

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF SHINYANGA**  
**AT SHINYANGA**

**PC MATRIMONIAL APPEAL No. 03 OF 2021**  
*(Arising from Matrimonial Appeal No. 11 of 2016 of Bariadi District of  
Court Original Matrimonial Case No. 59 of 2016 of Somanda  
Primary Court)*

**ANTHONY KIDIMA KALIWA.....APPLICANT**

**VERSUS**

**ROSEMARY LENGWA SAMWELI.....RESPONDENT**

**JUDGMENT**

*18<sup>th</sup> May & 1<sup>st</sup> July 2022*

**MKWIZU, J.:**

The Appellant Anthony Kidima Kaliwa is before this court challenging the decision of the Bariadi District Court dated 30/11/2020 in Matrimonial Appeal No. 11 of 2020 emanating from Matrimonial Cause No 59 of 2020 concluded at Somanda Primary court.

The genesis of the matter can be summarized as follows: Appellant and respondent were husband and wife. They solemnized their Christian marriage in the year 2015. And were blessed with three issues namely Christina d/o Anthony, Kulwa s/o Anthony, and Dotto s/o Anthony. They later got into a serious misunderstanding that the appellant could not endure. He decided to petition for divorce before Somanda primary Court on the grounds that the marriage has irretrievably broken down following

the respondent shirking her matrimonial responsibilities, denying him conjugal rights, and grave mistreatment of his relatives and parents.

The respondent did not express any hostility to the prayer for divorce. Her stress was only on the division of matrimonial assets acquired during the substance of their marriage namely, a house located at Salunda, two shops, stationery, M-Pesa center, furniture, and other domestic properties. She prayed for custody of the issues of their marriage and their maintenance.

The trial primary court found the marriage between the parties has broken down beyond repair. It proceeded to dissolve the marriage plus issue the divorce decree under section 110 (1) (a) of the law of Marriage Act Cap 29 RE 2019. The respondent was declared custodian of the children of the union under section 125(3) of the Act and the appellant was ordered to provide Tsh. 100,000/= per month for the maintenance of the children under sections 129 and 130 of the same Act and the Matrimonial assets were subjected to the division between the parties.

The Appellant seemed comfortable with the grant of divorce but was aggrieved by the order of division of matrimonial properties and maintenance of the children. His appeal to the District Court was however not successful hence this appeal. The appellant's petition of appeal is loaded with four grounds of appeal as follows:

- 1. That, Magistrates of Bariadi District Court and Somanda Primary Court both erred in law and fact for adjudging in four of the Respondent without real grieve grounds*

- 2. That, Magistrates of Bariadi District Court and the trial Court of Somanda both erred in law and fact for disregarding intentionally the Appellant's conclusive evidence together with his genuine documentary evidence which faithfully tendered before both courts.*
- 3. That, Magistrate of Bariadi District together with Somanda Primary Court both erred in law and facts for supporting whole heartedly the decision of the trial court to realize the truth, treachery and legality of the parties' evidence.*
- 4. That, both magistrate of the said court herein above erred in law and facts for making division of Matrimonial properties while some of them were not available.*

When the appeal was called on for hearing, both appellant and the respondent were unrepresented. Supporting his grounds of appeal, the appellant submitted that the division of matrimonial assets was improper. He contended that the house was built before marriage and therefore it was wrong for the court to order a 50 % share between the parties. He was however contented with the division of the rest of the matrimonial properties.

He also confronted the order of payment of 100,000/= to the respondent as maintenance of their children on the ground that he is the one caring for the children paying all the school fees, and medical bills, and giving them all their needs on a weekly basis.

Respondent's response was in support of the lower court's decision stating that the plot on which the house in question was built was given to them as a gift for their nuptial. On the maintenance, the respondent said she

was alone struggling to get money for the upkeep of the children and that they had just currently started visiting the appellant on a weekly basis.

I have carefully considered the grounds of appeal, parties' submissions, and the two lower court records. The complaint in this appeal centers on the equal division of the matrimonial house, and the 100,000/= maintenance costs ordered against the appellant. I will for that reason determine the appeal generally without going into each of the grounds of appeal.

Section 114 of the Law of Marriage Act lays down the principle which guide courts of law in determining the division of shares of spouses in matrimonial assets. The section reads:

*"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.”*

This provision empowers the courts to order the division of matrimonial assets acquired by the spouses during marriage through their joint efforts when granting or subsequent to the grant of a decree of separation or divorce. According to subsection 2 (b) of section 114, a spouse's contribution towards the acquisition of such assets can be in form of money, property, work, or a combination of all. See also: **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (CA) (unreported) and **Bi Hawa Mohamed Vs Ally Sefu**, [1983] TLR 32/

During the trial, the appellant claimed to have no property for division. He did not mention at all having a house as matrimonial property. The Respondent, on the other hand, listed properties they jointly acquired during the subsistence of their marriage, the house in question inclusive explaining how it was acquired. Apart from the evidence that the plot was given to them as a gift during their wedding. The respondent said, they had farming activities and businesses that supported them. The appellant did not challenge this piece of evidence leaving it as established that the

matrimonial house in question is a matrimonial asset acquired during the subsistence of their marriage and each party had a 50 % share. I find no reason to interfere with the two lower courts' decisions.

Next, is the issue of maintenance of the children of the party's union awarded at the rate of 100,000/= per month. A father is duty bound to maintain his children whether they are in his custody or under the custody of any other person. Section 129 of the Law of Marriage Act provides that:

*"it shall be **the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.**"* (Bold is mine)

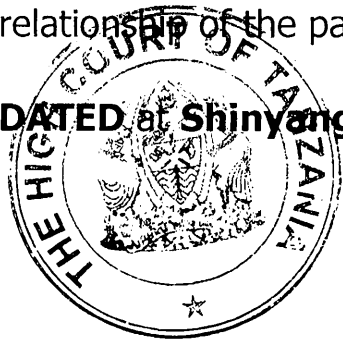
The appellant, in this case, was, by the two courts below ordered to pay a sum of 100,000/= monthly as a maintenance cost plus education and medical expenses for his children. His complaint on this order is that he is taking care of his children and he does not see why he should be ordered to maintain them to the extent described by the court order.

I think the appellant's complaint here is a misconception of the maintenance order. The maintenance order is simply an effective and enforceable arrangement by the court that guarantees regular and reliable financial support to help with the child's living costs. The father's care for his children is not optional, it is a mandatory legal requirement. The fact that the appellant is willingly performing his duty doesn't preclude the

court from giving directives on the manner and extent of its performance. And once the order is made, the appellant is bound to comply with the order before any extra assistance is added to it. The fact that the appellant is providing for the upkeep of his children in the manner that sweets him, does not mean that he should disregard the court order for maintenance. That being the case, I find no justification to interfere with the assessment of Tshs. 100,000/- ordered by the trial court as maintenance allowance per month.

As a result, the appeal is unmerited, it is dismissed with no order as to costs. This decision on costs has been arrived at after considering the relationship of the parties.

**DATED at Shinyanga** this **1<sup>st</sup>** day of **July**, 2022.



*E.Y. Mkwizu*  
**E.Y. MKWIZU**  
**JUDGE**  
**01/07/2022**

**COURT:** Right of appeal explained.

*E.Y. Mkwizu*  
**E.Y. MKWIZU**  
**JUDGE**  
**1/07/2022**