

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO 126 OF 2017

**(Original Matrimonial Cause No. 15 of 2013 of the District Court of
Kinondoni)**

DAVID ANDREW.....APPELLANT

VERSUS

THABITA GEORGE.....RESPONDENT

JUDGMENT

Date of last Order: 22/3/2018

Date of Ruling: 20/4/2018

Munisi,J

Appellant, David Andrew and the respondent, Thabita George were husband and wife until 24/4/2017 when their marriage got nullified by the Kinondoni District Court. From the record, the couple contracted their marriage under customary rituals at Sengerema in 2006, after which they shifted to Dar es Salaam where they lived up to 2012 when their relationship got sour. During the subsistence of their marriage they were blessed with two female issues. Consequent to the resulting disharmony, respondent successfully filed and obtained a divorce decree and other consequential reliefs before the Kinondoni District court. Dissatisfied, the appellant has preferred the present appeal on the following grounds:

1. That the honourable court erred in law and fact by ordering division of non-existing matrimonial properties.

2. That the honourable court erred in law and fact for dividing matrimonial properties without considering contribution of the parties.
3. That the honourable court erred in law and fact for failure to consider economic status of the appellant when it ordered him to provide maintenance to children and the respondent.
4. That the honourable court erred in law and fact by ordering custody of children which discriminates the appellant.
5. That the honourable court erred in law and fact for delivering impugned decision disregarded evidence adduced by the appellant which was water tight.

On 22/3/2018, when this appeal was called on for hearing, Miss Jaines Kihwelo, learned counsel appeared for the appellant while the respondent appeared in person unrepresented.

Miss Kihwelo opted to abandon ground number five and prayed to argue only the remaining four grounds of appeal i.e. Nos 1 - 4. With regard to the 1st ground, she argued that in distributing the matrimonial assets to the parties, the court distributed non-existent properties. She mentioned such properties to include; a car Toyota Chaser, Reg. No. T130 CBG which the evidence from both sides showed clearly that it did not exist. She argued further that from the adduced evidence, the only car the spouses ever owned was a Toyota Chaser, Reg. No. 887 BBS which was however sold in 2014 as revealed by exhibit D2.

The learned counsel also faulted the trial magistrate for ordering division of furniture while the evidence showed that appellant left the matrimonial home under the control of the respondent with all the furniture in 2012 when their relationship deteriorated. In that regard, the claim that appellant moved the furniture was not supported by evidence. With regard to the alleged go-down that the court ordered to be valuated, she argued that there was no evidence to substantiate that such property existed. Referring to section 115 of the Evidence Act, the learned counsel argued that it

was upon the respondent to prove existence of the alleged go-down since she claimed it existed. She argued thus that with such reality, the order for division of the same at the ratio of 40% and 60% shares between the spouses had no foundation. Similarly, she faulted the order of maintenance of the respondent arguing that the court erred to hold that there was a subsisting order issued by Sinza Primary Court as such order did not exist.

On the fourth ground, Miss Kihwelo argued that the court erred in not granting access of the marriage issues to the appellant despite the fact that he takes care of them. She thus prayed for the appeal to be allowed.

Responding to the counsel's submission, the respondent countered that all the properties existed. She elaborated that she told the court that the go-down was at Nyati Street and that the motor vehicle together with the furniture were all there. With regard to the maintenance order, she insisted that it was there, adding that she had no problem with the appellant getting access to the children.

In a brief rejoinder, Miss Kihwelo reiterated her submission in chief and added that the appellant was ready to offer cooperation on the access issue.

I have given due consideration to the parties' submission and have also duly studied the trial court's record. It appears that the main issue of contention is the division of the alleged matrimonial assets. While the respondent maintains that the same existed during the subsistence of their marriage, the appellant vehemently disputes their existence. The trial magistrate after her analysis of the evidence observed, thus:

"From the evidence by both sides of the case thus is the petitioner and the respondent is quit (sic) observant that the parties had jointly acquired a hardware shop and a godown which are situated at Kariakoo, a car with registration number TT30 CVG and house furniture and households."

