**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF TANGA**

**AT TANGA**

**CIVIL APPEAL No. 9 of 2020**

[*Arising from the decision of the District Court of Tanga in Matrimonial Cause No. 4 of 2018, Kamugisha Esquire Resident Magistrate*]

Between

**ISMAIL OMARI KASOMO.....APPELLANT**

**Versus**

**FATUMA KASIM MDOE.....RESPONDENT**

## JUDGMENT

**MRUMA, J**

The Appellant Ismail Omar Kasomo through his advocate Mohammed Kajembe of Kajembe Law Chambers filed this appeal against the decision of his Worship D. K. Kamugisha Esq. Senior Resident Magistrate delivered on 15th June 2020 on the following grounds:

1. As the District Court of Tanga in Matrimonial Cause No.2 of 2018 between parties herein struck out the petition on account that the conciliatory Board was improperly constituted the trial court erred in law and fact for failure to hold that there is no proper Form No. 3 of i.e. Certificate of Conciliation issued basing on the same proceedings subject of ruling in Matrimonial Cause No. 2 of 2018;

2. That the trial Magistrate erred in law and fact for holding that Plot No. 3 Block 40 Ngamiani area was still a matrimonial asset and hence divided it between the parties despite the fact that the same had been sold to cover children's school fees with the Appellant's? (Respondent's) knowledge;

3. That the trial Magistrate erred in law and fact for holding that the Appellant had mismanaged matrimonial assets without considering the fact that Appellant used all proceeds obtained from the sale of matrimonial assets and his own assets to cover children's school fees inside the country and overseas without the Respondent's financial assistance;

4. That the trial Magistrate erred in law and in fact for disregarding exhibit D1 on account that there is no proof as to whether the Respondent made it;

5. As the Respondent prayed to be left with house situated in Plot No 4 Block 52 Nagmiani, the trial Magistrate erred in law and in fact by dividing it equally together with house in Plot No 5 Block 52 Ngamiani between the parties despite the later being commercial one which is the only source of income of the Appellant to cover school fees for their son Yunus who still pursues his long carrier on piloting.

The facts of appeal as gathered from the judgment can be briefly stated as follows;

The parties to the appeal were lawfully married in accordance to Islamic law in 1991. During the subsistence of their marriage they were blessed with three issues. They lived together in their matrimonial home at Tanga. In 2008 they separated on allegations of adultery on the part of the Appellant, desertion etc. In 2018 the Respondent sought for and order of divorce on the grounds adultery, long separation, desertion and cruelty. She in addition sought for orders for division of matrimonial assets, custody and maintenance of the three issue of their marriage.

The Appellant (the Respondent in the lower court), denied all conjugal offences and in his evidence alleged cruelty by the Respondent in that she denied him sexual intercourse and having more children for him. He then sought orders for a finding by the court that the Respondent was guilty of cruelty.

In its decision the District trial court came to a conclusion that on the evidence adduced by both sides, the marriage had irretrievably broken down and ordered it legally terminated. The court found that all the three issues of marriage had attained the age of majority therefore it refrained from making an order regarding their custody. However, with the Appellant's consent the court made an order that the Appellant shall take care of Yunis Ibrahim, the couples' last born (born in 2000) and pay for his school fees and other expenses until he graduates from college.

The Appellant being dissatisfied with that decision lodged this appeal on the grounds I have stated above.

It is trite law that the first Appellate Court has the duty to review the evidence of the case and to review the evidence of the case and to reconsider the materials before the trial magistrate. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it

I will resolve the grounds of appeal seriatim.

In the first ground the Appellant is complaining that the learned trial Magistrate erred in law for failure to hold that there was no proper form No. 3 (i.e. Certificate of Conciliation Board) issued. It has been submitted that it is the requirement of the law (Section 101 of the Law of Marriage Act [Cap 29 R.E. 2019], that every matrimonial dispute must be referred to a conciliation board before one can petition for divorce in a court of law. The effect of contravening the said provision makes the whole petition incompetent. Attention of the court has been drawn to the decision of the Court of Appeal in the case of **Hassan Ally Sandali Versus Asha Ally** Civil Appeal No. 246 of 2019 [CAT Mtwara] unreported where lack of valid certificate of the Conciliation Board was held to be fatal to the divorce proceedings.

