IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 134 OF 2020

(Arising from Matrimonial Cause No. 40 of 2019 Ilala District Court)

RICHARD RODRICK MOYE.....APPELLANT

VERSUS

DIANA CONSTANTINE KISOKA.....RESPONDENT

JUDGMENT

Date of Last Order: 30/08/2021

Date of Judgment: 22/04/2022

S.M. KULITA, J.

The appellant herein one **RICHARD RODRICK MOYE** was the Respondent in the Matrimonial Cause No. 40 of 2019 Ilala District Court. Regarding the petition for divorce filed by the Respondent herein one **DIANA CONSTANTINE KISOKA** the said court dissolved the marriage tie between the two. On furtherance to that the court ordered for division of the matrimonial houses at the ratio of 65% for the Appellant and 35% for the Respondent. As well the District Court ordered that all three infant children to be under custody of their mother, Respondent but the Appellant was ordered

to provide maintenance for the said infants including a total sum of Tsh. 300,000/= per month.

Aggrieved with the said decision the Appellant lodged this appeal relying on the following four grounds;

1. That, the trial Magistrate erred in law and fact for awarding 35% of the matrimonial properties to the Respondent and 65% to the Appellant while the Respondent's contribution, if any, was for minor improvements of the properties solely acquired by the Appellant prior to the marriage.
2. That, the trial Magistrate erred both in law and fact by ordering the Appellant to provide maintenance allowance at the tune of Tsh. 300,000/= per month without ascertaining his means of paying that amount.
3. That, the trial Magistrate erred both in law and fact by failing to evaluate properly the evidence tendered before her.
4. That, the trial Magistrate erred both in law and fact by vesting custody of the issues of the marriage to the Respondent.

The matter was argued by way of written submissions and the scheduling orders were fully complied with by the parties. While the Appellant was represented by Mr. Wilson Edward Ogunde, Advocate from Brotherhood Attorneys, the Respondent was

enjoying the legal services of Ms. Leah Kamanga and Ms. Ediltruda Mrema, Advocates from Lekas Attorneys. Before starting to submit on appeal, Advocate for the Appellant decided to waive the 3rd ground of appeal, hence remained with three ground to argue.

In his written submission in support of the 1st ground of appeal the Appellant's Counsel, Mr. Wilson Edward Ogunde, Advocate stated that the trial Magistrate erred in law and fact for awarding 35% of the matrimonial properties to the Respondent and 65% to the Appellant while the Respondent contributed almost nothing in their acquisition. He stated that the purported Respondent's contribution at the rate of 35% is not supported with any evidence. He said that the Respondent's contribution is very low that cannot attain that said rate.

The Counsel further submitted that while the Appellant was in Moshi for preaching programs, the Respondent used to collect rent and spent them for finishing the minor works that had remained in the houses, which include placing the ceiling board, gypsum and kitchen cupboard in the second house. He said that the said contribution does not exceed 5%.

Submitting on the 2nd ground the Counsel stated that the trial Magistrate erred both in law and fact by ordering the Appellant to

provide maintenance allowance at the tune of Tsh. 300,000/= per month without ascertaining his means of paying that amount. He averred that before granting the sum that the man has to provide for maintenance the Magistrate has to take into consideration of the means and life standard of the man. He said that the amount of Tsh. 300,000/= fixed by the court is excessive and out of reach of the Appellant's means of living. He alleged that he is a mere Pastor who nowdays depends on uncertain tithes and offerings.

As for the 4th ground Mr. Wilson Edward Ogunde, Advocate submitted that all three children are grown up. They are over 7 years old, hence they can be placed to him. He said that the Appellant's stay at Moshi for preaching was the consensus agreement between the Appellant and the Respondent. He said that during that time they used to visit each other and that the Appellant used to provide services to the family Respondent.

The Appellant's counsel prefers children to be custodied into the Appellant. He said that by doing so the Appellant will not be obliged to provide the Respondent with money and services for maintenance of the children.

He concluded by praying for the appeal to be allowed.

In their reply to the 1st ground of appeal the Respondent's Counsels, Ms. Leah Kamanga and Ms. Ediltruda Mrema, Advocates submitted that while they started their marriage life the Appellant had a 5 bedrooms house. Number of bedrooms were later on added into eight after the marriage. Another house, holding five bedrooms was also constructed on the same plot after the marriage.

