

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CONSOLIDATED PC MATRIMONIAL APPEALS NOS. 17 & 18 OF  
2019**

(Arising from Matrimonial Appeal No. 12 of 2018 in District Court of Lindi at  
Lindi. Original Matrimonial Cause No. 18/2017 at Lindi Urban Primary  
Court)

**SALIMA HASSAN MPITA.....APPELLANT**

**VERSUS**

**ALLY SAID NYELE.....RESPONDENT**

**JUDGMENT**

**29<sup>th</sup> Sept. & 11<sup>th</sup> Nov., 2021**

**DYANSOBERA, J.:**

The parties in these appeals are assailing the judgment of the District Court of Lindi in Matrimonial Appeal No.12 of 2018 which slightly varied the decision of the trial Primary Court. In view of the undeniable fact that these two appeals owe their origin in Matrimonial Appeal No. 12 of 2018 of Lindi District Court originating from Matrimonial Cause No. 18 of 2017 before Lindi Urban Primary Court, these appeals have, for the sake of convenience, been consolidated. Accordingly, Salima Hassan Mpita (herein

referred to as Salima) is the appellant in PC Matrimonial Appeal No. 17 of 2019 and the respondent in PC Matrimonial Appeal No. 18 of 2019 whereas Ally Said Nyele (hereinafter referred to as Nyele) is the appellant in PC Matrimonial Appeal No. 18 of 2019 and respondent in PC Matrimonial Appeal No. 17 of 2019.

The factual background of this appeal is that the parties were married through Islamic rites on 2<sup>nd</sup> October, 1997 at Mtumbikile village and their marriage has lasted for about twenty years. They were blessed with live four issues; namely Said Ally Mnyeale, Zainabu Ally Mnyeale, Adam Ally Mnyeale and Hailati Ally Mnyeale. During the subsistence of their marriage, the parties managed to jointly acquire various properties including a house at Mtumbikile, pieces of land located at Lindi Municipality and at Mchinga, cashew nuts crop farms, coconut crop farms, a machine and machine stall at Mtumbukile and other house hold items.

Before the Primary Court of Lindi District at Urban, Salima did, on 11<sup>th</sup> July, 2017, petition for dissolution of their marriage and division of matrimonial properties. In its judgment, the trial Primary Court, on 25<sup>th</sup> August, 2017 declined to dissolve the marriage for lack of proof that the marriage was broken down beyond repair. It, however, awarded the

parties a legal separation of three years. Salima was displeased with this decision and appealed to the District Court. On 20<sup>th</sup> day of February, 2018, the District Court partly allowed the appeal by reducing the period of separation from three years to one year. On 3<sup>rd</sup> September, 2019 Salima wife went back to the Primary Court and asked for dissolution of their marriage on the ground that the separation period had elapsed and no any progress had been attained and insisted that she was no longer interested in being married to Nyele.

The trial court, after hearing the evidence, was satisfied that the marriage between the parties had irreparably broken down. It granted a decree of divorce and made division of matrimonial assets. It also made an orders on custody of the children as well as their maintenance. Mnyeie was not satisfied with the trial court's decision and lodged an appeal to the District Court. In a judgment handed down on 27<sup>th</sup> day of March, 2019, the District Court remanded the record back to the trial Primary Court for it to take additional evidence on the proper amount of maintenance awardable for the infant children and the custody of the said issues. This order was duly complied with and when the record was back to the District court, the District court endorsed the dissolution of the marriage, slightly varied the

order of division of matrimonial assets and reversed the orders of maintenance of the infant children. Both Salima and Nyele were dissatisfied with the first appellate District Court and lodged their separate appeals Nos. 17 & 18 of 2019 which, as indicated above, have been consolidated.

In PC Matrimonial Appeal No. 17 of 2019 filed on 21<sup>st</sup> June 2019, Salima complained that the District Court failed to consider that all assets were obtained during the subsistence of marriage by their joint efforts and contribution. She argued that the first appellate court erroneously gave all the three structures including two dwelling houses to the respondent leaving the appellant homeless. Further that all sources of income were allocated to the respondent which include two huts for leasing in Lindi Urban located on the same plot, a shop at Mtumbikile and a cereal machine (mashine ya nafaka) without considering that all these assets were obtained through their joint efforts in twenty years of their marriage. Salima was also of the view that the award maintenance of the children was unjustifiable in that each child was to be maintained at a cost of Tshs. 30, 000/= every three months meaning that the husband was to pay 10,000/= for three children for a month and that this was without considering that the cost of life is very high and she was left without any

source of income as all productive and fertile farms were given to the respondent. Lastly, Salima complained that the District Court awarded all fertile and productive land to the respondent while offering her pieces of land whose harvest cannot afford to cover even the running costs of one child. With these grounds, she prayed this court to quash and set aside the decision of the first appellate District Court and restore the decision of the trial Primary Court or, in the alternative, redistribute the matrimonial assets fairly. She also prayed the respondent to pay Tshs. 50, 000/= per month as maintenance for the two children and any other order.

