IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 96 OF 2020

(Originating from Kinondoni District Court at Kinondoni in

Civil Appeal No. 93 of 2019)

LUSEKELO NELSON MWAKATIKA..... APPELLANT

VERSUS

GERIDA EGINO KAPINGA..... RESPONDENT

JUDGEMENT

19th October & 24th November 2020

ACK. Rwizile, J

Before separation, parties to this appeal had lived under presumption of marriage from 2003 to 2007. They then separated for a while before living together again in 2010 to 2019. Lastly, they decided to part ways. They were however blessed with two issues. Misunderstanding that led to this case started way back in 2018. This time the appellant is alleged to have forced the respondent to move out of their matrimonial house. As she refused, the appellant consequently, petitioned the Kawe Primary Court for custody of their children and division of the assets jointly acquired. The trial court upon full trial, divided their property (a house) to the ration of 60% and 20% to the appellant and respondent respectively.

Appellant was given custody of one child while the other was placed to the respondent with a maintenance order to the tune of Tsh. 100,000/= per moon. The respondent was aggrieved by division of the said house, she appealed to Kinondoni District Court. The District Court assessed the amount of contribution and raised it to 40% share of the value of the house and placed custody of all children to her. This time, it the appellant who was not happy with the decision of the first appellate court, hence this appeal. The following grounds of appeal were preferred;

1. *That, the trial magistrate erred in law and facts by not taking into consideration that division of matrimonial properties was not proper.*
2. *That, the trial magistrate erred in law by misdirected himself when he ordered division of matrimonial property by 40% to 60% between appellant and respondent without taking into consideration the contribution of the appellant in its acquisition.*
3. *That, the magistrate erred in law and fact by ordering Tsh. 100,000/= per month for maintenance of the young child without assuming that, the same is over 7 years old.*
4. *That, the magistrate erred in law by misdirecting himself to order division of matrimonial property, maintenance and custody without taking into consideration that the parties lived in presumption and were not in marriage.*
5. *That, the trial magistrate erred in law and fact when he divided the said house, without considering that, appellant has other children who depend on the same house and they have nowhere else to live.*

The appellant prayed; this appeal be allowed.

At the hearing parties appeared in person. They preferred to argue their case by way of written submissions. The respondent, however was offered legal aid by WLAC who prepared her submission while the appellant prepared his submissions.

Supporting the appeal, it was submitted on ground one and two together that, there was miscarriage of justice when the District Court divided the house at 40% to 60%. He said, the respondent's contribution did not commensurate the share given. According to him the first appellate court did not consider his evidence. He said the house was built by him and his former wife. It was pointed out that, the respondent's contribution in building the same house was too little, because she assisted in building one room. This according to him, deserved a lesser than 40%.

As for ground three, the appellant argued that, it was wrong for the District Court to place the children under the custody of the respondent, without their opinion since they are above 7years. It was therefore his opinion that failure to do that was to favour the respondent in order to benefit with the amount of maintenance.

Arguing, the succeeding two grounds (four and five) it was pointed out that the trial magistrate misdirected himself by deciding that the parties were married, while they were not. He argued further that, he built his house without the respondent's contribution. It was the commitment of the appellant that, the house is the only home for his children and so should not be subject of division.

He therefore asked this court to quash and set aside an order for maintenance, and allow this appeal generally.

Resisting the appeal, it was the respondent's submission that, the District Court fairly analyzed the evidence, leading to a reasoned decision on the respondent's share. It was added, the respondent contributed towards building the house which is in compliance to section 114(1)(2) of the Law of Marriage Act (LMA) [Cap 29 RE 2019 and the cases of **Bi. Hawa Mohamed vs Ally Seif** [1983] TLR 32 and **Eliester Philemon Lipangahela vs Daud Makuhuna,** Civil Appeal No. 139 of 2002. It was her argument that the resident magistrate was right to find the house is a matrimonial property subject to division.

As for the third ground, learned advocate argued that, it was right to order maintenance to the appellant since it his duty. She said, it was in the interest of the child to be under the custody of his mother. Further to that he added, since the appellant is working with a Chinese company, he has means to provide for the same, the court was referred to section 9(3) (b) of the Law of the Child, (LCA) [Cap 21 RE 2019]

It was her argument on forth and fifth grounds that, the District Court was satisfied that the parties lived under presumption of marriage, hence subject to distribution of the matrimonial property. As well, she submitted, the respondent proved her case on balance of probability as provided under section 111 of Evidence Act. The judgement of the trial court, she went asserting, it was considerate.

She cited section 112 of evidence Act to support her argument. She therefore asked this court to dismiss the appeal.

Having gone through the submission of the parties and the records of the lower courts, I would propose to determine grounds 1,2,4 and 5 together which hinge on division of matrimonial property. It is worth noting that ground 3rd will be determined separately.

Prior to delving into whether division of the assets was properly made, I have to consider whether parties were duly married. In Tanzania, marriages can be contracted in civil or religious rites as under section 10 and 11 of the LMA or under customary law. In this appeal, it is not in dispute that, parties lived under presumption of marriage. This type of marriage is recognized under section 160 (1) of the LMA, states as hereunder;

> *Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.*

It has been evidenced that the two lived under one roof for the period that exceeds 7 years. Through this union, they were blessed with two children. This is not also disputed. It is actually in record with agreement by the parties. The period under consideration was not static. It is alleged they also acquired a house which is subject of this appeal. Apparently, it is crystal clear as submitted that the appellant started building the house before living with the respondent.

