IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL No. 28 OF 2020

(Original Matrimonial Cause No.25 of 2016 of the Court of Resident Magistrate of Arusha)

JOSHUA JOSEPH..... APPELLANT

VERSUS

FLORA SAMWEL ..... RESSPONDENT

JUDGMENT

16th & 11th July, 2022

TIGANGA, J.

Parties in this appeal were husband and wife before their marriage was resolved by the Court of Resident Magistrates of Arusha at Arusha (herein after referred to as the trial Court), in Matrimonial Cause No. 25 of 2016. In that case the respondent petitioned for the following orders;

(i) A declaration that the marriage is irreparably broken down.

(ii) A decree of divorce

(iii) a) Custody of Children

b) Respondent should pay fees for his children as per the school fees schedule to be provided by the respective school.

(iv) Maintenance of both, the petitioner and the children at the rate of Tshs. 300,000/=per month

(iv) Equal division of matrimonial properties

(v) Costs of the petition

(vi) Any other relief that this Honourable Court may deem just and fit to grant.

After full hearing, the trial court found and decreed that;

(a) The marriage between the parties is broken down beyond repair.

(b) The respondent should maintain the petitioner and the children at the tune of Tshs. 150,000/= per month aside with school fees and medical expenses when required.

(c) Custody of the children is placed to the petitioner with the right of the respondent to timely visit per month.

(d) A matrimonial home is placed to the petitioner along with the house utilities.

(e) The motorcycle is placed to the respondent

(f) Respondent to bear the cost of the suit.

Dissatisfied by the decision, the appellant decided to appeal before this court, but before doing so he realised that he was out of time, he therefore applied for extension of time which was granted by Hon. Gwae, J on 24th September 2020. In the memorandum of appeal, the appellant raised five grounds of appeal which are as follows:

1. That there have been no exceptional circumstances raised in the petition for divorce to justify the matrimonial cause to be entertained without certificate from reconciliation board established by law, the trial magistrate erred in law for failure to reject the petition outright.
2. That, after the trial magistrate had held that each partly has to acquire matrimonial house the only property declared to be owned by the parties erred in law and in fact to declare the respondent the sole owner.
3. That, the honourable trial magistrate erred in law to place motorcycle to the appellant as his share from matrimonial properties acquired while the said motorcycle has not been listed in the petition as part of property jointly acquired.

4. That the Honourable trial magistrate erred in law and fact by making uncertain decision/judgment.
5. That the honourable trial magistrate erred in law and in fact when she ordered the respondent to pay Tshs. 150,000/= to the respondent apart from school fees and medical expenses without first conducting inquiry to his ability to raise the amount.

At the hearing, the applicant was represented by Mrs. Kimale, learned Advocate while the respondent fended for herself, unrepresented. Hearing of the appeal was conducted orally. Mrs. Kimale submitted in support of the appeal with regard to the first ground of appeal that, the matter before the trial court did not comply with the requirement of section 101 (a) up to (f) of the Law of Marriage Act [Cap. 29 R.E 2019], (hereinafter referred to as the Act). To her, this provision makes it mandatory that before any matrimonial disputes has been referred to court, it must first be referred to the Marriage Conciliation Board for conciliating the parties in dispute.

However, in this case the dispute was not referred to the Marriage Conciliatory Board as required by the above referred provision. She submitted that, all paragraphs except paragraph (f) which creates for exception, must be complied with. She went on saying that, the marriage at

hand does not fall under the exception. Therefore, it was a must that the matter be referred to the Marriage Conciliatory Board. Supporting the argument that the case does not fall under the exception, she said the parties were living under the same roof up to when the judgment was delivered. Therefore, there was a possibility for them to attend to the conciliation board but they did not do so.

