

IN THE HIGH COURT OF UNITED THE REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

MATRIMONIAL APPEAL NO. 7599 OF 2024

*(Originated from Matrimonial Cause No. 100 of 2023 at the
District Court of Temeke at One Stop Judicial Centre)*

JACQUELINE CHACHA ISSAME.....APPLICANT

VERSUS

NICKSON LUDOVICK MTALEMWA.....RESPONDENT

JUDGMENT

30/05/2024 & 18/06/2024

SARWATT, J.;

The parties to the present appeal were a husband and a wife, after contracting their Christian marriage on 18th April 2009. Throughout their union, the parties were blessed with two issues, Precious Nickson, aged 13, and Prince Nickson, aged 9. Their marriage came to an end on 10th November 2023 upon being dissolved by the District Court of Temeke at One

Stop Judicial Centre following the petition for divorce filed by the appellant.

In her petition, the appellant prayed for the decree of divorce, division of matrimonial properties, custody of their children, and an order for maintenance to the tune of Tshs 1,500,000/= per month. Upon full trial, the Court was satisfied that the marriage between them was broken down beyond repair and issued the decree for divorce, ordered the division of their matrimonial assets, and granted custody of Precious Nickson Ludovick to the respondent while Prince Nickson Ludovick was placed under the custody of the appellant and the respondent was ordered to pay Tsh. 100,000 per month as maintenance.

Aggrieved, the appellant preferred to appeal before this Court with three grounds as follows;

- i. That the District Court at One Stop Judicial Centre erred in law and, in fact by deciding that the respondent has the responsibility to pay back the loan of Akiba Commercial Bank (ACB) while she is not the one who had taken it.*
- ii. That the District Court at One Stop Judicial Centre erred in law and, in fact, gave the respondent the custody of PRECIOUS*

NICKSON LUDOVICK, who is a girl, without considering the best interest of the child in her upbringing, education, and health.

iii. That the District Court at One Stop Judicial Centre erred in law and, in fact, by ordering only Tshs.100,000/= as child maintenance per month without taking into account that the respondent's financial position is good and he is the practicing advocate in White Law Chamber Advocates.

During the hearing of the appeal, both parties appeared in person unrepresented. Since the hearing of the appeal was agreed to be by way of written submissions, the appellant submission was drawn by the Women Legal Aid Centre (WLAC).

Submitting on the first ground of appeal, the appellant advanced that it was the respondent who took a loan of 100,000,000/= at Akiba Commercial Bank and decided to put their house at Majohe as security. The contract was between the respondent and the Bank. She added since it was the respondent who breached the contract by defaulting to pay the loan, he must pay the same.

Further, the appellant referred the Court to section 37 of the Law of Contract

Act, Cap 345, which provides for parties' obligation to perform their respective promises and the Court of Appeal case, **Simon Kichele Chacha v Avelina M. Kilawe**, Civil Appeal no 160 of 2018 which insists that parties are bound by their agreement they entered.

It was the appellant's contention that the trial Court erred when it ordered 50% distribution of the house between the parties after payment of the loan. The appellant argued that the Court should order the respondent to pay the loan alone as she was not a party to the loan contract, and the order of 50% distribution on the house should remain intact.

On the second ground of appeal, the appellant argued that the District Court had jurisdiction to order custody of the children as per section 125(1) of the Law of Marriage Act (the Law). However, she advanced that before the Court makes an order for custody, it should consider the criteria as stipulated under section 125 (2)(a)(b) and (c) of the Law.

According to the appellant, the child is female in gender whose behavior is not so good, and she has reached puberty, where she will need guidance from her mother as there are things that she will not feel comfortable telling her father. The appellant further advanced that the trial court ought to have

considered the best welfare of the child as required by sections 4(2) and 37(4) of the Law of the Child, Cap 13.

The appellant also attacked the trial Court as it did not consider the importance of a child staying with her mother as required under section 39(1) of The Law of Child Act. On another note, the appellant also pointed out that the Court erred as it failed to request the social welfare report, which was prepared after getting the opinion of the children on whose custody they want to be placed as required under section 45(1) and (2) of the Law of the Child Act.

Submitting on the third ground of appeal, the appellant advanced that section 129 (1) of the Law casts the respondent with the duty to maintain his children and the Law of the Child Act, under section 44(b) and (d) insists that before the court issue the order for maintenance it must consider the earning capacity of the person as well as the costs of living. It was the appellant's contention that there is nowhere in the Court judgment that shows that before issuing the order, the magistrate was satisfied that the respondent's ability to pay is Tsh. 100,000/= per month, the amount which is very low compared to the cost of living, and the respondent, being a lawyer and having his law firm, can afford to pay Tsh. 1,500,000/= per month.

