THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
AT MBEYA
(PC.) MATRIMONIAL APPEAL No. 2 OF 2020.
(Arising from Matrimonial Appeal No. 4 of 2019, in the District Court of Mbozi District, at Vwawa, Original from Matrimonial Cause No. 30 of 2019, in the Primary Court of Mbozi District, at Urban).

LUCAS ENOCK LUVANDA..... APPELLANT
VERSUS
SAYUNI SAMWELI KILAMWEGULA..... RESPONDENT

JUDGMENT

11/02 & 25/03/2021.
UTAMWA, J.

This is a second appeal. The appellant LUCAS ENOCK LUVANDA challenged the judgment dated 28th November, 2019 (impugned judgment) of the District Court of Mbozi District, at Vwawa (the District Court) in Matrimonial Appeal No. 4 of 2019. The matter arose in Matrimonial Cause No. 30 of 2019, in the Primary Court of Mbozi District, at Urban (the trial court). The respondent SAYUNI SAMWELI KILAMWEGULA resisted the appeal.

The brief background of this matter, according to the record, goes thus; the appellant and the respondent were husband and wife respectively. Their union was so considered under the principle of presumption of marriage since they started living together in 2011. They were blessed with one issue of the marriage (Omega Lucas Luvanda, a girl). However, after some years their marriage turned sour. In the year 2019 therefore, the appellant filed a matrimonial matter before the trial court (the Matrimonial Cause No. 30 of 2019) claiming for divorce and custody of children. The respondent disputed the claims by the appellant

before the trial court. In the course of the trial however, an issue on division of matrimonial assets arose though it was not part of the appellant's claim when he instituted the matter through a formal claim form dated 20th June, 2019 before the trial court. The properties which came into issue during the trial included a piece of land (plot), a guest house and at Mbimba area in Mbozi District, a house (rented to some tenants) at Chibuya area of the same District, a farm, a Car (Make prado) and a sunflower-processing plant.

Nevertheless, at the end of the day, the trial court held, through its judgement dated 28th August, 2019, that, the house at Chibuya area was the only property jointly acquired by the parties, hence the single matrimonial asset fit for division. It further held that, the respondent was entitled to only 5 percent (5%) of the value of that house as her share. It also directed that, the issue of the marriage (Omega) who was 7 years at the time of the judgment, should be placed in the custody of her mother, the respondent, following her young age. The appellant was directed to pay Tanzanian shillings (Tshs.) 30, 000/= per month as maintenance for the child. Additionally, the trial court directed him to meet the costs for her health and education.

The respondent (Sayuni) was aggrieved by the decree for divorce, the division of the assets and the order for maintenance made by the trial court. She thus, appealed against the judgment of the trial court to the District Court.

In its turn, and through the impugned judgment, the District Court partially allowed her appeal and partly dismissed it. It essentially upheld the decree for divorce and the order for custody of the child (i. e to be under the respondent). Nevertheless, it raised the maintenance order. It

directed the appellant to pay to the respondent Tshs. 50, 000/= per month as maintenance for the child, i. e for meals. It also directed him to provide for the child's clothing, health services and education. Regarding the division of matrimonial assets, the District Court found that, the respondent (Sayuni) was entitled to shares in the two matrimonial assets namely the house (used for renting) and the guest house. Additionally, it directed that, 30 percent (30%) of the value of those two houses should be given to her.

The appellant (Lucas) was not contended by the impugned judgment of the District Court, hence the appeal at hand. His petition of appeal enveloped the following three grounds of appeal:

1. That, the District Court erred both in law and facts in dividing the property (house) located at Mbimba area to the parties though the same was not among the matrimonial assets.
2. That, the District Court erred both in law and facts in giving excessive shares to the respondent on the matrimonial property (also a house) located at Chibuya area though she contributed nothing to its acquisition, instead, she misused the appellants funds and shops.
3. That, the District Court erred both in law and facts in upholding the judgment of the trial court that had given the custody of the issue of marriage (Omega) to the respondent though she had already attained the age of 7 years without considering her welfare.

Owing to the above grounds of appeal, the appellant urged this court to grant him the following reliefs;

i. That, the impugned judgement and order of the District Court be set aside.

ii. That, the judgment and orders of the trial court be maintained and remain undisturbed.

iii. That, this appeal be allowed.

iv. That, the appellant be allowed to stay with the issue (of marriage).

v. That, costs of the suit be borne by the respondent.

vi. Any other relief as this court may deem just and fit to grant.

