IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

P.C. CIVIL APPEAL NO. 3 OF 2022

(Coming from Matrimonial Appeal No. 10 of 201 before the District Court of Karatu at Karatu, C/F matrimonial Case No. 3 of 2021 before Karatu Urban Primary Court)

BETWEEN

PASKALINA JOSEPH BAYYO.....APPELLANT

VERSUS

SOLJA SEMALI MASHAURI.....RESPONDENT

JUDGMENT

03.05.2022 & 17.05.2022

N.R. MWASEBA, J.

The Appellant herein, Paskalina J. Bayyo is challenging the decision of the District Court of Karatu at Karatu dated 24th day of September, 2021 which dismissed his Civil Appeal No. 10 of 2021 for want of merit. She has come to this Court armed with five grounds of appeal couched as follows:

1. *That, the first appellate court erred in law and fact for upholding the trial court's premature petition for divorce which was made without prior reference of the matter to marriage conciliation board.*
2. *That, first appellate magistrate erred in law and fact for failure to consider domestic contribution by the appellant herein as a corner stone for equal distribution of matrimonial properties.*
3. *That, the first appellate Magistrate grossly erred in law and fact for unfair denial of custody of children to the appellant herein, basing on assumption of facts and not water tight evidence by the respondent herein.*
4. *That, the first appellate Magistrate fatally erred in law and fact for using Appellant's health status as a tool of denying her well-deserved rights of access to children.*
5. *That, the first appellate Magistrate grossly erred in law and fact for failure to announce proper custodian of the minor child.*

She implored this Court to quash the decision and the entire proceeding of the first appellate court. Hearing of the appeal proceeded by way of written submissions, an order that was adhered to by both parties. Before recapping the submissions and making a decision on the grounds

of appeal, there is a need to summarise the factual background leading to this appeal.

The appellant and the respondent were once a married couple who wedded at Roman Catholic Church and they were blessed with three issues namely, Elionarah Solja, Morren Solja and Morren Solja. Further to that they acquired some matrimonial properties before the devil took part in their marriage. Thy tried different means to solve their marriage but their effort did not bear fruits. Thereafter the respondent decided to file a petition for divorce at Karatu urban primary Court, where after a full trial the court decided that the marriage was broken down beyond repair.

Regarding the issue of custody of the children, the same was given to the respondent who was living with them at that time, and for the issue of matrimonial properties, the court was of the view that since the appellant contributed to the misappropriation of the matrimonial properties, she deserves to be given a piece of land which was written in her names.

Being aggrieved by the above decision of the Karatu Urban primary court, the appellant decided to file an appeal at Karatu district Court

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where her appeal was dismissed for want of merit. It is against this decision that this appeal was preferred.

Mr. Oscar Mallya, learned advocate for the appellant, submitted on the first ground that, the trial court proceed with the hearing of the Matrimonial cause No. 3 of 2021 without a proof of form No. 3 that the matter was first referred to a conciliation board and the board has certified that it has failed to reconcile the parties. The same is provided under **Section 106 (2) of the law of Marriage Act**, Cap 29 R.E 2019. It was his further submission that, although Section 101(f) of Cap 29 provides for exceptional circumstances, there was no proof that the court was moved regarding those circumstances and be certified with the said circumstances. To glue his argument, he cited the case of **Hellen Gen Lucas vs Cleophas Lucas**, Matrimonial Cause No. 1 of 2021, HC Mwanza Registry (Unreported) where it was held that the court needs to be satisfied that the reasons adduced by the petitioner was enough to waive the requirement of Form No. 3. As the first appellate court failed to consider whether the respondent applied to waive the said requirement and opted to rely on mere words that there were extraordinary circumstances, that is why this appeal was preferred.

Opposing the appeal, on the first ground the respondent who appeared in person, submitted that, it was not true that the petition was filed without having form No. 3 as required by the law. The respondent did comply with the law by referring the dispute to the Marriage Conciliation Board at Ganako Ward and the appellant was summoned via a letter dated 17.12.2020 to appear on 21.12.2020 for conciliation. However, since the board was not formed the Ward Executive Officer who was supervising all boards, tribunal and committee at ward level notified the court accordingly.

It was his further submission that, since the said certificate form part of the court record, the petition was competent as it falls within the provision of Section 101 (f) of Cap 29, which deals with extraordinary circumstances where the court can waive the requirement of referring a matter to a conciliation board before going to the court. And the cited case of **Hellen Gen Lucas** (supra) is distinguishable from this case since in the case at hand the matter was referred to the conciliation board. Moreover, since the appellant supported the petition at the trial court, it is an afterthought to challenge the same at this stage.

