IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 144 OF 2018

(Originating from Kinondoni District Court Civil Appeal No. 35 of 2015)

DOMINIC KYARUZI ..... APPELLANT

VERSUS

SUZAN J. MRUTU ..... RESPONDENT

JUDGMENT

7th and 28th August, 2020

BANZI, J.:

Dominic Kyaruzi, the appellant and Suzan J. Mrutu, the respondent contracted a Christian marriage on 14th November 1998. Their marriage was blessed with one issue, Samwel Kyaruzi who was born in 2006. Unfortunately, Samwel is autistic. After the marriage, they went to live in Ruvuma as the appellant was working at Mbinga Coffee Company Limited. Two years later, the respondent returned to Dar es Salaam and began to work at Tumaini Hospital, Upanga. In 2002, the appellant also returned to Dar es salaam after quitting his job. He worked in two different companies until in 2006 when he was employed by the government.

Upon returning to Dar es Salaam, the couple lived together at Makumbusho and later moved to Magomeni, Somanga street until October, 2011 when they separated after the appellant moved out of the house. According to the respondent, they bought a plot at Goba and started to build a house in 2005 by their joint efforts whereby in 2014, the appellant moved in. However, the appellant in his testimony claimed that, the plot in question was acquired by him and in 2003 he surveyed it in the name of his two children, Lilian Charles and Samwel Kyaruzi. He started to build the house in 2008 by his own income through credit facilities. According to him, the house is legally owned by the said children.

On 10th June, 2015, the appellant filed a petition for divorce and custody of the only issue of the marriage before the District Court of Kinondoni. The trial court upon being satisfied that the marriage was broken down irreparably, granted the divorce and ordered the house situated in plot number 2173 Goba Kunguru area and one motor vehicle makes SUZUKI be sold and the proceeds to be divided equally between the parties. Further, the respondent was given the custody of the child with visitation right to the appellant whenever he wishes. In addition, the appellant was ordered to maintain his child by paying Tshs.400,000/= per month plus education and

hospital costs. The appellant being dissatisfied with the decision of the trial court preferred this appeal with seven grounds as follows;

1. *The trial District Court erred both in law and fact when it failed to determine existence of marriage while there was no consummation of marriage on the first day of marriage.*
2. *The trial District Court erred in fact when it held that the appellant had prayed for division of matrimonial properties in his petition while there was no such prayer in his petition.*
3. *The trail District Court erred both in law and fact by unreasonably holding that the appellant's property on Plot No. 2173 at Goba be sold and proceeds therefrom be divided equally to the parties.*
4. *The trial District Court erred both in law and facts by maliciously declining to consider the extent of contribution made by each party towards acquisition of the only house at Plot No. 2173 Block B at Goba within the City of Dar es Salaam.*
5. *The trial District Court erred in law when it ordered equal division of the appellant's properties without considering that there are outstanding loans on house of which the appellant is having the responsibility to liquidate them.*

6. *The trial District Court erred in law and facts when it granted custody of the only issue of marriage to the respondent who had testified in court that she was unable to foot needs of the said infant.*

7. *The trial District Court erred in law and facts when it ordered the appellant to provide Tsh.400,000/= per month plus education and medical cost which sum is overwhelmingly high.*

Apart from filing reply to the petition of appeal through Mr. Aaron Lesindamu, learned counsel, the respondent has never appeared since the inception of this appeal save for two dates when her Advocate entered appearance. Despite several summons including the one published via Mwananchi newspaper dated 17th March, 2020, the respondent failed to appear. Thus, the appeal was heard *ex-parte* through written submission.

In his submission, Mr. Godwin Muganyizi, learned counsel for the appellant prayed to abandon the first ground of appeal. Starting with the second ground, Mr. Muganyizi, submitted that, division of the matrimonial properties was not among the prayers by appellant in his petition for divorce. Hence, it was an error for the trial Magistrate at the beginning of the judgment to hold division of matrimonial properties amongst the prayer of

the appellant. In respect of the third, fourth and fifth grounds which were argued jointly he submitted that, the trial Magistrate misconstrued the principle laid down in the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32 by ordering the house to be divided equally without considering the extent of contribution made by each part towards acquisition of the property in question. According to him, the evidence on record shows that, the respondent was not performing domestic works at the time of construction of the house as they separated since 2011. He added that, the respondent did not give any evidence of her contribution to substantiate equal division and the said house has never been a matrimonial home. To buttress his argument, he cited the case of **Regina Lutandala v. Pendo Joseph** [2017] TLS LR 51. It was further submitted that, the house in question is registered in the name of children as proved by the Certificate of Title and receipts from the Ministry of Land, Housing and Human Settlement Development. He added that since there is no law prohibiting a parent from purchasing a piece of land for his children, the trial Magistrate was not justified to hold that children can only inherit property from their parents otherwise there should have been deed of gift signed by both parties.

