IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC MATRIMONIAL APPEAL NO. 8 OF 2022

(C/f Matrimonial Appeal No.1 of 2022 of the District Court of Moshi Originating from Matrimonial Cause No. 7 of 2022 of Moshi Urban Primary Court)

ONESFORA PETER MASSAWE ..... APPELLANT

VERSUS

HUSSEIN RAMADHAN HASSAN .....RESPONDENT

JUDGMENT

12/7/2023 & 31/07/2023

SIMFUKWE, J.

This appeal originates from Moshi Urban Primary court (trial court) where the appellant herein successfully petitioned for divorce, division of matrimonial properties, custody and maintenance of three issues.

Briefly, Onesphora Peter Massawe and Hussein Peter Massawe were husband and wife having celebrated Islamic Marriage in 2016. They were blessed with three issues namely Najma, Salimu and Salma. They lived happily until when the appellant instituted the matrimonial cause before the trial court petitioning for the above noted reliefs which were granted by the trial court. The trial court issued a decree of divorce and distributed

the matrimonial properties to wit one house and one car each in an equal share of 50%. Also, the trial court ordered the respondent herein to maintain the three issues at the tune of Tshs 300,000/- per month.

The Respondent herein was aggrieved with the decision of the trial court He successfully appealed to Moshi District Court (first appellate Court) whereby the appellate court granted 80% share of the motor vehicle to the respondent and the appellant was granted 20%. Regarding the house, the first appellate court found that the alleged house is not matrimonial property as it was acquired by the respondent before marriage. Also, the respondent was ordered to maintain the three issues to the tune of Tshs 120,000/= per month. The appellant was aggrieved, she preferred this appeal on the following grounds:

1. *That, the Appellate Magistrate erred in law and fact by failing to evaluate and address the evidence properly which led to miscarriage of justice.*
2. *That, the Appellate Magistrate erred in both law and fact by failing to appreciate that the Matrimonial House is joint property of the parties herein hence subject to division as per the records as the ownership document bears the names of the appellant and the respondent respectively.*
3. *That, the Appellate Magistrate erred both in law and fact by varying the distribution of the motor vehicle acquired during the subsistence of the marriage without any justification as the same was not subject to the ground of the appeal before the District Court.*
4. *That, the Appellate Magistrate erred both in law and fact by varying the reasonable amount granted by the trial court*

for maintenance of the three issues of marriage from Tshs.300,000/= to Tshs. 120,000/= without any justification at all and contrary to the law.

5. *That, the Appellate Magistrate erred both in law and fact for ordering the ambiguous order regarding the matrimonial house while the children who are still very young are living with the appellant outside the said house after being chased away by the respondent.*
6. *That, the Appellate Magistrate erred in both law and fact for violating the provision of the law regarding the duty to maintenance of the children and without taking into account that the custodian (sic) of the children is fully left to the appellant who is to pay for shelter, medical and school fees.*

The appeal was ordered to proceed by filing written submissions. The appellant was represented by Mr. Mussa Mziray, learned counsel while the respondent was represented by Ms. Zuhura Twalib, also learned counsel.

Mr. Mziray abandoned the 1st ground of appeal and opted to submit on the rest of the grounds of appeal and his submission was as summarised hereunder:

On the second ground of appeal, Mr. Mziray challenged the distribution made in respect of the house by arguing that the same is matrimonial house. The learned counsel explained that in order to know whether the said house was acquired jointly or not, there must be proof that the same was acquired during the subsistence of marriage or was acquired by one spouse but developed by the other spouse during subsistence of marriage.

He averred that the efforts in the acquisition of matrimonial property are subject of evidence and proof as stated in the case of **Gabriel Nimrod Kurwijila vs Theresia Hassani Malongo, Civil Appeal No. 102 of 2018**. (CAT)

In the instant matter, Mr. Mziray submitted that the records show that the property was registered in their joint name which is presumed that each of the spouse has an equal share to the property. Thus, in division of the said property, each part has to prove his/her extent of contribution whether monetary or non-monetary. The learned counsel referred to page 9 of the typed judgment of the trial court, 18th line where the respondent herein stated that:

> *"…ikiwa basi watatalakiana mali walizochuma isiuzwe zibaki kuwa za watoto yeye yupo tayari ahame katika nyumba hiyo na iweze kupangishwa watoto wapate mahitaji maana hiyo nyumba siyo yake wala yangu…"*

From the above quotation, Mr. Mziray argued that the respondent insisted that the said house belonged to both of them whereas the trial court found it prudent to divide the same at equal share of 50% to each party.

