**IN THE HIGH COURT OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**ONE STOP JUDICIAL CENTRE AT TEMEKE**

**PC CIVIL APPEAL N0.59 OF 2022**

*(Originating from Civil Appeal Cause No. 51 of 2022 at One Stop Judicial Centre at Temeke, Swai-SRM)*

**RENSON ELISONGUO MREMA.....APPELANT**

***VERSUS***

**SHILOO PAUL MSUYA .....RESPONDENT**

# JUDGMENT

Date of last order: - 14/03/2023
Date of Judgment: - 19/06/2023

## OMARI, J.

The Appellant, Renson Elisonguo Mrema is dissatisfied with the decision of the Temeke District court at the One Stop Judicial Centre in Civil Appeal No. 51 of 2022 as well as the decision of the Temeke Primary Court in Matrimonial Cause No. 473 of 2021 wherein his former wife and the Respondent herein Shilooo Paul Msuya, Petitioned for Divorce and was granted the same with the ancillary orders. He unsuccessfully appealed to the district court and has now approached this court armed with four grounds of appeal as follows:

1. That, both the trial court and the first appellate court magistrates erred in law and facts when erroneously disregarded the Appellant's

evidence towards the acquisition of matrimonial assets jointly acquired with the Respondent and thereby the courts favoured the Respondent without any apparent reasons.

2. That, both the trial and first appellate court magistrates erred in law and facts when misdirected (sic) on the issue of custody of children by giving an ambiguous order in respect of custody of children.
3. That, the first appellate court magistrate erred in law by failure to nullify the proceedings and quash the judgment and decree of the trial court (Temeke Primary Court) after it had entertained the matter without having jurisdiction while the parties had contracted a Christian marriage.
4. That, the first appellate and the trial court magistrates erred in law and facts when(sic) ruled out that the house at Mbweni, Kinondoni District, Dar es Salaam was the sole personal property owned by the Respondent without any proof whatsoever.

On the basis of the four grounds he prayed for this court to allow the Appeal, nullify the proceedings of both lower courts and to set aside the judgment and decrees thereof, then order the matter to be heard by a court of competent jurisdiction. In the alternative, he prayed to be given custody of both children; the division of matrimonial assets to be varied and assessment be done afresh for the interests of justice.

When the matter was called for hearing the Appellant had the services of Raphael David while the Respondent had the services of John James; both learned advocates.

As he began his submission, Mr. David prayed to be allowed to consolidate and submit the first and fourth grounds of appeal and to begin his submission with the second ground of appeal. He submitted that the second ground is centred on the trial court's jurisdiction. He argued that the trial court did not address itself as to whether it had jurisdiction to entertain the matter before it or not. The learned advocate asserted that section 18 (1) (b) of the Magistrates' Courts Act, Cap RE 2019 (the MCA) allows the Primary Court to entertain matrimonial matters but subject to section 75 of the Law of Marriage Act, Cap 29 RE 2019 (the LMA). Mr David went on to state that since the parties contracted a Christian marriage the Primary Court had no jurisdiction and since the issue of jurisdiction can be raised at any time as observed in **Mwananchi Communication and Two Others v. Joshua K.Kajula and Two Others,** Vol 1 TLR (2020) 495. He concluded his submission on the third ground by inviting this court to nullify the proceedings of the two lower courts because the trial court lacked jurisdiction.

Challenging his learned brother's submission on the third ground, Mr. James stated that the Primary Court, District Court, the Court of the Resident Magistrate as well as the High Court all have concurrent jurisdiction on matrimonial proceedings and this was the position in **Yohana Balole v. Anna Benjamin Malongo**, Civil Appeal 18 of 2020 where the Court of Appeal clearly said all courts have original jurisdiction in matrimonial proceedings. Therefore, the Appellant's allegation that the Primary Court does not have jurisdiction for the reason that the parties were married in the Christian form cannot be right. The primary court, in his view is vested with the jurisdiction regardless of the form of marriage. He concluded his submission of the third ground of appeal by distinguishing the **Mwananchi Communication and Two Others v. Joshua K.Kajula and Two Others** (supra) case for not being a matrimonial case. In his rejoinder on this ground the Appellant's counsel adamantly argued that the Primary Court has no jurisdiction for section 75 of the LMA takes it away and the cited case alone cannot confer jurisdiction on the Primary Court.

