

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF SHINYANGA
AT SHINYANGA**

PC. CIVIL APPEAL NO. 13 OF 2023

HELENA WILIAM JAMES..... APPELLANT

VERSUS

PAULO MASANJA EMMANUEL..... RESPONDENT

[Appeal from the decision of the District Court of Bariadi at Bariadi.]

(Hon. Kiliwa, SRM.)

**dated the 8th day of September, 2022
in
Matrimonial Appeal No. 5 of 2022**

JUDGMENT

12th September & 30th November, 2023.

S.M. KULITA, J.

This is an appeal from Bariadi District Court. The story behind this appeal in a nut shell is that, the appellant herein instituted a Matrimonial Cause at Somanda Primary Court against the respondent herein which was registered as No. 78 of 2022, claiming for Divorce, division of matrimonial properties and maintenance of their marriage issues. The suit was heard and finally determined by the Primary Court on 25th April, 2022.

The appellant however got aggrieved with the decision, hence appealed at the District Court of Bariadi. Her Centre of argument was on the following; **one**, division of matrimonial properties, **two**, legality of admission of the respondent's exhibit tendered during trial and **three**, maintenance of issues of marriage.

In reply, the respondent filed a cross appeal on following aspects; **one**, division of matrimonial properties, **two**, custody of issues of marriage and **three**, failure to mediate the marriage dispute before institution of this case.

The District Court heard both, the petition of appeal together with the cross appeal and, on 8th September, 2022 entered the Judgment. Again, the appellant was aggrieved with the said decision of the District Court, hence appealed to this court on twelve grounds whose Centre of argument based on; **one**, division of matrimonial properties, and **two**, maintenance of issues of marriage.

On 24th July, 2023 the matter was fixed for hearing. Both parties appeared in person, unrepresented.

Submitting on grounds of appeal, the appellant, Helena William James stated in respect to the 1st and 2nd grounds that, the lower courts failed to distribute properties fairly and in accordance with the requirements of section 114 of the Law of Marriage Act. She said that,

they have 3 (three) houses in two plots, 9 (nine) plots, 1 motor vehicle, spare parts shop, garage and two motorcycles. She claimed that, the same were not distributed fairly as she was given one motor cycle and one plot of which she alleged to be hers. She added that the lower courts just declared her to live with the children in a house located at Malambo, but the same was not given to her.

Concerning the third ground, the appellant stated that, in the division of matrimonial assets, her contribution as a house wife was not considered by the lower courts. She said that, though she was not employed, the works she used to perform for the family matters had a great contribution to the acquisition of the matrimonial assets.

As for the fourth ground, the appellant stated that, the lower courts failed to properly analyze the evidence adduced during trial, particularly on the aspect that, while the respondent was attending the office jobs at a place where he was employed as the Mechanical Engineer, she was daily supervising the Spare Parts Shop and Garage, which were the family businesses. She added that, as she was not paid for those works, that should be considered as her contribution.

On ground five of appeal, the appellant was of the views that, as part of her contribution, she managed to raise spare parts capital from 6

million to 300 million shillings. On this, she had in mind that, her contribution was great.

As for the sixth ground, the appellant stated that, exhibits D2, D3, D4, D5, D6, D8 and D20 were received without being read out aloud before the court which is the legal requirement. She thus prayed for the same to be expunged from the record.

As for the seventh ground of appeal, the appellant stated that, the Motor Vehicle No. T 845 DUQ make Toyota Land Cruiser is the respondent's car, but the same was not included in a list of matrimonial properties. She lamented that, no person was called to prove that it was not a matrimonial property.

Submitting on ground eight, the appellant stated that, Plot Number 78 Block "C", Plot number 80 Block "C" and Plot Number 81 Block "C" located at Salunda, Bariadi were formerly given to her by the Primary Court. She complained on the act of the first appellate court to overturn the same. She said that, the said first appellate court, Bariadi District Court did not consider that they were acquired through the income of the family businesses that she was supervising.

Concerning ground number nine of the appeal, the appellant stated that, Plot number 350 Block "C" Maperani and the Plot located at Izunya Bariadi were wrongly included in the matrimonial assets. She said that

they are hers. She acquired them through inheritance as her share from their late father's estates.

On the tenth ground, the appellant faulted the lower courts for not distributing plots located at Maperani, Kidulya and the one nearby the filling station namely Petrol Africa. She alleged that, the lower Courts mentioned them without distributing them among the parties, as a result the respondent took all of them.

As for the eleventh ground, the appellant faulted the lower court for not ordering her to be given her 15% share of the company namely Planet Engineering Works Company Limited in which both parties herein are Directors. She complained that, the respondent maliciously added the other persons as Directors so that the same could not be regarded the matrimonial property.