Moreover, the learned advocate condemned the first appellate magistrate for failure to consider the above quoted words of the respondent. Hence, reached at wrong conclusion that the said house should be left to the respondent undisturbed while the records show that the appellant together with her children were chased away from the said house which is against the principle of the best interest and welfare of children regarding the division of matrimonial properties. That, the issues of

marriage are still minor hence placed under the custody of the appellant who is now wandering looking for shelter.

Submitting on the third ground of appeal which concerns distribution of the motor vehicle, Mr. Mziray submitted that they are aware that the District Court is vested with power to vary the decision of the primary court where there is an error or miscarriage of justice. He argued that the trial court distributed the said motor vehicle equally as the same was jointly acquired by the parties. However, such order was varied by the first appellate court whereas the respondent herein was granted a share of 80% and the appellant herein was granted a share of 20% contrary to the evidence presented before the trial court that the said motor vehicle was acquired during subsistence of marriage. Reference was made to the case of **Samwel Olung'a Igogo and Two others vs Social Action Trust Fund and Others [2005] TLR 345** which held that:

> *"Acquisition of property by a spouse during subsistence of marriage. Rebuttable presumption of exclusive ownership by the spouse acquiring the property."*

It was argued further that the first appellate court erred to vary the distribution of the said motor vehicle which was not even among the grounds of appeal, while the records reveal that the motor vehicle was jointly acquired by the parties during subsistence of their marriage.

On the fourth ground of appeal, the learned counsel faulted the maintenance awarded by the first appellate court. He argued that the fact that the respondent is a mere electrician was not stated anywhere in the trial court records, and that the words were of the appellate magistrate for the reasons known to him.

It was elaborated that according to **section 129(1) of the Law of Marriage Act, Cap 29 R.E 2019** the duty to maintain children is placed to the man. The learned counsel for the appellant was of the opinion that it is from the above provision of the law that the appellate magistrate misdirected himself and reduced the amount of maintenance of children who are under the appellant's custody to the tune of Tshs 120,000/- without considering accommodation, clothing, food and education.

Mr. Mziray challenged the findings that the appellant is a police officer thus capable of maintaining the children while it is the duty of the man to maintain her children unless he is dead or his whereabout is unknown. That, in the present matter, the respondent is alive and able to maintain his children.

It was contended further that the amount of Tshs 120,000/= per month is not enough to maintain three children for accommodation, food, school fees and clothing. The learned counsel prayed the court to allow the maintenance of Tshs 300,000/- as ordered by the trial court.

On the 5th ground of appeal, the learned counsel for the appellant faulted the first appellate court for ordering ambiguous order regarding the matrimonial house. He stated that in determining custody of children, what matters is the best interest and welfare of the children. That, children of tender age are kept under the custody of their mother unless there is sufficient reason to discredit the mother as per **section 125 of the Law of Marriage Act** (supra) and **section 26 (2) of the Law of the Child Act No. 21 of 2009**. Mr. Mziray condemned the appellate magistrate for ordering the house to be left to the respondent which violates the **Law of the Child** and the **Law of Marriage Act**. That, the

appellate magistrate pronounced that the house should be left to the respondent herein while custody of the children was ordered to be under the appellant which is against the principle of best interest and welfare of the child.

Lastly, on the 6th ground of appeal, the appellate magistrate was blamed for violating the law regarding the duty to maintain the child and failure to take into consideration that the custody of children was fully left to the appellant. The learned advocate argued that it is the duty of a parent to provides all needs including food, shelter, education care and liberty. He cited **section 44 of the Law of the Child Act** which provides among other things that the court shall consider the income and wealth of both parents of the child or of the person legally liable to maintain the child. Mr. Mziray cemented that the court has no choice other than to comply with this provision. That, failure to consider this provision renders the maintenance order unlawful. He supported the order of the trial court granting maintenance for three issues at the tune of Tshs 300,000/- basing on the income of the parent.

In conclusion, Mr. Mziray called upon this court to allow the appeal, quash and set aside the entire judgment and orders of the first appellate court and uphold the decision of the trial court.

Responding to the second ground of appeal in respect of division of the matrimonial house, Ms. Zuhura submitted that it is trite law that whoever desires any court to give judgment as to any legal right or liability dependant of existence of facts must prove that those facts exist. That, in the instant matter, no record shows that the said matrimonial house was acquired during subsistence of marriage. That, the records show that

the house was there even before marriage. Thus, the said house was not a result of joint effort and equal distribution to the parties would jeopardise **section 114 of the Law of Marriage Act** (supra).