On the second ground, the Appellant's counsel submitted that there was total failure of addressing the issue of custody of children as required under section 125 (1) and (2) of the LMA that has to be read together with section 4 of the Law of the Child Act, Cap 13 RE 2019. He went on to state that the

children were not asked to express their views as to which parent they wish to stay with. Moreover, the child who was by then 13 was not placed with either of the parents and was left to decide without a court order, something that counsel found dangerous for her growth. When it was his turn, Mr. James resisted the contention by the Appellant's counsel for being erroneous because custody was properly dealt with by both courts. He referred this court to page 14 of the Primary Court's typed judgment which gives the older child a choice to live with either of the parents and in his view by doing so the court considered section 125 of the LMA. He submitted that the other child's custody status was also determined. The learned advocate further submitted that in the first appellate court the same were also dealt with and as it is there is no reason for disturbing the same. In his rejoinder Mr. David vehemently argued that there is no clear evidence on the procedure that was adopted in placing the children and the older child left hanging.

On the last ground which is the consolidated first and fourth grounds of appeal Mr. David was of the view that both courts looked at the contribution of either party to the acquisition of matrimonial properties. He argued that the division was made without abiding to any standard set by the law. When Mr. James took the floor, he argued that what the Appellant's advocate submitted was incorrect. He stated that the assets jointly acquired by the

parties are listed in the trial court's judgment. The distribution is also shown in the trial court's judgment to the extent of who is getting what and why. The first appellate court looked at the distribution and adopted the Primary Court's reasoning and upheld the same. The learned counsel further submitted that the drug store had already been disposed of and contrary to the court's order the Appellant has pocketed 95% of the proceeds. He further argued that as it is now the Appellant has enjoyed the bigger cut in the distribution as compared to the Respondent including his refusal to give her a picture he was ordered by the court to. He bemoaned that if the intention of the Appellant was to take the Mbweni property then the Respondent will remain with nothing. He prayed for this ground to be found as unmeritorious.

In his rejoinder, Mr. David contended that the distribution of matrimonial properties is based on the principle that is known, that there must be evidence, not just mentioning, the Respondent did not adduce any evidence contrary to section 114 of the LMA. To conclude his submission on the grounds of appeal Mr. David submitted that the case was totally mishandled and invited this court to allow the appeal and if the court is agreeing with their submission on the issue of jurisdiction then the lower court's proceedings be nullified and judgment set aside and if it has a different view the court be pleased to order the trial court to consider afresh the questions

of custody and the distribution of assets acquired jointly. He prayed for the Appeal to be allowed and for each party to bear their own costs.

The Respondent's counsel concluded with a prayer that the Appeal lacks merit for the trial court and the first appellate court attended all the issues properly and there is nothing warranting it. He therefore prayed for the appeal to be dismissed with costs as generally the Appellant's counsel submission has not pointed out any specific problems with two judgments.

Before going into the merit of what is before this court it is prudent for this court to look at what transpired in both the trial court and the first appellate court. In determining the Petition, the trial court raised three issues. On the first issue, whether there is a legal marriage between the two the court found that there was and it went on to determine the second issue as to whether the marriage has irreparably broken down. The trial court extensively dealt with this issue on page 9 through to 12 of the trial court's judgment. The learned magistrate was guided by section 107 (2) (a) and the fact that parties having failed to be reconciled by the Marriage Conciliatory Board were issued with a Certificate as per section 101 and 104 of the LMA. She looked at the definition and essence of marriage and reflected on section 140 and declared the marriage irreparably broken down. On the third issue of whether there were any matrimonial properties that were jointly acquired by

