

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

c

CIVIL APPEAL NO. 150 OF 2012

EDWIN YUDA MAKWETA.....PETITIONER

VERSUS

MAGRETH MICHAEL MFUGALE.....RESPONDENT

JUDGMENT

Mwaikugile, J.

This appeal arises from Matrimonial Cause No. 29 of 2011 in the District Court of Ilala at Ilala in which the respondent sought for and was granted orders for payment by the appellant of maintenance of their two children and equal division of the Land located at Kivule, Dar es Salaam. The trial court held for the respondent and ordered the appellant to pay Tshs. 200,000 per month as maintenance for the two children. It was further ordered that the respondent should get a share of 35% of the Land situated at Kivule.

The appellant was dissatisfied with the decision and preferred the present appeal to this court based on two grounds namely:

- (i) The trial court erred in law by ordering the appellant to pay the respondent Tshs. 200,000 monthly which is too excessive compared to the monthly income of the appellant.*
- (ii) The trial court erred in law by ordering equal distribution of a plot (unsurveyed) without considering the fact that the said plot was acquired before the marriage of the Appellant to the respondent and that it was no longer the property of the appellant.*

Both parties in the appeal appeared in person, unrepresented.

The appellant arguing the 1st ground of appeal submitted that the court erred in law by making an assessment of Tshs. 200,000/= as maintenance for the two children. He submitted that the amount assessed per month was on the high side compared to the appellant's income. He contended that the

assessment was erroneously made as no evidence was adduced to establish to the satisfaction of the court that the appellant had sustainable income and the ability to pay the assessed amount of Tshs. 200,000/= per month as maintenance for the two children. For that reason, he prayed that the first ground of appeal be allowed.

With regard to the 2nd ground, the appellant submitted that the trial court erred in distributing between them the plot at Kivule on the ground that the same was acquired by him before their marriage. He argued that there was no evidence adduced and available on record to establish the extent of joint effort put by the respondent in developing the plot after their marriage.

On the basis of the facts and the submissions made, the appellant urged the court to allow the appeal, with costs.

On the other hand, the respondent resisted the appeal. Submitting on the 1st ground of appeal, she averred that the decision of the lower Court cannot be faulted in that under Section 129 (1) of the Law of Marriage Act Cap. 29 RE 2002 a man has a legal duty to maintain his infant children. The preceding cited section is self explanatory and clearly states thus:

*"Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable **having regard to his means** and station in life or by paying the cost thereof."*

On the basis of the preceding authority, the respondent submitted that the appellant as a matter of law has a duty to maintain his infant children. The court order requiring the appellant to pay the amount of Tshs. 200,000/= as maintenance per month for the two children was quite fair and reasonable for the upkeep of the issues.

Submitting on the 2nd ground of appeal, the respondent dismissed it to have no merit on the ground that Section 114 (1) empowers the court to order division of matrimonial assets. The section provides:

"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 division between the parties of the proceeds of sale."

There is however evidence to the effect that the piece of land in issue was acquired by the appellant before marriage.

A close look at sub-section (3) of the preceding cited section which provides:

"For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts", in my view brings the piece of land in issue within the ambit of matrimonial property. What should be considered and determined in the circumstance is the extent of improvement or

effort put by the respondent or by their joint effort on the property after the marriage.

On the basis of the argument advanced and the preceding cited provision the respondent pointed out that the trial court order for division of matrimonial property acquired during their marriage including the one acquired before but substantially improved during the marriage by their joint efforts was quite in order. She in the circumstance, prayed to this court that the appeal be dismissed with costs.

I have followed through with keen interest and carefully considered the arguments advanced by both parties in this case. In determining the first ground of appeal, I have carefully gone through the court case record and observed that the issue of appellant's income was in my considered view clearly ascertained. It is clearly reflected on record that the respondent, was a man of means and had the ability to pay the amount assessed.

On thorough scrutiny of the trial court proceedings at page 9 the 6th to 7th line from the top, the court must have drawn its inference from those lines that the appellant was a man of means. The 6th line states in part, "... **the respondent left shop with applicant**, but applicant failed to maintain." The preceding

quoted portion of the proceedings clearly shows that the respondent managed to run a shop while he was living with the respondent/applicant. A person without means cannot in my view afford to run a shop. In addition to the foregoing the appellant further stated on the same page, the 7th line from top and I quote: "... we pray that for that issue of 4 years old, respondent is ready to take her and live with her, and as to the 2nd issue, respondent is ready to maintain her for Tshs. 100,000/= every month." The trial court judging from the preceding circumstances was fortified in its view that the appellant was a man of means hence proceeded to set a sum of Tshs. 200,000/= as fair and reasonable amount for maintenance of the two children per month. On the basis of the preceding evidence and analysis made I am unable to go along with the contention that the appellant's income was not ascertained. That said and in the circumstance therefore, I find the payment of Tshs. 200,000/= as maintenance for the two children per month to be a fair and reasonable sum for the welfare and upkeep of the children, hence the first ground of appeal fails and same must be as I hereby do dismiss it.

With regard to the second ground of appeal, as matter of law the court has power under Section 114 (3) of the Land of Marriage Act, Cap. 29 to order division of matrimonial assets

acquired by the spouse during the marriage which include asset/property owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts. It is not in dispute in this case that the (plot) piece of land at Kivule, Dar es Salaam was acquired by the appellant before the marriage. I have not seen any statement on record negating the fact that the said plot was improved by the joint efforts of the appellant and respondent during the time the two lived together as man and wife. I for one do find that the trial court order for equal division of the plot at 35% that was acquired by the appellant before the two started living together as man and wife was quite correct and in order hence, I find no ground on which to base my decision to fault the same.

In the result therefore, the second ground of appeal also fails. Consequently the appeal is dismissed with no order as to costs.

N. M. Mwaikugile

JUDGE

10/7/2015

Coram : E. G. Mrangu, DR

For the Petitioner : Present

For the Respondent : Present

CC: Saida

COURT: Judgment delivered in chamber this 10th day of July, 2015 in presence of both parties.

E. G. Mrangu

DEPUTY REGISTRAR

10/7/2015