

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

MATRIMONIAL APPEAL NO. 02 OF 2021

*(Arising from the decision in Matrimonial Appeal No. 2 of 2021 of Muheza District Court
originating from Matrimonial Case No. 05 of 2020 of Mbaramo Primary Court)*

HAMISI ALLY.....APPELLANT

-VERSUS-

SAIDATI JUMA..... RESPONDENT

JUDGMENT

Date of last order: 24/10/2022

Date of judgment: 31/10/2022

AGATHO, J:

The background of this appeal is that the Appellant was the Respondent at Mbaramo Primary Court where he petitioned for divorce, distribution of matrimonial properties and custody of children. The decision was in his favour that the divorce decree was granted, and matrimonial properties were distributed, and custody of children was granted. Despite that the Appellant was aggrieved and appealed to Muheza District Court questioning the distribution of matrimonial properties. The District Court overruled the Primary Court's decision with respect to distribution of matrimonial properties. It further ordered the Primary Court to assess the contribution of each spouse towards acquisition of matrimonial properties.

The Primary Court did redo the assessment of spouses' contribution in acquisition of matrimonial properties. The Appellant was further unhappy with the decision of Primary Court he appealed to Muheza District Court that yet decided in favour



of the Respondent. Following that circus and the District Court's decision he appealed to this Court on the grounds below:

1. That the learned Senior Resident Magistrate erred in law and fact by failing to make a finding as to whether the trial primary court exercised the proceedings after having received a Certificate of Conciliation Board - BAKWATA the school the parties belong.
2. That the learned Senior Resident Magistrate erred in law and fact, hence failed to be assured the power of trial primary court to arrive to the division of matrimonial properties was after the trial court granted a decree of divorce as spelled by the law of Marriage Act of 1971 or misapplied the provision.
3. That the learned Senior Resident Magistrate erred in law and fact when concurred with the trial primary court which exercised the matrimonial proceedings unfortunately as if the couple or parties were divorced following Islamic Law not to be applied, hence no divorce by any other law except under the Law of Marriage Act of 1971. Copies of judgments of the District Court of Muheza in Matrimonial Appeal No. 2 of 2021 and Matrimonial Appeal No. 05 of 2020 re hereby attached collectively as Annexure A1 to form part of the petition of Appeal.
4. That the learned Senior Resident Magistrate erred in law and fact when concurred with the proceedings of the trial primary court which failed to make an order for custody and maintenance of children or have regard to the needs of the children of the marriage inclusively the burden and liabilities attached to those matrimonial properties.
5. That the learned Senior Resident Magistrate erred in law and facts by failing to note the second house was built before a divorce decree was granted, leave alone the Applicant (sic) herein above named to have smelt

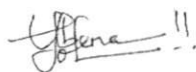
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an injustice by being driven out of the matrimonial house before the execution of decree.

The Appellant prayed for this Court quash the decisions of Primary Court and District Court and the matter be referred back to the Conciliation Board, costs and any other orders deemed fit to be granted.

In this appeal both the Appellant and the Respondent appeared in person. And it was agreed that the appeal be heard by way of written submissions. The schedule was thus drawn. But to begin with, it is vital to state that this appeal was uncontested because the Respondent failed to file her reply to the Appellant's written submission on time as scheduled. It is on record that on 12th August 2022, the Appellant filed his submission. Despite being given extension of time to file her reply to the Appellant's submission on 27/09/2022 and to the dismay of the Court the Respondent did not file her reply to the Appellant's written submission. She failed to comply with the Court order granting her extension of time. But being the uncontested appeal does not mean that the Court should not examine and determine it on merit. The Court thus embarked on examining the petition of appeal, the Appellant's submissions, lower courts proceedings and judgments as well as the law to make an informed decision.

Looking at the grounds of appeal and to begin with the first ground that the learned senior resident magistrate erred in law and fact by failing to make a finding as to whether the trial primary court exercised the proceedings after having received a certificate from Board – BAKWATA the school (sic) the parties belong. It is my settled view that Senior Resident Magistrate did not commit any error. It is thus non-issue because on page 7 of the trial court judgment it is crystal that prior to petitioning for divorce the parties referred the matter to the elders and later to BAKWATA that were unable to reconcile them and issued a

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certificate that they have failed to reconcile them (that certificate was received and marked as exhibit1). Therefore, the first ground of appeal is without merit.

On the second ground of appeal that, the learned Senior Resident Magistrate erred in law and fact, hence failed to be assured the power of trial court to arrive to the division of matrimonial properties was after the trial Court granted decree of divorce as spelled by the Law of Marriage Act of 1971 or misapplied the provision. Despite the language issues noted in the pleadings the Court proceeded to examine the second ground of appeal. It is conspicuous in the trial Court judgment of Matrimonial Case No. 20 of 2020 on pages 1, 7 and 8 that the Appellant deserted the Respondent and their children. And the Respondent decided to live with another man in their house. When the Appellant went to see the children, he was chased and attacked by the Respondent with a panga. The Respondent also stated in her testimony on page 7 of the trial court judgment that the Appellant did not provide any support and he also denied her conjugal rights. They referred the matter to BAKWATA where reconciliation failed and exhibit 1 was issued to confirm that they have failed to reconcile them. Moreover, the parties were separated for three years. See page 8 of the trial court's judgment. Following the controversies, and being married under Islamic Law, the Appellant issued talaka to the Respondent. See page 8 of the trial Court judgment.