She said however, in paragraph 14 of the petition the respondent pleaded and attached the minutes of the deliberation of the church leaders in which the parties were referred to the higher church leader. But the parties did not go to that higher leader of the church, instead the respondent went to court and filed the matrimonial proceedings. She reminded the court that the board after has failed to reconcile the parties, it is supposed to issue a certificate of failure to reconcile. She said, the meeting of the church leader did not amount to Marriage Reconciliation Board. Therefore, she submitted that, the matter was to be referred to the Marriage Reconciliation Board first. And that, there is no certificate to prove that the reconciliation failed. She prayed the ground of appeal to be upheld.

Regarding the second ground of appeal she submitted that, the court erred when it held that, both parties contributed to the acquisition of the

house while at the same time saying that the whole house should remain to the respondent denying the appellant any share thereof.

In her view that was not proper because, after holding that the house was a matrimonial property it means both parties were entitled to a share in a house. To the contrary, the court held that the whole house should remain to the respondent. In support of her arguments, she cited the authority in the case of **Mwayoma Mohamed Njopeka vs Juma Said Mkorogoro,** Civil Appeal No. 20 of 2021, where the court held that, the property obtained by joint efforts must be divided to the parties who acquired them jointly. That, since there is no dispute that the appellant contributed in the acquisition of the said house, then the ground of appeal be allowed.

Regarding the third ground of appeal which raises the complaint that, the honourable trial magistrate erred in law to place motorcycle to the appellant as his share from matrimonial properties acquired during the marriage while the said motorcycle has not been listed in the petition as part of property jointly acquired she said, the appellant was just a motor cycle rider. Also that, and it was not proved that the motor cycle was obtained during the marriage. She submitted that, the court erred in distributing the

said motor cycle as among the properties which were acquired during the marriage.

The fourth ground raised the complaint that the honourable trial magistrate erred in law and in fact when she ordered the appellant to pay Tshs. 150, 000/= to the respondent apart from school fees and medical expenses without first conducting inquiry to his ability to raise the amount. In her view, whenever the maintenance order is to be made, the court must satisfy itself that, the respondent had the capacity to pay the maintenance. She further submitted that, after the order of the court, the respondent rented a room and that the only source of income of the appellant was the motor cycle. Therefore, by the order of the court regarding maintenance, the appellant was given a burden which he cannot bear.

To fortify her argument, she cited section 116 of the Act, which provide that, the court in its assessment of maintenance should take into account the means of the person ordered to pay the said maintenance. To the contrary in this case according to her, the decision did not take into account the capacity of the respondent to pay. She submitted that, that is the valid ground to invalidate the decision.

Last is the complaint that the judgment is uncertain. She referred this court at the last paragraph of page 4 of the judgement. That the court did not say how much should be paid as the maintenance. She said, the judgment says the amount of Tshs. 150,000/= aside from school fees and other medical expenses. Therefore, the judgment does not show how this amount shall be used. She submitted that, the judgment ought to have been certain.

Another example of uncertainty is at page 6 paragraph (b) which is to the effect that the amount ordered is aside from the school fees and medical expenses the finding which contradicts the finding at page 4 of the judgment. In her view, this uncertainty causes failure to bring home the meaning. She prayed the appeal to be allowed without costs.

In the reply submission, the respondent submitted that it is not true that they were not reconciled. That, they started to the ten cell leader, the street chairman, social well fare officer, at the gender desk of the Police Force and later to central police station. That, it was after the failure of the Police to reconcile them when they went to church and got reconciled there but the reconciliation also failed. Due to that failure the church gave them a letter for them to go to court.

Replying on the second ground she submitted that, she bought the plot and the house thereon by using her own money. Therefore, she therefore asked the court to find that, it was correct for the court to let the house remain in her hands because the appellant did not contribute anything to the acquisition of that house.

Regarding the motorcycle, she submitted that the court was correct to term the said motorcycle among the matrimonial assets because she contributed Tsh. 500,000/= for its acquisition as she wanted to be using it to carry her luggage.