In respect of the last ground concerning payment of Tshs.400,000/= per month as maintenance plus education and medical costs, he submitted that, the order was a punishment to the appellant because it came from nowhere without knowing the income of the appellant. Apart from that, the order was never prayed by the respondent in her reply to the petition for divorce. According to him, the appellant has been paying the respondent Tshs.250,000/= and taking care of education and medical costs; hence, he be allowed to continue doing so. Thus, it was his prayer that, the appeal be allowed.

Having thoroughly considered the evidence on record and arguments in support of grounds of appeal, the issues for determination are;

1. *Whether the trial court had power to order the division of property in the absence of prayer by the petitioner.*
2. *Whether the house in plot No. 2173 Block B is matrimonial asset. If yes, whether the respondent is entitled to equal share.*
3. *Whether Tshs.400,000/= per month as maintenance of the child is excessive.*

Starting with the first issue, the counsel for appellant in his submission contended that, the petition for divorce contained three prayers and division of matrimonial properties was not among them. Hence, according to him, the trial magistrate was biased as from the beginning of the judgment was interested with division of matrimonial properties. With due respect, the argument by the learned counsel is misconceived. Section 114 (1) of the Law of Marriage Act [Cap.29 R.E. 2019] ("the LMA") provides as follows:

> *"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".* (Emphasis is added).

It is apparent from the extract provisions that, the court is vested with power to order division of assets acquired during the marriage. The court can do so without the same being prayed by the petitioner so long as the evidence on record establishes existence of properties acquired in the subsistence of marriage. In the present matter, it is undisputed that,

appellant in his petition for divorce did not include the prayer for division of matrimonial properties. But that in itself did not preclude the trial magistrate to make such order because according to the cited law above, is empowered to do so. See also the case of **Robert Aranjo v. Zena Mwijuma** [1984] TLR 7. Apart from that, the issue of matrimonial properties has featured from the beginning in the respondent's reply to the petition for divorce. Likewise, the same has featured in the evidence of both, the appellant and the respondent. Besides, under the LMA, the order of division of matrimonial assets is among the consequential orders following dissolution of marriage. Hence, it can be made regardless it was prayed or not. In the circumstances thereof, the trial court committed no error by holding on the issue of division of matrimonial properties after grating the divorce because it acted within the parameters of the law. Thus, the second ground lacks merit.

Reverting to the second issue which is the essence of third, fourth and fifth grounds of appeal, it is the contention of the counsel for the appellant that, the respondent is not entitled to equal distribution as the house in question was not the matrimonial property. It was also not jointly acquired because at the time of construction, the respondent performed no domestic duties.

In terms of section 114 (1) of the LMA, matrimonial or family assets are only those assets acquired during the subsistence of marriage by the joint efforts of husband and wife. Although the sale agreement in respect of the property in question, Plot No. 2173 Block B was never tendered, but the evidence on record revealed that the property was acquired during the subsistence of marriage. The appellant in his chief testimony did not mention the year he claimed to buy that plot from Bakari Salehe for Tshs.3,500,000/= but he claimed to survey the same in 2003. Nonetheless, during cross examination, he stated that, he bought it in 2008 when he was with his wife (the respondent) while they were staying at Magomeni. Likewise, the respondent did not mention when the said plot was bought. But her witness Emanuel Willgod Weraeli Muro (DW3) claimed to be a witness when the said plot was bought by the appellant and the respondent. Be as it may, from the evidence of both parties, there is no dispute that, the plot in question was bought before 2011 when the appellant and respondent separated. In other words, it was bought during subsistence of marriage while the couple were living in a rented house at Magomeni. At that time, the respondent was not only working but also performing domestic work which taken all together amount to contribution towards acquisition of the plot in question.

Apart from that, the evidence on record shows that the construction of the house in the said plot began before the couple separated in 2011. According to the appellant, he started the construction in 2008 after getting the loan from his friend following by other loans from Azania bank, Postal bank and from TIRDO Cooperative Savings and Credit Society. On the other side, according to the testimony of the respondent, the construction began in 2005. Her evidence is supported by Emanuel Asanterabi Muro (DW2) who said in the year 2003/2004 he was given a task of removing stumps in the said plot before the construction. He also claimed to be among the ones who roofed the house in 2009. Apart from these testimonies, according to the testimony of Isack Kulumuna (PW2) and exhibit PE2, it shows that, the first three loans Tshs.36,000,000/= from PW2, Tshs.13,000,000/= from Azania Bank Limited and Tshs.15,000,000/= from Tanzania Postal Bank were advanced to the appellant before the two separated. Thus, taking the evidence of both sides, it is apparent that, when the construction began either in 2005 or 2008, the appellant and respondent were still husband and wife living together in the rented house at Magomeni. Also, through the evidence of DW2, it is apparent that when the house was at roofing stage, the appellant and the respondent were living in the rented house. Moreover,

in her testimony in paragraph 7 at page 24 of the typed proceedings, the respondent stated that:

