

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

**TEMEKE SUB - REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**CIVIL APPEAL NO 27 OF 2022**

*(Originating from the decision of District Court of Kigamboni at Kigamboni in Matrimonial Cause No.06 of 2021 delivered by Hon. H.Mchome, RSM on 30<sup>th</sup> March, 2022)*

**SHEKHA RASHID MOHAMED.....APPELLANT**

***VERSUS***

**FAZLE ABBAS DUNGERS.....RESPONDENT**

**JUDGMENT**

28<sup>th</sup> September & 5<sup>th</sup> October, 2022

**A.P. KILIMI, J.:**

In the District Court of Kigamboni, at Kigamboni the appellant, Shekha Rashid Mohamed petitioned for dissolution of marriage with Fazle Abbas Dungers, the respondent. Specifically, the appellant prayed for the following reliefs:

(a) Declaration that the marriage has broken down irreparably,

- (b) That the decree of divorce be granted against the respondent.
- (c) Equal division of matrimonial properties.
- (d) The costs of this petition be provided by the respondent.
- (e) Maintenance be provided for the petitioner from the time the respondent has denied to maintain the petitioner.
- (f) Custody of children be made for the petitioner.
- (g) Maintenance of children.
- (h) Any other reliefs as this Court may deem fit and just to grant.

At the end of trial, the trial court gave the following orders: That, the respondent to be given a house no.VJB/KIS/307 plot no. 307 Located at Kigamboni Municipal together with car Registration no. T606 DMT make Toyota IST. While a house no VJB/KI5/628 plot no 628 located at Kigamboni, Municipal shall remain with the petitioner. The two farms located at Mtaa wa Madege, Kisarawe two Kigamboni Municipal shall be divided equally in terms of acres. The pharmacy and Bajaj shall remain with the petitioner as they were already given to her. All livestock like goats and cows shall be remain with the petitioner.Custody of the three issues of this marriage shall be upon the mother. The respondent is only given access right during public holidays and on weekend. The respondent shall bear the duty of maintaining the issue of this marriage in all aspects

concerning school and medicals. And, the petitioner on other hand shall provide for food, shelter and clothing.

The appellant aggrieved by the above decision sought an appeal to this court basing on the following grounds in her amended memorandum of appeal; **One**; That, the learned Magistrate grossly erred in law and in fact by failing to order equal division of matrimonial assets acquired during the subsistence of marriage by joint efforts of the parties i.e. the matrimonial home situated at Plot No. 307, Upendo Street Kigamboni District, Dar es Salaam. **Two**; That, the magistrate, erred in law by ordering and awarded the motor vehicle make Toyota IST Reg No. T 606 DMT which was bought by joint efforts to remain with the Respondent. **Three**; That, the learned Magistrate grossly misconceived himself in fact and in law, by failing to identify that the unfinished house located at Plot No. 628, Kisiwani, Kigamboni District was acquired by the Appellant before marriage and the same is the property of the Appellant and was not subject to division despite of overwhelming evidence showing the same was acquired in 2003 by the Appellant before she married the Respondent. **Four**; That, the learned magistrate erred in law and in practice by failing to properly record the evidence of the Appellant and refused to admit important documentary

evidence of the appellant without assigning good reasons. **Five;** That, the learned magistrate erred in law and in fact in rejecting to admit the sale agreement of the Appellant in respect of Plot No. 628 located at Kisiwani, Kigamboni which the appellant intended to rely to prove that she acquired the property before she married the Respondent for want of stamp duty, while applying double standard by admitting the documentary evidence of the Respondent which had same shortcomings i.e., no stamp duty on the sale agreement. **Six;** That, the learned magistrate, erred in law and in fact by ordering and placed the custody of the issues of marriage to the appellant and order the respondent only to pay for school fees and medical expenses of the issue but not their up keep and accommodation contrary to section 6, 114 and 115 of the law of marriage Act [ Cap 29 R.E. 2019]. **Seven;** That, the learned magistrate erred in law and in fact by impugning that the appellant did not show how she contributed in the acquisition of the matrimonial assets while by the parties' own pleadings and evidence the couple were happily married and functional for 13 years. **Eight;** That, the learned magistrate erred in law and in practice by failure to address the prayers of the appellant for equal division of matrimonial assets while blanket endorsing the prayers of the respondent. And **Nine;** That, there were

procedural irregularity as the successor trial Magistrate did not assign and record the reasons for reassignment. Hence the successor Magistrate had no jurisdiction to take over the trial of the petition.

