IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 50 OF 1993

ASSAH E. MGONJA ..... APPELLANT

versus

ELIESKIA I. MGONJA ..... RESPONDENT

JUDGEMENT

MWAIKASU, J:-

The parties in this appeal, namely ASSAH E. MGONJA, who is the appellant, and one ELIESKIA I. MGONJA, were formerly husband and wife, having entered a Christian marriage sometime in 1980. Due to misunderstanding and upon the appellant's petition their marriage was legally dissolved on 19/4/1993 by the order of the lower court.

Among the reliefs prayed for, besides the dissolution of the marriage, were division of matrimonial assets; the custody of all the children maintenance for all the children and any other relief.

There was evidence adduced by the petitioner which was not at all disputed by the Respondent, that during their marriage the couple was blessed with four children, namely Joel Mgonja, Grace Mgonja, Richard Mgonja, and Baraka Mgonja, then aged 12yrs, 10yrs, 6yrs and 3yrs old, respectively. During such duration of their marriage the couple also managed to build a house; purchased one m/v Reg.No.TZ.89712, make Toyota Hillux Pickup, now out of Order, and developed a farm that had been purchased by the Respondent in 1977.

In determining the reliefs song he by the appellant, the lower court declined to make any order in respect of the house on the ground that the same had to remain a family house to shelter the children of the marriage; no orders was made in respect of the m/v on the ground that there was no evidence given by the appellant that during the subsistence of their marriage they had acquired a motor vehicle Reg.No. TZ.89712, make Toyota Hillux Pick up; and as regards the custody of children the learned trial magistrate considered the ages only of the four children and and then made the order that the three older children had to remain in the custody ofthe Respondent; while the youngest had to be under the custody and sole maintenance of the appellant.

It is against such decision of the trial court on the reliefs, other than dissolution of the marriage, sought by the appellant that this appeal has been proferred to this Court.

Arguing her appeal, the appellant has maintained, among other things that she cannot accept that children of the marriage are entitled to inherit the properties of their parents while the parents are still alive, which would appear to be the effect of the decision of the trial court in respect of the house jointly acquired with the Respondent; that the m/v Reg.No.TZ 89712 Toyota Hillux had been purchased by them in 1987; and that though the farm was purchased by the Respondent in 1977, before their marriage, it was herself to who had played a major role in developing it by supervising the clearing of it, providing fertilizers and planting with pineapples, oranges and banana plantains all of which are said to be growing in the farm. Besides it is on such very farm that their matrimonial house was later built.

Arguing the appeal for the Respondent, Mr. Kashumbugu, learned advocate, has contended, among other things, in support of the judgement of the lower court to the effect that there was no evidence relating to the existence of m/v TZ 89712, Toyota Hillux Pick-up or as to whether she ever contributed in its acquisition, how such m/v was so acquired, and whether the same was so acquired during their marriage. As regards the farm, it has been his contention that as such farm was bought by the Respondent in 1977, at the time when they were not married, the appellant cannot claim any interest in it. As regards the division of the matrimonial house he has argued that it was upon considering the interests of the nine children of the Respondent, of whom four were begotten with the appellant, that the lower court declined to order the division of such matrimonial house. However, the learned counsel would be prepared to accept determination of the interests of the parties in the matrimonial house, irrespective of whether or not the property is to be divided among the interested parties.

In the light of the evidence adduced before the lower court, it is my considered opinion that it was wrong for the learned trial magistrate to deprive the appellant of her interests in the matrimonial house by refraining to determine the same for the simple reason that there were children of the marriage who stood to benefit. As rightly contended by the appellant, that was not a disposal of the property in the course of an administration of deceased's estate. The guiding principles in the division of matrimonial property following a divorce are those provided for under S.114 of the Law of Marriage Act 1971; as also interpreted by the court of Appeal in Bi-Hawa's case. What then does the law say?

In terms of S.114 of the Law of Marriage Act 1971, it is there provided as follows:-

"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.

(2) In exercising the power conferred by subs(1) the court shall have regard

(a) to the custom 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;

(d) to the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquited during a 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."

