

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

ONE STOP JUDICIAL CENTRE

CIVIL APPEAL. NO. 26/2022

(Originating from Matrimonial Cause No. 65/2021 of Temeke District Court at One Stop Judicial Centre).

MOSES SEBASTIAN MKINGAMIAPPELANT

VERSUS

VANESA MAULID KIMBILIRESPONDENT

JUDGMENT

Date of last order: 07/03/2023

Date of Ruling: 06/06/2023

OMARI, J.

The Appellant herein is challenging the judgment of the District Court of Temeke at One Stop Judicial Centre in Matrimonial Cause No. 65 of 2021. Formerly, the Respondent petitioned for divorce and sought for orders for distribution of matrimonial properties, custody of the couple's child, maintenance, costs of the case and any other reliefs that the court deemed fit to grant. The District Court dissolved the marriage and divided their matrimonial house at the ratio of 60% to the Appellant and 40% to Respondent. The Respondent was granted full custody of their only child and the Appellant ordered to pay TZS 75,000 monthly, as maintenance.

Aggrieved by that decision the Appellant prayed that this court dismisses the judgment and resultant decree on three grounds, to wit:

1. That the honorable magistrate erred in law and fact for not analysing, evaluating and scrutinizing evidence adduced by the parties hence injustice.
2. That the honorable magistrate erred in law and fact by upholding that there was irreparable loss hence dissolve the marriage that was not existed before (sic).
3. That the honorable magistrate erred in law and fact since the whole proceedings and the judgment thereto possessed with irregularities and illegalities hence injustice (sic).

When the matter came for hearing the Appellant appeared in person, while the Respondent had the services of Michael Nyambo, learned advocate. Mr. Nyambo prayed for written submissions stating that the Respondent as unrepresented, however, the Respondent sought to have the matter disposed by oral submissions so that he can speak for himself. Therefore, this Appeal was disposed by oral submissions.

Submitting in support of the first ground of appeal, the Appellant criticized the trial court's decision stating that the magistrate failed to make a just decision despite the fact that he had enough witnesses who testified that there was no problem between him and his wife, the magistrate ruled that the court cannot force people to live together hence he granted a divorce. On the second ground, the Appellant submitted that the honorable magistrate erred in granting 40% of the properties that the Respondent found him with. With regard to the third ground, the appellant argued that the whole proceedings are with illegalities. He claimed that his wife did not produce even a single witness to testify that they had any marital problems yet, the court ruled in her favour.

When it was his turn, Mr. Nyambo argued against the Appeal beginning with the first ground of appeal. He submitted that the Respondent testified in the court the basis of her Petition for divorce, that is, she was deserted by the Appellant for a prolonged period of time. He stated that neither the Appellant nor the witnesses he brought testified on the reasons for the prolonged desertion, therefore the court decided that the marriage had broken down. Mr. Nyambo submitted further that when testifying in the trial court the Appellant stated that he loves and

still loves his wife but he failed to give explanation on why he deserted her. In addition, the learned advocate stated that the Appellant failed to give explanation of the conduct stated from paragraphs 7 through to 30 of the Petition. He did not deny or explain the cause of such action and conduct that the Respondent had stated in the Petition and this is what led the court to the decision it reached.

On the second ground, Mr. Nyambo submitted that, in the trial court the Pétitioner (now the Respondent) testified on her contribution in the acquisition of the said house that was acquired to a large extent during the subsistence of the marriage. As to the Appellant's contention that the magistrate erred in stating there is irreparable loss and went on to grant the divorce of a marriage that was not hitherto nonexistent, the learned advocate stated that in the trial court the marriage and its existence was not a matter at issue. To evidence this, the marriage certificate was tendered and admitted into evidence as "Exhibit B1". Therefore, this was not a fact in dispute.

With regard to the third ground the learned advocate submitted that, the Appellant has failed to state how and where in the impugned judg-

ment are the said irregularities and illegalities that occasioned the miscarriage of justice. The learned advocate concluded by stating that the said judgment is properly prepared and has reasons as to why the magistrate reached the said decision; therefore, there is no reason to prompt this court to overturn the decision and proceedings.