Respondent's counsel agreed that the issue of the validity of the certificate of the Conciliation Board was raised as a preliminary point of law but he argues that after consideration by the trial court it was found that it didn't constitute pure point of law and the Appellant was required to prove

that issue during the trial. It is the counsel's further submission that during the trial the Appellant didn't lead any evidence to prove that Hemed M. Musa who signed the certificate on behalf of the board had no mandate to do so, so that he could convince the court that the Board was not properly constituted.

I agree with both the findings and the ruling of the trial court and the submissions of the Respondent's counsel that the constitution of the Conciliation Board is matter of fact which needs to be proved by evidence. As correctly held by the trial Court the fact whether parties were reconciled by a properly constituted Board as the certificate purports to show is a matter of evidence and in terms of section 110 of the Evidence Act, the burden was on the Appellant to prove that the Board was not properly constituted or that Hemed M. Musa who signed the Certificate had no mandate to sign it.

But assuming that there was evidence to the effect that the Board was not properly constituted or that Hemed M. Musa had no mandate to sign the Certificate, the question would be whether in the circumstances of this case that alone would vitiate the subsequent divorce proceedings?

It has been submitted that in view of the decision of the Court of Appeal in the case **Sandali** [supra], where the Coram Of a Conciliatory Board which purport to hear the parties is not properly constituted and/or the Certificate is signed by a person who is neither a member to the Board nor its secretary, the ensued certificate is invalid as it violates the provision of Section 101 of the Law of Marriage Act. I took liberty to read the

decision of the Court of Appeal in **Sandali's case** [supra]. With due respect to the Appellant's counsel I find that the two cases are distinguishable. In Sandali's case the issue was whether a letter from the Marriage Conciliation Board which is not in conformity with the certificate in the prescribed form could still be used as a certificate for instituting a petition for divorce. The issue in the present case is whether a certificate (not a letter) issued by an improperly constituted Conciliatory Board and signed by unqualified person could be used to initiate divorce proceedings. As I have just held above, the question whether the Coram of the Board was properly constituted and whether the person signed the certificate was mandated to sign it are matters of facts which the Appellant ought to have proved in terms of section 110(1) of the Evidence Act which provides:-

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists"*

In the present case the Appellant had asserted that the Coram of the Board was not properly constituted and that the person who signed the certificate had no mandate to do so. These assertions were first raised by way of a notice of preliminary objections on allegations that they constituted pure points of law but when the trial court ruled that they do not (and correctly so) qualify to be preliminary points of law, the Appellant chose not to prove that the asserted facts actually do exist. Thus, the Appellant didn't discharge his burden.

Secondly, in Sandali's case the Court of Appeal held that where there is extra ordinary circumstances obtained at the material time court may dispense with the reference to Board under Section 101(f) of the Law of Marriage Act. In that case the Court of Appeal found that there was no such extra ordinary circumstance. In that case the Appellant was complaining that the dissolution of his marriage was premature. Unlike in the Sandal's case in the present case the issue of pre-mature dissolution of the marriage didn't arise. The Appellant is rather relying on technicalities provided by the law simply to prolong litigations in court since it is mutually agreed that the parties marriage has broken down irreparably.

It is common ground that both parties professed Islamic faith and their marriage was contracted in accordance with Islamic rites. There is also no dispute that the parties separated in 2008 and in 2011 the Appellant gave the Respondent a talaq. Marriage (Nikah) in Islam is a solemn and sacred social union between bride and groom. This union is a strong covenant *"mithaqun ghalithun"* as expressed in the in Quran 4:21. The marriage in Islam is not a sacrament like in other rites. It is revocable, i.e. you can divorce.

One of the grounds upon which the Respondent had petitioned for divorce is that while the marraiage of Appellant and the respondent was subsisting the Appellant contracted a Christian Marriage with Victoria Antony Mushi in 2008. The trial court held that under Section 15(2) of the Law of Marriage Act, a man who is in a polygamous or potentially polygamous marriage is prohibited to contract a marriage in

monogamous form with any other person. I agree with the trial court that that is what the law says. However, I note that there was no evidence in the form of a certificate of marriage between the Appellant and the said Victoria Antony Mushi which could be used as a proof that their marriage was monogamous. The fact that it was a Christian marriage per se is not a conclusive proof that it was monogamous. Marrying couple may agree otherwise. And it should be noted that a Muslim man may marry a Christian or Jew faith woman so long as she does not practice '*Shirk* '(i.e. associating God with other deities) and does not believe in anything that is forbidden in Islam. Thus, marrying a Christian woman per se could not form a ground for divorce.

