IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

PC CIVIL APPEAL NO. 25 OF 2021

(C/F From the District Court of Karatu Civil Appeal No. 20/2020 Which Originated from Matrimonial Cause No. 07 of 2020 of Karatu Primary Court)

ALLY RAMADHANI.....APPELLANT

VERSUS

JUDITH ABEL.....RESPONDENT

JUDGEMENT

15th June & 11th July, 2022

TIGANGA, J

In this case, the appellant Ally Ramadahani is challenging the decision of the District Court of Karatu, (hereinafter referred to as the first appellate court) which was passed in Civil Appeal No. 20 of 2020, in which he was also appealing against the decision of Karatu Primary Court, (hereinafter referred as the trial court) in Matrimonial Cause No. 07 of 2020 in which he was the respondent after being sued by the respondent, Judith Abel.

Initially, as earlier on pointed out, the respondent Judith Abel petitioned before the trial court for divorce, division of matrimonial properties and maintenance of children as well as their custody.

The reasons for these prayers are that, the current appellant did not care and ceased to maintain her and the children, and has been annoying her by donating the house built by them to his concubine before infecting her with HIV/AIDS.

Before that court, the appellant disputed the claim and said he had no any form of marriage with the respondent. Secondly, that all two houses which the respondent mentioned in the petition are his, so is the ¾ acres farm and the cow. However, he said he started to live with the respondent since 2001 and were blessed with two issues, the elder being 18 years, while the younger is 14 years old and are all living at his home.

After full hearing, the trial court decided in favour of the respondent. It ruled out that parties had customary marriage, and that it was proved that the appellant has been annoying the respondent. Regarding the issue of the respondent being infected with HIV, the court held that there was no evidence to that effect. With regard to the issue of failure to maintain the family, the trial court held that, there is enough evidence to prove that, the appellant does not provide for necessities to the family as exhibited by the evidence of SM2 and SM3, the later being the blood sister of the appellant.

The trial court held that the marriage between the parties was broken down irreparably, and it further ordered the respondent to be given her share in the properties obtained jointly which are a one mud house, one cow with one calf and a "Mkokoteni". The appellant was given one brick house and a business kiosk.

The appellant was also ordered to maintain one child who was by then under 18 years old by paying Tshs. 20,000/= (twenty thousand) only per month. He was also ordered to provide or pay school fees together with school accessories as well as for health care, up to when that child will attain 18 years old.

That decision aggrieved the appellant. He unsuccessfully appealed before the District Court, where all four grounds of appeal namely;

(i) That it was not proper for the trial court to grant a decree of divorce while there was no evidence to prove that the marriage was broken down irreparably.

(ii) That the division and matrimonial properties was not justified without considering effort of each party toward acquisition of the properties subject to the division.

(iii) That the decision reached was bad in law for lack of scrutiny of evidence adduced by the parties.

(iv) That the trial court erred in entertaining the matrimonial cause without a valid marriage conciliation board certificate in (Form 3).

The first appellate court found the appeal to have no semblance of merit and dismissed it in its entirety.

Dissatisfied by the decision of the 1st appellate court, the appellant appealed to this court by filing four grounds of appeal which are as follows:

1. That the appellate court erred in law and fact in upholding that the division of asserts as ordered was fair without considering the efforts by each party to its acquisition.
2. That the appellate court reasoning that being HIV positive is sufficient reason to break marriage is bad in law.
3. That the appellant court erred in law and fact in upholding order granting decree of divorce while there was no sufficient cause that the marriage was irreparably broken down.
4. That the appellate court's decision is bad in law for ignoring and upholding vague marriage conciliation certificate (form 3) used in entertaining this matrimonial cause.

The appeal was contested by the respondent who filed the reply to the petition of appeal. She averred that the 1st appellate court decision was valid and fair, and so is the decision of the trial court which in fact based on the evidence recorded during trial. She also told the court that, the issue of HIV was not a related factor for divorce. In the end, she averred that, all grounds of appeal have no merits and asked for their dismissal.

As parties were in person without representation, the court tried its best to confine them to argue the grounds of appeal. However, despite that effort by the court they went astray and posed as if the case was being heard a fresh. In this judgement therefore, I will confine myself on what is relevant in as far as the grounds of appeal are concerned.

In the grounds of appeal, the first complaint is that, the 1st appellate court upheld the decision of the trial court which did not analytically consider the effort made by each party to the acquisition of the matrimonial assets.

Basically, the complaint is on the division of matrimonial assets in this matrimonial case. The issue of division of matrimonial properties is governed by section 114(1) of the Law of Marriage Act [CAP. 29 R.E 2019], herein after, 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 of 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 dispute at this point that parties had customary marriage which they contracted in 2001 which was dissolved in 2020. There is also no dispute that during this period according to the respondent, the following properties were acquired namely; one mud house, a ¾ farm land, one brick house, one cow and its calf, and one business kiosk. While the respondent says, these properties were acquired through joint effort by the parties, the appellant asserts that they are his

personal properties without the contribution of the respondent. He went on saying that, a mud house was built in 2000, one year before they contracted marriage.

