IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 104 OF 2020

(Originating from the judgment of District Court of Kinondoni, in Civil Appeal No. 106 of 2020)

AMRI YAHAYA MFIKILWA.....APPELLANT

VERSUS

FATUMA MOHAMED NAMPEMBE.....RESPONDENT

JUDGMENT

06th November, 2021 – 06th January, 2022

N.R. MWASEBA, J.

Aggrieved by the decision of District Court of Kinondoni of the Civil Case No. 106 of 2020, which was delivered by Hon. D.D Mlashani on 8th April, 2021, the appellant appealed to this court on the following grounds:

1. That, the appellate court erred in law and fact for not considering the heavy evidence brought by the appellant during the trial court that the respondent had never shown interest on participating in

matrimonial asset and each has his/her own assets and ended on deciding on giving the applicant 30% of the petitioner assets. *(sic)*

2. That, the appellate court erred in law for wanting the appellant to keep on insisting the respondent to provide 100,000/= as maintenance of the children and fail to consider the evidence adduced during the trial court on economic status of the appellant who is jobless while the respondent is a government employee. *(sic)*

3. That, the appellate court erred in law and fact for entertaining the respondent to be under custodian of the child without considering the best interest and the welfare of the child which had never been discussed to the trial court. *(sic)*

On 4th October, 2021 this court ordered the matter to be disposed of by written submission, and I am glad both parties adhered to the instructions and filed their respective submissions timely.

Submitting in chief, the appellant stated that the first appellate court did not direct itself in analysing the evidence of SU1, Amri Yahaya Mfikilwa and SU2, Idrisa Yahaya on the existence of the statement made by the respondent on 24th April, 2014 that, all properties bought from that day should be personal properties and not matrimonial properties and the court failed to direct itself on the contents of the letter from Baraza Kuu la Waislamu (BAKWATA) dated 25th June, 2020. If that evidence was considered, the trial court would not order the Mabwepande house to be a matrimonial asset and order the division of 30% to the respondent as it was agreed by the parties each to have their own properties. Accordingly, the respondent bought 100 shares from Mwalimu Commercial Bank on 7th October, 2015 and the appellant bought a house in Mabwepande on 2nd November, 2015 and the respondent never disputed all these and cited the case of **Goodluck Kyando v R (2006) TLR 363 and Damian Ruhele v Republic, Criminal Appeal No. 501 of 2007.**

Also, the appellant prayed for this court to find that the 100 shares from Mwalimu Commercial Bank bought by the respondent be considered as a matrimonial share and subject to division, and as to the second ground the trial court failed to take into account the economic status of the

appellant before ordering Tsh 100,000/= of maintenance of issues and referred to Section 129(1) of the Law of Marriage Act, Cap 29, R.E 2019 and Section 44 of the Law of the Child Act, Cap 13, R.E 2019 which provides for the factors to be considered such as income and wealth of both parents, any impairment of the earning capacity of the person with a duty to maintain the child, other financial responsibilities, and the cost of living in the area where the child is resident and the right of the child under the Act.

The appellant has no monthly income, he is a mere small business person depending on the seasonal market and sales, both trial courts failed to consider the economic capability of the applicant, and the order of paying TZS 100,000/= as maintenance is thus not reasonable. He further stated that, as the respondent has monthly salary she should be ordered to pay for maintenance, thus this court should reduce the cost of maintenance to TZS 20,000/=

Lastly, the District Court erred in granting custody to the respondent as to the fact that, the respondent is living with another man named Eric Mkwembo under the same roof with the issues, such act will ingrain into issues' mind that adultery is a normal thing, and her behaviour of

coming home late will affect the upbringing of the issues and the fact that the issues are boys they need more care from the father and thus the applicant prayed for this appeal to be allowed with cost.