At the hearing of this appeal the appellant was represented by Nehemia Mkoko learned advocate while Mr. Mashaka Ngole learned counsel entered appearance representing the respondent.

Mr. Nehemia Mkoko started by preferring consolidation ground no. 1,2,3,7 and 8. He also consolidate grounds no. 4 and 5. And the other ground number six and nine argued separately.

On the first group of ground he submitted that he disputes the division of properties jointly acquired aiming to the house no 307 and 628 both situated kisiwani, vijibweni kigamboni. The house 307 is purely matrimonial property, the trial court did not regard provision of the law section.114(2)(b) and s.69(a) of Law of Marriage Act Cap.29 R.E. 2019 (hereinafter LMA). The house no. 608, the trial court proved, that appellant owned the said property before, being the case, it was not matrimonial property.

He further submitted that, appellant dispute house no. 307 to be divided, despite of being acquired by joint effort, is a matrimonial home and evidence

was there but the trial court did not regard the law about matrimonial house. In regard to the motor vehicle reg. no. T606 DMT, make Toyota IST, the appellant contributed to it for Tshs. 7,000,000 but the same was not divided to the appellant and no reasons were stated by the court. Therefore, the counsel is contending that the trial court did not see the contribution of the appellant, to support his argument counsel cited the case of **Mbegu Mohamed v. Mariam Ramadhani** PC Civil Appeal No. 22 of 2021 at page 8. And the case of **Fatuma Shokat Mustapha v. Imran Sario Abdulrasal**. PC Civil Appeal No. 73 of 2020. (unreported)

Arguing for another set of grounds of appeal, the counsel for appellant submitted that, the trial court refused to admit exhibit for purchasing the plot but surprisingly the same court accepted exhibit from the respondent which was exhibit D3, a certificate of sale of plot 307 which also was not having stamp duty, so he prays to this court to consider that refusal to admit it as evidence.

In respect to ground number six, Mr. Mkoko contended that the trial court erred by giving custody to appellant and only ordered respondent to pay only school fees and medicals, he said the court was required to order full maintenance which may include food, treatment, clothes and school fees.

Also, Mr. Mkoko further argued that, appellant required maintenance from the respondent until she marry another man. Therefore, prayed this court to consider section 63(a),114 and 115 of LMA.

In the last ground which is ground number nine, the counsel for appellant submitted that according to the record it is apparent that order X rule X(i) of Civil Procedure Code Act R.E 2019 was not complied with the trial court. This is when the case at the trial was transferred to another magistrate on 20/5/2019. The magistrate did not give reasons to continue with the case, he then said taking a case without assigning reason is fatal and vitiate proceeding and cannot be cured by overriding objectives, to support his argument he has cited the case of **Mariam Samburo v. Masoud Mohammed Josh** Civil Appeal No. 109 of 2016 (unreported).

Mr. Mashaka in reply submitted that, the first trial court Magistrate dealt with pleading on issue of divorce and did not deal with evidence while it was the second magistrate who dealt with the first witness, therefore, according to the order and rule cited no violation of law was done. He further submitted that as per S. 162(1) of LMA says matrimonial proceeding by practice and procedure be made by time Chief Justice, thus part II and part IV of LMA provides for procedure. The law entertains separate determination of

separate application such as division of matrimonial properties or custody of children.

In respect to group two of grounds, submitted that the exhibit was stamped on 17/05/2019 and TRA acknowledge to receive Tshs. 150,000/=, so the admission follows the law. But the document on appellant part was refused because it was not paid.

In regard to group one of grounds he submitted that it is not true that appellant owned plot no. 628, the plot was given to them by appellant's father immediately after marriage, this was evidenced appellant's witness who testified at the trial court. Also, it is on evidence that plot no. 307 was bought by the respondent. The appellant on her work she earned Tsh.200,000/= therefore she was having no capacity to buy the said plot.

The counsel for respondent, further said plot no. 307 has the name of the respondent, and this was witnessed by the appellant's witness who sold the said plot at Tsh 3,000,000/=. In respect to motorcar nowhere is saying Appellant contributed anything. The card has the name of the respondent, so is a separate property, but appellant was awarded Bajaji and pharmacy through capital which was given by respondent which is saying is enough for her.



Mr. Mashaka lastly, contended that the gist of S.63 and S.115(i) of LMA in regard to maintenance for a wife, is usually provided before the decree of divorce has not been issued, after a decree of divorce, no maintenance accrue from the former husband again.