Submitting on the 2nd ground of appeal, Mr. Mallya complained that the trial court and the first appellate court failed to consider the contribution

made by the appellant as a corner stone for equal distribution. He added that **Section 114 (1) of the Law of Marriage Act,** allows the court to distribute the property acquired during the subsistence of the marriage or before the marriage but was improved during the existing of the marriage after the decree of the divorce has been issued. The same was also decided in the case of **Bi. Hawa Mohamed vs Ally Sefu**, [1983] TLR 9 page 29 which insisted fairly distribution of matrimonial properties to the parties after the breakdown of the marriage.

More to that, he submitted that the appellant served well her family and contributed to the acquisition of two cars (business and private one), one garage, two matrimonial houses in Karatu one of them is for rental purposes, three plots in Babati, one fenced plot in Karatu with foundation of sixteen rooms for rental purposes. Thus, it was his further submission that the first appellate court grossly erred to grant the appellant only one plot and ignoring his contribution to the Acquisition of those properties.

Responding to this ground, the respondent submitted that the appellant failed to prove her contribution towards the properties she mentioned that were acquired during their marriage. The appellant also failed to counter the evidence adduced at the trial court that she misuses the

properties of the matrimonial. He submitted further that, even the cited case of **Bi. Hawa Mohamed Vs Ally Sefu** (supra) it was stated that the spouse who misuse the matrimonial properties would not be entitled to a share in the property. He added that the appellant should not be allowed to benefit from her own wrong that's why the respondent was given properties as he was taking care of the children including the one with HIV Aids resulted from the act of the appellants a per **Section 114 (2) (d) of the Law of Marriage Act**. As the appellant did contribute to the misuse of the matrimonial properties, she does not deserve equal distribution of matrimonial properties as per **Section 114 (2) (b) of the Law of Marriage Act**. It was his submission that the ground lack merit.

As for the 3rd, 4th and 5th grounds of appeal, the counsel for the appellant submitted that, **Section 37 (1) (2) of the Law of the Child Act**, Cap 13 R.E 2019, allow a parent, guardian or a relative to apply to a court for a custody of the child, and the court may grant the same based on the certain consideration. The said consideration is provided under Section 45 of Cap 13 R.E 2019. Some of the considerations are the environment, income and the paramount wellbeing of the child. Further to that it is the duty of the social welfare to inform the court

regarding the said considerations, however, in our case nothing was done.

He added that, the first appellate court denied the appellant the access to her children based on her health status and deprived all of her rights to her children. Despite of her prayer regarding the custody of the children at the trial court, her payer was denied without giving any reasons for the denial, and without taking into consideration the sufficient information from the social inquiry report.

Opposing these grounds (3rd, 4th and 5th) the respondent submitted that the appellant was not denied an access to her children as every parent has the right to visit his/her child, what the court did was to give the custody of the children to the respondent as the custody cannot be granted to both parents. What the court do is to consider the best interests of the child not of a parent, and the trial court advance reason as to why the custody was given to the respondent including, peacefully of the children, history and behavior of the parent including adultery and alcoholism and their health status.

Moreover, the cited Sections 37 (1), (2) and 45 of cap 13 R.E 2019 being related to right of parentage is governed by the Juvenile Court in the meaning provided for under Section 3 of the Act No. 13 R.E 2019

and not in the custody of children based on the Law of Marriage Act, Cap 29 R.E 2019. Based on their submission, they prayed for the appeal to be dismissed for lack of merit.

In his brief rejoinder, the counsel for the appellant reiterated what was submitted in their submission in chief and added that, the statement submitted by the respondent regarding form No. 3 from the conciliation board is very confusing. While they alleged that there was no conciliation board formed at their ward area, they argued that they did go to the conciliation board and they were given a summons to call the appellant and since there was no conciliation board the ward executive officer filled the form to allow the court to proceed with the petition. Nonexistence of the reconciliation board was taken as an extraordinary circumstance to waive the requirement of referring the matter to the reconciliation board. So, they maintained their position that the petition was pre maturely filed at Karatu Urban primary Court.

He added further that, the respondent failed to adduce any evidence at the trial court to prove how the appellant misused the matrimonial properties as alleged, thus, they reiterated what was submitted earlier for the court to allow the appeal.

I have keenly gone through the petition of appeal, records of both lower courts and the submissions made by both parties. The pertinent issue for determination is whether the appeal has merit or not. In so doing, the court will determine all the grounds of appeal in a sequence.