In this case there has been no dispute as to the extent of contribution by either party in the acquision of both the house and the m/v and in the development of the farm that was purchased by the Respondent prior to their marriage. For while the appellant claimed before the lower court to have acquired both the house and m/v during their marriage, there was no dispute raised by the Respondent as to the extent of contribution by either of them. Neither did the Respondent dispute the appellant's extent of involvement in their efforts to develop their farm. As such there can be no question as to the extent of contribution by either of the parties. They have, in the circumstances, to be taken to have had equal contribution in the acquisition of both the house, the motor vehicle and in the development of the farm. I also take note of the fact that among the needs of infant

children that is those children who have not reached the age of majority as to be able to lead an independant life, there is the need for adequate and suitable shelter. The duty to provide the same lies upon the father, unless unable to do so, for reasons of physical or mental ill-health. That can be effected by renting a house or building one for the purpose. In considering such interests of infant children, it is the party who has custody of the children who has to be awarded control of the matrimonial home for the benefit of the children of the marriage. Nevertheless, that should not be construed as a way to deprive the other party denied of such possession, of any interest in the house. It is therefore imperative that despite awarding possession of the house to the party who has custody of the infant children the share of the other party who has been deprived of such possession must be determined, so that in the event of an attempt by the party who has possession of the house to dispose of it, or upon such other party's dealty, the interest of the party who has been deprived of possession of such house, is duly recognized and protected.

It is in the light of such considerations and in terms of the provisions of S.114 of the Law of marriage Act 1971, that this Court orders as follows that is to say:

(a) that the appellant is entitled to two fifths (2/5) of the value of both the house and the farm acquired and developed, respectively, by the parties during their marriage,

(b) that the parties are entitled to an equal share of the proceeds of sale upon the sale of the m/v TZ 89712 Toyota Hillux Pick-up.

(c) that the matrimonial house and farm shall remain in the possession of the party who has custody of infant children of the marriage until they reach the age of majority and have started leading an independent life, after which either party shall be entitled and have liberty to demand division of such matrimonial house and farm, by sale of the same.

(d) Upon each party having custody of some of the infant children of the marriage, then both the house and farm shall be subject to sale and divided on equal basis, in order to enable

each party establish a new home for the children.

Now coming to the issue of maintenance, it is understood that the Respondent is still working with the Ministry of Education and culture and the appellant is working with TAGOSODE on contract basis. The law on maintenance of children and spouses is very clear. As regards maintenance of children, that is spelt out under S.129 of the Law of Marriage Act 1971. It is there provided as follows:

> "129-(1) save where an agreement or order of court otherwise provides it shall be the duty of a man to maintain his infant 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.
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> (2) Subject to the provisions of Subs. (I), it shall be the duty of a woman to maintain or contribute to the maintenance of her infant children if their father is dead, or his whereabouts are unknown or if and so far as he is unable to maintain them."

It is clear from the foregoing provision that while the law imposes a duty upon father of a child to maintain such child, such duty may be shifted by an order of a court where circumstances so demand. That is what happened in the instant case in respect of the youngest child that was placed under the custody of the appellant. It appears that the lower court did so, and it had the mandate under our law to do so, upon being made aware that the appellant had her own independent source of income, as she was then said to be working with TAGOSODE. That being the position the order of the lower court as to the maintenance by the appellant of the infant child under the custody of the appellant cannot be interferred with.

Coming to the issue of the custody of the children of the marriage, the four children were then aged between 12yrs and 3yrs. It upon considering the ages of the children only that the lower court decided to place only

the youngest child under the custody of the appellant. The children were not given any opportunity to choose as between their divorcing parents as with whom they would feel more comfortable to live. Yet in terms of subs.(2) of S.125 of the Law of Marriage Act 1971, it is provided as follows:

> "125 - (2) In deciding in whose custody on infant should be placed the paramount consideration shall be the welfare of the infant and subject to this, the court shall have regard -
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> (a) to the wishes of the parents of the infant; and
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> (b) to the wishes of the infant, where he or she is of an age to express an independent opinion; and
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> (c) to the customs of the community to which the parties belong.
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> (3) There shall be a rebuttable presumption that it is for the good of an infant below the age of seven years to be with his or her mother but in deciding whether the presumption applies to the facts of any particular case, the court shall have regard to the undersirability of disturbing the life of an infant by changes of custody.
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> (4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently."

It is evident from the foregoing provisions that the three children of the marriage then aged 12yrs, 10yrs and 6yrs, ought to have been heard before being placed under the custody of the Respondent, as with whom between the divorcing parents they would have liked most to live. It is also evident that the lower court erred in law, to place the 6-year old child under the custody of the Respondent; without there being any reasonable grounds to rebut the presumption that a child of that age ought to be placed under the custody of the mother. Of course the situation now has changed. What, however, remains to be regularized, is the opportunity to be given to the other three children of the marriage begotten by the appellant and the Respondent, to choose as between the

two parents, with whom they would most prefer to live. In the circumstances, I set aside the lower court's order for the custody of the three older children all of whom had been placed upon the Respondent and order that such children be required to appear before the lower court and allowed to exercise such choice, in accordance with the law.

Accordingly, I allow this appeal in part, and make no order for costs.

R. MWAIKASU

JUDGE

Delivered in chambers at Dar es Salaam this 8th day of September 1995, in the presence of both parties.

R. MWAIKASU

JUDGE.

8/9/1995.