On the order for maintenance she said that, the court ordered him to pay the money because he is the father of the children and he was duty bound to maintain them. That, if he complains to have no money to maintain the family she asked the court to ask itself as to where exactly the appellant got the money to contribute to the acquisition of the matrimonial assets. He asked the court to find that the amount ordered by the trial court as the maintenance is reasonable. She said, even after the court had ordered him to maintain it, he had never maintained the family at all or paid any school fees. She gave example that, their first born is in form one but up to that

moment, he had not paid the school fees. Therefore, she prayed the appeal to be dismissed for want of merit.

In rejoinder, the learned counsel submitted that, the explanation given by the respondent did not negate the fact that the latter did not comply with the requirement of the law.

Regarding the second ground she said, paragraph 13 proves that both had contributed to the acquisition of the assets, and there is no evidence advanced by the respondent to prove that she had bought the house on her own money.

On the third ground the counsel she submitted that, the appellant has been paying the maintenance of the children, he paid the school fees and maintained his children. She prayed the court to quash the decision and direct the parties to follow the law.

That presents a summary of the record and submissions made by the parties in support and against the appeal. The first ground of appeal which raises a complaint that the matrimonial disputes was entertained and decided without first being referred to the Marriage Conciliation Board brings in the point of law. It is the position of the law under section 101 of the Act

that, the court should not admit and entertain any matrimonial case unless parties have been first referred their dispute to the Marriage Conciliation Board. The duty of the board is to reconcile them and if the Board under section 104(5) and (6) fail to reconcile them, it shall issue a certificate for failure to reconcile which shall contain its findings and recommendations. That certificate is as contained in Form No. 3. As earlier on pointed out, in this case, the complaint is that, the matter has never been referred to the Board something which invalidate the case at trial. To prove that I find it apposite to visit the record to ascertain the truthfulness or otherwise of the complaint.

I have had time to pass through the record. It is true that, there is no certificate as contained in Form No. 3, what was submitted accompanying the petition for divorce was the minutes of the church elders meeting convened to reconcile the parties. The content of that document shows that, the respondent complained to the Rev. in charge of the church where the parties were professing. It is also the content of the document that the respondent was summoned but did not attend. It is also evident from the document that even when they were at the meeting, one or the members of the meeting called him but he said he could not attend unlsess his brother

Rev. Magembe has given him a permission to attend and that even when Rev. Magembe was called, he insisted that the appellant could not attend the said meeting. According to that document, due to that state of affairs, the meeting heard the case one sided. They allowed the respondent to state her case and give chances to the witnesses who, in one way or another they were aware of the dispute between the parties and on a number of occasions participated in reconciling them. All these testified that, the parties could not be reconciled and in the last but one paragraph they anonymously concluded that the respondent be allowed to go to court for further legal action and in their view to save his life. To quote what the meeting resolved, it was said:

> '*Wajumbe wote waliohudhuria kikao hiki, kwa kauli moja walimruhusu Flora Samwel kwenda Mahakamani ili kupata Msaada Zaidi na kuokoa maisha yake kwa sababu serikali ndiyo yenye jukumu la kulinda uhai wa raia wake.*'

This literally means, that all members of the meeting have unanimously agreed to allow Flora to go to court for further help to protect her life because it is the government with responsible to ensure the security of its people.

After such a remark, the meeting was closed at 11.30 in the evening. However, the minutes were referred to one Fr. Rev. Can- Patrick Maanda for

his action as at the level of the parish they can no longer reconcile the parties. It is not disclosed in the minutes itself or by any witness as to why the minutes was forwarded to the said Fr. Rev. Can- Patrick Maanda.

It has not been said that, the church elders meeting constituted the marriage conciliatory board within the meaning of the law. However, inferring from the purpose for which the parliament made it as a condition precedent for a matrimonial disputed to be referred to the reconciliation Board was aiming at protecting the marriage. Under section 102 of the Act, the board mandated to reconcile the marriage is the board established by the Minister in every ward. It may be the one established by any community in Tanzania as a committee or a body of persons to perform the functions of the Board and which the minister has designated as such. The question which arises is whether, the body which reconciled the parties was established by the Christian community of the church under which the parties were professing to perform the function of the marriage reconciliatory board? From the record, the answer to this issue cannot be found.