In reply to the first ground of appeal the respondent cited Section 114(2)(b) of the Law of Marriage Act, Cap 29, R.E 2019, and with regard to the interpretation of that section he referred to the case of **Bi Hawa Mohamed v Ally Seif (1983) TLR 32 (CA).** She further stated that her contribution towards the acquisition of matrimonial assets is by doing domestic work including taking care of the issues and the appellant of which those facts entitled her to equal distribution of the matrimonial asset.

On the second ground, the appellant wants the cost of maintenance to be reduced, if the amount is reduced it will not be sufficient to maintain the issues to the lifestyle that they are accustomed to and the appellant will not pay expenses as the respondent had been ordered to contribute half of the maintenance to the tune of TZS 100,000/=.

And the third ground regarding the issue of custody, the respondent referred to Section 125(1) of the Law of Marriage Act (supra). The

issues are young that is why the court placed custody to the mother and also referred to section 125(3) of the Law of Marriage Act (supra).

Lastly, the respondent replied that the appellant claims to be unemployed at one point and self-employed in another, this shows that he has no sense of direction regarding his financial position. The decision of granting custody to the respondent was not in the best interest of the children only but also to allow the appellant to look for a proper job to maintain himself and the children and thus the respondent prayed for the appeal to be quashed for want of merit.

On the rejoinder, the appellant reiterates what was submitted in chief but stated that he is a business person who can maintain the issues and at the same time manage the business as he has employed few people to assist him running that business.

Having gone through all the submissions, it is my position that, the appellant intends mostly to challenge the division of matrimonial property, maintenance, and custody of the children. Thus, the issue for determination is whether this appeal has merit.

On the first ground, the appellant submitted that, the first appellate court did not direct itself in analysing the evidence of SU1 Amri Yahaya Mfikilwa and SU2, Idrisa Yahaya on the existence of the statement made by the respondent on 24th April, 2014 that all properties bought from that day should be personal properties and not matrimonial properties. From the perusal of the lower court file, it is not disputed that the parties contracted an Islamic marriage on **24th February, 2008**, and on **26th February 2020** divorce was issued by the Primary Court of Kimara. During the subsistence of their marriage, the appellant bought a plot on **2/11/2015.** In her reply, the respondent submitted that, she was taking care of the family including the appellant, and doing other domestic works.

Section 58 of the Law of Marriage Act, Cap 29, R.E 2019 provides for the separate property of the husband and wife while **Section 60(a) and (b) of the Law of Marriage Act (*supra*)** provides for the presumptions regarding the property acquired during the marriage. Marriage does not remove the right to acquire personal property, if the property is acquired in the name of husband or wife it shall be a rebuttable presumption that the property belongs to that person, and when it is in both names, it shall be a presumption that the beneficial

interests are equal. The court is also empowered to order the division of the matrimonial property during divorce and the test is on the customs of the community, the extent of contribution, debts, and needs of infant children as provided under **Section 114(2)(a) to (d) of the Law of Marriage Act, Cap 29, (supra).**

With regard to Mabwepande house, it is not disputed that, the plot was bought by the appellant while the marriage was subsisting, by virtue of the case of **BI HAWA MOHAMED v ALLY SEFU 1983 TLR 32,** where it came out with two major factors to consider on what makes a matrimonial property, it was held that:

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

Thus, from that angle, **domestic** efforts or work of the husband or wife has to be considered which in the case at hand the respondent claimed to be taking care of the family and the appellant and doing other works.

These factors have been considered by the trial court as it can be reflected on **page 7 of the judgment** and regarding the issue of shares the **depository receipt from Dar es Salaam Stock Exchange** with **serial No. 427955** contains the name of **Fatuma M. Nampembe.** And by the virtue of **Section 58 of the Law of Marriage Act,** *(supra)* this property falls under separate property. I find no evidence to rebut the presumption that the shares in Mwalimu Commercial Bank PLC have been obtained jointly. Due to the above reasons, I determine that the first ground lacks merit.