Responding to the third ground of appeal which concerns distribution of the motor vehicle; Ms. Zuhura conceded to the submission that the District Court is vested with powers to vary the decision of the primary court subject to limitations. She argued that in this case, the appellate magistrate exercised such powers properly. She went on to say that there is no evidence on joint efforts in acquisition of the said Motor vehicle as the same was acquired before marriage. Therefore, the appellant's claim that the properties should be shared equally just because they were married is contrary to **section 114(2) of the Law of Marriage Act** (supra) as affirmed in the case of **Bi Hawa Mohamed vs Ally Seif [1983] TLR 32** that the extent of contribution determine the amount of division.

In reply to the allegation that the issue of the motor vehicle was not the subject of the ground of appeal, Ms. Zuhura submitted that the respondent was dissatisfied with the whole proceedings and judgment and appealed against the whole judgment on seven grounds whereas ground No. 5 of appeal disagreed on the distribution of assets (house and motor vehicle).

Responding to the fourth ground of appeal which concerns maintenance of Tshs 120,000/- which was ordered by the first appellate court, Ms. Zuhura argued that the amount of Tshs 300,000/- was varied by the first appellate court with justification and according to the law. That, the trial court misdirected itself by ordering such amount without considering the

respondent's income. She added that, both parents have the duty to maintain their children. She was of the view that the father cannot maintain to the required standards to the well-being of the children as provided for under **section 129(2)** of the Act.

Opposing the fifth ground which concerns ambiguous order in respect of the matrimonial house by the first appellate court, Ms. Zuhura explained to this court that the first appellate court reached to its decision that the said house is not a matrimonial house subject to distribution, after evaluating the evidence and finding that the said house should be left to the respondent undistributed to be benefited by the respondent herein and his issues.

Concerning the allegations that the appellate magistrate violated the law regarding duty to maintain the children, Ms. Zuhura submitted to the contrary that no law was violated. That, the appellate magistrate directed himself to **section 129(1)(2) of the Law of Marriage Act** and considered the income and wealth of both parents and finally varied the maintenance order of the trial court.

In her conclusion, Ms. Zuhura implored the court to dismiss this appeal and uphold the judgment and orders of the first appellate court.

In rejoinder, the learned advocate for the appellant reiterated what has been submitted in chief.

On the second ground of appeal which concerns distribution of the house, Mr. Mziray faulted Ms. Zuhura for citing **section 114 of the Law of Marriage Act** without stating sub-sections. He argued that the said section does not support her argument.

On the third ground of appeal in respect of the motor vehicle, Mr. Mziray replied that according to the records the parties testified that the same was acquired after they had contracted marriage. He argued that the case of **Bi Hawa Mohamed** has been overruled by the case of **Samwel Olung'a Igogo and Two Others** (supra).

On the sixth ground of appeal Mr. Mziray re-joined that in case there is conflict between the **Law of Marriage Act** and the **Law of the Child Act** regarding maintenance, then the specific law which is the **Law of the Child Act** should prevail. That the first appellate court failed to consult the specific law which is the **Law of the Child Act** (supra). He insisted that **section 129(1) of the Law of Marriage Act** (supra) specifically impose duty to the father to maintain the children and the custody of the child.

Having carefully considered the submissions of both sides and having gone through the entire records of the lower courts, it is clear that the main grievances in this appeal is centred on the following issues:

1. *Division of matrimonial house*
2. *Division of motor vehicle*
3. *The amount of maintenance of the issues*.

The first issue will cover the 2nd and 5th grounds of appeal, the second issue will resolve the 3rd ground of appeal while the third issue will cover the 4th and 6th grounds of appeal.

On the 2nd and 5th grounds of appeal, the appellant was not happy with the way the first appellate court distributed the said house. Mr. Mziray submitted that the said property was joint property since the records

shows that the same was registered in their joint names which is presumed that each spouse has equal share.

To the contrary, Ms. Zuhura stated that the said house belonged to the respondent even before he contracted the marriage. Thus, it is not matrimonial property.

The law clearly provides for factors to be considered in division of matrimonial properties. **Section 114 of LMA** provides that:

> *"114. - (1) 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 o f sale.*
>
> *(2) In exercising the power conferred by subsection (1), the court shall have regard to -*
>
> *(a) The customs of the community to which the parties belong;*
>
> *(b) The extent of the contributions made by each party in money, property or work towards the acquiring of the assets;*
>
> *(c) Any debts owing by either party which were contracted for their joint benefit and*
>
> *(d) The needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.*

Times without numbers this court and the Court of Appeal has expanded the above provisions by stating that evidence is required in proving the extent of contribution made by each party towards acquisition of matrimonial assets. See the case of **Gabriel Nimrodi Kurwijila** (supra) and the case of **Paulina Nereson vs. Zawadi Timothy, PC Matrimonial Appeal No. 1 of 2019 (HC).**

Basing on **section 114 of the Law of Marriage Act** (supra), the first appellate court in determining how to distribute matrimonial assets found that the disputed house was there even before marriage. These findings made me to revisit the trial court's evidence to ascertain the findings of the first appellate court.