The respondent, in opposing the appeal, before embarking on his submission, wanted to notify that, this Court cannot determine a ground of appeal as raised by the appellant because she raised some new issues that the trial Court did not determine. According to the respondent, the appellant raised new issues on ground one. He submitted that it is a known principle in our jurisprudence that the appellate Court cannot determine matters that were not raised nor decided by the trial Court. To support his assertion, he cited the decision in the case of **Hassan Bundala @ Swaga v Republic**, Criminal Appeal No.386 of 2015.

The appellant went on to submit on the first ground that, before the loan was taken, both the appellant and the respondent agreed as husband and wife. He signed the loan contract with the Bank because the title deed was in his name, the act which cannot be interpreted that he has the duty to perform the contract alone. He further pointed out that he could not have borrowed the money without the consent of the appellant, and the money was used to complete the house in dispute, pay school fees, and maintain the family at large. Therefore, since the house was equally distributed between them, then the obligation on that particular house before and after divorce has to be shared equally.

On the second ground, the respondent referred the Court to section 4(2) of the Law of the Child Act, which provides that when making the order for custody, the paramount consideration is the best interest of the child. According to the respondent, it is in the best interest of the said child if she is placed under the custody of the respondent as she was living with him for five years, and changing the custody now will disturb the equilibrium of the said child, something which is not permitted by law.

He further provided that the appellant's argument that the child is going through body changes and growth does not hold water, as the said body changes had occurred while the child was staying with the respondent. Since the child is studying at a boarding school, she stays at home only 60 days out of 360 in a year. She has always been taking care of herself.

The respondent went ahead and cited section 125(1) of the Law of Marriage Act and the decision on the case of **Celestine Kilala and Halima Yusuph v Restituta Celestine Kilala** (1980) TLR 76, which insist that when issues of the marriage are above seven years can be placed under the custody of the father.

On the third ground, he submitted that the trial Court ordered him to pay

Tshs 100,000/= for the food of the child. The respondent was ordered to provide for all other needs in respect of the child. According to him, this is more than enough because the said child as he stays with his father on Friday and returns to his mother on Monday. He added since the days that the child stays with his mother are school days, and the child gets breakfast and lunch at school, Tshs 100,000/= is enough to cover dinner for the said child in a month.

On the appellant's argument that he has good income because he is an advocate and owns a Law Firm, the respondent advanced that the argument is weak since not all advocates have money, especially in a current situation whereby the legal business is weak. The respondent further contended that it was the duty of the appellant to prove his income. He cited sections 110 and 111 of The Law of Evidence Act, which casts the duty of proof to those who allege. To support his assertions, he cited the case of **Tatu Mohamed v Maua Mohamed**, Civil Appeal No. 31 of 2000, and the case of the **Attorney General and others v Eligi Edward and 104 others**(unreported).

Rejoining, the appellant firstly attacked the respondent's assertion that the present appeal is centered on matters that were not discussed at the trial .

Court and advanced that the present appeal is centered on the issue of the loan taken on Majohe's house, custody of children and the amount for maintenance, which were the issues discussed in the trial Court.

On the raised ground of appeal, the appellant reiterated what she had submitted earlier and added that there is nowhere on the loan agreement that shows that she was a party to the contract. Therefore the respondent should be responsible for paying back the loan he took.

Having heard the submission of both parties and the court records, I'm now tasked to determine if the present appeal is meritorious.

Before embarking on determining the grounds of appeal, I would like to address the issue raised by the respondent that this Court cannot determine the appeal because the raised grounds of appeal are new issues that the trial Court did not determine. While I agree with the respondent that in the appeal stage, the Court cannot decide on new matters that were neither raised nor decided on the trial Court, in the present case, looking at the raised grounds of appeal, the appellant challenges the order of payment of the loan issued by the trial Court, the order for custody and the order for maintenance. Therefore, there are no new matters that the appellant raised in the present

appeal as alleged by the respondent.

Back to the appeal grounds, the appellant, on the first ground, faulted the trial Court's order requiring the parties to have equal distribution on the house after the debt had been paid. Her main argument is that she was not a party to the loan agreement. Despite this argument by the appellant, in her evidence, she told the trial Court that when the respondent was taking the loan, she was the surety. Further, during cross-examination, she acknowledged that when the appellant was taking the loan, she was involved as the wife. Based on that piece of evidence, it is obvious that the respondent knew that the appellant was using their house as loan security. By consenting the house to be used as security for the loan, impliedly, she was also party to the loan agreement.