In rejoinder, Mr. Mkocho submitted that neither evidence brought at the trial that the said plot was a gift, nor proof that is the respondent loan used to build the matrimonial house. He also submitted that, according to section 60 of LMA any property being in the names of one spouse is a rebuttable presumption that own to the exclusive of the other. And lastly said, in respect to maintenance, the trial court ordered only school fees and medical care, it did not order for clothes, food and also to maintain his wife who took care of children.

I have considered the rival submissions of learned counsels, the grounds of appeal and having read the entire record at the trial court, I wish to start with ground nine which to my view touches the jurisdiction of the trial court.

Mr. Mkocho argued on this ground that according to the record it is apparent that order X rule X(i) of Civil Procedure Code Act R.E 2019 was not complied with at the trial court, this is because the magistrate did not give reasons to continue with the case after take over from her predecessor. The

point I wish to engage here before I proceed with other grounds, is what is the gist of this provision in the administration of civil trials.

This provision empowers judges or Magistrates to take over and deal with evidence taken by other judges/ magistrates in civil matters and it provides as follows: -

*"10(1). Where a Judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with an evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it "*

The court of this land has numerously interpreted and developed the principle from this provision. As rightly cited by Mr. Nehemia Mkojo the case of **Mariam Samburo v. Masoud Mohammed Josh** (supra). the Court quoted with approval its decision in **M/S Georges Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) at pages 5-6; where it was held as follows with regard to the above provision:

*"The general premise that can be from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason, he/she is unable to do that **the provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another.** There are number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. **Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised.**"*

[Emphasis added].

(See also **Fahari Bottlers Ltd and Another v. the Registrar of Companies and Another**, Civil Revision No.1 of 1999, **Kajoka Masanga v. Attorney General and Another**, Civil Appeal No. 153 of 2016. **National**

**Microfinance Bank v. Augustino Wesaka Gidimara T/A Builders Paints & General Enterprises**, Civil Appeal No. 74 of 2016, **M/SGeorges Limited v. The Honourable Attorney General and Another**, CAT-Civil Appeal No. 29 of 2016 ( both unreported))

Having the above principle in mind, now I excerpt what happen at the trial court. As it appears on the typed proceeding, this matter at the trial was presided by two learned Magistrates. At page 3 shows the first Magistrate started trial on 28/03/2019 wherein appellant testified, and later another hearing was on 3/04/2019 where she heard four witnesses. After some adjournments, later on 4/09/2019 the second Magistrate entered officially on the Bench as a successor Magistrate and proceeded with hearing of defense case of this matter. However, it seems the learned counsel for respondent tried to remind in disguise manner the successor magistrate at page 14 of the typed proceeding, with respect she did not get the kick.

Having passed keenly on the record as hereinabove I concede with the argument of appellant counsel no reasons were assigned by a successor Magistrate. In the circumstances, I am of considered opinion, failure by the said successor Magistrate to assign reasons for continuing with hearing the defense made her to lack jurisdiction to take over the trial of the suit as

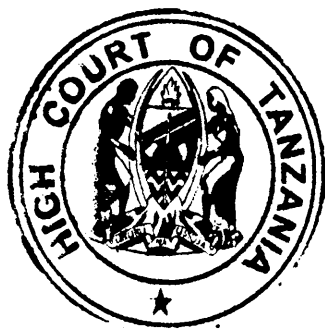
principle enunciated hereinabove. Since the answer of this ground goes to the root of this matter, I see no need to labour much further on other grounds argued.

Thus, this leads me to hold that, the entire proceedings as well as the judgment and decree are nullity. I therefore, hereby quash the entire proceedings conducted at the trial court and set aside the judgment and decree dated 30/3/2022. Appeal allowed.

I order the case file be remitted to the trial Court, for a fresh trial before another Magistrate in accordance with the law. In the circumstances of this appeal, I make no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 5<sup>th</sup> day of October, 2022.



A handwritten signature in black ink, appearing to read "A.P. Kilimi", followed by a long horizontal line and a small flourish.

**A.P. KILIMI**

**JUDGE**

**5/10/2022**

**Court:** Judgment delivered in chambers in the presence of both appellant and respondent. Also Mr. Abdallah Zungiza holding brief of Advocate Mashaka Ngole for respondent. Right of Appeal dully explained to them.

**Sgd: A.P. KILIMI**

**JUDGE**

**5/10/2022**