At page 6 of the typed proceedings of the trial court, the appellant apart from mentioning that the alleged house is matrimonial property, she did not explain the extent of contribution towards such property. However, her evidence was explained by the respondent who at page 20 said that:

> *"Kuhusu Nyumba yangu nilijenga kabla ya kufunga ndoa. Mwanzo tulipanga na hata ndoa tuliishi hukohuko tunatafuta maisha, muda uliendelea kuisha nikawa na kiwanja nikajenga hapo mke wangu alinitaka tubadili hati ya nyumba akitaka jina lake lisomeke, tuliishi miezi (7) saba hutuongei hata hiyo siku aliponingoja nikarudi akasema kama hataona ameandikwa kwenye hati atakunywa sumu niliogopa nikamweleza asifanye hivyo nitaandika hati hiyo nilipokea ile sumunikaihifadhi darini kwa hali hiyo yeye akawa anaenda kazini mimi nilibaki nakuwanamngoja nilizidi kumpigia magoti asifanye mambo hayo*

nitamwandikia hiyo nyumba na alifungua droo ya kabati akachukua hati zote ya nyumba, zangu za kazi yangu ndipo alitafuta Mwanasheria akabadili hati nililazimika kufanya hivyo kuokoa uhai. Kiwanja hicho mimi nilipewa na familia na tuliwekewa onyo kuwa hapo hapauzwi kwa hiyo hakunakati yetu anayetaka pauzwe maana ilishaelekezwa hapatawahi pakauzwa."

At page 23, the respondent went on to state that:

"Mimi niko radhi nyumba alikotoka ipangishwe miminitoke hela itakayopatikana isaidie watoto maana hiyo nyumba siyo yangu wala siyo yake ni ya familia…"

From the above quoted words, it goes without saying that the said house is in the names of the appellant and the respondent which implies that the same is owned jointly by both of them. Evidence that the name of the appellant was inserted just because she threatened to kill herself if her name would not be inserted in the Title Deed is not supported by any evidence. To that end, I join hands with the trial court's decision which distributed the said house to the equal share of 50%. I am of considered opinion that the first appellate magistrate misapprehended the above piece of evidence in declaring the said house to be the property of the respondent herein.

The second issue is division of the motor vehicle. Mr. Mziray submitted that the said motor vehicle was jointly owned by the parties herein. Ms. Zuhura alleged that the said motor vehicle was acquired before marriage.

The first appellate court at page 13 of the judgment found that there was no evidence to support joint efforts on acquisition of the said motor

vehicle. The trial court at page 15 distributed the said motor vehicle the share of 50% to each party.

With due respect to the appellate magistrate, during the trial, at page 23 the respondent admitted that the said motor vehicle was acquired during subsistence of their marriage and thus subject of contribution. Therefore, I am of considered opinion that the division made in respect of the said motor vehicle by the trial court was just and fair as both parties never stated the extent of their contribution.

The last issue is in respect of maintenance of children; the appellant's advocate challenged the maintenance of Tshs 120,000/- ordered by the first appellate court. On the other hand, the respondent's counsel supported the amount ordered on the reason that both parents are vested with duty to maintain their children.

The law is very clear on the issue of maintenance. As rightly stated by the appellant's advocate, **section 129(1) of the Law of Marriage Act** (supra) places the duty to maintain the child to the father. Also, **section 44 of the Law of the Child Act** provides that the court should consider the income and wealth of both parents of the child or of the person legally liable to maintain the child when ordering maintenance. In the case of **Jerome Chilumba vs. Amina Adamu [1989] TLR 117** it was held that:

> *"In a case of 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 trial court ordered maintenance of Tshs. 300,000/- per month for three children. The amount was varied to Tshs 120,000/- on the reason that the respondent is a mere electrician earning casual income.

With due respect to the appellate magistrate, his findings are suggesting contrary to what the respondent himself testified before the trial court. At page 25 of the typed proceedings during cross examination, the respondent stated as follows:

"nina uwezo kulipwa hadi milioni tatu kwa kazi moja."

The above quoted piece of evidence skipped the attention of the learned appellate magistrate. Basing on such reason and bearing in mind that the child needs not only food but also shelter, clothes, education and health care, I am of considered opinion that the amount of Tshs 300,000/= per months as ordered by the trial magistrate is reasonable and suffices to accommodate the three issues per months.

That said and done, I hereby quash and set aside the entire judgment and orders of the first appellate court and proceed to uphold the decision of the trial court. Considering the nature of the matter, I make no order for costs. Appeal allowed.

Dated and Delivered at Moshi this 31st day of July 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

31/07/2023