IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO 22 of 2011

(Originates from the Judgment and Decree of the District Court of Temeke at Temeke-Kangwa-RM- in the Matrimonial Cause No. 15 of 2010 dated 10th January 2011)

AISHA ANDREW MWINUKA..... APPELLANT

VS

AMANI RAMADHANI SEIF..... RESPONDENT

JUDGMENT

Date of last Order: 21-07-2011
Date of Judgment: 17-08-2011

JUMA, J.:

This appeal by the appellant Aisha Andrew Mwinuka originates from the Judgment and Decree of the District Court of Temeke at Temeke (Kangwa-RM) which was delivered on 10th January 2011 in Matrimonial Cause No. 15 of 2010. By a petition she filed at the district court on 13th April 2010, the appellant sought a declaration that her marriage to the respondent Amani Ramadhani Seif had irreparably broken down and the trial court should issue a decree for divorce. Moreover, appellant wanted the trial court to order not only equal division of their

matrimonial assets; but also to grant her full custody of the issues of her marriage to Amani Ramadhani Seif.

In his reply to the petition for divorce at the district court, respondent in essence conceded that their marriage had broken down irreparably. Like the appellant, respondent also wanted the court to divide their matrimonial assets in accordance with Islamic law. In addition, in the division of matrimonial asset the respondent asked the trial court to take into account the second wife the respondent had married in accordance with Islamic tradition. Respondent also wanted the custody of all the children except those under the age of seven.

The trial magistrate dissolved the marriage; awarded the appellant a house at Chanika and the respondent obtained the house at Mbagala Kiburugwa. Custody of the two issues of the marriage went to the respondent, while the custody of the last born to that marriage went to the appellant.

Against the judgment of the trial district court, the appellant filed this appeal containing six grounds. In her first and sixth grounds of appeal, appellant contends that the trial magistrate did not specifically divide the matrimonial assets. Appellant

further contended that the house at Chanika which the court had awarded her was underdeveloped. As her second ground, appellant contends that the trial court erred in awarding the custody of Fatina Aman and Rahim Aman to the respondent. Appellant's third and fourth grounds of appeal centres on her grievance that the learned trial magistrate erred in law and fact in relying on the report of the Government Chemist which was not tendered in court and as a result appellant was denied an opportunity to cross examine upon it. In her fifth ground, appellant asserted that the learned trial magistrate erred in law and fact by failing to determine the question of the maintenance and custody of one issue of the marriage- Mwinyichande Aman.

Appellant's written submissions on the grounds of appeal were filed on 19th May 2011 while respondent's submissions were filed on his behalf by F. A. M. Mgare on 2nd June 2011. The exchange of written submissions ended on 22nd June 2011 when appellant presented her rejoinder submissions.

Appellant submitted that she and her children had been residing in the matrimonial house at Mbagala Kiburugwa. She had also contributed much in the development of that house

making it her own home. Further, appellant referred me to section 114 (2) (d) of the **Law of Marriage Act, Cap. 29 R.E. 2002** and contended that the trial magistrate failed to seek the guidance of this provision regarding matters the trial court should have taken into account when dividing matrimonial assets. Appellant submitted further that section 114 (2) (d) in mandatory terms, obliges the courts to take into account the needs of children who have not attained the age of eighteen when dividing matrimonial assets. According to the appellant, the needs of the infant children were not taken into account when the trial court awarded the respondent the house at Mbagala Kiburugwa.

Responding to the submission that the learned trial magistrate erred by failing to be guided by section 114 (2) (d) of the **Law of Marriage Act**, respondent contended that the issue of appellant having resided in a certain house with children of their marriage is not amongst the matters which the trial court could take into account when dividing matrimonial assets within the meaning of section 114 (2) (d) of the **Law of Marriage Act**. Respondent submitted further that interests of children were taken care of by the trial court because not only did the trial

court placed the custody of the two issues of the marriage to the respondent, but it also required the respondent to provide maintenance to one child born to their marriage who remained under custody of the appellant.

