANT

VERSUS

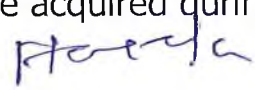
PIRIAS TUBULWA NGURUMWA.....RESPONDENT

JUDGMENT

4/4/2022 & 21/4/2022

N.R. MWASEBA, J.

Parties herein were an old couple whose marriage unfortunately turned to be sour and subsequently dissolved by the Loliondo Primary Court vide Matrimonial Cause No. 01 of 2019. However, while dissolving the marriage between the old couple, no division of matrimonial property was done, and neither of the parties raised such an issue before the court. Subsequently, on 04/09/2019 the respondent herein filed an application in the Resident Magistrates' Court of Arusha (to be referred as the trial court henceforth) seeking for division of matrimonial properties that were acquired during the



subsistence of their marriage. Basically, this is the source of the controversy between the parties. Having determined the application, this trial court proceeded to divide the matrimonial properties equally between the parties (i.e 50% each). Nevertheless, the matrimonial home was ordered to remain intact if at all the issues of the broken marriage were below the age of 18 years and the house shall be occupied by the spouse to whom the issues would be in the custody of them and if the said issues attain the age of majority (18 years) then the matrimonial house was to be divided equally to the old couple.

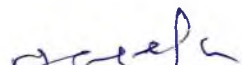
It is this ruling of the trial magistrate which has triggered the appellant to file this appeal after being dissatisfied by the entire decision. The appeal before me comprises of five (5) grounds of appeal enlisted hereunder:

- 1. That the honourable court erred in law and fact by ordering division of matrimonial assets without evidence on contribution and existence of such properties.*
- 2. That the honourable court erred in law and fact when it held that the home (boma) remains with the child.*



3. *That the honourable court erred in law and fact by hearing the matter yet the court has no jurisdiction and the matter was res judicata as well.*
4. *That the honourable court erred in law and fact by delivering ruling with uncertainty.*
5. *That the honourable court erred in law and fact by delivering a ruling tainted with irregularities.*

At the hearing of this appeal the appellant was under the legal representation of **Mr Daudi Haraka**, whereas the respondent also enjoyed legal services from **Mr Joseph Melau Alais**, both learned advocates. With leave of the court the appeal was disposed of by way of written submissions which I shall consider them while disposing of the grounds of appeal.

I have gone through the grounds of appeal and wish to start with the third ground which says the honourable court erred in law and fact by hearing the matter yet the court had no jurisdiction and the matter was *res judicata* as well. This ground can dispose of the appeal. 

Submitting on the third ground of appeal, Mr Daudi Haraka for the appellant averred that Loliondo Primary Court had dealt with the issue of marriage of the parties via Shauri la Ndoa No. 1 of 2019 at Mahakama ya Mwanzo Loliondo Wilaya ya Ngorongoro, as such there was no any appeal that was preferred against the decision that dissolved their marriage. By bringing a new application as a "Matrimonial cause No. 20 of 2019 at the Resident Magistrate Court of Arusha at Arusha between the same parties renders the matter to be *res judicata* under the provision of **Section 9 of the CPC.**

He further argued that if at all it was an application for division of matrimonial assets under the auspice of **Section 114 (1) and 81 (b) of the Law of Marriage Act**, Cap 29 R.E 2019 and **Regulation 32 of the Law of Marriage (Matrimonial Proceedings) Rules**, 1971 GN No. 25 VOL. III of 1971; it would have been right if it was brought as a Miscellaneous application but not as a main matrimonial case as it was brought.

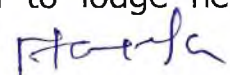
In his reply, Mr Joseph Melau Alais, learned counsel for the respondent submitted that the issue of jurisdiction is the creation of statutes. However, **Section 76 of the Law of Marriage Act** is very clear on the issue of

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jurisdiction. It provides original jurisdiction in matrimonial proceedings to the High Court, a court of Resident Magistrate, a District Court and a Primary Court. It is their submission that in regard to jurisdiction on distribution of matrimonial property, the resident magistrate court of Arusha had jurisdiction to entertain the same.

Regarding the issue of *res judicata*, he submitted that the counsel for the appellant has misdirected himself on the said issue. He clarified that to establish the doctrine of *res judicata* there are four elements to be discussed namely: a judicial decision was pronounced by a court of competent jurisdiction; the subject matter and the issues decided are the same or substantially the same as issues in the subsequent suit; the judicial decision was final; and it was in respect of the same parties litigating under the same title. He referred this court to the case of **Zuhura Amani Kumala vs Farida Saidi Mbisi**, Misc Land Appeal No. 2 of 2020. He says it is unfortunate that the appellant did not direct himself to all the four elements as stipulated above.

In his rejoinder, the counsel for the appellant reiterated what he submitted in chief and insisted that the respondent was supposed to lodge her



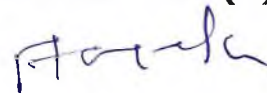
application in the same court which dissolved the marriage and not to file a fresh matrimonial cause.