Another ground is on the issue of maintenance. The appellant prayed for the maintenance order issued by the district court of TZS 100,000/= to be reduced to TZS 20,000/= and further stated that, as the respondent has a monthly salary and she should be ordered to pay for maintenance. **Section 129(1) of the Law of Marriage Act,** *(supra)* imposes the duty of a man to maintain his children, whether they are in his custody or the custody of any other person by providing them with needs such

as accommodation, clothing, food, and education as may be reasonable having regard to his means and station in life or by paying the cost. However, if a man is dead or his whereabouts are unknown, or if he is unable to maintain the children this duty shifts to a woman by virtue of Section **129(2) of the Law of Marriage Act,** (*supra).*

Section 129(1) of the Law of Marriage Act, *(supra)* provides for a test to consider and regard is means and station of life which have been reflected in details by **Section 44 (a) of the Law of the Child, Cap 13, R.E 2019.** In the instant case, there is a contradiction on the part of the appellant, first on his submission in chief at **page 9, the last paragraph** the appellant claimed to be a mere business person depending on seasonal market and sales, and on his rejoinder at **page 3 the last paragraph** he insisted that he is a business person who manages his business well and he has employed few people to assist him running his business thus capable of maintaining the issues. Those are the two documents filed by the appellant himself but contradictory to each other. If the appellant is able to employ few people it is obvious that his means of life is stable and can manage to issue TZS100, 000/= as maintenance. The prayer of the appellant to provide TZS 20,000/= that means TZS 10,000/= for each issue monthly does not sound to be

realistic based on the contemporary economic situation. Hence, I find the second having no merit as well.

Lastly, with regard to the issue of custody. the appellant wants the issues to be under his custody because the respondent is living with another man named Eric Mkwembo under the same roof with the issues. The argument is that, such a practice will ingrain into issues' mind that adultery is a normal thing, and additionally, her behaviour of coming home late will affect the upbringing of the issues.

Section 125 (2) of the Law of Marriage Act, (*supra)* provides that:

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

Besides, **Section 39 (2) of the Law of the Child,** (*supra*) directs the court to consider the best interest of the child and the importance of a child being with his mother when making an order for custody or access and it shall also regard the views of the child if the views have been independently given.

From the law, views of the child or children who have attained the age to express independent opinion must be considered but mostly the court shall consider the welfare of the child.

In the case at hand, there is no record from the court proceedings or the social welfare officer that the views of the children have been considered, **at page 8 of the judgment,** the first appellate court stated that the children were above **7 years,** whereby one was aged **12 years** and another one **9 years.** Above all **Section 11 of the Law of the Child,** (*supra*) provides for the right of the opinion of the matters affecting his /her wellbeing of which custody is one of them. It states that:

> *"A child shall have a right of opinion and no person shall deprive a child capable of forming views the right to*

express an opinion, to be listened to and to participate in decisions which affect his well-being."

In similar line of argument, the case of **Mariam Tumbo v Harold Tumbo (1983) TLR (HC),** it was held that:

"...Unfortunately, I was not privileged to see and hear these children. I, therefore, do not know what their wishes are. It would therefore be improper on my part to order custody one way or the other and I desist from doing so."

From the case above, the wishes of the child are very crucial to be determined. In the lower court, and as I stated earlier, this was not done as there is no evidence to it in the file. The only question left concerns deciding the welfare of the children. It is also important that, the court accord due consideration to the undesirability of disturbing the life of an infant by change of custody as elaborated in Section **125(3) of the Law of Marriage Act, Cap 29** *(supra)*. With this in mind, I find no need of disturbing the decision of the trial court as the reason adduced by the respondent has no substantial proof.

Therefore, due to the afore stated reasons, nothing is left with me rather than dismissing this appeal as it lacks merits. No order as to costs due to the nature of the parties' relationship before the dispute.

It is so ordered.

DATED at **DAR ES SALAAM** this 06th day of January, 2021

N. R. MWASEBA

JUDGE

6/01/2022