On the last ground, the appellant faulted the lower courts in the sense that, despite the knowledge it had, that the parties have four issues of marriage yet the lower courts did not make an order for maintenance. She prayed for this court to order the respondent to maintain his children by providing her with Tsh. 800,000/= per month. She said that as the Respondent is a Mechanical Engineer and a businessman, he has that capacity. She however added that, that the said maintenance order should also extend to education and medication costs.

In the reply thereto, the respondent, Paulo Masanja Emmanuel, submitted that he is a Mechanical Engineer employed by the Government. He said that, both his family and business depended wholly on his salary. Concerning the house at Block "C" Malambo, the respondent submitted to have constructed it within 2004 and 2006, before he had married the appellant. As for the business and the plots, the respondent stated that, the same were acquired through loans that he had been taking and topping up via his salary.

Concerning distribution of the matrimonial properties, the respondent preferred distribution by way of percentage, as it had been so ordered by the lower courts. He said that, this is in accordance with the requirement of section 114 of The Law of Marriage Act.

In reply to the second ground of appeal, the respondent stated that, not all matrimonial properties were given to him, but the appellant too was given some properties. He urged this court to refer page 21 of the District Court's judgment.

Concerning ground number three, the respondent stated that the appellant was a just a House Wife, she contributed nothing in the acquisition of the properties. The Respondent also faulted the appellant for failure to prove her contribution towards the acquisition of the properties.

On the fourth ground of appeal, the respondent stated that, the lower courts properly analyzed the evidence adduced at the Primary Court and consequently gave the appellant a house and some plots. He insisted that, the said house was just for the appellant to live with the children.

Concerning ground number five, the respondent stated that, the appellant didn't tender Valuation Report to prove the value of the shop. He again insisted that, the appellant had to prove her contribution to make the shop a matrimonial property. He said that his salary is deducted regarding the loans and their top ups that he had been taking for the said shop, while the appellant has nothing to repay.

On the issue of exhibits being admitted un-procedurally, the respondent stated that, the same is unmeritorious. He gave the reason that, the laws were adhered in receiving them.

Concerning the car which is registered as No. T 845 DUQ make Toyota Land Cruiser, the responded argued that, the appellant who alleged that the car was among the matrimonial properties, is the one who was supposed to prove that fact. He said that the Appellant should not blame someone else for not calling a witness to testify on that. He added that, the said vehicle's registration card proves by itself that, it is belongs to someone else, namely Kiswaga.

As for the Plots Nos. 78, 80 and 81 of Salunda Street, Bariadi, the respondent contended that, the same were not distributed to the appellant because of the contribution factor that led to their acquisition.

Concerning Plot No. 350 Block "C" and that of Izunya in Bariadi, the same are matrimonial properties. The respondent averred that, even though the said properties are registered in the name of the appellant, yet they were acquired during the subsistence of their marriage, and that, his money were used in purchasing them, thus matrimonial properties.

Concerning a piece of land at Izunya street, and that nearby Petrol Africa, the respondent submitted that, the same were not discussed at the District Court, he thus prayed for the same not be disturbed at this appellate stage of the case.

As for the issue of division of the Planet Engineering Works Company Limited, the respondent stated that, the same is not a matrimonial property. He said that, it has four Directors who are also shareholders. To him, its division should follow the law of Companies Act.

On the last ground, the respondent stated that, it is him who maintains issues of marriage all the time. He added that, the Appellant was ordered to rent one of the two houses located on Plot No. 516 Block "C" Malambo, a premise which was allocated to her to live with the issues. She was further ordered to use the rent paid to her by the tenants for

maintenance of issues of marriage. The respondent also prayed that the appellant should not be given any percent in the Spare Parts Shop for the reasons that, the appellant has no contribution its acquisition and that he is still indebted by the financial institutions for it. As for the maintenance order given by the District Court, the Respondent stated that it is correct, however, he cannot manage to pay Tshs. 800,000/= while his take home salary is Tshs. 319,000/= per month.

In rejoinder the appellant stated that, there was no loan money that had been taken for the Spare Parts Shop. To her, the shop accumulated its capital by itself. Concerning the loans, the appellant stated that the same were taken by putting their houses as collateral. As the properties are many, the appellant wanted distribution to be done by physical way instead of the percentage form. The appellant further stated that, they had also been taking loans from the banks for the expansion of the Spare Parts Shop capital which extended its value. On the maintenance of issues, the appellant stated that, the house which the court ordered to be rented to furnish maintenance is unfinished, thus, cannot be rented. Concerning the loan taken at Kadunya Micro Finance, the appellant stated that, she is not concerned with it, thus it should not be used to affect the life of her children. As for the house located on Plot No. 516 Block "C"

Malambo, the Appellant stated that, while married she found it at the foundation stage.