the parties the trial court also went through determining that the said properties were acquired jointly as per what the parties testified and per the evidence presented. The court guided by section 114 of the LMA proceeded to grant the prayer for distribution of the assets in the manner that it did as depicted on page 16 of the judgment. After the three issues raised were determined the trial court went ahead and granted the divorce pursuant to section 110 (1) (a) of the LMA. Thereafter, it dealt with the issue of custody of the two children of the marriage. The younger child who was at the time nine years was living with mother, that is the Respondent, and the older one who was 13 years at the time was studying at St. Mary's Mazinde Juu Secondary School as a boarder. Guided by section 125 of the LMA and the case of **Valence Domincianus v. Yasinter Malegesi,** Matrimonial Appeal No. 04 of 2012, High Court (unreported), the trial magistrate ordered that the younger child should continue to live with his mother and the older one to decide which parent to reside with, including alternating between the two parents during school vacations. It further ordered that the Appellant was allowed access to the said children so the Respondent should facilitate access. The Appellant was also reminded to maintain and provide for his children.

The Appellant was aggrieved by the trial court's decision and appealed to the district court on three grounds that revolved around the grant custody to the Respondent, the distribution of the matrimonial properties and that the order for the Appellant to pay fees was unfair for the Respondent works and has an income and can pay the requisite fees. On the basis of those grounds the Appellant prayed the District Court to allow the appeal and to order the Respondent to contribute half of the school fees for the children. He also prayed that the court grants custody of the children to the Appellant with access to the Respondent, further, the distribution of matrimonial properties to be re-done equally between the parties and the Lindi plot that was not distributed be distributed.

The learned magistrate in the first appellate court went through the grounds of appeal. On the first ground of appeal concerning the custody of the two children the first appellate court having gone through the proceedings and evidence of the Primary Court and guided by section 125 of the LMA , section 4 (2) of the LCA and the cases of **Sajjad Ibrahim DHaramsi and Ally Jawad Gulamabas v. Shabir Gulamabas Nathan,** Civil Appeal No. 42 of 2020, High Court (unreported) and that of **Nacky Esther Nyange v. Mihayo Marijani Wilmore**, Civil Appeal No. 169 of 2019, Court of Appeal (unreported) upheld the decision of the of the trial court.

As for the distribution of matrimonial properties, the first appellate court also went through the proceedings and evidence of the trial court and relied on sections 56 and 58 of the LMA as well as the case of **Habiba Ahmad Nangulukuta and 2 others v. Hassan Ausi Mchopa and another**, Civil Appeal No. 10 of 2022, Court of Appeal (unreported) and declared the Lindi plot as property of the Appellant, the Mbweni property to be of the Respondent, the drug store was held to belong to both thus, to be sold and deivided between the two. Basically, the first appellate court upheld the decision of the trial court after considering the parties submissions and going through the proceedings as well as the evidence adduced on matrimonial properties.

On the last ground of appeal the first appellate court after going through the proceedings as well as the parties submission rectified the order for maintenance which in the learned magistrate's view was improper and not in accordance to section 110 (3) of the LMA. He then ordered the Appellant to pay 300,000/= per month as maintenance for the two children. Moreover, the learned magistrate in the first appellate court concluded by stating that it has made a determination on the Lindi property and the drug store and held that everything else in the appeal was unmeritorious and dismissed it with costs pursuant to section 90(1) of the LMA.

Having gone through the two lower courts' findings it is now opportune for this court to determine one issue; whether the appeal before it is meritorious. In doing so I shall go through the grounds of appeal as presented and argued by both counsels as well as the lower courts' decisions and record. In doing so, I am alive to the fact that this being a second appellate court is not expected to disturb the lower courts' concurrent findings unless there is a misapplication of the law or misdirection of the evidence as was held in **DPP v. Jafari Mfaume** [1981] TLR 149 see also **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31.

