IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(PC) MATRIMONIA APPEAL NO. 09 OF 2021

(Arising from Matrimonial Appeal No. 2 of 2021 of District Court of Kasulu before I.D. Batenzi, RM, Originated Matrimonial Cause No. 6 of 2021 of Kasulu Urban Primary Court before R. I. Shineneko – RM)

ASIA D/O CHRISTOPHER ..... APPELLANT

VERSUS

JAFARI S/O SAID ....RESPONDENT

JUDGMENT

18/5/2022 & 24/6/2022

L.M. Mlacha,J

The appellant, Asia Chrispher, the first wife of the respondent, Jafari Said, filed a petition at the primary court of Kasulu district at Urban Court seeking divorce, division of matrimonial assets and custody of children. She claimed desertion, cruelty and lack of care for the family. The primary court (R.I. Shineneko RM) found for the appellant and granted divorce, division of matrimonial assets and custody of children. The court found that there were two houses in the family. Each wife occupied one house. The appellant was given custody of the children and a parcentage of the value of the house at Nyantare where she lived. It ordered the house at to be

sold and shared between them. The appellant was to be given 30% of the purchase price. The rest, 70% was to remain with the respondent. The house at Nyansha was left for the occupation of the second wife. The shamba at Mzila (1/4 an acre) was given to the respondent while the shamba at Rungwe (one acre) was given to the appellant. The appellant was aggrieved and appealed to the district court of Kasulu in Matrimonial Appeal No. 2 of 2021. The appeal was dismissed hence this appeal.

The grounds upon which the appeal is based read as follows;

1. That, the Hon Resident Magistrate of the Kasulu District Court erred in law and fact by showing direct biasness against the Appellant. He has shown his personal interest in favour of the Respondent. This can be observed in the first and last paragraphs of his judgment.
2. That, the Hon. RM erred in law and fact for not focusing his mind on the memorandum of Appeal lodged by the Appellant, instead waved by looking on his own factors.
3. That, as this marriage was performed in Islamic form and the Respondent has after reference to the marriage conciliatory Board (BAKWATA), pronounced talakas in accordance with Islamic law, the subordinate courts should have made order to the Respondent to pay

maintenance to the Appellant for the customary period of iddat. This was not done by the subordinate courts.

4. That, the appellant was ill treated by the subordinate Court in the assessment of maintenance and division of Assets between the parties.
5. That, the duty to maintain the children of the marriage was not given a paramount consideration as directed in section 129(1) of the law of marriage.

The parties appeared in person. Hearing was done by oral submissions but before going to consider the submissions, as it is now the rule of practice, I will reproduce the background information which will assist us follow the discussions which will follow. The appellant told the primary court that she started to live with the respondent in 2005. They had a customary marriage but in 2012 they celebrated the Islamic marriage. Life went on smoothly throughout up to 2014. She was attending their shop while the respondent worked at his carpentry workshop. In 2014 the respondent married a second wife. The appellant accused him of failing to balance the equation. She told the court that her husband spent 2 days with her and 2 weeks for the second wife. Difficulties started and grew big. Life became

difficulty. The respondent could not care for the children. She moved to BAKWATA to complain without success. She was divorced in the end.

The appellant told the primary court that they have two plots which has houses, two farms, a motorcycle and a bicycle. She asked for an equal distribution of the assets and custody of the children. She brought the children said Jafari (15) and Amina Jafari (13) as her witnesses. They all said that they witnessed quarrels but they did not know why. They witnessed the respondent beating the appellant 3 or 4 times. They also witnessed her being chased out of the matrimonial home. Both expressed their wish to live with their matter.

The respondent agreed before the primary court that they had a customary marriage in 2005 before the 2012 Islamic marriage. He also agreed that he gave her talaka. He said that he gave her the talaka in 2015 because she was not faithful. She also practiced some witchcraft (ushirikina). He denied to posses a motorcycle. He said that the bicycle was in existence before the marriage therefore not a matrimonial asset. He said that they built the Nyantare house together but the Nyansha house was built for the second wife later, it was built after divorce. He said that he is not the father of the 5th child who was born after separation. He called his father DW2 Saidi

Horohwa who said that the shop is his. He just left it to the respondent to operate. He denied to have seen the appellant in the shop. DW2 Iddi Said said that he witnessed the respondent buying the second plot. He was accompanied by his two wives. He stressed during cross examination seying "Tulienda akiwa na wake 2".

The decisions of the two courts were based on this evidence.

The primary court decided that the appellant should stay with the children but the respondent did not handle them to her. The basis of the decision of the two courts on this aspect was the opinion of two of them who said that they wished to stay with their mother. Given the lapse of time and given the fact that the appellant got another child during separation and in the great interest of justice; I saw the need of hearing the children again. I directed the children to appear before me in chambers for my observations. They appeared before the court in chambers on 18/5/2022. I talked with them in the absence of their parents.