The respondent resisted the appeal. Both parties appeared in person and without any legal representation. The appeal was argued by way of written submissions following the directive of this court. This followed the fact that, the parties had agreed to adopt that mode of hearing.

Regarding the first and second grounds of appeal, the appellant essentially argued that, the District Court erred in ordering the division of the two houses at the extent of awarding the respondent the said 30% of the value thereof. This was because, the evidence before the trial court did not favour such a decision. The respondent herself had admitted that her contributions were through advice and some services of preparing meals to the masons who built the houses. The District Court did not thus, comply with the conditions set under section 114(1) and (2) of the Law of Marriage Act, Cap. 29 R. E.2019 (the LMA). These provisions of law guide on matters related to division of matrimonial assets, if any.

Concerning the third ground of appeal the appellant contended that, the District Court erroneously granted the custody of the child to the respondent against section 125 of the LMA. This was because, the

child was 7 years old when the trial court pronounced its judgment. The District Court did not also consider the welfare of the child in making the orders related to her custody.

On her replying submissions, the respondent argued in respect of the first two grounds that, the District Court rightly considered the evidence on record as the first appellate court. It then reached into a fair decision. As to the third ground of appeal, she also advocated for the decision of the District Court in making the orders for custody and maintenance for the child.

I have considered the grounds of appeal, the submissions by both parties, the record and the law. In my view, since no party appealed to this court against the order of the District Court upholding the decree for divorce, this court is entitled to take it that the parties now do not have any dispute regarding the decree for divorce. The court thus, considers the decree for divorce as not in issue between the parties and it will continue to take them as a divorced couple.

Again, since the appellant's grievances against the division of matrimonial assets in his petition of appeal is focused on the two houses only (i. e. the one used for renting and the other as the guests' house) in his petition of appeal, and since the respondent did not file any appeal against the decisions of the District Court regarding the division for the rest of the properties that were at issue before the trial court, this court is entitled to take it that, the only matrimonial assets at issue are currently the above mentioned two houses, henceforth the two houses. This Court thus, finds that, the rest of the properties which were at issue before the trial court are not in issue as far as this appeal is concerned.

Now, owing to the observations made above, I find that, under the circumstances of the case at hand, the first and second grounds of appeal relate to the appellant's dissatisfaction on the division of the two houses. The third ground of appeal, concerns his complaint against the order of custody of the issue of the marriage (Omega). There are thus, only the following two issues for determination before me:

a) Whether or not the District Court was justified in making the order for division of the two houses as it did.
b) Whether or not the District Court rightly upheld the trial court's order that gave the custody of the issue of the marriage (Omega) to the respondent.

In relation to the first issue, I am of the view that, the circumstances of this case encourage answering it in favour of the appellant. This is so due to the following grounds: in the first place, it is true that, according to section 114 (1) of the LMA, a court granting divorce may order division of matrimonial assets between the parties. However, the court does not perform that exercise arbitrarily. The law sets some factors to be considered by the court in performing that task. Such factors are set under section 114(2) of the same Act. The Court of Appeal of Tanzania (the CAT) in the case of **Yesse Mrisho v. Sania Abdul, Civil Appeal No. 147 of 2016, CAT at Mwanza** (unreported, at page 9 of the typed version of the Judgment) underscored that, the import of section 114 of the LMA, is that distribution of matrimonial property is guided by the principles enshrined in the said section.

These provisions of section 114(2) just cited above are couched in mandatory form as follows, and I quote them for a readymade reference:

"114(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,..."

In my view, these provisions apply to division of matrimonial assets depending on the circumstances of each case.

In the matter at hand, the record shows clearly that, the District Court and the trial court only considered the factor set under section 114(2)(b) of the LMA (i. e. regarding the contribution of the married couple to the acquisition of the assets at issue). They did not however, considered the other factors mentioned under section 114(2)(a), (c) and (d) though they were applicable in the circumstances of the case at hand. This court believes that, the factors skipped by the two lower courts were applicable because, according to the evidence on record, the two parties lived in Chimbuya area (a community), they did not live in isolation from other persons. The customs of that area had thus, to be considered, unless there were reasons for not doing so, which said reasons had to be recorded. Again, it is not disputed by the parties that, the appellant had executed a bank loan agreement (a debt) for the benefit of the parties and he is still paying for it. Furthermore, it is not disputed that the parties were blessed with the issue of marriage as I shown before, who needs maintenance, health care and education.