After hearing the submissions of both parties and upon my perusal of the record of the trial court proceedings, there is no doubt that the learned trial magistrate reached a correct conclusion that the marriage between the appellant and respondent had irretrievably broken down. This appeal is as a result restricted to the issues of division of matrimonial assets, custody and maintenance of the issues of the marriage between the appellant and respondent. I will at the outset determine the first and the sixth grounds of appeal together. In the first ground of appeal the appellant is aggrieved by the division of matrimonial houses, and in the sixth ground, she contends that the learned trial magistrate failed to divide all the listed matrimonial assets that were proved to have been jointly acquired during the subsistence of their marriage.

From submissions of the parties on whether the needs of the infant children were taken into account when the trial court divided the house at Mbagala Kiburugwa to the respondent and

the one at Chanika to the appellant; my determination must inevitably begin from the provisions of the law governing the power of courts to divide matrimonial assets. The power of courts in Tanzania to divide matrimonial assets when a marriage irretrievably breaks down is set out under section 114-(1) of the **Law of Marriage Act, 1971**. This provision states:

> *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.*

My reading of this provision of the **Law of Marriage Act** underscores the need of the trial court to first identify assets that was acquired by divorcing or separating couples by their joint efforts during the subsistence of their marriage. After identifying the assets, the trial court is required to order division between the parties. I will ask myself whether the learned trial magistrate took the first important step before division of assets by identifying jointly acquired matrimonial assets for purposes of division. The appellant in her paragraph 5 of the Petition for

Divorce lists assets she and respondent acquired during the subsistence of their marriage:

(i) A three (3) bedroom house at Chanika, Dar es Salaam,

(ii) A four (4) bedroom house at Mbagala Kiburugwa kwa Nyoka, Dar es Salaam,

(iii) A saloon car: - Toyota Mark II Grande (Baloon), with Registration No. T 904 ASF,

(iv) Plot No. 64 Block 2 Kilimanjaro located at Morogoro,

(v) A business office located at Kariakoo with TIN No. 106 802 181, and

(vi) Household items/furniture.

With due respect, the learned trial magistrate on page 7 of his judgment properly and in my view adequately took the important initial step to identify the matrimonial assets which were jointly acquired by the appellant and respondent. The trial court basically agreed that the appellant had contributed to the acquisition of the assets which she listed in paragraph 5 of her Petition for Divorce:

> *"From the facts and evidence adduced by the Petitioner... there is no direct evidence that the assets were acquired by their joint efforts. However the Petitioner contributed much to enable the Respondent*

to acquire these assets through different ways like keeping them, improving them, selling on their shop at Kariakoo, bringing up children, cleaning house, taking care of the ... cooking, ironing and providing conducive environment for him. ***All these domestic duties amounted to contribution ..... the facts which were not negated by the respondent that the assets listed by the Petitioner are the assets which they acquired while they were together.***"

The outstanding bone of contention in this ground of appeal is methodology the trial magistrate had used to divide the listed matrimonial assets and whether all the listed assets were actually divided between the appellant and the respondent. Appellant contends that the trial magistrate should have given her the house at Mbagala Kiburugwa because it would have taken care of the interests of their infant children. Respondent on the other hand, does not share this interpretation of section 114 (1) (d) of the **Law of Marriage Act** and supports the decision of the learned trial magistrate.

Having found that the assets which listed in paragraph 5 of the Petition for Divorce were jointly acquired by the appellant and respondent, the trial magistrate needed the guidance of subsection (2) of section 114 of the **Law of Marriage Act, 1971** on the modality of division of the listed assets:

(2) 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,

and subject to those considerations, shall incline towards equality of division.

The Islamic law, which the respondent asked the trial court to apply, is one of the factors which the trial court could have considered under section 114 (2) (a) named as "customs of the community to which the parties belong."