To begin with, I find it imperative to address the third ground of appeal as presented by the Appellant for it is trite law that jurisdiction is an issue that has to be determined before the court can go on with anything else, since the lack thereof vitiates the whole of the proceedings. The Appellant, citing section 18(1) of the MCA and section 75 of the LMA argued that the trial court lacked jurisdiction to entertain the Petition as the parties contracted their marriage in the Christian form. In rejoinder he argued that the **Yohana Balole v. Anna Benjamin Malongo** (supra) case that counsel for the Respondent cited cannot give the Primary Court jurisdiction as the same is not in the law. To determine this ground, I reflect on the provisions that

counsel for the Appellant is citing, that is section 18(1) of the MCA and 75 of the LMA which for avoidance of doubt I reproduce hereunder. Beginning with section 18 (1) of the MCA which in part provides:

> *'A primary court shall have and exercise jurisdiction - (a) In all proceedings o f a civil nature - (i) where the law applicable is customary law or Islamic law: Provided that no primary court shall have jurisdiction in any proceedings o f a civil nature relating to land;..... (b) In all matrimonial proceedings in the manner prescribed under the Law of Marriage Act'*

The above provision empowers the primary court not only to hear proceedings of a civil nature where the law applicable is customary or Islamic law as provided for in section 18(1) (a) of the LMA. However, when one reads on to section 18(1) (b) of the LMA, it can clearly be seen that matrimonial proceedings are categorically stated as one of the proceedings where the primary court has jurisdiction and in the language of the provision, in the manner prescribed under the LMA. Before moving on to section 75 of the LMA that was specifically cited by counsel for the Appellant, I find it appropriate to first look at section 76 of the LMA as follows:

> *Original jurisdiction in matrimonial proceedings shall be vested* ***concurrently in the High Court, a court of a resident magistrate, a district court and a primary court.*** (emphasis supplied)

Clearly the above provision empowers the primary court to hear matrimonial proceedings and more so when read together with section 18(1) (b) of the MCA. This brings me to section 75 of the LMA which learned counsel for the Appellant cited as the applicable provision stating that section 76 of the LMA that the learned counsel for the Respondent referred to is repealed and non-existent. Section 75 is providing as follows:

> ***'A primary court shall have jurisdiction to entertain a suit under this Part where the parties were married in accordance with customary law or in Islamic form*** *or, in the case of a suit under section 69 or section 71, if the court is satisfied that had the parties proceeded to marry they would have married in accordance with customary law or in Islamic form.' (*emphasis supplied)

While the above provision is ousting the jurisdiction of the primary court as referred to by the appellant's counsel, it is only doing so in so far as the proceedings under "this Part" are concerned. The reference to "this Part" concerns Part V of the LMA which provides for miscellaneous rights of action from section 69 through to section 74, thus, it is limited to only the said Part of the LMA.

It is my considered view that counsel for the Appellant may not be not aware that section 76 is still in the LMA or choose to purposely mislead this court

when he stated that the same is repealed and non-existent, which is unbecoming for an officer of the court. In addition, he also misread, section 75 of the LMA thus, arriving to an erroneous conclusion that the Primary Court has no jurisdiction to entertain all matters where the parties were married in the Christian form. In reality the only matters that the Primary court is barred from entertaining are those in the specific part, that is Part V of the LMA. For the rest of the matters the Primary court has jurisdiction as rightly argued by the Respondent's counsel and in the cited case of **Yohana Balole v. Anna Benjamin Malongo** where the Court of Appeal had this to say:

> *'In terms of the above provisions, there is no doubt that the Primary Court, the District Court and the High Court all have original jurisdiction to entertain a matrimonial proceeding.'*

This being the case, there is no doubt that the trial court was correct in hearing and determining the Petition for it is vested with the requisite jurisdiction. In the circumstances I find the third ground of appeal as unmeritorious and dismiss it.

On the second ground of appeal in which the Appellant is challenging the grant of custody alleging that the order is ambiguous. Having gone through the record and the decisions of the two courts below, I find it untenable to