As to the manner in which the court distributed the matrimonial assets, the judgment speaks for itself; thus:

"Therefore, this honorable court judges and orders as follows:

- i) NIL*
- ii) Orders the division of matrimonial properties between the petitioner and respondent as follows:
 - a) The furniture and households should be given to the petitioner.*
 - b) The Kariakoo shop and the Go down should be evaluated by a Government Valuer and divided at the rate of 60% and 40% whereby the petitioner should be given 40% and 60% should be given to the respondent*
 - c) The car Toyota Chaser with registration No. T 130 CVG given to the petitioner.**
- iii) NIL*

The above distribution order is what offended the appellant hence the present appeal. The issue is whether the mentioned properties existed as claimed by the respondent. It is apparent from the record that the petitioner's case comprised oral testimony from the respondent alone and she did not call anybody to support her case. It can be gleaned from her testimony that she mentioned the existence of matrimonial assets that included among others; household items, a shop, go-down, motor vehicle; Toyota Chaser, Reg. No. T 130 CVG without tendering any document to support her assertion. It is notable that in the course of the proceedings the court assisted the respondent to obtain some documents from TRA which for unknown reasons she omitted to tender so as to form part of her evidence.

I observed that during the hearing of the appeal, respondent was still under the impression that the said documents which she filed as additional list of documents, i.e. information regarding motor vehicles; Reg. Nos. T 887 BBS & T 130 CVG together with a TIN

Number in the name of Daudi Andrew Mathayo automatically formed part of her evidence since they had been filed in court. With respect, this was a misconception arising out of her ignorance on the court procedures. In my view in the absence of those documents to support the respondent's claim that they related to the properties she and the appellant had jointly owned as deposed in her evidence, there was no evidence whatsoever to support the claim that a go-down and the said car existed.

With regard to the household furniture, as the evidence stands, it is the word of the respondent against that of the appellant but like the other items, no proof of their existence was produced by the respondent so as to prove conclusively that they existed and were taken away by the appellant. The respondent did not state what were those household items she claimed were collected by the appellant after moving out of the matrimonial home a fact disputed strongly by the appellant. In that regard, it cannot be said conclusively that there were such items. The distribution of unknown household items was thus also flawed.

It is settled law that for any exhibit to be part of the record it has to be tendered in evidence and endorsed by the court in line with the provisions of Order XIII Rule 4(1) of the Civil Procedure Code, Cap 33 RE 2002 which states:

4(1) Subject to the provisions of sub-rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely-

- (a) The number and the title of the suit;*
 - (b) The name of the person producing the document;*
 - (c) The date on which it was produced; and*
 - (d) A statement of its having been so admitted;*
- And the endorsement shall be signed or initialed by the judge or magistrate.*

The Court of Appeal in the case of **Ismail Rashid V Mariam Msati, Civil Appeal No. 75 of 2015** (unreported) adopted the position taken

by courts in India (**Sadik Hussain Khan V Hashim Ali Khan, AIR (1916) PC 27 (41)**) that the rule as to endorsement must be observed in letter and spirit with a view to insisting observance of the wholesome provisions of these statute in order to prevent abuse of justice.

As the provisions cited herein above were not complied with in so far as the respondent's documents were concerned, I am inclined to the appellant's view that the trial magistrate erred in distributing properties which were not proved to have existed i.e. a go-down and a car Reg. No. T 130 CVG car.

In his evidence, appellant disputed vehemently the existence of the alleged go-down, car Toyota Chaser with registration No. T 130 CVG and the house hold items. He tendered in court the TIN Number mentioned by the respondent together with a sale agreement – exhibit D2 in respect of the car Toyota Chaser, Reg. No. T 887 BBC which he claimed was the sole car the spouses ever had. Appellant denied having had a shop at Tandika or having worked jointly in the Kariakoo shop with the appellant. In that respect, evidence regarding the existence of the items mentioned by the respondent in her petition was highly disputed by the appellant save for the Kariakoo shop. In addition, neither party gave the details of that shop.

From the foregoing discussion I am satisfied that ground number 1 of the appeal has merit and it succeeds. With regard to ground No 2, following the finding in ground one, this ground also succeeds as the alleged capital of 80,000,000/ Shs mentioned by the respondent was not substantiated nor proved. Further, apart from mentioning the existence of two shops, one at Tandika and another at Kariakoo, respondent did not advance any evidence to demonstrate how she took part in those shop business or the manner she contributed towards its acquisition.

With regard to the 3rd and 4th grounds of appeal, on the issue of maintenance the court directed:

“iii) The custody of the children is hereby given to the petitioner and the respondent is ordered to provide for maintenance of the children by providing them with accommodation, clothing, food and education.

iv) Any other relief this honorable court orders that the respondent should provide maintenance to the petitioner as was ordered by the Sinza Primary Court which was Tsh 300,000/.

