IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO.35 OF 2023

(Arising from decision of Kinondoni District Court in Matrimonial Cause No.74 of 2021 before Hon. Mtega – PRM)

GODWISHES GIBSON MINJA.....APPELLANT

VERSUS

NEEMA JUMANNE KIROGA.....RESPONDENT

JUDGMENT

19/09/2023 & 20/10/2023

M.MNYUKWA, J.

This is the first appeal which traces its origin from Matrimonial Cause No. 74 of 2021 where the appellant is dissatisfied with the decision of the trial court of dismissing the petition for divorce. For better understanding of this appeal, it is vital to briefly narrate the background facts which leading to the same.

What has been gathered from the records are that; parties to this appeal were husband and wife since 2007 when they celebrated their holy Christian marriage on 19th August 2006 at CCT- Champlaincy, University of Dar es Salaam, at Dar es Salaam. They were blessed with three children. It is from record that their marriage became sour when the appellant alleged that, the respondent engaged in adulterous association

when she joined and worship at *UFUFUO NA UZIMA* church. The appellant was not happy after his wife joined and worship in that church. The appellant also claimed that respondent was cruel to him and his relatives, she deserted him since 17th May 2014 which is more than 7 years after reconciliation at the family level to be futile. The appellant also alleged that respondent refused to consummate the marriage and she also refused to associate with appellant which makes marriage life impracticable.

He thus prayed for trial court to grant decree of divorce, make an order for division of matrimonial properties, an order for custody and maintenance of the issues of marriage.

Respondent generally disputed the appellant's allegations and prayed the trial court to grant her custody of the issues of marriage and the appellant be ordered to maintain them. On division of matrimonial properties, she prayed the five plots acquired during the subsistence of marriage be declared as her personal properties though they have appellant's names. She also prayed the court to order appellant to disclose other properties and the same be divided equally among them as they were acquired during the subsistence of the marriage and any other relief the trial court may deem fit and just to grant.

During the trial, appellant mainly testified that, in 2009 respondent started to worship at *UFUFUO NA UZIMA* church and from there onwards her behaviour changed and that was the source of their matrimonial dispute and that they tried to reconcile without success. The appellant further testified that in May 2014 he sent back respondent to his parent. Appellant testified that they lived under separation with the respondent from 2014. Appellant also testified that, they have acquired five plots with the respondent during the subsistence of their marriage and that the said plots are in his name as purchaser.

On her part, the respondent testified that, their misunderstanding is mainly based on the place of worship. She stated that, at first, they were both (herself and appellant) visited at *UFUFUO NA UZIMA* church before they were blessed with issues of marriage. And that later on, he refused to worship in the said church and he even stopped her from worshipping at *UFUNUO NA UZIMA* church. She further testified that appellant sent her back to her parents at Kibamba on 17th June 2014 when she was pregnant of her third born. She added that, she stayed at her blood relative house at Mikocheni for 6 years. The appellant denied to have love relationship with anyone at *UFUFUO NA UZIMA* church. Respondent also stated that they have acquired five plots with the appellant and two motor

vehicles, one for herself and another for appellant. The respondent stated that she still love the petitioner.

After a full trial, the trial court dismissed the petition for a reason that the marriage between the parties were not broken down beyond repair for it to be dissolved.

This decision did not amuse the appellant who knocked the door of this court with three grounds of appeal that;

1. *That the learned principal resident magistrate erred in law and fact in declaring that the marriage has not been broken irreparably.*
2. *That the learned principal resident magistrate totally misdirected herself in delivering Judgement in favour of the respondent by failing to consider and appreciate the evidence on record tendered by the appellant.*
3. *That the learned principal resident magistrate further erred in law and facts in refusing to order the status of the matrimonial property and custody of issues on the reason that the appellant failed to prove the first issue on the balance of probability against the respondent.*

He then prayed for the appeal to be allowed and the decision of the trial court be set aside, grant the appellant the orders sought on the strength of the evidence and his submissions and other relief this court deem fit and just to grant.

At the hearing parties were represented Mr. Deogratius Godfery, learned counsel entered appearance for appellant, while for the respondent was Ms. Veronica Tesha, learned counsel. Appeal was argued by filling written submissions.