In my further view, considering the factors set by the provisions of the law cited above in dividing the assets is a vital step in such an exercise. It is more so considering the fact that, the law recognises a situation (a rebuttable presumption) where one spouse may own

property alone and in exclusion of the other; see section 60(a) of the LMA as underscored by the CAT in the **Yesse Mrisho case** (supra, at the same page 9 of the judgment). It follows thus, that, though a court of law is empowered to divide matrimonial assets at or after granting divorce to a married couple, its powers cannot be exercised through skipping section 114(2) of the LMA. These provisions of law must be considered by the court together with the evidence adduced by the parties.

There is also one vital sleep committed by the trial court and the District Court in the matter at hand. Both courts made orders in relation to the two landed properties (the two houses) without directing the parties to adequately provide their location. The parties did not also mention if the two houses were on registered land or not. It could not suffice to mention the respective areas of their allocation, i. e. at Mbimba and Chibuye areas correspondingly. One should provide an adequate description of the land at issue for purposes of certainty of court orders. Otherwise, it may be difficult for the court to make certain and executable orders. This court (my brother **Moshi, J.** as he then was) remarked once that, land can only be allocated or owned when distinct and determinable; see the case of **Asumwike Kamwela v. Semu Mwazyunga, High Court, Civil Appeal No; 13 of 1997, at Mbeya...**" It is for this reason that, where a registered landed property is in dispute, disclosing its plot number or title number is important. Otherwise, describing its boundaries sufficiently to identify it from other pieces of land surrounding it is vital. The parties in the case at hand did not however, do so.

It is for the above highlighted importance of properly identifying land under a dispute that, even in other normal suits it is vital to disclose the sufficient description of the land at issue. Order VII rule 3 of the Civil Procedure Code, Cap. 33 R. E. 2019 (the CPC) for example, provides mandatorily that, where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it and, in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such title number. Indeed, my settled opinion is that, though the matter at hand was not a claim of land under the CPC, the practice under that statute applies *mutatis mutandis* in matrimonial proceedings where landed properties are in issue as matrimonial assets. This is for the sake of certain and executable court orders in case of executing the order through sale of the landed property or otherwise.

Owing to the reasons shown above, it is clear that, both the District Court and the trial court offended the provisions of the law above and the violation was fatal. The violation caused the two courts to reach into their respective wrong decisions on the rights of the parties to the two houses at issue. This finding attracts thus, a negative answer to the first issues. I thus, determine this issue negatively that, the District Court was not justified in making the order for division of the two houses as it did. I consequently uphold the first and second grounds of appeal.

Concerning the second issue, my views are that, like the division of matrimonial assets, custody of an issue of marriage is also guided by the law. Section 125 of the LMA makes the pertinent guidance. Section 125(1) for example; vests powers in the court to make an order placing

a child of the marriage in the custody of either of the couple or any other appropriate relative or association. Section 125(2) and (3) of the same Act set factors to be considered by the court in making such order for custody. It guides thus, and I quote it verbatim for ease of reference:

> **"125(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.
>
> **(3)** There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody."

Section 126 and 127 of the LMA provides for some additional conditions that may be set by the court considering custody of an issue of marriage.

It is thus, my settled view that, the factors to be considered in making an order for custody, have to be strictly observed where they are applicable. In the matter at hand, there was no consensus by the two parties on the custody of the child at issue. Each of them wanted to be granted the custody of their child. The conditions under section 125(1)(a) of the LMA (related to the wishes of the parties as parents) could not thus, apply. However, the other conditions were applicable. This is because, as shown above, the welfare of the child is the paramount consideration. Moreover, the child under discussion was undisputedly 7 years when the issue of her custody was being discussed before the trial court. The rebuttable presumption that she ought to

have been in the custody of her mother (the respondent) could not be automatically considered in her (respondent) favour.