The counsels stated that the Respondent was previously employed but later on established her own business of selling food, and she used some of the proceeds of her employment and business to contribute in the construction of the 3 additional bedrooms to the former house and construction of the 2nd house (the five-rooms house). They further submitted that the Respondent tendered the receipts at the trial court to prove that she was actually contributing towards the acquisition of those matrimonial houses.

The counsels submitted that the Respondent was rightly granted that ratio of 35% as her rate of contribution in the acquisition of the said properties.

In their reply to the 2nd ground of appeal the Respondent's Counsels submitted that the sum of Tsh. 300,000/= that the trial court had granted for maintenance of the infant children is

reasonable as per the current life expenses. They said that number of children being three in number the said amount is still minimal, hence should not be reduced as suggested by the Appellant.

As for the issue of custody of the infant children the Respondent's counsels had nothing to submit, they just suggested the appeal to be dismissed in its totality as the appellant intends to delay justice.

In the rejoinder submission the Appellant's Counsel maintained what he had submitted in his submission in chief.

From the above submissions, here is my analysis in respect of the 1st ground of appeal; it is undisputed that while married by the Appellant the Respondent found him holding a house which was semi-finished. It is also evident that, as she then was, the Respondent, as the Appellant's wife participated in further construction of the said house whereby three other bedrooms were added in that said building. Not only that, but also a 5 bedrooms house was constructed, if not finished, after the addition of 3 bedrooms in the first house. According to the records the Respondent also spent her own money in construction/finishing of the said houses. The Respondent tendered at the trial court, the documents (exhibit P4) to prove that she acquired for loan from VICOBA and benefits from NSSF for the purchase of building

materials. She also tendered different receipts to prove the said purchases (also exhibit P4).

Among the things that the Appellant does not dispute is that the Respondent involved herself in placing of the ceiling board, gypsum and kitchen cupboard in the second house and addition of 3 bedrooms in the 1st house. Whether those activities had been done through her personal money or not, in law the Respondent is considered to have contributed into their acquisition as it is undisputable and evident that she is the one who was supervising the constructions while the Appellant was at Moshi for the preaching activities.

In divorce cases, each party deserves division of the matrimonial assets acquired in the joint efforts. This is according to **section 114(1) of the Law of Marriage Act [Cap 29 RE 2019]** which provides;

> *"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".*

However, division of the matrimonial assets acquired during the subsistence of marriage should base on the efforts of each party in their acquisition. That is a position of law as per **subsection (2)(b) of section 114** which provides;

> *"In exercising the power conferred by subsection (1), the court shall have regard to the* ***extent of the contributions made by each party in money, property or work towards the acquiring of the assets" (emphasis is mine)***

This position of the law was also stated in **BIBIE MAURID V. MOHAMED IBRAHIM [1989] TLR 162** in which it was held;

> *"There must be evidence to show the extent of contribution before making an order for distribution of matrimonial assets"*

The appellant herein admits that supervision of further construction of the 1st house and finishing of the 2nd house by the Respondent is a contribution, but he opines that the ratio of 35% is greater as compared to what the Respondent had contributed in their acquisition. The appellant stated that the Respondent's contribution was for minor improvements of those properties which were solely acquired by him prior to the marriage.

The trial court's record particularly the judgment, transpire that in distributing the assets the said court mostly considered the issue of joint contribution in the acquisition of the matrimonial properties, which is a right finding. It rightly regarded the contributions made by each party in terms of money, properties and domestic work towards the acquisition of the said properties/houses which is a requirement of the law.

I can agree with the Appellant that contribution of the Respondent in the acquisition of the assets is lower as compared to that made by him, but that is in terms of money (financial contribution). In law, contribution in the acquisition of the matrimonial properties is not necessarily being in a direct/physical form like financial contribution, it can also be indirect contributions. As I have so stated herein before that the basic principle in the distribution of the matrimonial assets is that, it should base on the rate of contribution that each party has made in their acquisition. This was also narrated in the case of **BI HAWA MOHAMED V. ALLY SEFU [1983] TLR 32** and that of **MARIAM TUMBO V. HAROLD TUMBO [1983] TLR 293.**

In this matter, it is undisputable and the record is clear that the Respondent as the Appellant's wife together with the infants used to stay at the matrimonial home in Dar es Salaam for a long time,

from 2014 to 2018 while the Appellant was at Moshi for the preaches activities. This implies that, apart from supervising semi-construction of those matrimonial houses, the Respondent also performed the duty of taking care of the children and the said two matrimonial houses. It is therefore wrong to say that the Respondent's contribution in the acquisition of the houses is very minimal that it cannot attain the said rate of 35%.