However, as stated hereinbefore, unlike in Sandali's case apart from being in separation for over ten years (from 2008 to 2018), the Appellant gave the Respondent a talaq way back in 2011. Talaq in Islam is a divorce effected by the husband's enunciation of the word 'talaq'. This constitutes a formal repudiation of his wife. Pronouncing of talaq is preceded by a period of Iddah (a period of waiting), which is a period a woman must observe after a divorce during which she may not marry another man. Thus, the issue of divorce proceedings having being prematurely initiated could not arise in this case. In the present case divorce (according to Islamic rites) was effective immediately after the Iddah period (which is normally four months after the pronouncing of the talaq). Thus, what the Petitioner was seeking from the court in 2018 was approval of the divorce by the court in accordance with the law of the land.

Finally as parties in these proceedings do not dispute the fact that their marriage has broken beyond repair upholding the first ground which will have the effect of retrying the matter afresh will not be in the interest of justice or any of the parties and will defeat the principle of overriding objective as embodied in Article 107A (1) (e) of the Constitution and Section 2A and 3A of the Civil Procedure Code.

Considering the second and third grounds of the appeal the Appellant asserts that the trial court erred in law and in facts in holding that Plot No. 40 Block 40 Ngamiani is still a matrimonial asset despite the fact that the same and other assets (ground three) had been sold and the proceeds thereof used for paying school fees the fact which is in the knowledge of the Respondent.

It has been submitted that during the hearing the Appellant had testified that the said house and other assets were disposed of in 2016 (for the house) and the proceeds obtained (T.shs 70,000,000/=) was used to pay parties' children school fees who went to school outside the country.

The law is that the burden to prove any fact in issue is on he who alleges and in law a fact is said to be proved when the court is satisfied as to its truth. The general rule is that the burden of proof rests on the party who asserts the affirmative of the issue or question in dispute. When a party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof to his

opponent; that is his allegation is presumed to be true unless his opponent adduces evidence to rebut the presumption.

In the instant case the Appellant alleged that Plot No. 3 Block 40 Ngamiani area was sold and the proceeds thereof used to pay for school fees. The question that follows is whether he proved this fact.

Selling of a landed property is not like selling of a duck. Sale of landed property is governed by several laws including the Land Act, the Land (Disposition of the Right of Occupancy Act), the Law of Contract Act to mention but just a few. Such disposition includes transfer of the right of occupancy or title, registration of the disposition etc. Apart from an assertion that Plot No. 3 Block 40 Ngamiani was sold therefore doesn't form part of the matrimonial assets the Appellant didn't lead any evidence to prove the said sale and he didn't even call the buyer who must have huge interest in the property to give evidence on his behalf. This leaves a lot to be desired. For instance if it were true that the plot had been sold, I have no doubt that the buyer would have come up to defend his or her interest in the property. Secondly one may wonder what interest does the Appellant have in the property the title of which had passed to a third party?

Thus, looking at the facts of this case in totality, the Appellant failed to prove that at the time of dissolution of their marriages Plot No 3 Block 40 Ngamiani was no longer a matrimonial asset as found by the trial court. The 2nd and 3rd grounds therefore fail.

With regard to ground number 4 the Appellant is complaining that the trial court erred in law in disregarding Exhibit D1. Exhibit DI is a purported agreement executed by the parties on how their matrimonial asserts should be divided between them. The Respondent (the petitioner) denied to have executed it.

As correctly observed by the learned trial magistrate the burden of proof that the petitioner signed the said agreement was on the Appellant. He didn't produce any evidence to the satisfaction of the court that what he asserted was true. Because the Respondent had denied to have signed the agreement the Appellant could have asked the court to order forensic examination of the Respondent's handwriting. He didn't do that and he didn't lead any evidence of an independent person who saw the Respondent signing. In such circumstances, the trial court was justified in its findings that there was no proof that the Respondent executed Exhibit D1.