> *"...I contributed in that house on building, because I was also working so I did some other home domestic matter and taking care of the family while my husband was financially building that house."*

Basing on this evidence, it is clear that the respondent also contributed in the construction of the house in question because it is evident that, at that time, the respondent was not only working but also performing domestic work which taken all together amount to contribution towards acquisition of the house in question. Therefore, in the considered view of this court, performance of domestic duties amounts to contribution towards acquisition of matrimonial asset although not necessarily 50% as it was stated in the cases of **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 [2019] TZCA 414 at www.tanzlii.org and **Bibie Mauridi v. Mohamed Ibrahim** [1989] TLR 162.

However, there is contention from the appellant that, the house in question belongs to his children. Now the question to be answered is whether the house was properly transferred to Lilian and Samwel. The

appellant in his evidence stated that, he surveyed the plot on 23rd March, 2003 and that was given plot No. 2173 block B and owner being Lilian Charles and Samwel Kyaruzi. To support his evidence, the appellant tendered receipt of payment and request for survey which were admitted as exhibit PE1. The request for survey shows that, the occupier of the plot is Dominic Charles Kyaruzi (the appellant) applied for survey on 31st December, 2010 and the instructions for survey were issued on 14th January, 2011 which is way back before the separation. There is clear contradiction between the evidence of the appellant and exhibit PE1 in respect of when the said survey was conducted between 2003 and 2011. Be as it may, it is obvious that, the survey in question was conducted when the appellant and respondent were husband and wife living together in the rented house. Adding salt to the fresh wound, according to the receipt in question which is in the form of letter of acknowledgement of payments, the ownership on the plot in question by Lilian and Samwel began from 1st January, 2013 when the two were separated but were still legally married. That is to say, the property in question was transferred to Lilian and Samwel during the subsistence of marriage. The appellant in his testimony did not reveal if the respondent was aware of the disposition. Likewise, the evidence of the respondent did not show whether she consented to the disposition of the property in question.

During cross examination she claimed that, the appellant was supposed to seek her consent before disposition.

From the testimony of both parties, it is clear that the appellant did not consent to the disposition of the house in question. This offends section 161 (3) of the Land Act [Cap. 113 R.E. 2002] which requires the consent of the spouse before disposition. Although the disposition was not in a form of sale, yet still it required the consent of the respondent who was also the owner of the property in question. It is the considered view of this court that, despite the disposition, the respondent is still entitled to some share because she has contributed to the acquisition as explained above. In the case of **Rehema Salum Abdallah v. Nizar Abdallah Hirji**, Civil Appeal No. 120 of 2018 [2019] TZCA 316 at www.tanzlii.org, the Court of Appeal in circumstances similar like the one at hand where matrimonial properties were disposed by sell to the children without consent of the spouse, it was court held that, the appellant is still entitled to some shares.

Since the house in question is matrimonial asset acquired during subsistence of marriage by the joint efforts of the spouses and because it was transferred without the consent of the respondent, it is the finding of this court that, the respondent is entitled to some shares. There is no dispute

that, after separation, the appellant continued to develop the property on his own effort. Therefore, considering the extent of contribution of the respondent which according to her evidence was mostly domestic duties, that in itself does not necessarily amount to 50%, equal share as stated in the cited cases above. Therefore, considering her contribution and because she was no longer living with the appellant since 2011, it is the considered view of this court that, the respondent is entitled to 40% of the total value of the house and the remaining 60% goes to the appellant. Moreover, the complaint raised in the fifth ground has no merit because according to exhibit PE2 all credit facilities advanced to the appellant were secured by his salary following guarantee agreement between his employer and lenders. The house in question has never been used as security over any credit facility. For those reasons, the third ground is partly allowed while the fourth and fifth grounds are dismissed for want of merit.

Concerning the complaint raised in the sixth ground, the trial court before grating the custody of the child to the respondent considered the best interest and welfare of the child. In addition, the health condition of the child was also considered. According to the evidence of the appellant, their child is autistic and needs assistance in everything including in wearing clothes.

He added that, since their separation in 2011, the child was living with the respondent. His evidence is supported by the evidence of the respondent. According to her, their child needs extremely care of parent since he has unfriendly habit. She also stated that, since the appellant left her in 2011, the child was living with her. Basing on this evidence, I don't find any reason to fault the decision of the trial court on this issue because the child will be in safe hands with the respondent as he used to live with her for his entire life. Likewise, the sixth ground lacks merit.

