IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

CIVIL APPEAL NO. 78 OF 2019

(Arising from Matrimonial Cause No. 24 Of 2018 District Court Temeke, At Temeke Hon. Mfanga, RM)

MWINYIMKUU M. ZAME.....APPELLANT

VERSUS

ZAMZAM H. HASSAN.....RESPONDENT

JUDGMENT

MASABO, J.L:-

Having being aggrieved by the decision of district court of Temeke at Temeke in Matrimonial Cause No. 24 of 2018 the Appellant, Mwinyimkuu M. Zake, has appealed to this Court on the following grounds

1. That the trail magistrate erred in law and fact by grossly failing to record and analyse evidence given by the appellant
2. The trail magistrate erred in law and fact by admitting vicious claims by the respondent against the appellant which were already adjudicated in Primary Court at Mbagala given that this case was not an appeal
3. The honourable magistrate erred in law and in fact by ordering equal division of the house at Chamazi between the Appellant and the Respondent and the Respondent without taking into consideration of the weight contribution between the appellant and the respondent

4. That the magistrate erred in law and in fact by ordering both maintenance of the child at the tune of 50,000/= plus medical care while the ejecting the request by the appellant to register the child for health insurance

During the hearing the appellant appeared unrepresented whereas the Respondent enjoyed the service of Mr. Yohana Ayale, advocate. I his submission the Appellant abandoned the first two grounds of appeal. Submitting on the third ground of appeal, he lamented that the court erred in ordering equal division of the house at Chamanzi because the said have house is built on a plot given to him by his mother long before they contracted the marriage, His main case is that, although he does not disputed that the Respondent reserved a share in the house it is unfair to have the house divided in equal halves because the wife contributed nothing to the acquisition of the plot hence giving her 50% would be tantamount to assuming that the plot was jointly acquired which is not the case. Besides, he reasoned that the said area has an approximate area of ¼ acre and that in addition to the house there are two huts which he built single handedly with no contribution from the respondent and as such the respondent has no claim over the two huts. On the issue of maintenance, he basically does have not a major complaint except that with respect to medical care, he would prefer to have an insurance cover for the issue so at reduce the costs he incurs by paying in cash and to ensure that the child has stable medical care even in the event he does not have cash when the issue falls sick.

In his response Mr. Ayalle submitted that the trial court did not erre in the issue of division of matrimonial property and that the court division is well supported by the case of **Bi Hawa Mohamed v. Ally Seif [1983] TLR 32.** He further argued that the liable for division was acquired through joint efforts hence falls within the purview of section 114(3) of the Law of marriage Act in that while the plot was acquired by the Appellant, the house was jointly developed by the appellant and the respondent during the subsistent of their marriage. On the issue of maintenance, he argued that the claim is baseless because the Appellant is not prevented from purchasing an insurance cover for the issue if he so wishes. He cautioned however that there are some medical conditions not covered by insurance schemes hence the appellant should be aware that even where the child is under health insurance he may be required to pay cash should the need arise.

Having considered all the submissions, it is clear to me that the bone of contention between the parties is on division of a matrimonial house situated at Chamazi area in Temeke Dar es salaam and the main question for determination is whether or not the trial court applied a wrong formula in arriving at its decision which ordered division of the said house in equal halves. Before I deal with this question, I will first address myself to the issue of maintenance of issue of marriage which does not seem to be contentious because the Appellant is neither disputing his liability to pay for maintenance nor is, he disputing the liability to pay for medical and health services. His main prayer is that he be allowed to buy an insurance cover which, in his opinion will serve two purposes namely, ensure steady provision of medical

services to the child and reduce the costs on his part. The Respondent is equally not objecting. Under the circumstances, I have found it fair to uphold the decision of the trial court on the issue of custody and maintenance and to add that the Appellant shall be free if he so wishes to buy a health insurance cover for the issue whereupon he will only have to pay cash if the need arises to carter for medical/health expenses not covered by the respective health insurance scheme.

Regarding the division of asserts, section 114 (1) and (2)(b) and (3) provides that:

> 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 of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the assets division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1), the court shall have regard.....
> (b) to the extent of the contributions made by each party money, property or work towards the acquiring of the assets;
>
> (3) For the purposes of this section, references to assets acquired during a 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

Under section 114(3) a property acquired by one spouse to the exclusion of the other before the marriage or during the subsistence of the marriage will therefore as a trite law not be responsible for distribution unless it has been substantially improved during the subsistence of the marriage by the other party or by their joint efforts. When these properties are substantially improved during the subsistence of marriage by the joint efforts of the spouse, they become liable for distribution (see **Anna Kanungha V Andrea Kanungha** 1996 TLR 195 (HC)).

In the instant case it is not under dispute that the plot was acquired by the Appellant prior to the marriage. It is equally undisputable that the house was constructed by joint efforts of the Appellant and the Respondent whereby the Respondent contributed to the construction of the house both financially and indirectly through housekeeping and raising the issue of marriage hence she is entitled to a share in the said house. The Appellant does not contest this. All what he is contesting is the share accorded to the Respondent.

While there is no hard formula on the division of matrimonial assets the law as provided for under section 114 (2)(b) requires the court to have regard to the extent of the contributions made by each party. Thus, in this case, considering that there was already a plot which was acquired by the Appellant single handedly, it would have been just and fair for the court to have regard to this fact when dividing the assets to the parties. Failure to pay regard to this fact presupposes that the plot had no value which is contrary to the spirit of the Land Act, Cap 113 RE 2002 and the Village Land

Act, Cap 114 2002 which recognize an interest in undeveloped land as a valuable interest (section 3(1) (f) of the Land Act and section 3(1)(g) of the village Land Act). According to these sections, an interest in land is considered as a valuable interest even where there are no unexhausted improvements in the said land. Accordingly, any transaction that affects the land such as disposition must take into account the market value of the land. In this premise and considering that the house cannot stand without a land, I am of the settled view that the court erred in ordering that the house be divided in equal halves while in essence the contribution of the Appellant outweighs that of the Respondent.

According, I allow the appeal on this ground and proceed to reverse the distribution of matrimonial assets to the effect that, the house be sold and its proceeds be shared in the ratio or 35% for the Respondent and 65% for the Appellant.

DATED at DAR ES SALAAM this 17th day of October 2019.

J.L. MASABO

JUDGE

Judgment delivered this this 17th day of October 2019 in the Presence of Yohana Ayale Counsel for the Respondent, the Appellant present in Person.

J.L. MASABO

JUDGE