I have perused the Judgment of the trial court to determine what factors within subsection (2) of section 114 of **LMA** guided the trial magistrate when he divided the matrimonial assets. With due respect, I have three problems with the way the learned trial magistrate proceeded to divide the matrimonial assets. First, the orders of the learned trial magistrate were restricted to only the matrimonial house at Chanika which the

trial court gave the appellant and the house at Mbagala Kiburugwa which went to the respondent. Secondly; even with regard to these two houses, the learned trial magistrate did not indicate what factors within subsection (2) of section 114 of **LMA** that guided the trial court in the division of the house at Chanika to the appellant and the house at Mbagala Kiburugwa to the respondent. Thirdly; the trial magistrate clearly said nothing about the rest of assets itemised in paragraph 5 of the Petition for Divorce. In other words, the orders of the trial court did not extend to the division of the saloon car; Plot No. 64 Block 2 Kilimanjaro located at Morogoro; a business office located at Kariakoo with TIN No. 106 802 181; and the household items/ furniture.

It was not enough for the learned trial magistrate to state on page 7 of his judgment that ***the assets listed by the Petitioner are the assets which they acquired while they were together***, but to restrict his division of the matrimonial assets to the two houses at Mbagala and at Chanika. Where a trial court makes a finding and identifies matrimonial assets jointly acquired during the subsistence of a marriage, that court has a legal duty to issue appropriate orders with regard to all the itemized

matrimonial assets. That court cannot pick only a few of matrimonial assets for the purposes of division. From my re-evaluation of evidence and the judgment of the trial court I am not in any doubt that the learned magistrate did not sufficiently address himself to the division of all the listed matrimonial assets. I make a finding that the first and sixth grounds appeal have merit and are hereby allowed.

From the submission of the parties, it is obvious to me that the second, third, fourth and fifth grounds of appeal can conveniently be disposed of together. The second ground of appeal centres on the grant of custody of Fatina Aman and Rahim Aman to the respondent. The third ground of appeal centres on the decision of the learned trial magistrate to rely on the report purportedly made by a Government Chemist. The trial magistrate relied on this report purportedly profiling the DNA, to conclude that the respondent is not the biological father of Mwinyichande Amani.

Appellant contends that this report was not tendered in court by its author and she was hence denied a chance to cross examine on the report. The fifth ground of appeal centres on the complaint by the appellant that the learned trial magistrate

relied on the report of the Government Chemist to not only determine the paternity of one of the children of the marriage (Mwinyichande Aman) but to decline to issue any order regarding the maintenance and custody of Mwinyichande Aman.

With regard to the custody of Fatina Aman and Rahim Aman, it was submitted on behalf of the appellant that the welfare of the children envisaged by section 125 (2) of the **Law of Marriage Act**, was not taken into account when the court awarded respondent the custody of the two children. Further, appellant contended that the welfare of the children would not be served since the respondent had married a second wife. In his replying submissions on the custody of the two children, the respondent noted that the trial court while receiving evidence had the opportunity to assess the surrounding circumstances and reached a correct decision on custody of the two children.

Having given due consideration, to the submissions of the opposing parties on the issue of custody of Fatina Aman and Rahim Aman; I will with due respect decline to interfere with the decision of the learned trial magistrate. The learned magistrate on pages 7 and 8 of his judgment was in my considered opinion

properly guided by the provisions of section 125 of the **Law of Marriage Act, 1971** on the paramount importance of the welfare of the children when determining their custody. The court found that the respondent who was gainfully employed was better placed to take custody of Fatina Aman and Rahim Aman who were above seven years of age, and both were attending a boarding school. Similarly the trial court was properly guided by welfare considerations when it left the then 2 year old Ibrahim (last born) to the custody of appellant, its mother. The second ground of appeal is as a result found to be without merit and it is hereby dismissed.

The third and fourth grounds of appeal raise an interesting issue regarding the way the trial magistrate used the report of the Government Chemist to tenuously conclude that respondent was biological father to only three of the four children of the marriage, and the respondent was not the biological father to Mwichande Aman. On page 8 of his judgment, the learned trial magistrate explained how he drew from the report of the Government Chemistry Laboratory the possibility that the respondent (Aman Seif) may not be a biological father to Mwinyichande Aman. From this possibility, the trial magistrate

in essence merely "advised" the respondent to continue to provide maintenance to Mwinyichande Aman because the respondent had known from very early infancy of this child that he was not the child's biological father.