Coming to last ground in respect of the issue of maintenance, it is worthwhile noting here that, according to section 29 (1) (a) of the Law of the Child Act [Cap. 13 R.E. 2019], any child following the divorce of his parents has a right to maintenance and education of the quality he enjoyed immediately before his parents were divorced. It is also prudent to note that, according to section 129 (1) of the LMA generally, the duty to maintain the child is vested to the man following the divorce of his parent. The section reads as follows;

> *"Save where an agreement or order of court otherwise provides,* ***it shall be the duty of a man to maintain his children****, whether they are in his custody or the 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".* (Emphasis supplied).

In the instant case, the appellant was ordered to pay Tshs.400,000/= per month as maintenance (in respect of food and shelter) plus education costs and hospital services. According to the appellant, the trial court was not justified to issue the order in question and it was not emanating from the respondent's prayers. To him, the order was a punishment from the trial court without considering his income.

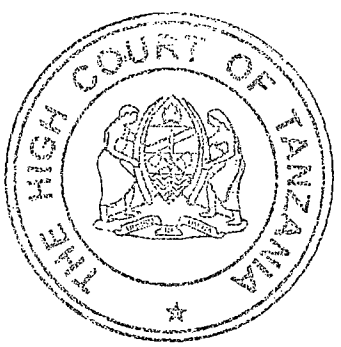
Admittedly, looking at pleadings before the trial court, neither of the parties prayed for the maintenance of the child. Nonetheless, according to section 130 (1) of the LMA, the court is empowered to order a man to pay maintenance for the benefit of his child. With due respect, the argument by learned counsel for the appellant concerning the order was made without being prayed is misplaced because even in the absence of such prayer, the court still has power under the law to make maintenance order. Maintenance order is among consequential orders following dissolution of marriage between parties just like the order of distribution of matrimonial properties.

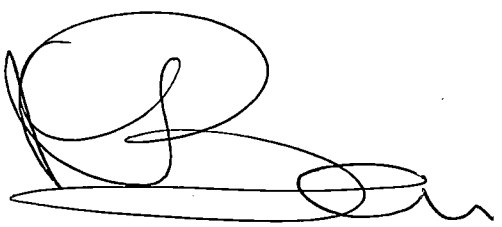
Therefore, it can be made regardless it was prayed or not. In addition, according to the provisions of section 129 (1) of the LMA, the duty of maintenance of the child after the divorce is vested in the man by providing him with accommodation, clothing, food and education having regard to his means and station in life. It is not about being punished but, the appellant is legally bound to maintain his child who is under the custody of his mother by providing him with accommodation, clothing, food and education. Therefore, the trial court was right to order the appellant to maintain his child following dissolution of their marriage.

The remaining issue is whether the amount of Tshs.400,000/= per month for maintenance of the child was excessive. The evidence on record proves that the appellant is the employee of the government institution (TIRDO). Both, the appellant and respondent testified over health condition of their son who according to the respondent, he needs quiet environment, special care and health services. Therefore, the order of maintenance of Tshs.400,000/= per month to cover accommodation and food is reasonable and not excessive. Thus, considering the health condition of the child, the trial court was right to order the appellant to pay Tshs.400,000/= per month as maintenance and to cover for education and health costs.

For the foregoing reasons, the appeal is partly allowed to the extent mentioned above. All orders of the trial court are upheld save for the order of selling of the house in Plot No. 2173 Block B Goba area and its proceeds be divided equally between the parties which is hereby varied. Thus, since the house in Plot No. 2173 Block B Goba area has already been transferred and registered in the names of the children, the appellant is ordered to pay the respondent the amount equivalent to 40% of the total value of the house after conducting valuation. Owing to the nature of the matter, each party shall bear its own costs.

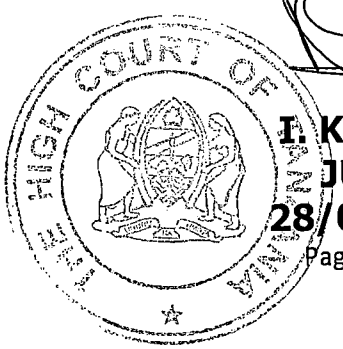
It is so ordered.

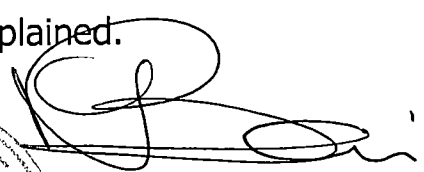




I. K. BANZI
JUDGE
28/08/2020

Delivered this 28th day of August, 2020 in the presence of Ms. Jesca Ndembeka, learned counsel for the appellant and in the absence of the respondent. Right of appeal explained.





I. K. BANZI
JUDGE
28/08/2020