The children appeared health. They did not complain of lack of food or any victimization. They are also attending school regularly. When I asked them of the place when they wished to stay following the breakdown of

marriage, they had this to say; Rukia (7) said she needed to stay with her mother, Sada (12) said that she needed to stay with both, Amina (14) said that she needed to stay with her father and Said (16) said that he needed to stay with his father.

The parties being laymen could not submit on the grounds of appeal. They made general submissions. The appellant said that she has appealed because the orders in respect of the Nyantare house. She need to remain in the house with her children. She said that she is being victimized because there are two houses in the family. There was no need for the sale of the house. He went on to say that the respondent deserted her for 8 years and went to live with the other wife. He should proceed to live with the second wife in the other house. She complained that the court ordered the house to be sold without considering that she needed a place to live with her children. She asked the court to allow her to stay in the house with her children. She went on to say that the respondent have picked the children (4) and shifted the farms and shop to the other wife. He has now chased her out of the house.

It was the submissions of the respondent that the decisions of the lower courts are correct. He said that matrimonial houses involved were the

house at Nyantare and the two pieces of land only. All others belonged to the family before marriage. He went on to say that he lives with the 4 children while the appellant is living with the 5th child which she got with another man during separation. He said that he separated with the appellant in 2014. He requested the court to allow him to stay with the children and leave other orders as they are.

I will start with grounds four and five. They contain accusations of failure to assess maintenance and divisior of matrimonial assets. The gist of the submissions made by the parties was not on maintenance but the custody itself. I will therefore direct my mind on division of matrimonial assets and custody of children. Maintenance will just come as a component in case I agree that the orders of custody of children were made correctly.

Division of matrimonial assets is governed by section 114 of the Law of Marriage Act cap.29 R.E.2019. It reads thus:

> ***"114.-(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.*

(2) In exercising the power conferred by subsection (1), the court shall have regard to -

(a) the customs of the community to which the parties belong;

(b) ***the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;***

(c) any debts owing by either party which were contracted for their joint benefit; and

(d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one

party which have been substantially improved during the marriage by the other party or by their joint efforts." (Emphasis added)

The law talks of the division between the parties of any assets acquired by them during the marriage by their joint efforts. The emphasis is on the words 'assets acquired during the marriage by their joint efforts'. That is the starting point. There must be assets acquired during the marriage by the joint efforts of the parties. The petitioner must come with a list of

assets and evidence showing that they were acquired during the marriage their joint efforts.

The law also talks of the extent of the contributions made by each party in money, property or work towards the acquiring of the assets. It means that the petitioner must give evidence on the way he or she has contributed in the acquisition of the assets. It is not a mechanical process. Evidence must lead the court in making the division. The court must be guided by the extent of the contributions made by parties and not assumptions.

In **Yesse Mrisho vs Sania Abdul**, civil aappeal no. 147 of 2016 the Court of Appeal had similar observations but extended the rule to cover assets which may have been acquired by one party but improved during the marriage by their joint efforts. It had this to say in pages 9 and 10:

> *"Section 114 of the LMA provides for division of properties acquired by parties by their efforts during the pendency of matrimony, and it requires the courts, when considering this issue, to ensure that the extent of contribution of each party is the prime factor. The assets to be determined are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts."*

In **Bl. Hawa Mohamed vs. Ally Self** (1983) TLR 32 the Court had this to say:-

(i) *Since the welfare of family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets; and*

(ii) *the "joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts" or "work" of husband and wife"*

The Court of Appeal recognized the contribution made by parties in the welfare of the family as contribution to the acquisition of the assets. It extended the rule to cover domestic efforts or work done by women while the man is at work. It was said that by doing the domestic works the woman made the man work properly in his office or business thereby making the increase of income.

Custody of children is governed by section 125 of the Act. It reads as under:

> ***125**.-(1) **The court may, at any time, by order, place a child in the custody of his or her father or his or her mother** or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any*

other relative of the child or of any association the objects of which include child welfare.

(2) ***In deciding in whose custody, a child should be placed the paramount consideration shall be the welfare of the child*** *and, subject to this, the court shall have regard to-*

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of ***seven years*** *to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody.*

(4) Where there are two or more children of a marriage, ***the court shall not be bound to place both or all in the custody of the same person*** *but the shall consider the welfare of each independently. (Emphasis added)*

The law talks of power to give custody of children to the mother or father where circumstance so dictates. The obvious case where there is a decree of divorce or separation. The guiding principle is the '*welfare of the child*'. And in so doing the court should have regard to three things. i) the wishes

of the parents of the child. The parent must be ready to receive the child. ii) the wishes of the child, where he or she can express his or her independent opinion. iii) the customs of the community to which the parties belong. I will add a fourth scenario, the circumstance of each particular case, for example where the party who wish to take the child has already is already married or is in anew relation, the court must go a mile ahead to see if the children could be confortable in the new family. See also 39 (1) and (2) of the Law of the Child Act cap 13 R.E.2019 and the case **Mwana Nyabuta Malima v. Eva Mganga**, Civil Appeal No. 12 of 2022(HC at Dar es Salaa,) page 6.