The record of the matter at hand nevertheless, shows that, in deciding the issue of custody of the child, neither the trial court nor the District Court considered the applicable factors mentioned above. They did not even consider the paramount factor of the welfare of the child as rightly contended by the appellant. In fact, this is the major consideration a court should take into account in deciding the issue of custody of a child of the marriage; see also decisions of this court in the cases of **Febronia Nicodem v. Yohana Shimba, (PC) Matrimonial Appeal No. 19 of 2019, High Court of Tanzania, at Mwanza** (unreported judgement) and **Festina Kibutu v. Mbaya Ngajimba [1985] TLR 44.**

It is thus obvious that, despite the fact that a court is empowered by law to make an order on the custody of a child of marriage, such powers, like the powers to divide matrimonial assets, are not exercised arbitrarily. They are exercised judiciously and in consideration of the factors set under the provisions of law cited earlier. Such consideration should also base on the evidence from the parties. The two courts below thus, violated the law cited above and the violation was fatal since it caused them to reach into undesirable decisions.

Indeed, I seize this opportunity to remind all lower courts that, the welfare of children is a vital matter under the contemporary local and international laws. It is for this reason that, our legislature enacted the Law of the Child Act, 2009 (Cap. 13 R. E. 2019). The purposes of this piece of legislation are obvious from its long title. The long title shows that, the Act was put in place for the following purposes: to provide for

reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child. Other purposes are to provide for affiliation, foster care, adoption and custody of the child. Moreover, the Act was intended to regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters. Owing to this legislative emphasis, courts of this land should always be mindful of section 125 of the LMA and the provisions of the Law of the Child Act in making orders for custody and maintenance of children upon granting divorce or separation.

Due to the above reasons, I also answer the second issue negatively that, the District Court erred in upholding the trial court's order that had given the custody of the issue of the marriage (Omega) to the respondent. The order related to the maintenance of the child is thus, rendered inoperative because its existence depended on the order for custody of the child which I have held was erroneously made. I thus, also uphold the third ground of appeal.

Having upheld all the grounds of appeal preferred by the appellant, I now consider the reliefs sought by him. In my view, the circumstances of the case do not encourage granting all his reliefs listed earlier. This court can only grant the relief on setting aside the impugned judgment of the District Court for the reasons shown above. I accordingly set aside the said impugned judgment of the District Court.

I further make the following orders which I believe, will meet the justice of the case under the prevailing circumstances: The proceedings of both the District Court and those of the trial court are hereby nullified

and quashed for offending the respective mandatory provisions of the LMA cited above. It must however, be noted that, this nullification and quashing of the proceedings do not concern the issue on the divorce. This is because, the concurrent decisions of the two lower courts granting the divorce were not appealed against to this court by either party. I thus, find that, the issue on divorce was settled and agreed by the parties as hinted previously.

The above mentioned nullification and quashing of the proceedings of both lower courts thus, are in respect of only the issues related to division of matrimonial assets (if any). This is so because, the parties are still in dispute on which are actually, their matrimonial assets and on the extent of the appellants' contribution to the acquisition of such assets (if any). The nullification of the proceedings also concerns the issues of the custody of the child of the marriage (Omega) and her maintenance.

Due to the above reasons, the judgment of the trial court is thus, also set aside. The appeal is consequently, partly upheld and partly dismissed to the extent shown above. Each party shall bear his/her own costs since the two lower courts were instrumental in committing the irregularities discussed above. It is further advised that, if either party still wishes, he/she may approach any competent court for the relevant reliefs mentioned above. Such reliefs are related to only the division of matrimonial assets (if any), custody of the child of marriage and maintenance order (in case it will be necessary to make it). In case any competent lower court will be moved, it shall observe the provisions of the LMA cited above in deciding the questions between the parties. It is further directed that, in case any party institutes the proceedings just

mentioned above, the assessors of the trial court and magistrates of both lower courts who entertained this matter, shall not preside it again. This is for the sake of testing justice from fresh judicial minds and avoiding any possibilities of bias.

Furthermore, for avoidance of doubts, and for the interests of the child of the marriage, it is hereby directed that, she shall continue to be in the custody of the respondent (her mother) temporarily. This particular directive however, is pending either party moving a competent court for necessary and perpetual orders related to her custody. The appellant, as the father of the child is however, reminded of his duty under section 129(1) of the LMA to maintain the child pending permanent court orders for custody and maintenance (if there will be any). It is so ordered.

JHK. UTAMWA.
JUDGE
25/03/2021.

25/03/2021.
CORAM; JHK. Utamwa, J.
Appellant: present in person.
Respondent: present in person.
BC; Ms. Gaudensia, RMA.

Court: Judgment delivered in the presence of the parties, in court, this 25th March, 2021.

JHK. UTAMWA.
JUDGE.
25/03/2021.