The record transpires that the parties have been living as husband and wife for twelve years. Apart from the Respondent contributing in monetary terms, though in small amount, she also contributed in taking care of the matrimonial home and properties at all the times including the four years period that the Appellant was at Moshi for preaches activities. In that sense the Respondent is entitled for the assets distribution at that said rate as assessed by the trial Magistrate. It is obvious that the rate of contribution made by the Appellant is greater as compared to that of the Respondent, the trial Magistrate was therefore right to distribute the houses at the rate of 65% for the Appellant and 35% for the Respondent.

I find this ground of appeal meritless, hence dismissed.

As for the 2nd ground of appeal, I can agree with the Appellant that the trial Magistrate ordered the Appellant to provide maintenance

allowance at the tune of Tsh. 300,000/= per month without ascertaining his means of paying that amount. Actually, judgment of the lower court does not transpire as to what made the trial Magistrate to award that said amount. It is the duty of a man to maintain his infant children but the amount he is supposed to provide should depend on his income status. **Section 129(1) of the Law of Marriage Act** states;

> *"Save where an agreement or order of court otherwise provides, **it shall be the duty of a man to maintain his infant children**, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education **as may be reasonable having regard to his means and station in life** or by paying the cost thereof" **(emphasis is mine)***

As well, in a case of **JEROME CHILUMBA V. AMINA ADAM [1989] TLR 117** it was held;

> *"In a case for maintenance, it is important for a trial court to find out the income of the person sued in order to be able to decide the amount to be paid"*

The above cited authorities require the court to order the amount which is reasonable for the man to provide for the maintenance of

the infants. It should be the amount which is capable for him to provide. According to his submission and evidence on record the Appellant is a mere Pastor with a salary of Tsh. 157,000/= as his take-home from the basic salary of Tsh. 184,000/= by 2019 when this matter was attended at Ilala District Court.

I concur with the trial court's decision that the proceeds of sales of the houses should be distributed between the parties. By doing so each party will be in a position to plan his/her new life in the absence of another. The decree of divorce that has been issued is a venue for each party to get married with another person. Apart from providing services to the infants, the Appellant as a man will still have a duty to maintain a new wife and the family he is going to make with her, if he so decides to marry. Therefore, the 65% proceeds that he is going to get from the sale of the houses should not be considered in the amount to be provided for the maintenance of the infants herein.

From the above analysis therefore, the appellant should be ordered to pay the amount which does not exceed that sum of Tsh. 157,000/= per month, the basic amount which he uses to take from his salary, for maintenance of the infants. That being the case, the sum of money that the appellant should pay for maintenance is reduced to Tsh. 150,000/= from Tsh. 300,000/=.

However, the appellant's duties to provide clothing, education and accommodation for the infants stand still.

The last ground of appeal is about custody of the infant children. The records transpire that each party alleges that he/she is righteous person to stay with the children, but in her analysis the trial court Magistrate found it convenient for the infants to stay with their mother (Respondent). The trial court came up into that conclusion upon considering the welfare of the children who have been living with their mother for a long time including the 4 years period that the Appellant had been living at Moshi, 2014 to 2018.

According to the records the said children were pupils by 2019 when the matter was decided at the District Court. The 1st born was in standard VI while the other two who are twins were in Standard I. Be it noted that among the welfare that the infant children deserve is that their custody should not to disturbed unnecessarily. **Section 125(3) of the Law of Marriage Act** among the other things provides that, in deciding on the custody of the infant children **the court should also regard to the undesirability of disturbing the life of the infant by changes of custody.** The fact that the said children have been living with their mother who is capable to stay with them, it will be chaos for them to change custody.

The way this issue has been analysed and decided by the trial court that for the best interests of the children, all of them should stay with their mother is absolutely correct, hence I am not going to disturb it.

In upshot the **appeal is partly allowed** only to the extent that **the maintenance sum that the Appellant is required to provide is reduced to Tsh. 150,000/= per month** from Tsh. 300,000/= that was granted by the District Court.

As for the other orders, that is Division of the proceeds for the Matrimonial houses at the ratio of 65% and 35% for the Appellant and Respondent respectively, stands still. The same applied to the order for custody of the infant children, that it should be upon the Respondent (mother), but the duty to maintain them in accommodation, school fees and medication is upon the Appellant (father). The District Court's order that the Appellant has right to access the infants also remains undisturbed.

This being a family matter, I grant no order as to costs.

S.M. KULITA

JUDGE

22/04/2022


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