By way of rejoinder the Appellant opposed the submission by the Respondent's advocate that he did not bring witnesses. He stated that he did and they were sworn in and testified. Regarding the contention that he deserted his wife for a long time, the Appellant averred that he had interrogated them on what desertion means but they were unable to give him an answer so he explained to them that before he married his wife he was living in Kinyerezi and up to the time she petitioned for divorce they were living in Kinyerezi. He also stated that in the court and he brought witnesses to testify on that. As for the irregularities and illegalities in the proceedings, the Appellant submitted that he has not been provided with the proceedings so he was unable to analyze the same.

Having considered grounds of appeal, submissions from both parties and the record the main issue for this court's determination is whether this Appeal has merit.

The first ground of appeal concerns the Appellant's contention that the trial magistrate failed to analyse, evaluate and scrutinise the evidence hence occasioned injustice. Considering the Appellant's testimony in the trial court and submissions in this court he is persuading this court to agree that what he testified at the trial court was sufficient prove that there was no dispute between him and the Respondent nonetheless the court ignored it and proceeded to dissolve their marriage. This argument is wanting in many ways, for instance a perusal of the record reveals DW2 one Aisha Mohamed testified to the effect that the parties were husband and wife, have a house but they are currently in conflict and are not living together.

The record from the trial court also reveals that the Respondent mentioned in the Petition that their marital dispute started after she was accused of abusing her stepson which spiralled to being arrested and prosecuted. Upon being released from custody she returned to her matrimonial home but she was chased and prevented to access the

home by the Respondent and his mother. She testified that, even after the case ended, she made every effort to communicate with the Appellant to save their marriage, at no avail. This includes attempts to be reconciled by religious leaders through a Parish Priest to wit the appellant emphasized that he cannot live with her again.

It is settled law that in determining whether the marriage has broken down beyond repair, the court will consider the evidence of the parties. Based on the records in the trial court, it is necessary to find out whether the evidence by the Respondent sufficiently proved that the marriage has irreparably broken down as is required under section 99 read together with section 107 of the Law of Marriage Act, CAP 29 RE 2019 (the LMA).

The Respondent, established through testimony in the trial court that she left home after being accused and was eventually arrested for allegations of abusing her stepson. She made efforts to return to her matrimonial home but they were futile. The Appellant made no efforts to have her return to the matrimonial home. He even told a priest he could not live with her again. As if this is not enough the two have lived apart for more than three years before the Respondent petitioned for divorce.

The explanation above depicts that it is the act of the Respondent being constructively evicted and refused to return to her matrimonial home by her then husband and his family, that compelled her to stay away from the matrimonial home and that can be construed as desertion occasioned by the Respondent, thus, it is correct for the Respondent to say that the Appellant abandoned her since he was the one who contributed to her leaving. In the case of **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293, the Court of Appeal held that:

'It is settled that where one spouse behaves in such a manner that the other is virtually compelled to leave, the former may in law be the deserter. It is imperative for there to be conduct which amounts to dismissal from the consortium.'

It is my considered view that the trial court considered the circumstances of the parties in this Appeal, and made a decision that it was futile to compel them to live together as spouses for it is evident that there is no more love or in the words of the trial magistrate "the hatred situation" between the two. In the case of **John David Mayengo v. Catherina Malembeka**, PC Civil Appeal No. 32 of 2003, this court observed that:

'marriage is a voluntary union of a man and a woman intended to last for their joint lives. It is the parties themselves who are the best judges on what is going on in their joint lives. A crucial ingredient in marriage is love. Once love disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him.'

That said, I am inclined to agree with the findings of the trial court that the marriage between the Appellant and the Respondent has broken down to the extent that it cannot be repaired, so the first ground of the appeal has no merit and is dismissed.

On the second ground which is not very clear in the Memorandum of Appeal but through submission the Appellant claims that the trial magistrate was wrong to grant 40% of the properties that the Respondent found him with. On the side of the Respondent, Mr. Nyambo contended that the Respondent gave evidence at the trial court as regards her contribution in the acquisition of their matrimonial house. The Appellant's contention is that the Respondent found him with the house in dispute, therefore it is not a matrimonial property. Hence, the issue here is whether the said house is matrimonial property or not.

Going through the trial court's judgment it appears that the trial court magistrate relied on the Respondent's evidence in reaching his decision. He was convinced that the house is a marital property and the Respondent had her contribution, there are also developments and or improvements made to the said house and she was therefore entitled to a share of the house. At page 6 of the typed judgment the trial magistrate stated:

'Among factors to be considered in deciding how much party should get from matrimonial assets when the marriage is dissolved is the extent of contribution made by each party. From the above cases, the testimony made by the petitioner, there is no doubt that the alleged properties have been acquired during their marriage, some developments have been made hence the petitioner deserves 40% as her share in that house.'

