IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 57 OF 2020

ALFAYO ZACHARIA SIRIKWA.....APPELLANT

AND

ROGATHE LEVETA KAAYA.....RESPONDENT

JUDGMENT

28/2/2022 & 25/8/2022

ROBERT, J:-

Before Emaoi Primary Court, the appellant unsuccessfully instituted a petition for divorce vide Matrimonial Cause No.05 of 2018. He then appealed successfully to the District Court of Arumeru where the marriage between the appellant and respondent was found to be broken beyond repair and a decree of divorce issued. Dissatisfied, the respondent appealed to the High Court where her appeal was dismissed for lack of merit. The appellant then went back to the Primary Court of Emaoi for division of matrimonial assets. However, he was not successful as the court ruled that the assets were already divided therefore there were no assets to divide between the parties. Aggrieved, he lodged an appeal to the District Court of Arumeru which upheld the decision of the trial Court.

Still aggrieved, he preferred this appeal challenging the decision of the District Court on three grounds of appeal as follows:-

1. *That, the learned Appellate Magistrate erred in law by confirming that it was lawful for the Ward Tribunal to divide matrimonial properties before divorce.*
2. *That, the learned Appellate Magistrate erred in law by considering Maasai customs in distribution of properties while the marriage was contracted in Christian religion.*
3. *That, the learned Appellate Magistrate erred in law by confirming that it was lawfully (sic) for the appellant herein to divide matrimonial property before divorce.*

When this matter came up for hearing, the appellant was represented by Messrs Vincent Stewart and George Mnzava, both learned advocates whereas the Respondent was represented by Mr. Daudi Saimalie Leirumbe, learned advocate. At the request of parties, the appeal proceeded by way of written submissions.

Submitting on the first ground of appeal, the learned counsel for the appellant faulted the first appellate court for holding that there was no matrimonial assets to be divided to the parties as the Ward Tribunal had already divided the same. He argued that, the Ward Tribunal has no jurisdiction over the division of the matrimonial properties since section 76 of the Marriage Act, Cap. 29 R.E.2019 vests original jurisdiction in matrimonial proceedings concurrently in the High Court, a court of

Resident Magistrate and a District Court. He maintained that, what the Ward Tribunal of Kimnyaki did was to separate the parties in order to avoid further conflicts between them and not to divide properties as decided by the trial Court.

In response, the learned counsel for the respondent submitted that, the Ward Tribunal of Kimnyaki did not divide the matrimonial properties as alleged by the appellant nor did the appellate magistrate confirm that it was lawful for the Ward Tribunal to divide matrimonial properties but it analysed the evidence and exhibits tendered by the parties and came into conclusion that the appellant had already distributed his properties to the respondent. Thus, he argued that, the issue for determination is whether the appellant can claim division of matrimonial properties which he has already distributed and agreed with the decision made by the lower court.

Coming to the second ground, the appellant faulted both the first appellate court and the trial Court for considering Maasai customs in the division of matrimonial assets while the marriage was contracted in Christian religion. To support his argument, he cited the case of Richard William Sawe versus Woitara Richard Sawe (1992).

In response, counsel for the respondent argued that the marriage between the respondent and appellant was a Christian marriage and it is

not true that the learned trial Magistrate had considered the Maasai customs in distribution of properties but he considered the wisdom of the respective assessors in finding whether the properties which were already distributed by the appellant being a Maasai by tribe can be claimed back as matrimonial properties.

On the third ground, the appellant faulted the first appellate Court for confirming that it was lawful for the appellant to divide matrimonial properties before divorce. He argued that, section 114 of the Law of Marriage Act requires that, for the matrimonial properties to be divided between parties the Court must have issued a decree of separation or divorce. He maintained that a decree of divorce in this matter was issued on 7th March, 2019 while the lower court's decision is that the matrimonial properties were distributed in 2016 by the Ward Tribunal of Kimyaki.

In response, the learned counsel for the respondent argued that, the decree of divorce was issued while the appellant had already distributed the property in question to the respondent by the Ward Tribunal and the decree was already executed on 23/6/2017 by the village officer vide application for execution No. 5 of 2017.

From the raised grounds of appeal, submissions of parties and records of this matter, it is not disputed that the appellant and respondent were married in 1976, jointly acquired two houses and a farm next to the said houses and were divorced on 7th March, 2019 as per the decree of divorce. It is also not disputed that, prior to their divorce, the appellant gave the two houses and half of the farm to his wife and son (see decision of Kimnyak Ward Tribunal dated 23/2/2016 and other documents all of which were received as exhibit A,B and C at the primary Court) which he now seeks to be distributed as matrimonial properties. Therefore, the central question for determination by this Court whether it was proper for the two lower courts to make a determination that the appellant having given the said properties to his wife and son prior to their divorce there was no matrimonial property left to be divided for the divorced couple.

As rightly argued by the learned counsel for the appellant, the division of matrimonial properties is governed by the Law of Marriage Act [CAP. 29 R.E. 2019] where by section 114(1) clearly provides that;

> *"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"*

It is clear that subsequent to the grant of decree of separation, the court is given mandate to make an order for the division of any properties acquired through the joint efforts of the parties during the subsistence of their marriage. In order for that to happen, parties must establish to the satisfaction of the court that assets subject to division are matrimonial assets. In the present case, assets sought to be divided are two houses and a part of the farm which, according to the decision of the Ward Tribunal in Case No. BKK 10/2015 and order for execution by the District Land and Housing Tribunal in Application for Execution No. 5 of 2017, were given by the appellant to the respondent and his son. This court is of the considered view that, by giving the said properties to the respondent and his son the appellant must have intended for the said properties to be solely owned by the said individuals and therefore they are not part of the matrimonial property.

It should be noted that, the Ward Tribunal had no jurisdiction to entertain matters of matrimonial concerns and therefore the land dispute between the appellant and respondent in case No. BKK 5 of 2017 was not decided by the Ward Tribunal as a dispute on division of matrimonial properties but as a dispute on land ownership. There is no indication from

the records of this matter that the said decision was successfully challenged by any of the parties in this case.

In the circumstances, the appellant having failed to establish that the two houses and part of the farm given to the respondent and his son are matrimonial properties and in the absence of any other properties jointly acquired by the parties during the subsistence of their marriage, there was no property to be divided upon dissolution. That said I find no reason to fault the decision of the two lower courts.

As a consequence, I dismiss this appeal for lack of merit. Each party to bear its own cost.

It is so decided.

K.N.ROBERT
JUDGE
25/8/2022