Having closely studied the learned magistrate's judgment and the proceedings in general, it is apparent that, The District Court of Kinondoni heard the petition in its original jurisdiction and not at the appellate level, therefore adopting an order alleged to have been issued by Sinza Primary Court as seen herein above was wrong. The court ought to have assessed the evidence presented before it and make its own findings. The complaint on the order for maintenance is thus justified hence ground number three has merit.

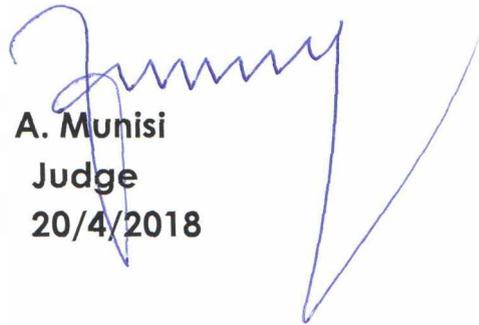
In view of the above finding, under the provisions of section 30(1)(b)(i) of the Magistrates' Courts Act, Cap 11 RE 2002, I invoke revisional powers and revise the order for maintenance and quash it. In lieu thereof, I order the appellant to maintain the two issue at the rate of Tshs 200,000/ per month.

With regard to the complaint on the failure to grant access to the issues to the appellant, it is apparent from the judgment and orders thereto that no such order was issued by the magistrate. With respect, this was wrong because, it was unfair to issue an order to maintain the children but deny him access. Fortunately, during the hearing of the appeal parties were in agreement that access by the appellant was necessary and important for the welfare of the two issues. I will thus invoke revisional powers under the same provision of the Act and grant the appellant access of the two issues whereby he will have their access two weekends of every month as it will be agreed upon by the parties from Friday afternoon to

Sunday evening. Likewise, during the holidays, parties will share access for any duration involved equally i.e. half by half.

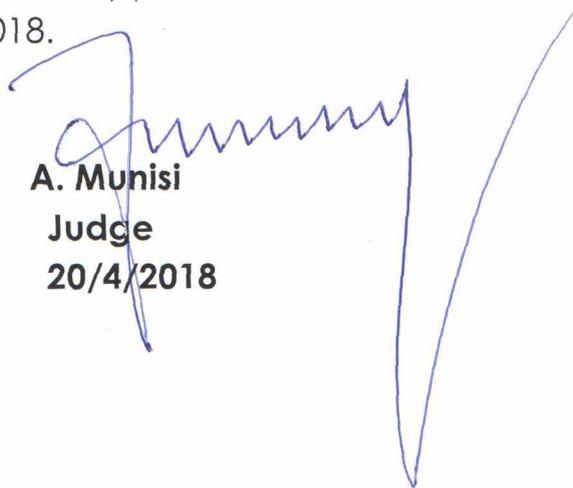
From the foregoing the appeal succeeds to the extent that there is no evidence to support the claim that a shop at Tandika, a go-down at Kariakoo, a car Toyota Chaser with registration No. T 130 CVG and the claimed household items existed during the subsistence of the marriage. However, with regard to the alleged shop at Kariakoo, there is sufficient evidence proving its existence which has not been disputed by the appellant. He however maintained in his evidence that the shop was a personal property acquired through personal efforts as the respondent was a mere house wife who deserves nothing. With respect, the appellant's reasoning is misconceived because if the respondent performed the conjugal obligations, then within the reasoning of the Court of Appeal in the case of **Bi Hawa Mohamed V Ally Sefu (1983) TLR 32**, respondent deserves to get something. In that regard, having found that the only asset that is not disputed is a shop at Kariakoo whose details were not disclosed by the respondent or appellant, an order for its valuation might not realistically benefit the respondent as such shop might not be in existence as we speak today. For that reason, under the circumstances of this case, I order the appellant to pay the respondent Tshs 5,000,000/ as her share to compensate for her contribution in the family welfare and her performance of conjugal obligations during the subsistence of the marriage.

In the final analysis the appeal succeeds to the extent that the magistrate erred in distributing to the parties, non-existent properties including; furniture, a shop and go-down at Kariakoo, a car, Toyota Chaser Reg. No. T130 CVG. Further that the order for the maintenance of the petitioner is quashed and in lieu thereof an order for the maintenance of the two issues to the extent of Tshs. 200,000/- per month is hereby substituted. Appellant to compensate respondent TShs 5,000,000/- as her share of the matrimonial properties.



A. Munisi
Judge
20/4/2018

Judgment delivered in Chambers in the presence of Miss Jaines Kihwelo, learned counsel for the Appellant and in the absence of the Respondent, this, 20/4/2018.



A. Munisi
Judge
20/4/2018