

# IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

**CIVIL APPEAL NO. 80 OF 2014**

*Arising from Matr. Cause No. 36 of 2012*

*Kinondoni District Court Kasailo, Rm*

**CHRISTOPHER KASWALALA.....APPELLANT**

**V.**

**GLORIA MASSAWE.....RESPONDENT**

## **JUDGMENT**

*Date of last Order: ..... 21/12/2015*

*Date of Judgment: ..... 30/12/2015*

**Shangwa, J.**

In this appeal, the Appellant Christopher Kaswalala was aggrieved by the decision of the Kinondoni District Court delivered on 9<sup>th</sup> October, 2013 by Kasailo, RM in

Matrimonial Cause No. 36 of 2012. He then decided to appeal to this court.

In his decision, Kasailo RM declared the marriage between the parties as void on grounds that the parties were mere lovers and that the Respondent was the Appellant's concubine. He ordered that the Respondent be given a Mercedes Benz as her share of the properties acquired by both parties through their joint efforts during their concubinage and that the house at Malamba Mawili in Mbezi Luis area, Kinondoni District be the property of their child Chris Junior Christopher and that the said child be under the Respondent's custody.

In his Memorandum of Appeal against the said decision, the Appellant raised nine grounds of appeal. However,

grounds 4, 6 & 7 are not clear. Therefore, I will skip them and deal with the rest of the grounds which are clear.

These are as follows:-

1. That the trial Magistrate grossly erred in both law and facts in finding that the marriage between the parties was void whereas they were living in one roof as husband and wife and not as concubines.
2. That the trial Magistrate grossly misdirected himself in fact and law in failing to apply the law on the division of matrimonial properties.
3. That the trial Magistrate erred in law and fact in failing to order for the sale and equal distribution of the proceeds of the house located at Mbezi Luis Malamba Mawili which was acquired through joint efforts by the parties.

4. (Not clear).
5. That the trial Magistrate erred in law and fact for awarding all motor vehicles including Mercedes Benz, Noah and Carina to the Respondent.
6. (Not clear).
7. (Not clear).
8. That the trial Magistrate erred in law and in fact in ordering the custody of the child to be under the Respondent and not the Appellant who was ordered to pay maintenance costs.
9. That the trial Magistrate was biased.

On the 1<sup>st</sup> ground of appeal, the Appellant raises an issue as to whether it was proper for the trial Magistrate to find that the marriage between the parties was void and that the parties were living in concubinage. On this



ground, I think the finding by the trial court that the marriage between the parties was null and void is correct. This is because at the time when the Appellant contracted a Civil Marriage with the Respondent on 15<sup>th</sup> January, 2010 at the District Commissioner's Office at Kinondoni, he was not competent to marry as he had previously before contracted a Christian Monogamous marriage with another woman which was solemnized in 2001 at St. Peters Roman Catholic Church Oysterbay, Dar es Salaam and which had not been dissolved by a court of law.

By finding that the marriage between the parties was null and void, the trial Magistrate correctly relied on S. 38 (1) (c) of the Law of Marriage Act Cap. 29 R.E. 2002 which provides as follows:

"S.38 (1) Any ceremony purporting to be a marriage shall be a nullity-

(a) .....

(b) .....

(c) If either party is incompetent to marry by reason of an existing marriage."

Although, I agree with the trial Magistrate's finding that the marriage between the parties was null and void, I do not agree with him that the parties were living in concubinage. According to the Oxford Learner's Dictionary at page 300, a concubine is described as a woman who lives with a man often in addition to his wife or wives. The Respondent was not such a woman as she was not living with the Appellant as an additional wife to his wife. She

had contracted a Civil Marriage even though her marriage with the Appellant was invalid at law because of the previous marriage between the Appellant and another woman which was till subsisting at the time he married the Respondent. This disposes of the 1<sup>st</sup> ground of appeal which partly fails and partly succeeds.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal are closely related and I do combine them for the purposes of their determination. The issues that are raised by the Appellant on those grounds are as follows:

1. Whether it was proper for the trial Magistrate for not ordering the division of the matrimonial properties.



2. Whether it was proper for the trial Magistrate for not ordering the sale of the house located at Mbezi Malamba Mawili which was acquired through joint efforts for the purposes of equal distribution of the proceeds of sale of the said house.
3. Whether it was proper for the trial Magistrate to award all motor vehicles including the Mercedes Benz to the Respondent.

In his decision, the trial Magistrate held that during their marriage association, the parties acquired two motor vehicles namely one Mercedes Benz Saloon and a Toyota Rav 4 and that there was no evidence to prove that they acquired a Toyota Carina and a Noah. It was found by the trial Magistrate that the Toyota Rav 4 (T673 AFB) was sold by the Appellant and the proceeds of its sale were not



shared between him and the Respondent. After so finding, he ordered that the Mercedes Benz should be given to the Respondent. There is nothing in the trial Magistrate's judgment to show that all Motor Vehicles mentioned above were given to the Respondent as submitted by the Appellant on the 5<sup>th</sup> ground of appeal. In my judgment, as the Mercedes Benz which was given by the trial court to the Respondent is more expensive than the Rav 4, I vary the trial Magistrate's decision by ordering that the said motor vehicle should be sold and the proceeds of sale should be divided between the parties and the Respondent should be given more money from those proceeds which will compensate for her share of proceeds of sale of the Rav 4 which she did not get from the Appellant.