However, from the evidence on record, parties solemnized their marriage in St. Hellen Parish Church, and it is in that very church where their marriage was reconciled according to the stamp on the minutes. In the

circumstances, I find the place where they were reconciled to be a proper one. I find so because in my view, the marriage solemnized according to a certain religious ritual, can be successfully reconciled by that religion under which the marriage was contracted. It should also be noted that, under section 104(7) of the Act, the proceedings of the board shall not be invalid on the ground that the board did not have jurisdiction under section 103(2) of the Act.

It should also be noted that, under section 101 (c) the requirement to reconcile shall not apply in the case where the respondent has been required to appear but has willfully failed to attend. Like in this case, there is enough evidence to prove that, the respondent was required to appear but refused to do so. Even when he was called via phone he refused to appear.

In the normal cause, the matter would have ended there. However, in this case the Board went a step further, to require the respondent to state her case, the witnesses too, and went as far as writing the minute and the findings. Now the issue is whether, the minutes may stand as Form No. 3 under section 104 (5) and (6) of the Act. The law does not insist on the form of the said certificate but on the content, that the board had filed to reconcile the parties and give the recommendation. In this case the minutes really has

expressly pointed out the effort made to reconcile the parties. That said I find the first ground of appeal to be devoid of merit. It is dismissed.

The second ground of appeal raises a complaint that after the trial magistrate had held that each party contributed to acquire the matrimonial house it erred in law and in fact to declare the respondent the sole owner. The matter pertaining division of matrimonial property is governed by section 114(1) of the Act. Under this provision, the properties which are subject to division after the dissolution of marriage are those acquire by the parties through joint efforts during their marriage.

The factors to consider when making an order for division of matrimonial property are provided under section 114(2) of the Act, which are;

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 the assets,
c. any debt owing by either party which were contracted for their joint benefit, and
d. the need of an infant if any of the marriage.

The sub section also emphasis on the need of the court subject to this consideration to incline towards equality of division.

In this case, there is no evidence showing as to whether parties share common customs, therefore the aspect of customs will not be considered. There is also no dispute that during their marriage they acquired jointly the matrimonial house by buying a plot and building the house thereon as reflected at paragraph 13 of the petition.

Although it has been admitted that, that the house was acquired by joint effort, it can not be ascertained from the evidence, how much each party contributed in terms of money or effort/work. However, that does not mean that, they did not contribute. From the phraseology of the law, it is presumed that, parties to the marriage deserve equal share of the properties acquired during the subsistence of their marriage. If one party alleges that he deserves a bigger share than his or her fellow, he must prove to the court by evidence that, his contribution is bigger than that of his/her fellow. That is in line with section 114(2) of the Act and sections 110 and 112 of the Evidence Act [Cap 6 R.E 2019].

In this case, there is no such evidence led by the appellant or even the respondent proving that any of them contributed a bigger share than the other. In the case of **Yesse Mrisho vs Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported) the Court of Appeal held inter alia that;

> *"There is no doubt that a court, when determining such contribution must also scrutinize the contribution or effort of each party to the marriage in acquisition of matrimonial assets. That said, it was therefore not proper for the trial Court to leave the whole house to the respondent as the is evidence that the property is a matrimonial asset jointly acquired by both parties."*

In the case of **Gabriel Nimrod Kurwijila vs Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018, CAT, at Tanga (unreported) the court held while expounding the principle of the extent of contribution that;

> *"Having so said, the extent of contribution by a party a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect the appellant can not blame the High Court Judge for not considering the same in its decision. In our view the issue of equality of division as envisaged under section 114(2) of LMA cannot also where there is no evidence to prove the extent of contribution."*

In this case, parties concentrated on proving the ground for divorce but did not testify much in proving the extent of contribution. However, of the two, the respondent gave evidence on how she got the money through a loan, how she got iron sheets and the cement as reflected at page 14 of the proceedings. That evidence was supported by the evidence of PW2 and PW3 the latter being a person who advanced the respondent with a loan who proved to have given a loan to the respondent and that to date the loan has not been paid back. This is reflected at pages 17, 19, and 20 of the proceedings. The respondent went as far as telling the court the extent of contribution made by the appellant as reflected at page 14 that he contributed only 30 bags of cements and 12 iron sheets. However, the iron sheets are still there but only 15 bags were used while 15 bags were sold without his knowledge.