When submitting in support of the appeal learned counsel argued ground 1 and 2 altogether. He stated that the trial court did not evaluate properly appellant's evidence and failed to appreciate the fact that respondent was deserted and parties lived under separation for nine years. He submitted that desertion and voluntary separation was proved by the parties' testimony before the trial court which shows that the marriage between the parties is broken down beyond repair.

To support his argument on the evidence of desertion and voluntary separation to show that their marriage is broken down, he referred to section 107(1)(e) and (f) of the Law of Marriage Act, Cap 29 R.E 2019. He went on that, the marriage between the parties is broken down beyond repair since reconciliation at the family level and before the marriage conciliation board proved futile. He added that, there is no voluntary union of the parties to live together as husband and wife as it is required under section 9 of the Law of Marriage Act, Cap 29 R.E 2019 and that no proceedings can be brought to compel parties to live together as husband and wife. To buttress his argument, he referred to the decision of this

court in **Hassan Mmbaga v Suzane Kamote,** Civil Appeal No 226 of 2020.

In respect to ground three, he submitted that, the trial court erred for its failure to make an order on the division of matrimonial properties and custody of the issues of marriage. He averred that, evidence on record shows that in 2007 appellant acquired the farm for a consideration of Tsh 2,000,000. He added that the said farm was divided into five plots as proved by Exhibit P3. He went on that, respondent's assertion that the plots were acquired by their joint efforts is false and was manufactured by the respondent who failed to prove the same. He referred to the case of **Bibie Mauridi v Mohamed Ibrahim** 1989 TLR 162.

He also referred to section 114(1) of the Law of Marriage Act, Cap 29 R.E 2019 and section 60(a) of the Law of Marriage Act, Cap 29 R,E 2019 concerning with the issue of matrimonial assets. He further cited the case of **Mariam Tumbo v Harold Tumbo** 1983 TLR 293 concerning with the issue of custody of children and urged that, the independent views of the children need to be taken when considering custody.

He retires prayed this court to declare the marriage between the parties is broken down irreparably and deserves to be dissolved by issuing decree of divorce. He also prayed custody of children be given to him,

maintenance of the issues of marriage be shared by both, appellant and respondent and the five plots be divided equally to parties and their issues.

Submitting on the grounds of appeal the learned advocate for the respondent argued jointly the first and second grounds of appeal as it was done by the appellant. He submitted that, it's true that the trial magistrate did not dissolve parties' marriage, but the same was not done in favour of the respondent. He further submitted that, the evidence on record shows that there was desertion and parties separated from 2016 to date which is more than three years and there was every reason for a trial court to declare the marriage between the parties is broken down irreparably.

He further submitted that, respondent supported the fact that, the trial magistrate erred for his failure to dissolve the marriage and to order other reliefs like the division of matrimonial assets, custody of children who are now living with respondent and their maintenance. The counsel referred to section 110 (1)(a) of the Law of Marriage Act, Cap 29 R.E 2019 to support her argument that the trial court erred for his failure to grant reliefs.

In regard to the third ground of appeal he submitted that, the trial court did not order division of matrimonial assets as he failed to appreciate the evidence on record that the marriage was broken down beyond repair. He went on that, the evidence of DW1 and DW2 shows that the plots were acquired by the parties during the subsistence of their marriage. She added that, as it was rightly submitted by the appellant, there must be evidence on the extent of contribution made by each party in the acquisition of the matrimonial property before making distribution. She retires by stated that, in her evidence the respondent clearly stated that she contributed Tsh 2,000,000 in acquisition of the plots.

The counsel argued that, this court being the first appellate court, it has duty to re-evaluate the evidence on record and give an order on the division of matrimonial assets. She supported her argument with the case of **Martha Michael Weja v Hon. Attorney General and 3 others,** Civil Appeal No 3 of 1982. He retires prayed the court to order custody of children to respondent since she was the one who stays with the children during the whole period of separation. She also prayed maintenance order to be given.

That marked the end of the submissions of both parties since the appellant did not file rejoinder.

Having considered the submissions of the parties and the available records, the issue for consideration and determination is whether it was proper for the trial court to dismiss petition for divorce.