On whether it was proper for the trial Magistrate not to order for the sale and equal distribution of proceeds of sale of the house located at Mbezi Luis, Malamba Mawili, I am of the view that, it was not proper for him not to do so. In other words, when he ordered that the said house should be under the ownership of Chris Junior Christopher who is the parties' son, the trial Magistrate did not apply the law.

The following is what he said in his typed judgment at page 10 to 11 and I quote:

*"Coming to the plot of land which situated at Mbezi Malamba Mawili. Both parties stated that the said plot was in the name of their son in this regard it*

*is not proper to include this property among properties which they have been acquired jointly during their concubinage life. Therefore, this plot and the house which has already been erected is not involved in the division of the properties acquired by these parties. It belong to their son."*

I have gone through the testimonies of both parties in order to see as to whether or not the plot and the house at Malamba Mawili is not involved in the properties to be divided between the parties. In his testimony in chief, the Appellant was recorded as follows:-

*"Currently what I know the house situate at Malamba Mawili is matrimonial property. I pray the said house to be sold and divide the properties money which will be obtained."*

And the following is what he said in his cross-examination:-

*"We have bought plot which was on the name of Chris Junior Christopher Kaswalala who is my son who has about 6 years of age."*

On the other side, the Respondent said as follows in her testimony in chief:-



*"The plot is written in the name of our son ... Therefore should not be subjected to division of Matrimonial asset."*

In her cross – examination she said as follows:

*"The plot has no title ... currently the said plot has been erected a building".*

In her re-examination she said as follows:

*"The owner of the plot and the dwelling house is Chris Junior Christopher who is our son".*

It appears to me that although the plot on which the matrimonial house is built is in the name of Chris Junior Christopher, it is not registered. According to the

Respondent, this plot has no title. It is quite clear from the evidence on the trial court's record that the plot and the house on which it is built were acquired through joint efforts of the parties during the subsistence of their invalid marriage. Although, the Respondent wishes it to be owned and registered in their son's name, the Appellant wishes it to be sold and the proceeds of sale to be divided equally between him and the Respondent.

In my opinion, the Appellant's position with respect to the house at Malamba Mawili is a legal position. The trial Magistrate was supposed to apply the law and order for the sale of the house in issue and for division of the proceeds of its sale between the parties. The law which he ought to have applied is S. 114 (1) of the Law of Marriage Act 1971 which provides as follows:-

*"S.114 (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale".*

The said provision of law is self explanatory. There is no doubt that the trial Magistrate did not apply the said provision of law because in his view, the parties were living in concubinage as the Appellant was not competent to marry the Respondent by reason of his previous existing marriage between him and another woman whom



he calls his first wife. My view is that the parties were legally married at the office of the Area Commissioner Kinondoni despite the fact that their marriage was void. So, S.114 (1) of the Law of Marriage Act ought to have been applied in so far as their house at Malamba Mawili is concerned. The said provision of law does not confer power to the court to order the matrimonial assets be it motor vehicles, houses or furniture to be distributed to children when their parents' marriage has collapsed.

It only empowers the court to order the division of any assets acquired during their marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale. Perhaps, it would have been a different case had both parties decided to give the house at Malamba Mawili to



their child Chris Junior Christopher. Whereas the Respondent is willing to do so, the Appellant is not willing to do so.

Now, without more ado, as the parties no longer wish to live as husband and wife under their Civil Marriage let it be so and their house at Malamba Mawili should be sold and the proceeds of sale be divided equally between them. This disposes of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal which succeeds.

The 8<sup>th</sup> ground of appeal raises an issue as to whether it was proper in law and in fact in ordering the custody of Chris Junior who is the parties child to be under the Respondent and the Appellant to provide for its maintenance. In my opinion, it was proper both in fact

and in law for the trial Magistrate to order for custody of Chris Junior who was below seven years to be under the Respondent who is his mother and to order the Appellant who is his father to provide for his maintenance. As it was correctly pointed out by counsel for the Respondent, S. 128 of the Law of Marriage Act Cap. 29 R.E. 2002 provides inter-alia that where a marriage is a nullity, the mother shall be entitled to the custody of the infant child. Also as it was correctly pointed out by the same counsel, S. 129 (1) of the Act imposes a duty to the father of a child to maintain him/her whether such child is in his custody or the custody of any other person by providing him/her with accommodation, clothing, food and education. Under the circumstances of this case, the Respondent has no such a duty to Chris Junior because

his father (Appellant) is there and is physically fit and financially fit to maintain him. This disposes of the 8<sup>th</sup> ground of appeal which fails.

The 9<sup>th</sup> ground of appeal raises an issue of biasness on the part of the trial Magistrate. I think this ground of appeal was not well founded. In my opinion, the trial Magistrate was not biased at all.

Although, the Respondent has financial muscle to maintain Chris Junior, the decision of the trial court to order the Appellant alone to provide maintenance for him does not mean that the trial Magistrate was biased. As already pointed out, the law imposes a duty on a man to provide maintenance to his children.

The duty to maintain children after the break down of the marriage shifts to the woman in cases where the man is dead, or his whereabouts are unknown or is so poor not to be able to do so. See S. 129 (2) of the Act. This disposes of the 9<sup>th</sup> ground of appeal which fails.

All in all, this appeal partly succeeds and partly fails. Therefore, I order that each party should bear its own costs.

**A.Shangwa**

**JUDGE**

**30/12/2015**



Delivered in open court this 30<sup>th</sup> day of December, 2015  
in the presence of the parties.

**A.Shangwa**

**JUDGE**

**30/12/2015**