That was the end of both parties' submissions.

I have earnestly gone through both parties' submissions and the available records. In determining this appeal, I will endeavor into discussing some grounds jointly and others separately.

As both parties have been separately making reference to and admit, I also admit that, division of matrimonial properties, is governed by **section 114 of the Law of Marriage Act [Cap 29 RE 2019]**. For easy of reference, I hereunder reproduce the same;

"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 of sale"

As the trial court had already dissolved the parties' marriage and, as long as, there is no party who disputes on dissolution of their marriage, then, the court was entitled to make division of the matrimonial assets as the above quoted section commands.

Further, the same section, allows the court to order the sale of matrimonial assets, and thereby the parties get its proceeds of the sale. On that account, through this section, the lower courts were right to order the division of matrimonial assets in terms of percentage of the sale proceeds.

However, the same section that has been referred to by both parties, under **subsection (2)**, provides for factors that the court should consider in making division of the matrimonial properties. The provision states;

*"(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” (**emphasis is mine**)*

These are the factors which I am going to test so as to ascertain whether the lower courts have considered in dividing the matrimonial properties to the parties. However, I remain with one question, as what amounts to matrimonial asset? The answer is not far to fetch, the same section under **subsection (3)** provides;

*"(3) For the purposes of this section, references to assets **acquired during the marriage** include assets owned before the marriage by one party which have been **substantially improved during the marriage by the other party** or by their joint efforts” (**emphasis is mine**)*

The trial court record provides the testimonies that, the appellant has been a House Wife and that sometimes she has been a Shopkeeper selling goods in the spare parts shop. She was also supervising the garage. Meanwhile, the respondent was the Government Employee working as a Mechanical Engineer, whose salary and loans acquired through the said salary have been used towards meeting the family needs, as well as acquisition of the matrimonial properties. I am alive, with the

principle set in the case of **Bi. Hawa Mohamed Vs. Ally Sefu (Civil Appeal 9 of 1983) [1983] TZCA 12 (29 November 1983) tanzlii**, which recognises domestic works done by a wife as amounts to her contribution towards acquisition of matrimonial assets.

In the records, the appellant has been claiming to be awarded an equal percentage share as compared to the respondent. The issue is, can it be said with certainty that, the parties' contributions are the same to warrant equal division of matrimonial properties? I am firm that, without the respondent's salary, these matrimonial assets would not have been to that much. As well, without the respondent's loans through his salary which have been used to expand business and buying of new assets, the properties that exist would not have been that much. As it was observed by the lower courts, the respondent's contribution towards the acquisition of the matrimonial assets is greater than that of the appellant. That being the case, division of matrimonial assets should also be different.

On that account and upon considering the above cited laws, as well as the parties' testimonies in the record, I find it proper to order division of matrimonial properties complained of in this appeal as follows, and, to a great extent, I will side with the division that has been done by the trial court;

1. Two Houses in Plot No. 285 which the appellant has been referring the Plot as No. 516 Block "C" Malambo, both should be sold and its proceeds be divided at the rate of 30% for the appellant and 70% for the respondent
2. A house located on Plot No. 159 Block "B" Salunda, to be sold and its proceeds be divided at the rate of 30% for the appellant and 70% for the respondent.
3. All three Plots of land registered as No. 78, 80 and 81 Block "C" which are located nearby Lake Oil Petrol Station are hereby given to the appellant.
4. Two plots; one located nearby Petrol Africa and that of Kidulya are given to the respondent.
5. One plot registered as No. 350 Maperani is given to the respondent.
6. One plot at Maperani which is in the name of the appellant is given to the respondent.
7. Plot of land located at Izunya is given to the appellant.
8. One motorcycle with registration No. T. 135 BYX make Yamaha Crux is given to appellant.
9. As for the housewares, the appellant is given sofa set, dining table plus its six chairs, closet and two beds.

10. meanwhile the respondent is given a television, radio subwoofer and two beds.

For the issue of a Motor Vehicle with registration No. T 845 DUQ make Toyota Land Cruiser, the records show that, the same bears the name of someone Kiswaga. The appellant claims it to be a matrimonial property, while the respondent who also submitted its registration card, showing the name of Kiswaga, claimed that it is not a matrimonial property. It is trite law in civil cases that, he who alleges must prove, and, that the party with heavier evidence should be declared the winner. Thus, the appellant, as the one who wanted the court to believe that, the said car is the matrimonial asset, had a duty to prove it by bringing evidence to that effect. She should not shift the burden to the Respondent as she has averred in ground No. 7 of the Memorandum of appeal.

As the appellant failed to give evidence to prove the said vehicle being a matrimonial property, as the lower courts did, this court also finds that, the respondent's evidence that the vehicle's registration bears the name of someone else, hence not matrimonial property subject to division, is greater than that of the appellant.