Basing on the third ground of appeal and the arguments of the parties the issue for determination of the appeal is whether the trial court was vested with the jurisdiction to determine this application which is originated from the primary court.

The jurisdiction of determining matrimonial cases is well stipulated under **Section 76 of The Law of Marriage Act** which provides that:

"Original jurisdiction in matrimonial proceedings shall be vested concurrently in the High Court, a court of a resident magistrate, a district court and a primary court."

This provision as submitted by the counsel for the respondent provides clearly that in matrimonial proceedings the high court, a court of resident magistrate, a district court and a primary court have the original jurisdiction. In the case at hand there is no dispute that the marriage of the two parties was dissolved at Loliondo Primary Court. However, the court did not divide the matrimonial assets. **Section 114 (1) of the Law of Marriage Act** provides as hereunder:



*"(1) **The court shall have power**, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*
(Emphasis added)

The word "court" has been defined under **Section 2 of the Law of Marriage Act** to mean any court having jurisdiction under Section 76. It is obvious that with regard to the case at hand the said court which is referred under **Section 114 (1) of the Law of Marriage Act** is a primary court of Loliondo which already dissolved the marriage of the said parties.

Moreover, looking at the wording in **Section 114 (1) of the Law of Marriage Act** it is apparent that the court in granting the decree of divorce or subsequent to the grant of the decree of divorce makes an order for division of the matrimonial properties and other subsequent orders such as maintenance and custody of the children if any. Unfortunately, in this matter the Primary Court did not go further to issue the subsequent orders

for division of matrimonial properties, maintenance and custody of the children. It is in the firm view that even when parties seek for a decree of divorce only the court issuing such a decree is obliged to proceed to issue the subsequent orders of division of matrimonial properties and maintenance and custody of the children.

It is further the view of this court that the interpretation of **Section 114 (1) of the Law of Marriage Act** also entails that if such other orders were not issued at the time of granting the decree of divorce, then the subsequent order can be issued subsequent to the grant, meaning that the same court after having issued the decree of divorce may later on issue the subsequent orders upon being moved by either party. In the matter at hand, it was the Loliondo Primary Court which issued the decree of divorce, however the applicant filed her application for division of matrimonial properties at the Resident Magistrate's Court of Arusha at Arusha. This court is of the considered view that this was improper as it was the Loliondo Primary Court which issued the decree of divorce that ought to issue other subsequent orders.

The respondent (applicant before the trial court) moved the court under **Section 114 (1) and 81 (b) of the Law of Marriage Act, Cap 29 R.E**

2019 and **Regulation 32 of the Law of Marriage (Matrimonial Proceedings) Rules**, 1971 GN No. 25 VOL. III of 1971;

It is well explained above that the court which is referred to under **Section 114 (1) of the Law of Marriage Act** is the primary court of Loliondo which dissolved the marriage of the parties. Therefore **Section 81 (b) of the Law of Marriage Act** which the respondent used to move the court is not applicable in this matter. The provision provides that:

"Every application for maintenance, or for custody of children, or for any other matrimonial relief whatsoever shall, unless included in a petition for a declaratory decree or for annulment, separation or divorce, be by summons in chambers."

It goes without saying that this is not a procedure applicable to the case at hand which was originally tried by the primary court. Applications at the primary court are not initiated by chamber summons. Thus the counsel for the respondent misdirected himself to initiate this proceedings by using chamber summons and titled the same as matrimonial case while it ought to be titled Miscellaneous civil application. The procedure for conducting

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matrimonial proceedings at the primary court is well stated under Section 93 of the Law of Marriage Act which provides as hereunder:

*Notwithstanding the provisions of this Act, and subject to any rules made hereunder, where any matrimonial proceeding is instituted in a primary court, it may be instituted, tried and disposed of in the same manner as any civil proceeding instituted in a primary court and **the provisions of the Magistrates' Courts Act, and of any rules made thereunder regulating the institution, hearing and disposal of a proceeding of a civil nature in primary courts shall apply**, mutatis mutandis, to every such matrimonial proceeding. (Emphasis is mine)*

Considering the above provision, the civil suits in the primary courts are initiated by complaint or rather by filing specific forms. So long as the marriage was dissolved at the primary court, the respondent was obliged to be guided by the **Magistrate Court Act** in instituting the said application. Taking the application on division of matrimonial properties to the court which did not dissolve the marriage between the parties was

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wrong as it lacks jurisdiction to determine the same as stated under
Section 114 (1) of the Law of Marriage Act.



The above being said and explained, I will not discuss other grounds of appeal, as the third ground of appeal suffices to allow this appeal. In the event, the ruling, drawn order and proceedings of the Resident Magistrates' Court are hereby quashed and set aside for want jurisdiction.

It is further directed to the interested party seeking for orders of division of the matrimonial properties and maintenance and custody of the children (if any) to file the same before the court which issued the decree of divorce which in this case is the Loliondo Primary Court.

Considering the nature of the relationship between the parties, I refrain from making an order as to costs.

It is so ordered.

DATED at ARUSHA this 21st day of April, 2022.



N. R. MWASEBA
JUDGE
21/04/2022