Distribution of matrimonial properties is governed by section 114 of the LMA. Section 114 (1) of the LMA states that:

'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.'

Further section 114 (3) of the LMA states:

'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.'

The law through subsection (3) of section 114 of the LMA clarifies what constitutes matrimonial property to include the assets owned by one party before the marriage and have been substantially improved during the marriage or the assets acquired by the parties in their joint efforts during the marriage.

In his evidence during trial the Appellant testified that he constructed the house and had been living there before he married the Respondent. On the other hand, the Respondent testified that she found him with a plot on which they built the house with five rooms. She was forthright that there were two rooms on the plot and she helped him improve it until it was completed to the five roomed house.

In dividing the marital properties, the court must also satisfy itself about the contribution of each spouse in the acquisition of the property as provided for under section 114 (2)(b) of the LMA. In **Yesse Mrisho v. Sania**

Abdul, Civil Appeal No. 147 of 2016 (Unreported) 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.'

Furthermore, in our jurisdiction the extent of contribution in acquisition of matrimonial property is a matter of evidence. The Court of Appeal in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 had this to say:

'the extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution'

Basically, a party claiming part of the matrimonial property must justify the extent of their contribution in the acquisition of the said property.

In the current Appeal, the Respondent testified that she had contributed towards the acquisition of the said house. At page 10 of the trial court's proceedings, the Respondent testified that she was engaged in her own activities including running a day care at their home. Thus, it is evident

that the Respondent contributed through not only her wifely duties; see **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32 but also through making substantial improvements to the house. I find the second ground of appeal as unmeritorious and therefore dismiss it.

Regarding the third ground, the Appellant blames the trial magistrate for reaching a decision basing on proceedings with illegalities and irregularities. He has claimed that the Respondent did not bring any witness to prove that they had a matrimonial dispute yet the court decided in her favour, this in his view makes the proceedings and judgment to be with irregularities and illegalities. Arguing against this ground, the Respondent's advocate submitted that the Appellant has failed to show the irregularities and illegalities he complained of and argued that the judgment does not contain any irregularity or any illegality. In addition, there are reasons for the decision reached by the trial court.

There is no law that compels a Petitioner to produce any number of witnesses to warrant a finding that the marriage is irreparably broken down. On the other hand, a look at the proceedings reveals that one of the Appellant's witnesses, DW2 testified that the two were in dispute and do not live together. I am in agreement with the Respondent's counsel that the

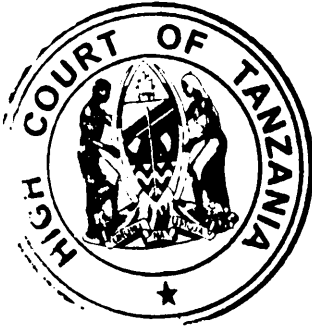
Appellant has failed to state where in the proceedings and or judgment are the alleged irregularities and illegalities that occasioned the miscarriage of justice that the Appellant is alleging. The Appellant claims to not have been supplied with the proceedings, thus, could not analyse them. The proceedings are in the court's file and there is a letter that he wrote seeking to be provided with "*mwongozo wa kesi*" being the proceedings were ready it is not clear why he did not get them, however that not being the subject of this Appeal I shall leave it for another forum.


On irregularities and illegalities as a ground of appeal, the Court of Appeal in the case of **Doto Isoda and 8 others v. Ambogo Elly Ambogo**, Civil Appeal No. 318 of 2021 had this to say:

'It is a trite principle of law that once the illegalities or irregularities are alleged in the impugned decision the same must be apparent on the face of the record...'


Upon reading of the said proceedings and judgment I saw no material irregularities or apparent breach of procedural rules that occasion the infringement of any of the parties' rights. I therefore find that the third ground of appeal is also lacking in merit.

In view of the foregoing, this Appeal is devoid of merit, accordingly it is dismissed. This being a matrimonial matter I make no orders as to costs.




A.A. OMARI
JUDGE
06/06/2023

Judgment delivered and dated 06th day of June, 2023.


A.A. OMARI
JUDGE
06/06/2023