Starting with the first ground of appeal, the appellant complained that the petition of divorce was prematurely filed at Karatu Urban Primary Court without Form No. 3 from the conciliation board as required by **Section 101 of the Law of Marriage Act**. On the other hand, the respondent alleged to have been complied with the requirement and since the conciliation board was not formed that's why the court waived the said requirement based on extraordinary requirement as per **Section 101 (f) of the Law of Marriage Act.**

For easy reference I wish to quote the above provisions. **Section 101 of the Law of Marriage Act**, provides that:

> "*No person shall petition for divorce unless he or she has first referred the matrimonial dispute or matter to a Board and the Board has certified that it has failed to reconcile the parties.*"

Clarifying the above provision, the respondent cited Section 101 (f) of the same Act which stipulates that the above requirement shall not apply in any case-

> *(f) where the court is satisfied that there are extraordinary circumstances which make reference to the Board impracticable."*

Going through the proceedings of the trial court, I happened to find Form No. 3 which was filled by the Ward Executive Officer (WEO) from Ganako ward which partly stated:

> "*Kwakuwa kata haina baraza la usuluhishi napendekeza shauri lisikilizwe moja kwa moja Mahakamani."*

This information from the WEO to my considered view falls under extraordinary circumstances which make reference to the Board impracticable. The WEO is a government officer whom I do not see the reason as to why he should not be trusted. If there is no Conciliation Board, the implication is that the parties cannot do anything.

The Counsel for the appellant cited the case of **Hellen Gen** (Supra) to support his point that **Section 101 (f) of the Law Marriage Act** cannot apply automatically rather the party must move the court by

the appellant as the case he cited is distinguishable from our own case. The cited case was instituted at the High court while this case is originated from the Primary court whose procedures are different from the procedure used in other courts. See **Section 93 of the Law of Marriage Act** which governs the proceedings of matrimonial cases in Primary courts. Thus, so long as the WEO notified the magistrate that in his ward where the parties come from there was no Conciliation Board is enough and the primary court after being satisfied instituted the case by waiving the requirement for the parties to go to the Board. Therefore, this ground has no merit.

Coming to the second ground of appeal the appellant is challenging the distribution of matrimonial assets to be unfair. The counsel for the appellant referred this court to **Section 114 of Law of Marriage Act** which gives power to the court when granting a decree of divorce or separation to order for division of matrimonial assets. And the respondent in his submission submitted that the appellant committed a matrimonial misconduct whereby the appellant misused the properties and also and that the parties had no equal contribution.

To determine this ground, I decided to go through the record thoroughly. It is noticed through the record that the matter is covered

up with emotions and stigmatization based on the health condition of the appellant. I am aware that the divorce was not disputed and thus was granted. As per **Section 114 of the Law of Marriage Act** the court had to determine the distribution of matrimonial assets. **Section 114 (2) (b) of the Law of Marriage Act** (Supra) states that:

> *(2) In exercising the power conferred by subsection (1), the court shall have regard-*
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> > *(b)* ***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 provision was also clarified in the case of **Yesse Mrisho v. Sania Abdu**, Civil Appeal No. 147 of 2016 (CA) (unreported) in which the Court of Appeal stated that:

> *"There is no doubt that a court, when determining such contribution* ***must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets."*** *(Emphasis is mine)*

In the case at hand the above requirement was not well adhered to by the two lower courts. Glancing on the record of the trial court the respondent mentioned the properties that were acquired during the

subsistence of the marriage to be the house which they are living, three plots, and wheel change machine but he says the appellant is not concerned with them. The appellant in addition to the mentioned assets she revealed that they have another house at Sumawe area and two vehicles. Unfortunately, no one explained how those properties were acquired and the contribution of each party to enable the court to invoke the above provision. The record shows that the trial court and first appellate court in dividing the matrimonial assets considered the fact that the appellant misused the matrimonial properties. In the record there is no where it is shown how she misused the properties. What I find here is an emotion due to her healthy condition. Thus, I find that this ground has merit.

In her third and fourth grounds of appeal again there is no evidence at all to assist the court to determine the issue of custody and access of children. The factors to be considered when determining custody of children are specified under **Section 125 (2) of the Law of Marriage Act** and Section **39 of the Law of the Child Act,** CAP 13 RE 2019. The law among other things requires the court to consider the best interest of the child. In the record the respondent said he wants to stay with his children as he has been staying with them. The appellant in her testimony said she prays to be given custody of children because all

three children are girls and they need her close supervision from their mother and that the respondent should pay maintenance. This is not sufficient to ascertain the best interest of those children. Thus, the third and fourth grounds have merit.

In the premises, it is my considered view that the interest of justice in this matter will be more saved if this case will go for retrial particularly on the issues of division of matrimonial properties and custody of children where more evidence is to be taken before giving out a verdict.

Basing on the foregone reasons, this appeal has merit. The decision of the two lower courts is quashed and set aside. I further order for retrial before another magistrate with competent jurisdiction to secure evidence with regard to the acquisition of matrimonial assets and best interest of the children and determine the matter according to the law. Since this is a family matter, I give no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 17th day of May, 2022.

N. R. MWASEBA

JUDGE

17.05.2022