It is true that, from the evidence it can not be ascertained 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, there is a presumption that, parties to the marriage deserves equal share of the properties acquired during the subsistence of their marriage. If one party wants the court to believe that he is the one who contributed more than the other, under section 114(2) of the Act, read together with Regulation 6 of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations GN. No. 22 OF 1964 and 66 of 1972 is obliged to prove such assertion to the court that he is entitled a bigger share.

In this case, there is no such evidence lead by the appellant who claims to own the properties alone. Neither has he given evidence to prove that he contributed much than the respondent. In the circumstances, the court was properly guided when it held by actually considering the equality in the division as contained in section 114 (2) of the Act.

That said, I would like to also respond to the allegation and argument by the appellant that the mud house was constructed before he married

the respondent. Section 114(3) of the Act provides that references to assets acquired during the marriage includes assets owned before the marriage by one party which have been substantially improved during marriage by the other party or by joint effort. On this, I am persuaded by the decision of my senior sister Hon. A. Z. Mgeyekwa, J, who so held while interpreting the above referred provision in the case of **Apolonia Kanome vs Nestory Mponda** [2020]1 TLR 44.

In this case, even if we assume that the property was acquired by the appellant alone before the marriage, still, there is enough evidence to prove that the respondent has been living in and maintaining that house since 2001 to date. That means she has throughout her life been substantially improving and maintain the said house. That said, I find the ground of appeal to have no merit. The trial and first appellate court were justified in dividing the matrimonial assets as they did.

Regarding the second ground of appeal, as replied by the respondent, the issue of the respondent being of HIV positive, was not the base of the conclusion that the marriage was broken down irreparably. The factors which were based on are, harassment and annoying of the respondent to the extent of marrying the second wife without her consent as well as

failure to take care of the family. That being the case, the second ground of appeal also lacks merit, it is dismissed.

The third ground of appeal is that, there were no sufficient causes for the court to hold that the marriage has been broken down irreparably. On this point, the court finds it important to refer to section 107(2) of the Act which provides for relevant factors to be regarded as the evidence to prove that the marriage has been broken down irreparably. Some of those factors are;

a. Adultery by the respondent is more that one act has been committed or when adulterous association is continuing despite protest.
b. Sexual perversion on the part of the respondent,
c. Cruelty, whether mental or physical inflicted by the respondent to the petitioner or on the children if any of the marriage,
d. Willful neglect on the part of the respondent,
e. Desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is willful.

From the evidence of SMI, SM2 and SM3 who are the respondent, the biological child of the parties and the blood sister of the appellant respectively, have proved at least the existence of the above evidence in

paragraph (a) – (d) of section 107(2) of the Act. That said, the trial Primary Court was justified to hold that the marriage between the parties was broken down irreparably. Therefore, the trial Court was proper to dissolve it. This ground of appeal suffers dismissal for being devoid of merit.

Last is the complaint that, the trial court and the first appellate court erred in law and fact by entertaining the matrimonial cause basing on the vague marriage conciliation certificate (Form No. 3). When dealing with this ground, I find it opposite to point out that it is a requirement that before the matrimonial dispute has been entertained by any court, parties must, under section 101 of the Act, refer their dispute to the Marriage Conciliation Board. If the Board under section 104(5) and (6) fails to reconcile them, it shall issue a certificate for failure to reconcile which shall contain its findings and recommendations.

In this case, the complaint is not over the absence of the certificate but the vagueness of the same. I have had time to pass through the said certificate as contained in Form No. 3, which was tendered as exhibit P1. It is clear that, the board had filed to reconcile the parties. It also gave directive which stands as the recommendation that the respondent should not leave a matrimonial house together with the children. In my view,

both by its form and contents, the said certificate complies with requirement provided under section 104 (5) and (6) of the Act.

That said, just like in other grounds I find the ground to have no merit, and it is thus dismissed. In the upshot, the entire appeal is found to be devoid of merits. It is dismissed for the reason given herein above.

However, after delivery of the judgment, parties addressed the court, that pending trial of the appeal, they had already made an arrangement on who was to remain with what. According to them, the appellant was by then living in the mud house while the respondent was living in the brick house. They asked the court to adopt such an arrangement.

They also asked the three cow to be divided as follows, that, the older calf which had already grown to a bull be given to the appellant while the older cow with the new calf remain with the respondent. they asked the court to adopt their arrangement, the request which I grant. Other orders, especially of the business kiosk remains undisturbed.

Given the nature of the matter and the relationship of the parties, no order as to costs is made.

It is accordingly ordered.

DATED at **ARUSHA**, this 11th day of July, 2022

J. C. TIGANGA

JUDGE