In PC Matrimonial Appeal No. 18 of 2019, Nyele, in his petition of appeal filed on 9<sup>th</sup> July, 2019, challenged the decision of the first appellate District Court in ordering three children to be in the custody of the respondent without considering her social welfare, economic income and the children's age as a determinant factor. He also complained that the District Court was in error in deciding that he was to subsidize Tshs. 90,000/= per every three months without critically analysing his reliable sources of income.

Nyele also attacked the decision of the District Court in the distribution of the land farms without considering the length of the land,

the number of crops that developed as well as the type of the land. He is complaining that the respondent got wet land with fertility while he got dry land with few crops and that the distribution of land farms to both parties was done without assigning more explanations. This court was invited to quash the decision of the lower (sic) court with costs.

The hearing of these appeals were conducted both orally and in writing.

The parties' submissions were, in brief, the following. Salima Hassan Mpita told this court that she had filed four grounds of appeal and had submitted in writing. She urged the court to do justice to her as she has nothing arguing that everything is with the Ally Said Mnyele.

On his part, Ally Said Mnyele prayed the court to do justice as well. He submitted that they are religious but the court below failed to recognize the procedures as there are Sheikhs'. He asserted that her fellow did not pass at the Regional Sheikh as the matter went straight to court. He complained that the court did not do justice arguing that the court did not analyse what was in the farm. Further that the division did not consider the properties which had to be ascertained. He admitted that they are married couples but the interests of their four children were not considered insisting

that one is in Form One it is he who is sponsoring her. She is Zainab. Nyele was emphatic that Salima got married while the case was still in court. he further insisted that both religious and the laws were not adhered to. It was his earnest prayer that justice should be done after analysing the properties and considering Islamic Religion.

On the maintenance for the infant children, he contended that the award of Tshs. 1000, 000/= which was not prayed for was illegally given. He was of the view that he better got custody of the two children as Salima is already married and lives apart from the children.

In her rejoinder, Salima maintained that her fellow was uncooperative as he told her father to go elsewhere he liked. It was her argument that three talaks were issued at Bakwata Mkoa kwa Mzee Shangano whereby they were referred to court. She further argued that the exhibits are in court. The respondent attended at BAKWATA only for the division of farms, she argued. As to what transpired at the primary court, she argued that they were asked to contribute and go home to see the property. That they did so and the court saw the property whereby the court called them and asked them to have the property valued and they participated. She also maintained that the division was just. She also

maintained that she is still the mother of the children and takes care of them arguing that though she is at her parents, she has to get busy so that she can take care of the children.

As regards the custody of the children, Salima argued that the district court called the children and asked them to express their wish and they opted to live with her. Zainab won the examination and she told her that she was eager to assist her but Nyele has given her nothing and she has, therefore, nothing. She referred the child to her father who reluctantly sponsors her studies.

Having considered the records of the lower courts, the memoranda of appeal and the rival submissions of the parties the issue is whether the parties' appeal have merit.

In her first and 2<sup>nd</sup> grounds of appeal, Salima is complaining against the award to Nyele of three structures and two dwelling houses resulting into leaving her homelessly and further that Nyele was given two huts, a shop at Mtumbikile. These two grounds lack any merit. In the first place, the evidence is overwhelming that it is the Salima who deserted her matrimonial home and went to live to her parents. No justifiable reasons were assigned for the desertion. Second, according to the valuation report



submitted to the court through Ref. No. LMC/L. 10/9/ VOL. II//86 dated 25.8.2021 prepared by Sumbuka E. M. on behalf of the Lindi Municipal Director dated 25<sup>th</sup> day of August, 2021, some of the properties which were listed to be valued were not valued as they were dilapidated and crappy. The report reads in part:-

'Katika mali ulizotuagiza tufanye uthamini, Mashine, Banda la mashine na Nyumba kijiji cha Mtumbikile hatujavifanyia uthamini kwa sababu ni vibovu'.