See also **Elizabeth Nkwimba Masanja v. Cosmas Michael machibya**, Matrimonial Appeal No.23 of 2020 (HC mwanza) page 17 where it was said as follows:

> *"What matters in the custody of a child is the best interest and welfare of the child.* ***Children of tender years are kept under the custody of their mothers unless there is sufficient evidence to discredit the mother****" (Emphasis added)*

In our case, it is apparent that the parties accept divorce. Divorce is not an issue at all. Love has escaped in the window and none of the parties is interested on it. The battle is on the division of matrimonial assets and custody of the children. In the assets, the battle is on the Nyantare house.

It is agreed that the appellant was marriage in 2005. By the time the respondent was still a student at FDC collage studying carpentry. She was then maintained by his parents or on assistance from his parents. But he soon went out of the college and started life. He run a shop and a carpentry workshop. The appellant says that she worked at the shop which is now under the control of the second wife while the respondent was at the workshop. The existence of the appellant at the shop was opposed by DW2 but I think he was just assisting his son for the respondent did not dispute this fact.

Armed with the shop and the carpentry workshop, the parties bought a plot at Nyantare and built a house. They lived in this house with their 4 children up to 2014 when the respondent developed an interest to get a second wife. He married the second wife in 2014. There was no peace since them but despite the problems, the evidence of DW3 shows that the respondent moved with his two wives to buy the Nyansha plot where they

built a second house. This became the residence of the second wife. So the appellant became the husband of two wives each living in her house. He used to visit them on a time table which later became the source of the conflict for as it was said by the appellant he had two days for her and two weeks for the second wife. So, both parties acted together to buy the plot and build the Nyantare house.

Coming to the division of matrimonial assets, I find no difficult to accept the finding that the appellant took part in building the first house where she stayed. The second house had her hand indirectly during the purchase of the plot. She did not take part in building it because it was built during separation. It was meant to be the residence of the second wife and she lives there.

I agree that the respondent must have a bigger contribution than the appellant taking into account of the carpentry workshop where he worked which must have had a bigger income, but I think the award of 30% to the appellant was on the lower side. I find her contribution on three areas; the shop where she worked, domestic services she rendered for the respondent and the children and in buying the plot for the second house. There is also the obvious factor that she started with the respondent from

point zero. Having examined all these factors closely, I would change the award in respect of the house from 30% to 70% to 50% by 50%. That is to say, the house should be sold and the proceeds thereof be shared on the basis of 50% for each. I find no problem with the way the farms were divided. They appear to have been divided fairly. I could not see any evidence on the bundles of iron sheets. I will not have orders to make on them.

On the custody of children, the lower courts appear to have been correct in their finding and decision. But, there were changes in between which have made me to think otherwise. The appellant got a fifty child with another man. She is now in anew relation with another man. It is this fact which forced the respondent to proceed to stay with his children. In a situation like this, it is not good to leave the children with the appellant. It will be contrary to rules of fairness to allow the children to live with another man while their father is alive and willing to take them. And, as shown above, when the children appeared before me, the all appeared health. They looked good. They told me that they had food and were attending school regularly. Despite the diverse opinion expressed by the younger child, I

think weight has tilted towards the father for all of them other than the mother. That disposes grounds four and five.

Ground one talks of personal biasness on the part of the appellate magistrate. I could not see any evidence or submission on this ground. I will disregard and dismiss it. That also apply to ground two which talks of failure to discuss the grounds of appeal. I could not find anything on this ground which stands dismissed. Ground three talks of failure to order maintance during the period of iddat. This a new claim which was not raised in the primary court. It lacks the basis of being here. It is dismissed.

In the final analysis, this appeal ends as follows:

i. The Nyantare house to be sold by public auction. Each to get 50%.
ii. The house at Nyansha to remain with the respondent as his resident with the second wife and the family.
iii. The respondent is given custody of the children but they shall be free to visit their mother whenever they will feel to do so or need arises.
iv. The division of the shamba remain undisturbed. The appellant to take the shamba at Rungwe (one acre) and the respondent to take the shamba at Mzila (1/4 an acre)

v. The respondent is directed to ensure that all the children get education and necessary needs.

Appeal partly allowed. No order for costs.

L.M. Mlacha

Judge

24/6/2022

Court: Judgement delivered in the presence of the parties via Virtual Court.

L.M. Mlacha

Judge

24/6/2022