

TANZANIA / JUDGMENT

oniface nicholous vs agnes niguli

2023 tzhc 19154 21 july 2023

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21 July 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB REGISTRY OF KIGOMA) AT KIGOMA DC MATRIMONIAL APPEAL NO. 02 OF 2023 (Arising from Matrimonial Cause No. 1 of 2022 of Kasulu District Court.) BONIFACE S/O NICHOLOUS..... APPELLANT VERSUS AGNES D/O NIGULI..... RESPONDENT Date of last Order: 09/05/2023 Date of Judgement: 21/07/2023

JUDGEMENT

MAGOIGA, J. The Appellant, Boniface S/O Nicholous dissatisfied by the judgement and decree of the District Court of Kasulu dated 28/12/2022 in Matrimonial cause No. 01 of 2022, now appeals against the said whole judgment and decree of the trial Court to this Court. The brief background of this matter is that, the appellant and the respondent, Agnes Niguli, prior to this matter were a couple who lived together as husband and wife under concubinage since May 1997 and were blessed with seven (7) issues. Page 1 of 10 Moreover, during the subsistence of their marriage they managed to acquire various matrimonial properties to mention a few include: four houses, two plots of land and one farm with seven acres to mention a few. According to the petitioner, since 1998, their marriage relationship started challenges due to the petitioner bearing a female child contrary to the appellant's wishes but the same was settled. Later on, according to the petitioner, misunderstandings arose again and she started facing cruelty and mistreatment which necessitated the respondent to petition for resolution of their marriage, division of matrimonial assets, custody of children and costs of the suit to be granted. The petitioner, further alleged that during their marriage they were able to acquire properties, namely; one house at Murusi near Juhudi Primary school, one plot of land with three houses at Nyachenda village, one plot of land at Nyachenda and one farm with 7.5 acres at Nyachenda all located at Kasulu. After hearing parties, the trial court granted all the prayers as contained in the petition to wit dissolved the presumed marriage, granted division of properties and gave an order of maintenance of children. Page 2 of 10 Aggrieved by the said District Court's decision, the respondent preferred this appeal armed with 3 grounds of appeal faulting the trial District court in the following language namely: -

1. That, the trial court erred in law and facts for considering only the evidence of the respondent and waiving away from the evidence of the appellant.
2. That, the trial court erred in law and facts for ordering maintenance of 20,000/= per month to the appellant while the said children are in custody of the appellant.
3. That, the trial court erred in law and facts for including the properties which are not matrimonial properties in the division. At the hearing of the appeal both the appellant and the respondent were present and unrepresented. The appellant started submitting by asking this court to consider his grounds of appeal on the record and added that the property which is the land in Nyachenda centre where they live currently was bought by himself before marrying the respondent in 1993. About the farms, the appellant claims that he bought them in 1996 before marrying the respondent while other farms were family properties and not his personal properties. The appellant strongly argued that all properties were for children, when sold Page 3 of 10 the family will remain homeless. He finally prayed this court to allow the appeal. On the other hand, the respondent had nothing to submit other than asking this court to consider her reply to the memorandum of appeal. For the purpose of proper understanding of this appeal, I will also reproduce the reply which is to be taken as the submission on the part of the respondent as hereunder stated;
 1. That the content of paragraph 1 of the petition of appeal are strongly disputed in the fact that the trial court without prejudice considered and evaluated well the evidences adduced by both parties hence satisfied with the respondent's evidences attest ended the case in her favour.
 2. That, the content of paragraph 2 is strongly disputed in the fact that the order delivered by the trial court is legally right as up to date the said children are under the custody of the respondent as ordered by the trial court different for what contented by the appellant.
 3. That the content under paragraph 3 is strongly disputed, further all the properties included in the order are matrimonial properties as they were obtained by the time the parties were living together Page 4 of 10 as husband and wife different to what argued by the appellant, otherwise the appellant is put under strict proof thereof. Having carefully gone through the grounds and reply of appeal and also the short submission for the appeal, and after going through the evidence on record in the trial proceedings, I find the central issue for determination of this matter is whether the appeal has merit or not. Starting with the first ground that, the trial court erred in law and facts for considering only the evidence of the respondent and waiving away from the evidence of the appellant. In short, the appellant in this ground faults the trial court for not considering his evidence while on the other hand the respondent strongly disputed this fact stating that there both parties' evidences were well considered. Having carefully considered this ground in the light of the evidence on record, I find the 1st ground of appeal baseless because in my considered view, after perusing the appeal record especially the testimony by the appellant, I found nothing important evidence which was left unconsidered. The defence testimony mainly based on