In the 4<sup>th</sup> ground of appeal, Salima also complained that the District Court erred in law and fact for awarding all productive/fertile farms to the respondent and offered her pieces of land whose harvest per year cannot afford to cover even the running costs of one child. A perusal of evidence, however, does not support Salima's complaint that she was awarded unproductive and infertile pieces of land. According to the report from the Lindi Municipal Director, Salima was awarded the property worthy Tshs. 40.3m/- while his fellow, that is Nyele, was awarded the property worthy Tshs. 12.056m/- only!. Not only that but also Salima did not establish how she contributed to the acquisition of the said properties to justify her acquiring the properties of the value higher than that of her fellow. This means that Salima's complaint in the 4<sup>th</sup> ground of appeal has no basis.

As far as the 3<sup>rd</sup> ground of appeal is concerned, I agree that the amount of maintenance for the three infant children awarded against Nyele was on the lower side taking into account the high living costs. That order of maintenance is revised to the extent that Nyele should pay Tshs. 150,000/= (say one hundred and fifty thousand shillings) monthly payable at the end of each month. It is advised that a bank account or bank accounts be opened so that the said money be deposited into the bank. Ground no. 3 in the appeal by Salima is allowed. This means that ground no. 2 of the appeal by Nyele that the trial Magistrate grossly erred in fact when he decided that the appellant has to effect a subsidization of Tshs. 90,000/= per three months without critically analysing his reliable sources of income is, accordingly, determined.

Respecting the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal by Nyele, I think they have merit. As said before the lower courts awarded him properties worthy Tshs. 12.056m/- while Salima was awarded assets valued at Tshs. 40.3m/-. In the absence of explanation of that great difference, the award was unjust and needs interference particularly when it was not established the extent of the contribution of each party to the acquisition of the said properties and the fact that Nyele was shouldered the obligation to

maintain the infant children. In order to be fair, I slightly reverse the order on division of matrimonial properties by awarding Nyele a coconut farm at Mtiti kwa Linga.

In other words, the parties are awarded the following properties with their value in the brackets:-

**Salima:**

1. Cashewnut farm at Mnyele kwa Mnyamato (2.7m/=)
2. Coconut farm at Said Mtimba (6.9m/=)
3. Coconut farm at Msipite (12.5m/=)
4. Piece of land (Plot) at Mchinga (1.7m/=)

**Nyele:-**

1. House at Mtumbikile (Nil)
2. Plot at Lindi Municipality (2.0m/=)
3. Cashewnuts farm at Mnyele kwa Athman Bori (2.5m/=)
4. Coconut farm at Mtiti kwa Karani (5.8m/=)
5. Bare farm at Mtiti kwa Tindia (0.456m/=)
6. Coconut farm at Msipite (1.3m/=)
7. Coconut farm at Mtiti kwa Linga (17.2m/=)

In his 1<sup>st</sup> ground of appeal, Mnyele complained that the Magistrate erred in law and fact when he ordered the three children to be in the custody of the respondent (Salima) without considering her social welfare, economic income and children's age as prime determinant factors in their

upkeep. The reply by Salima was that the lower courts considered the welfare of the children and their wishes.

With respect, I agree to the argument by Salima that the children were rightly placed in the custody of their mother, Salima. Their finding on this aspect cannot be faulted. In the first place, the children have, all along, been staying under the custody of the respondent that is from 2017 when the parties started to live in separation. The continuity of care is a most important part of a child's sense of security and the disruption of established bonds is to be avoided whenever it is possible to do so. There has to be strong counter valuing reasons for removing them from their mother's custody.

Second, all the children categorically and openly expressed that they wished to stay with the respondent, their mother.

Third, I am alive to the provisions of sub-sections (1) and (2) of Section 125 of the Law of Marriage Act. These provisions were re-enforced by the Court in the case of **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293 observed that,

in matters of custody, the welfare of the infant is of paramount consideration, but where the infant is of an age to express an

independent opinion, the court is obliged to have regard to his or her wishes .

This means, placing them in the custody of their father, Nyele would not meet their welfare which is a paramount consideration. The 1<sup>st</sup> ground of appeal by Nyele falls away.

Consequently and for the reasons I have indicated, these appeals are allowed and dismissed as follows, the appeal by Salima is allowed in the 3<sup>rd</sup> ground but dismissed in the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> grounds. Likewise, the appeal by Nyele is allowed in the 3<sup>rd</sup> and 4<sup>th</sup> grounds but dismissed in the 1<sup>st</sup> and 2<sup>nd</sup> grounds. Each party to bear their own costs.

Order accordingly.



**W. P. Dyansobera**

**Judge**

**11.11.2021**

This judgment is delivered under my hand and the seal of this Court on this 11<sup>th</sup> day of November, 2021 in the presence of Salima Hassan Mpita and Ally Said Nyele.



**W.P. Dyansobera**

**Judge.**