To the contrary, the appellant did not expressly say to what extent did he contribute to the acquisition of the said matrimonial house. Therefore, the appellant was entitled to a share in the matrimonial property particularly a house. Having analysed the evidence the next question is what percent which the appellant was entitled? In my view, the evidence on record justifies the findings that the respondent contributed much than the appellant, thus,

justifying to be entitled to a bigger share than the appellant. That said, after taking into account all factors stipulated under section 114(2) of the Act, I find that, looking at the evidence I think, the appellant was entitled to 30% of the house acquired during their marriage wile the respondent will remain with 70% of the value of the house. This has taken into account the extent of contribution and the need of the infants who are remaining with the mother.

As said, the third ground of appeal raises the complaint that the court erred when it placed the motor cycle in a list of the matrimonial property while it was not listed by the petitioner (now the respondent) as the matrimonial property. This ground is not going to detain me much. The appellant himself in his evidence is reflected at page 24, the first paragraph of the proceedings, where he said that;

> *"We posses one home, we also own one motor and building materials, domestic utensil. The properties belong to the children and therefore it can not be divided."*

Having testified on oath proving that they own the motorcycle, he can not be heard at this point disputing the same motorcycle to be the matrimonial property. The ground also is devoid of merits. It is dismissed.

Regarding the complain that the order made are uncertain, I find no any uncertainty in the order. The orders are clear. On the maintenance, the order is clear that the amount was to maintain the respondent and the children. And that, that does not include the school fees and medical expenses. This ground is also devoid of merit. It is on that base dismissed.

Last is the fourth ground of appeal, which is to the effect that, the honourable trial magistrate erred in law and in fact when she ordered the appellant to pay Tshs. 150,000/= to the respondent apart from school fees and medical expenses without first conducting inquiry to his ability to raise the amount. The power of the court to order maintenance is regulated by sections 115 and 129 of the Act, for maintenance of a spouse and children respectively. Generally, under section 129, it is a duty of a man to maintain his infant children whether they are under his custody or the custody of another person by providing them necessaries, such as accommodation, food, clothing, and education as may be reasonable having regard to his

means or station of his life. That corresponding duty under subsection 2 shifts to a woman if their father is dead or his where about is unknown or if and so far as he is unable to maintain them. In this case the respondent claimed the appellant to be ordered to pay Tsh. 300,000/= for maintenance. The court reduced it half way and ordered him to pay Tsh. 150,000/=. Now knowing that he was duty bound to maintain the children and the wife, the appellant was duty bound to tell the court how much he was ready to pay substantiating that with evidence. He was not expected to complain that the court did not conduct inquiry.

The issue of the capacity to pay or otherwise is a matter of evidence. That evidence was supposed to be availed to the court by the appellant who wanted the court to award lower than the requested. If he did not avail evidence, he can not complain against the trial court findings. That said, I find the ground to have no merits. It is thus dismissed basing on the reasons given hereinabove.

In the upshot, the appeal has been allowed in the 2nd ground to the extent of reversing the order which placed the whole house on the respondent, and ordering the respondent to remain with 70% while the appellant to get 30% of the value of the house.

In realisation of each party's right under this order, the first option should be to evaluate the house, and any of them capable of purchasing his/her fellow's share, do so. But if that will fail then, the house be sold for each party to get his/her share. The rest of the grounds of appeal have been dismissed.

It is accordingly ordered

DATE at **ARUSHA**, this 11th July 2022.

J. C. TIGANGA

JUDGE