The trial Court was satisfied that the cruelty and desertion were sufficient grounds to prove that the marriage was irreparably broken down. It thus granted divorce decree and went on ordering division of matrimonial property. That was in line with Section 114 of the Law of Marriage Act [Cap 29 R.E. 2019]. Therefore, I concur with the findings of both the trial Court and the District Court. The second ground of appeal is consequently rejected for lacking substance.

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Turning to the third ground of appeal that, the learned Senior Resident Magistrate erred in law and fact when concurred with the trial primary court which exercised the matrimonial proceedings unfortunately as if the couples or parties were divorced following Islamic Law not to be applied, hence no divorce by any other law except under the Law of Marriage Act [Cap 29 R.E. 2019]. Copies of judgments of the District Court of Muheza in Matrimonial Appeal No. 2/2021 and Matrimonial Appeal No. 05/2020 are hereby attached collectively as annexure A1 to form part of petition of appeal. This ground of appeal is refused because as stated in the second ground of appeal, the Islamic Law requires issuance of Talaka. The matter was also referred to BAKWATA which issued certificate it has failed to reconcile the parties. The allegation that Section 107(3) of the Law of Marriage Act [Cap 29 R.E. 2019] was not complied with is false because the Appellant himself testified at the trial Court that he deserted his spouse (the Respondent) and when he came to see the children he was chased and attacked by the Respondent with the panga. The Respondent also testified that the Appellant deserted her and the children without providing any support. What is more is that the Appellant denied the Respondent conjugal rights. Therefore, Section 107(3) of the Law of Marriage Act [Cap 29 R.E. 2019] requiring evidence that the marriage has broken down was complied with. And the third ground of appeal is consequently dismissed.

As for the fourth ground of appeal, that the learned Senior Resident Magistrate erred in law and fact when concurred with the proceedings of the trial court, which failed to make an order for custody and maintenance of the children or have regard as to the needs of the children of the marriage inclusively the burdens and liabilities attached to those matrimonial properties, this untrue. I am holding that because the Appellant seems to have misunderstood the judgments of the lower Courts. He was the one given custody of both children. See pages 9-

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10 of primary Court judgment. And that is what he prayed for before the trial Court. Consequently, there was not any error committed by Primary Court and District Court. I should also add that Section 115 of the Law of Marriage Act [Cap 29 R.E. 2019] deals with power of the Court to order maintenance of spouse. It is unclear whether that is what the Appellant wanted. But that is not seen in the record of proceedings and judgment of the trial Court. There was no such prayer in the Appellant's petition at the trial Court. His prayers as seen on page 1 of the trial Court judgment were: divorce decree, division of matrimonial properties and custody of children. For those reasons, citing of Section 115 of the Law of Marriage Act [Cap 29 R.E. 2019] is misleading.

Finally, the fifth ground is to the effect that, the Senior Resident Magistrate erred in law and facts by failing to note that the second house was built before a divorce decree was granted, leave alone the Appellant herein above named to have smelt injustice by being driven out of matrimonial house even before the execution of decree. On page 8 of the trial Court's judgment, it is apparent that the Respondent testified and the documents she tendered such as plot sale agreement shows that when Talaka was issued on 16/12/2015 the second house was not built yet. Even the testimony of their daughter, Asha Hamisi (SU2 then aged 19 years) on page 9 of the trial Court proceedings shows that the second house was built after Talaka. Therefore, the Respondent built the second house after the Appellant gave the Respondent Talaka. Therefore, only one house was acquired during before Talaka was issued.

I should remark that there is confusion as to the exact date when Talaka was issued is 10/09/2015, or 16/12/2015. But there could be typing error on the date. However, it is undisputed that in 2015 the Appellant gave the Respondent Talaka according to Islamic Law.

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In the end the appeal lacks merit, and it is dismissed. Given that this is matrimonial case, each party shall bear its costs

DATED at **TANGA** this 31st Day of October 2022.



[Signature]

U. J. AGATHO

JUDGE

31/10/2022

Court: Judgment to be delivered by the Hon. Sophia Massati, Resident Magistrate in charge and Acting Deputy Registrar, this 31st day of October 2022 in the presence of the parties.



[Signature]

U. J. AGATHO

JUDGE

31/10/2022

[Signature]

I CERTIFY THAT THIS IS
A TRUE COPY OF THE ORIGINAL

DEPUTY REGISTRAR

DATE 31/10/2022