It should be noted that when dividing matrimonial assets, among the factors that the Court is required to consider are the debts that were owed by either party which was contracted for their joint efforts. This is in accordance with section 114(2) (c) of the Law of Marriage Act. The provision provides;

"In exercising the power conferred by subsection (1), the Court shall have regard—

a) to the customs of the community to which the parties belong;

b) to the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets;

c) to any debts owing by either party which were contracted for their joint benefit and

d) to the needs of the infant children, if any, of the marriage,”

From the above provision of the law, the Court, when ordering the distribution of matrimonial assets, is required to consider, among other things, the debts that either party acquired through their joint efforts. In the present case, the respondent, in his evidence, told the Court that the loan was taken so that they could establish a charcoal business as well as to cater to the family's needs. From that evidence, it can be correctly said that the debt was incurred for their joint benefit. Therefore the trial Court rightly ordered the loan be paid first before distribution of the house. For the stated reasons, therefore, the first ground fails.

On the second ground, the appellant challenges the trial Court order, which placed their girl child under the custody of the respondent. According to the

appellant, the said child is going through body change, and some issues will be challenging for her to tell the respondent. She argues that it will be in the best interest of the child to be under the custody of her mother.

When deciding the issue of custody the paramount consideration is the best interest of the child. This principle is embodied in our laws. Section 4(2) of The Law of the Child Act provides,

"The best interest of a child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts or administrative bodies."

The Court of Appeal in the case of **Nacky Esther Nnyange v Mihayo Marijani Wilmore**, Civil Appeal no.169 of 2019, provided for the factors that can be considered in the determination of the best interest of the child.

It said;

"In applications for custody, the best interest of the child is determined in consideration of factors as the age and sex of the child, the independent views of the child, the desirability to keep siblings together, continuity in the care and control of the child, the child's physical, emotional and educational

needs, the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent".

The law insists that, when determining custody of infants, the paramount consideration should be the welfare of the child. However the Court should also consider other matters such as provided for under section 125(2) of The Law of Marriage Act. Section 125(2) provides;

"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."*

In the present case, the trial Court considered the opinions of the children and observed that it would be in the children's best interest if Precious Nickson Ludovick to be placed under the custody of the respondent and Prince Nickson Ludovick to be placed under the custody of the appellant.

While I agree with the appellant that the child's gender and the desirability of the children to stay together are among the factors that the Court should consider when determining the issues of custody, however the best interest of the child must be in line with these other factors. The appellant alleges that the said child is going through body changes, and it will be in her best interest to be placed with her mother. Despite the present argument, it is on record the said child is studying in a boarding school and the only time she is home is during holidays.

Considering the opinion of the child and the fact that most of the time, she is away, I don't see the need to change the order of custody as made by the trial Court. However, during the holidays, when schools are closed, both parents should have a chance to stay with the child by dividing the child's leave equally.

The third ground centered on the issue of maintenance order as the appellant alleges that Tsh.100,000/=, as ordered by the trial Court, is not enough considering the present costs of living. It should be noted that the Law of Child Act under section 44 provides for the matters that the Court should consider when making the order for maintenance. The section provides;

"A court shall consider the following matters when making a maintenance order

- a. the income and wealth of both parents of the child or the person legally liable to maintain the child,*
- b. any impairment of the earning capacity of the person with the duty to maintain the child*
- c. the financial responsibility of the person with respect to the maintenance of other children*
- d. the cost of living in the areas where the child is resident, and*
- e. the rights of the child under this act."*

In the present case, though the trial Court ordered the respondent to provide for sh. 100,000/= as maintenance, it did not indicate what are the bases for such order. The income of the person liable to maintain the child is among the factors that the Court should consider when making the order for maintenance. At the trial Court, the income of both parties was not established, though the appellant alleges that the respondent earns more than Tshs 5,000,000/= per month, this fact was not established during trial. However, during the trial, the respondent told the Court that the appellant was not working and was not financially capable of taking care of the

children.

Basing on that piece of evidence, it is obvious that the money that will be used to maintain the child will come from the respondent, and considering the present costs of living, I agree with the appellant the amount is not enough, and for that reason, this Court orders the respondent to pay Tsh.200,000 per month as maintenance.

In the event this appeal is allowed to the extent provided above, and I make no order as to costs.

Dated at Dar es Salaam this 18th day of June, 2024.



S. S. SARWATT

JUDGE

Delivered in the presence of the appellant in Person and Fabian Seif Advocate for the respondent.

The right of appeal is fully explained.