division of matrimonial properties where the appellant asked the court not to divide matrimonial properties for the reason that they were for children. I have traversed the judgement at page 7 and found that the trial magistrate wrote and here I quote;" the accused defence Page 5 of 10 that those properties cannot be divided because they are inheritance of their children this contention is devoid of merits because a spouse constitutional right to own properties can be superseded by inheritance rights of his or her children."The allegation that the trial court only considered the respondent's evidence waiving away the appellant's evidence, to my considered opinion, the appellant has not accorded any weight to that. The issue of living the matrimonial property for inheritance by the children of marriage is legally untenable and will create more conflict since each party wants to be the overseer to those properties. Section 114(1) of the law of Marriage Act (Cap 29 R.E 2019) provides clearly that upon grant of a decree of separation or divorce the court has powers to to order division of matrimonial assets between the parties acquired by them during the marriage by their joint efforts or to order the sale of any such assets and the division between the parties of the proceed. Therefore, in case a decree of divorce or separation is granted, the law requires matrimonial properties to be divided between the parties as it was held by this court in the case of Elizabeth A. Komakoma vs Zephania M. Andendekisye, Civil Appeal No. 171 of 2005 where his lordship Shangwa J. (as he then was) said; (...The trial Magistrate erred in law by giving the matrimonial house at Kimara Kilungule to the three issues of the marriage. The trial Magistrate had no legal ju Page 6 of 10 powers to do so. What the trial Magistrate was supposed to do in respect of the said matrimonial house was to order that it should be divided between the parties or be sold so that the proceeds of its sale be divided between them. That would be in line with S. 114(1) of the Law of Marriage Act [Cap. 29 R.E. 2002] which confers power to the Court to order the division of matrimonial property upon dissolving the parties' marriage or upon granting a decree of separation." Basing on the above citation, I see that the trial Magistrate correctly decided this case though did not justify his reason for his decision, but the prayer by the appellant that the matrimonial property should not be divided but be inherited by the children is unfounded. Therefore, the first ground of appeal is devoid of any merits and I hereby dismiss it. With regard to the second ground of appeal which is couched that the order for maintenance of 20,000/=per month to the appellant while the said children are in custody of the appellant is erroneous. I wish to state that this ground has merits because after I have passed through the evidence on record, I found that the respondent while cross examining the appellant, the issue of children was also tackled. At page 18 of the typed proceedings, the appellant responded that "I have been taking good care of our children since you left that why they have not Page 7 of 10 left me and come to you." From these wordings above, it means that the appellant is taking care of their 5 children to date. That being the case, I find no justifiable reason of putting the appellant to the order of paying the respondent Tzs 20,000/=monthly for maintaining the children who were left by herself to the appellant when she left matrimonial home. It is a common knowledge that children above 7 years are old enough to be placed under the custody of their father when the marriage has broken down as it happened to be in the case here. To my views and according to the pleadings in this appeal,

the children's age is more than seven years. According to the petition, the last child is Godliver Boniface whose age is 7 years. Therefore, from this piece of evidence, the trial magistrate was wrong to order Tzs 20,000/= per month as maintenance for the 5 children of the marriage to the appellant. I therefore find this ground of appeal meritorious and I consequently allow it. The last ground of appeal is based on the inclusion of properties which are not matrimonial properties in the division. The appellant in his submission stated that the land at Nyachenda centre where they live was bought by himself in 1993 before marrying the respondent and the farms were bought in 1996 before marriage. The respondent in her reply to petition of appeal stated that all the properties included in the order were Page 8 of 1 matrimonial properties as they were obtained by the time the parties were living together as husband and wife. I have followed less rivalling arguments on this ground but with due respect to the appellant, this ground must fail due to the reasons I am going to give hereunder; Upon perusal of the record of appeal, I found that in the trial court, the appellant did not raise any concern about the buying/obtaining of those properties on his own before marrying to the respondent. I have gone through the record of appeal specifically on the testimony of the appellant himself which is found at page 17 of the typed proceedings where the appellant among other things, testified that and here I quote; "Your honour all the properties we acquired together are inheritance of our children so they cannot be divided between ourselves".....I don't agree for any of our property to be divided or to be sold that are the property we acquired for the benefit of our children." From the above sworn testimony, there is no iota of evidence that the available properties were acquired through his own efforts or are family properties to the exclusion of the respondent. In fact, he admitted to have acquired the properties with the respondent except that, he did not wish the same to be divided among the spouses. There is no a single word in his defence referring to personal property but "our property" Page 9 of 10 To my considered view, with due respect to the appellant, I find that this ground is an afterthought hence unmaintainable, consequently, I hereby dismiss it. That said and done, this appeal is partly allowed and disallowed to the extent explained above with no order as to costs. It is so ordered. Page 10 of 10

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