It is in record that the respondent moved in at some stage. It follows therefore that they lived in a rented house before moving in. It is also apparent that the house has three rooms. It is therefore quite true that the same was built before they lived together. But it is also without doubt that the same was developed and completed when parties lived together. This type of development is in law counting, provided it is proved that the respondent, rendered support whether material in terms of money or work. As if that is not enough, domestic duties such as bringing up children and related duties are a worth noting contribution.

The Law of Marriage Act provides under section 114 for division of properties acquired by spouses through their joint effort or acquired by one spouse but has been developed during their marriage. Since the parties to this appeal lived under presumption of marriage and during their marriage, they acquired a house, the same is considered a matrimonial property subject to division. The law states as follows;

> *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.*
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> *(2) In exercising the power conferred by subsection*
>
> *(1), the court shall have regard to -*

(a) the customs of the community to which the parties belong; (b) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets; (c) any debts owing by either party which were contracted for their joint benefit; and (d) the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division.

(3) 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.

Proper interpretation of the section was given in the case of **Bi Hawa Mohamed and Eliester Philemon** (supra) that even domestic chores done by a wife during marriage are considered to be contribution when dividing the matrimonial properties. I therefore accept the reasoning of the first appellate court on the property. It is indeed a matrimonial asset subject of division. Upon assessment of the same, the first appellate court departed from the 20% share given to the respondent and raised it to 40%. In doing so, it was persuaded by the fact that the house was jointly built.

In law division of assets does not only depend on the amount of contribution, it includes the customs of the community to which the parties belong, any debts owing by either party which were contracted for their joint benefit, and the needs of the children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division. In this party, there is no evidence as to the customs of the parties or debts owing on their party. This means, only two factors should be considered. That is to say, the extent of the contribution made by each party in money and the needs of the children.

In my considered view, the appellant contributed first by purchasing the land, doing initial building of some rooms before their association got gain. By the time the respondent got in, there was something tangible done already and this entitles him a bigger share. second, it is in law the duty of the parents to maintain their children. The appellant has to provide for maintenance to the children because the respondent has said she has no means whatsoever. Still, he has to provide for other expenses like education. That taken into consideration, the appellant deserves a relatively bigger share compared to what was done by the first appellate court. Based on the above, it is reduced to 30% of the same.

Th appellant claimed that, the said house is the only accommodation of his children he had with his former wife. It is unfortunate that it is the same house belongs to the spouses. But that fact cannot prejudice the respondent from getting her rightful share of the matrimonial property.

Since properties acquired during marriage or under presumption belong to spouses and not children. That may be the case in my view, if the spouses agree to do so expressly. It is my considered view that those children will benefit from their father's share. I therefore dismiss grounds 1,2,4 and 5 for lack of merits.

Having determined four grounds as above, it is opportune to turn to the remaining ground three. The same stated as hereunder;

> *That, the trial magistrate erred in law and fact by ordering Tsh. 100,000/= per month for maintenance of the young child without assuming that, the same is over 7 years old.*

The Law of the Child under section 4(1) defines a child to be a person under the age of 18 years. Subsection 2 of the same section read with section 37(4) are intrusive that in all actions regarding the child his best interest shall be a primary consideration. It is indeed tragic that the appellant has a belief that a child over seven years is should not be entitled to maintenance. I think this is not correct. The law imposes a duty to maintain a child by his parents, guardian or any other person, see section 8 of LCA. Since the child is over 7 years and the court believed it was at the interest of the child to be in the custody of her mother, it follows therefore that the order was valid and it will remain so until the same turns 18 years as provided for under section 47 of the LCA. Apart from the above, parties as said before lived under presumption of marriage. Subsection 2 of section 160 of LMA provides that;

> *When a man and a woman have lived together in circumstances which give rise to a presumption*

provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and the court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefor either by the woman or the man, to grant such other reliefs, including custody of children, as it has jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section.

By the wording of this section it was proper for the trial court to make orders for maintenance. Since maintenance goes with a custody order, the courts was therefore guided by principles stated under section 26, 37 and 39 of the Law of Child read together. To be more specific, section 39 of the LCA provides as follows;

39.-(1) The court shall consider the best interest of the child and the importance of a child being with his mother when making an order for custody or access. (2) Subject to subsection (1), the court shall also consider - (a) the rights of the child under section 26; (b) the age and sex of the child; (c) that it is preferable for a child to be with his parents except if his right are persistently being abused by his parents; (d) the views of the child, if the views have been independently given; (e) that it is desirable to keep siblings together; (f) the need for continuity in the care and control of the child; and (g) any other matter that the court may consider relevant.

From the above, it should be noted that

before an order of custody is made courts should consider, the need for child to live with her mother, age and sex of the child and the need for the siblings to live together and the view of the child if it can be independently obtained. But the amount of maintenance depends on the evidence produced which is guided by section 44 of LCA. Since it was proved that appellant is working with a Chinese company while respondent is jobless. Therefore, I will not disturb what was decided by the lower court concerning the amount to be paid as maintenance. This ground lacks merit is hereby dismissed.

In fine therefore, this appeal is partly allowed to the extent explained. Since the same arises from matrimonial proceedings, I make no orders as to costs.

Recoverable Signature

X

Signed by: A.K.RWIZILE

A. K. Rwizile
JUDGE
24.11.2020