Concerning division of shares from Planet Engineering Works Company limited, both parties agree that it is a company with four

shareholders. Though, the appellant claims that, the respondent has fraudulently invited and allotted some shares to the other two persons, be it as it may, the fact still remains that, Planet Engineering Works Company limited, as we speak to date, has four shareholders. With these facts, I see no point to fault the lower courts for their conclusion that, the company is not a matrimonial property. Companies are governed by the **Companies Act**. Their modes of dissolution are well equipped therein. If the appellant wants it to be dissolved or she be given her share, the procedures as per the Companies Act, as well as the Memorandum and Articles of Association have to be complied with. It is therefore upon the Appellant to make a follow up at the proper forum for that purpose. Even the alleged issue of fraudulently allotting of shares to the other people as the appellant claims, if any, can be answered there. On that account, this ground of appeal fails.

As for the issue of a garage, the records reveal that the same is among the Company's properties, thus dividing it will amount to interfering someone's else properties. Hence, it is not subject to division as the matrimonial asset, instead the procedures as provided in the Companies Act should be adopted.

On the issue of Spare Parts Shop, the appellant stated that, the shop started with a capital of 6 million Tanzania shillings. She added that, by the time she stopped going to the shop, the same had the value of Tsh. 300 million. As alluded earlier, the law requires that the one who alleges must prove. Unfortunately, the appellant never given any evidence to support this assertion, like tendering the valuation report to that effect. On that account, this court cannot be certain that, the said spare parts shop values at Tsh. 300 million. To the contrary, the Respondent also testified that, the acquisition and development of the matrimonial assets, including the expansion of the Spare Parts Shop are the result the loans that he had been taking through his salary. Actually the respondent's salary slip which was tendered during trial proves the same. This fact which was also admitted by the appellant in her rejoinder submission. It means the appellant herself agreed with the said fact. On that note, the spare parts shop value is uncertain.

As the respondent is still indebted for the loans that he had taken from different financial institutions including Kidunya Microfinance, for instituting and developing the said shop, the same should be given to him, and I so order.

For the above discussion, the issue of division of matrimonial properties ends up at that extent.

Now to the issue of maintenance of issues of marriage (children). The law provides that, when the court orders separation or dissolution of a marriage, it should next, determine the issue of custody and maintenance of the issues of marriage. This is according **to section 125 of the Law of Marriage Act** which provides;

"125.-(1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare"

The same section under **subsection (2)** provides for the factors to consider when determining custody of them as follows; -

"(2) In deciding in whose custody, a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong”

The records provide that during the appeal at the District Court the respondent raised cross-appeal. One of the issues that he had raised was on custody of issues of marriage (children). Now that, the appellant through her ground of appeal number 4 calls for this court to re-evaluate the evidence, I find it better to chip in, and make analysis on this issue.

I understand that **section 125(3) of the Law of Marriage Act** provides that a child of below 7 (seven) years should preferably be kept under custody of his/her mother. On that account, I see it proper for the lower courts, placing the two younger issues of marriage under custody of the appellant. But, as for the two boys herein who were over the age of seven years, before ordering custody for them, the trial court was to ask each of them on their wishes. As these two great boys, Evodius and Edgar are of the age above 7 years but their wishes were not sought, it is however, not wrong for this court to order their custody be separate from the two young ones who may continue to live with their mother, appellant. This is in compliance with **section 125(4) of the Law of Marriage Act**. Therefore, it is the order of this court that, these two

issues of marriage, Evodius and Edgar, should stay with a party of their choice according to their wishes.

Back to the issue of maintenance the children. This matter is guided by **section 129 of The Law of Marriage Act** which provides;

*"129.-(1) Save where an agreement or order of court otherwise provides, **it shall be the duty of a man to maintain his 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.*

(2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them"

From the above cited sections, it is vivid that, father is burdened to maintain his children as according to his means and station in life. Also the law presses that burden to the mother, when the father is either dead, his whereabouts is not known or when he is unable to maintain them.

The said **Section 129(1)** provides that, maintenance shall be in the form of either providing the kids directly with such accommodation, clothing, food and education or by paying cost thereof. As the respondent's salary slip shows the loans deductions and as respondent's salary is the most reliable means to depend upon, the respondent is thus ordered to maintain his kids by providing them with Accommodation, School Fees, Medications, Clothing and Tshs. 200,000/= which will be payable monthly.

In upshot, the Appellant's **appeal** has been successful to that extent. It is **partly allowed**. This being a family matter, I grant no order as to costs.



S.M. KULITA
JUDGE
30/11/2023

DATED at SHINYANGA this 30th day of November, 2023.



S.M. KULITA
JUDGE
30/11/2023