I had time to peruse records of the trial court specifically on the evidence of both parties. It is beyond doubt that in their respective submissions and evidence at the trial court parties agreed that they lived under separation for more than two years. The evidence of the appellant is very clear during examination in chief and cross examination that he sent back the respondent to her parent way back in 2014. This evidence was corroborated by the respondent who also testified the same and showing in her evidence that she lived at her relative's house at Mikocheni for six years. The evidence on record proves that parties have never enjoyed the right to consortium after they separated since 2014.

It is settled that separation is one among the evidence which shows that the marriage is broken down as it is provided under section 107(2)(f) of the Law of Marriage Act, Cap 29 R.E 2019. Separation can be voluntary or judicial. What is important is the proof that spouses lived apart from each other voluntarily or through judicial order. Living apart from each other might either give parties an opportunity to reconcile their dispute or might be a catalyst to end up their marriage tie. In law, in order separation to be used as evidence that the marriage is broken down, the spouses

should live apart from each other and continued to live so for at least three years. (See section 107 (2) (e) of law of Marriage Act, Cap 29 R.E 2019).

As I have indicated earlier on, in our case at hand, parties are in agreement that they lived under separation for more than three years. When arguing the appeal, this fact is not denied and in fact both of them had the views that the trial magistrate erred for his failure to declare that marriage between them is broken down beyond repair.

On my part, upon carefully analysing the provision of section 9(1) of the Law of Marriage Act, Cap 29 R.E 2019 which provides that marriage is a voluntary union of a man and a woman intended to last for their joint lives, I don't see if the above definition works for the parties to this case. I say so because parties are living under separation for more than 8 years now and still there is no hope for them to live together as husband and wife. That is to say, their style of living defeated the purpose of section 9(1) of the Law of Marriage Act, Cap 29 R.E 2019.

Thus, considering the evidence on record and the submissions of the parties to this court, I am satisfied that the marriage between the parties is broken down beyond repair and deserves to be dissolved and the decree

of divorce be issued. To that end, I find the first and second grounds of appeal are merited and I allow them.

Coming now to the third ground of appeal. It is the claim of the appellant that this court being the first appellate court, it has power to analyse the evidence on record and determine on the relief sought by the parties after divorce. In his petition for divorce, the appellant under paragraph 6 mentioned only the five plots situated at Muheza within Kibaha Township to be the only matrimonial properties acquired by the parties during the subsistence of their marriage.

On her part, the respondent in her answer to the petition acknowledged the existence of those plots mentioned by the appellant as acquired during the subsistence of their marriage but she wanted the court to declare those plots as her personal properties even though they bears appellant's name. Further to that, in her answer to the petition, respondent also prayed for the trial court to order the appellant to disclose all matrimonial properties which were not disclosed in the petition for divorce and the same be distributed equally as they were acquired during the subsistence of their marriage.

I had time to revisit the evidence of the parties at the trial court concerning the matrimonial properties acquired by the parties during the

subsistence of the marriage. When he was testifying in chief, the appellant mentioned only the existence of the five plots situated at Kibaha as the only matrimonial properties acquired by the parties during the subsistence of the marriage. He tendered the title deeds that were admitted as Exhibit P3. However, when he was cross examined, he stated that they have also acquired two cars and one of them was sold by the respondent. And that, he had another car which is used by him. He also stated that they also acquired household items such as table, chair and fridge.

On her part, respondent testified to have acquired households' item, a farm situated at Muheza, Kibaha and that she was the one who purchased it for a sum of Tsh 2,000,000/-. On the issue of the cars, she testified that they owned two cars and one of the car was sold when they were together with the appellant and later on she sold hers and bought another one. When she was cross examined, she stated that upon selling one of the car, the appellant top up some money for her to purchase another car.

From their evidence, it is very clear that parties acquired properties more than what they pleaded in the petition of divorce and an answer to the petition. For example, the households items and cars which were not pleaded in their petition. It is also on record that all those mentioned properties were acquired during the subsistence of their marriage. In his

prayer before the trial court, the appellant proposed the manner of distribution in which he proposed one plot to be given to him, another plot to the respondent and the other three plots to children of marriage where each of them should get one plot.