The last ground is about division of matrimonial assets namely two houses one on Plot No.4 Block 52 and the other on Plot No. 5 Block 52 Ngamian. The Appellant is protesting against an order that the property on Plot 5 Block 52 be equally divided between the parties. He says that that property which is a commercial building is the only source of income he has and which he uses for paying school fees for their son who was/ is still pursuing his career in piloting.

Apparently the term matrimonial property or matrimonial asset is understood differently by different people. There is always a properly

which the couple chose to call home. That is their matrimonial home and is where they live. That property is matrimonial property. Another set of matrimonial properties or assets are those properties or assets which they jointly contributed to their acquisitions and therefore jointly own them. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property a spouse (ordinarily a husband), holds in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and those which they jointly contributed to or generated during the marriage excluding gifts and donations. Thus, it is not every property acquired by either spouse during the subsistence of marriage constitutes matrimonial property. Section 58 of the Law of Marriage Act, recognizes separate property of husband and wife while under section 60 (1) of the same Act the law presumes that a property acquired in the name of the husband or the wife belongs to the husband or to the wife to the exclusion of his or her spouse. This presumption is rebuttable. Accordingly there can be no suggestion that the status of marriage per se results in any common ownership of property. In Essa V. Essa, Kenya Court of Appeal Civil Appeal No. 101 of 1995 it was held that there is no presumption that any or all property acquired during subsistence of the marriage must be treated as being jointly owned by the parties. It is therefore quite possible for the property rights of parties to the marriage to be kept entirely separate. Whether the spouses contributing to the acquisition or generation should be equal owners or in some other

proportions must depend on the circumstances of each case (See Rimmer Versus Rimmer [1953]1 QB 63). The general practice of courts in presuming joint ownership of matrimonial property or asset is in respect of such property as is registered in the names of both spouses or property or asset registered in the names of spouse but in respect of which there is evidence of the other spouse's contribution to the acquisition of the property or asset. In such cases the spouses will be considered to be equal owners or some other proportions. This is illustrated by Petit V. Petit (1969)2 WLR 966 at 991 where Lord Upjohn stated thus:

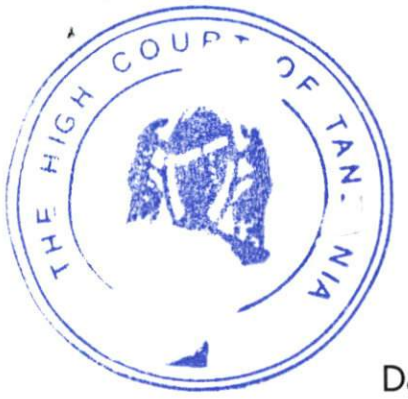
> *"But where both spouses contribute to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners that is so whether the acquisition be in the joint names or in the name of one. This is a result of an application of resulting trust"*

In the instant case, on the basis of the evidence on record the Appellant didn't dispute joint ownership of the two properties or that they are matrimonial property within the ambit of the law. He is challenging the proportion given to him on the ground that he has the obligation of paying school fees for their last born Yunus who during the trial was still at school.

I find this ground of complaint to have merit. It is on record that in dividing the said property equally, the trial court took into consideration what it stated as dishonest and mismanagement of the matrimonial assets by the Appellant. There was no evidence to prove the alleged mismanagement and dishonest behaviors of the Appellant. For the court to believe certain alleged facts a party who alleges must prove. Dishonest entails behaving in untrustworthy or deceitful. There is no evidence showing that in selling some of the properties the Appellant was insincere and dishonestly appropriated the proceeds of sale to the detriment of the family. To the contrary it was not disputed that he was paying for school fees for their children who were schooling outside the country. Had the District trial court taken that into consideration it would have divided this particular property the same way it divided the rest of the property. Accordingly I would quash and set aside the order dividing Land Plot No 5 Block 52 Ngamiani street equally between the parties and taking into consideration parties' contribution towards acquisition of the said property and their obligations towards the welfare of their children including paying for their school fees, I allow this ground of appeal and I order that the Appellant shall get 60% of the property in question and the Respondent shall get 40%.

In summary therefore, the appeal is dismissed save for the variation stated above. Taking into account the fact that parties are co-parents I will make no orders as to the costs.

Order accordingly,




**A.R. Mruma,**

**Judge.**

Dated this 4th day of ~~February~~ March, 2022.