There is no doubt from the third ground of appeal that paternity of Mwinyichande Aman is an important issue requiring careful re-evaluation by this Court because it has serious legal implications with regard to this child's support and his custody. It is therefore useful to set out the background facts surrounding the paternity of Mwinyichande Aman. In her petition for divorce, the appellant included the then 11 year old Mwinyichande Amani Salum as the first of the four children of her marriage to the respondent. In his reply to the petition, respondent reiterated that this child is not his biological son. Respondent followed this denial further in his evidence in chief (DW1) testified that his marriage to the appellant took place on 17th October 1997 and claimed that he discovered that he was not a biological father of this child on 15 June 1998 when this child was born. Respondent testified that he stumbled upon a hospital clinic card which showed that the biological father of

the child was in fact another man known as Alex, and there was a passport size photograph of Alex.

According to the respondent, it was for the sake of the child, the couple decided to live together but on condition that respondent would marry a second wife which he did almost seven years later in 2005. In her own evidence-in-chief the appellant insisted that she and respondent were married in 1997 and their first born (Mwinyichande Amani) was born in 1998. In so far as the appellant is concerned, the respondent is the biological father to Mwinyichande Amani.

Following the respondent's insistence that he was not a biological father to Mwinyichande Amani; the records of proceedings show that on 6th September 2010, the trial court ordered the parties to undergo DNA tests to determine the paternity of this child. Records further shows that by 24th November 2010 respondent had not as yet received the results from the DNA tests. Respondent asked the trial court to proceed with setting the date for its judgment. That judgment was finally delivered on 10th January 2010. My scrutiny of the trial court records clearly confirms the appellant's contention that that DNA report was neither tendered before the trial court

nor was it subjected to any cross examination by the parties concerned.

It is clear from the proceedings that the report profiling the DNA results came to the attention of the learned trial magistrate after the closure of the defence case and while he was writing his judgement. The DNA profiling report is dated 7th December 2010, well after 24th November 2010 when parties last appeared before the court to set the date for judgment. It is not clear why the report was not tendered before the trial court. All the same this report was a decisive factor in the judgment of the learned trial magistrate when he stated on page 6:

> *".. a Government Chemistry report of 7-12-2010 stated that after examining the parties (respondent and Mwinyichande Amani) the report or results shows that possibility of respondent to be the father is 0.00%."*

With due respect, the learned trial magistrate erred in law by relying on the DNA report while writing his judgment and without according the parties a prior chance to cross examine on its veracity and authenticity. Paternity of a child is a serious matter which cannot be taken away so easily. It is clear from the evidence that Mwinyichande Amani was born in 1998, which was during the subsistence of the marriage between the

appellant and respondent. Both the appellant and respondent did not bring witnesses to support their different versions regarding the paternity of Mwinyichande Amani. I hereby make a finding and hold that the DNA profiling report should not have been used by the trial magistrate to determine the paternity of a child born during the subsistence of the marriage for purposes of custody and maintenance. The DNA report shall be discarded from the evidence of the trial court.

Having discarded the evidence of the DNA profiling report, the respondent has not in my opinion rebutted the presumption under section 121 of the **Law of Evidence Act, 1967 [Cap. 6 R.E. 2002]** that Mwinyichande Amani is the legitimate son of the appellant and the respondent. The relevant section 121 of the **Law of Evidence** provides,

> ***121***. *The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution the mother remaining unmarried, shall raise a rebuttable presumption that such person is the legitimate son or daughter of that man.*

In the upshot, except for the second ground of appeal which is dismissed the remaining first, sixth, third, fourth and fifth grounds of appeal are hereby allowed. The trial court shall

divide afresh all the listed matrimonial assets. The trial court is directed to seek the guidance of subsection (2) of section 114 of the **Law of Marriage Act, 1971** when dividing all the listed matrimonial assets. Further, the trial court shall determine the maintenance and custody of Mwinyichande Amani taking into account not only his personal wishes, but also the wishes of his parents; and where applicable the customs of the community to which the appellant and respondent belong. Appellant is awarded the costs of this appeal.

It is ordered accordingly.

I.H. Juma
JUDGE
17-08-2011

Delivered in presence of Aisha Andrew Mwinuka (Appellant) and Amani Ramadhani Seif (Respondent).

I.H. Juma
JUDGE
17-08-2011