call the order ambiguous. In his submission the counsel for the Appellant contended that the older child was left hanging something that is dangerous for her growth. The trial court was clear in its decision that the younger child continue to live with his mother and the older child to choose which parent they seek to live with during the school vacations for she is a boarder student thus away from home for most of the year. In the first appellate court the Appellant had a ground of appeal that was geared at faulting the decision of the trial court for not considering the children had more than seven years, thus, should be living with their father and that the Respondent was living with another man. Although the learned magistrate in the first appellate court did not go into the Appellant's reasoning that the Respondent is living with a man, I find it important to put it to pen that while granting an order as to custody a court is required to have regard to section 125 (2) (a) (b) and (c) as well as consider the rights of the child as enumerated in section 26 of the LCA , none of those provisions stipulate that where a mother is living with a man she cannot be awarded custody. The determination should be on the basis of what is in the best interests of the child and not otherwise. The Appellant both in the two lower courts and in this court failed to demonstrate how the said custody order is not in the best interests of the two children. The first appellate court in addition to considering that there

was no evidence adduced in the trial court that it is not in the best interests of the children to live with the Respondent it went on and considered the continuity of care principle when upholding the primary court's order as to custody. The continuity of care principle has for the longest time been highly regarded in the child rights and child development circles where there are no impeding circumstances or it is not in the best interests of the child for the child to receive care from the person already caring for them; (see for example Mary Jean Dolan and Daniel J. Hynan, *Fighting Over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity over Quality in Child Custody Decisions*, in Vol. 38 LAW & PSYCHOLOGY REVIEW 2013 at page and George A. Awad, *Basic Principles in Custody Assessments* in Vol 23 No. 7 Canadian Psychiatric Association Journal at page 441). This is not a new creature in our jurisdiction for the LMA albeit in a slightly different context provides for it. Section 125 (3) of the LMA which is worded in the same manner as section 26 (2) of the LCA, provides:

> *There shall be a rebuttable presumption that it is in the best interest of a child below the age of seven years to be with his 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.***

Based on the above, even where a court is considering placing a child below seven years with a mother on the presumption that it is in the best interests of the said child it is obligated by section 26(2) of the LCA and section 125(3) of the LMA to have regard to the undesirability of disturbing the life of the child by changes in custody, which basically means the court has to consider continuity of care.

In the present appeal, as already pointed out elsewhere in this judgment the younger child was living with the mother and the older child is a boarder who is only home for school vacations. Having due regard to the provisions of law and the cases of **Sajjad Ibrahim DHaramsi and Ally Jawad Gulamabas v. Shabir Gulamabas Nathan**(supra) and that of **Nacky Esther Nyange v. Mihayo Marijani Wilmore** (supra) the learned magistrate upheld the trial court's order. I find it illusory to hold that the ground of appeal unmeritorious for it has no basis in law or anything that was adduced as evidence in the trial court or and or argued as a ground of appeal in the first appellate court.

As for the last ground of appeal, which is the first and fourth ground as combined by counsel for the Appellant that the two courts below erred in the distribution of matrimonial properties by disregarding the Appellant's evidence towards acquisition of the said properties and therefore favouring

the Respondent and holding the Mbweni property as personal to the Respondent without proof. When determining the issue of properties, the trial court listed all the properties that both sides claimed to be matrimonial property and in turn ordered the distribution in a manner where the Appellant got the following:

i. The house in Moshi Bar;

ii. 1 plot from the two Kigamboni plots;

iii. The Salasala plot;

iv. 50% of the drug store;

v. 1 vehicle make RAV4; and

vi. The remaining furniture and domestic appliances.

On the other hand, the Respondent got:

i. The house in Mbweni;

ii. 1 plot from the two Kigamboni plots;

iii. 50% of the drug store;

iv. 1 vehicle make Ractis; and

v. A picture (which was a gift from co-workers).

The only property that remained un distributed was the Lindi plot which the first appellate court declared belonged to the Appellant. The rest of the

distribution was to remain as is. Having gone through the record and the evidence adduced, I also do not see the need to disturb the findings of the two lower courts as they are based on the parties own aversions in the trial court and evidence adduced thereof. In that regard I also find this ground as unmeritorious.

In the event, the four grounds of appeal are all unmeritorious and the prayers by the Appellant cumulatively untenable. The Appeal is dismissed. This being a matrimonial matter no order as to costs.


**A.A. OMARI**

**JUDGE**

**19/06/2023**

Judgment delivered and dated 19th day of June, 2023.

**A.A. OMARI**

**JUDGE**

**19/06/2023**