The above proposal of distribution is also repeatedly in his submissions in this court when arguing the grounds of appeal, even if he was also trying to show that he personally acquired those plots that's why they bears his name. On her part, respondent also tried to show that even if the plots are registered in appellant's name, she was the one who purchased the same by using her own money and that appellant did not contribute money in the acquisition of the same since the farm was bought by her for Tsh 2, 000,000/-.

From the above piece of evidence, I am not convinced if respondent bought the farm which are now divided into five plots. I say so because respondent did not exhibit with a sale agreement to show that she bought the said farm as she alleged or the title deeds where the plots are registered on her name.

In short, respondent's evidence lacks proof to show that she personally bought the plots. Even her witness, DW2 who is alleged to have been involved to search that farm, his evidence is lacking since does not show

that respondent's money was solely used to purchase the farm. When he was cross examined he testified that, he does not know how much did the respondent contributed in purchasing the farm.

Reverting to the appellant evidence, it is very clear as reflected on page 10 to 11 of the trial court's proceedings that the plots were acquired during the subsistence of the marriage and they were acquired jointly. In his proposal, appellant suggested that the properties be divided equally to the parties and to the children. Regrettably, I am not at per with appellant's proposal because the plots are matrimonial properties and therefore, they are subject to division to spouses only. If the same was intended to be given to children, parties could have done so before. And if they still wishes, they can still do at their personal arrangement after I make an order for division of matrimonial assets.

Having said so, it is my firm view that, respondent contributed in terms of work as she was performing a domestic chore when they lived with the appellant as married couple. Again, being an employee who earned salary which she also surrendered to the family affairs, it is my conviction that she is entitled to equal distribution of the plots acquired during the subsistence of the marriage. My decision is also backed up by the appellant's proposal who wished each member of the family to be given one plot including the respondent as he testified that she is the family

members and appreciated her contribution in the acquisition of the said plots.

Now, considering the fact that matrimonial properties are subject to division to spouses, I make the following distribution on those five plots; Plots with the title deed No 179612 and 177724 on plot No 8 Block D and plot No 9 Block D will remain to the appellant as the sole owner, while the plot with a title deed No 178636 on Plot No 7 Block D will be jointly owned by the appellant and the respondent. The plots with the title deed No 177661 plot No 6 Block D and title deed No 178356 plot No 6 jalada Block D, is given to the respondent as the sole owner of those plots.

The other properties like the households' items which are chairs, table and fridge, is given to the respondent and each of the spouse should remain with the car which he/she is using for now.

By way of passing, in her answer to petition, respondent prayed the court to order the respondent to mention other properties that were not listed in the petition for divorce. With due respect, I don't think if this prayer is maintainable since it was her duty to list out those properties if at all do exist. In absence of that, this court cannot be in a position to divide properties which were not pleaded and not featured in their evidence.

The appellant also prayed this court to give an order for custody of children. It is my humble view that, since the court need to consider the best interest of the child before making an order of the custody and to consider the factors stated under section 125 of the Law of Marriage Act, Cap 29 R.E 2019 and section 39 of the Law of the Child Act, Cap 13 R.E 2019, I don't think if it is proper for this court to make such an order as there is insufficient evidence to enable the court to make its finding.

Again, among others, the court may also consider the views of the children if the same have been independently taken and also it consider the need to keep the siblings together. Thus, at this juncture, I am still hesitating to make an order for custody.

For an order of maintenance, the court is guided by the provision of section 44 of the Law of the Child Act, Cap 29 R.E 2019. Among others, the court has to consider the income and wealth of both parents of the child, financial responsibility of the person with respect to maintenance of other children and the costs of living in the area where the child is resident. All these evidences were not collected by the trial court.

For the aforesaid reason, it is my humble view that this court cannot make an order for custody of children as well as maintenance of the children of marriage. If parties are still interested to get an order for

custody and maintenance of children, they can make application before a court of competent jurisdiction to get the same.

Having said so, I allow the appeal to the extent explained therein. I also declare that the marriage between the parties herein is dissolved and a decree of divorce is issued. The order of the division of matrimonial properties is granted to the extent explained therein. No orders as to costs since a matter is a matrimonial dispute.

Order accordingly.

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

20/10/2023.

Court: Judgment delivered in the presence of appellant's counsel and respondent in person.

M.MNYUKWA

JUDGE

20/10/2023