

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 99 OF 2020

*(Arising from Kinondoni District Court Matrimonial Appeal No. 27 of 2019 Originating
from Kimara Primary Court Matrimonial Cause No. 80 of 2019)*

RAYMOND RAPHAEL **APPELLANT**

VERSUS

CESILIA MICHAEL **RESPONDENT**

JUDGMENT

11th August & 22nd September, 2020

BANZI, J.:

This is a second appeal originating from Kimara Primary Court where the Respondent petitioned for divorce, maintenance of children and distribution of properties basing on customary marriage contracted in 2012. The marriage between the Appellant and the Respondent was declared null and void because of the subsisting marriage between the Appellant and Margareth Ludovick Silayo which was contracted in accordance to Christian rites on 18th March, 2006. Following annulment of their marriage, the Appellant was ordered to maintain his two children by paying Tshs.80,000/=

per month. On the issue of distribution of properties, all properties remained with the Appellant save for one plot with office premises and four roofing iron sheets that were given to the Respondent.

Aggrieved with the decision of the trial Court, the Appellant appealed to the District Court of Kinondoni, which dismissed the appeal with costs after varying the maintenance order by increasing the amount from Tshs.80,000/= to Tshs.200,000/= per month plus an order to the Appellant to cover for education and medical costs for two issues. Still dissatisfied with the decision of the District Court, the Appellant lodged the appeal before this Court containing five grounds which may be crystallised and summarised as follows;

- 1. That the District Court erred in law and fact by not holding that, the trial Court was wrong by giving the properties to the Respondent which she did not contribute.*
- 2. That the District Court erred in law and fact in increasing maintenance from Tshs.80,000/= to Tshs.200,000/= per month basing on assumption over the Appellant's income.*
- 3. That the District Court erred in law and fact in by ordering the Appellant to pay costs of the case.*

At the hearing of this appeal, both parties appeared in person and unrepresented. By consent, the appeal was argued by way of written submissions.

It was the submission of the Appellant that, there was no concrete evidence adduced by the Respondent to establish her contribution towards acquisition of the properties subject to the division. It was added that, the District Court misconceived the facts in respect of the Respondent's contribution in acquisition of the property bought on 02/05/2015. According to him, it was an error for the District Court to assume that, the property was jointly acquired because it was bought immediately after the Appellant parted with his legal wife. He cited the case of **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113 to buttress his point that a person with heavier evidence than the other must win.

In respect of the second ground, it was argued that, the order for the increase of the maintenance amount was based on assumption about the income of the Appellant from aluminium business without considering the invested capital and market situation. It was also his contention that, the two issues were staying with his parents in Moshi but the Respondent took

them for her own interest. As for the last ground, he argued that, the District Court erred by ordering the Appellant to pay costs of the case because, as a matter of practice, being the family dispute, the Courts normally refrain from awarding costs for purpose of continuing good relationship. Thus, he prayed that, the proceedings, judgment and decree of lower Courts be quashed and set aside. He also prayed for maintenance amount to be reduced to Tshs.60,000/= per month.

In her reply, the Respondent submitted that, the District Court committed no error by upholding the decision of the trial Court in respect of division of matrimonial assets. She cited section 114 (2) of the Law of Marriage Act [Cap. 29 R.E. 2002] ("the LMA") and insisted that, she has managed to prove her contribution towards acquisition of the properties in question by purchasing building materials. She added that, the evidence adduced by both parties was clearly and correctly considered by the District Court and there was no misconception of facts. She also cited the case of **Eliester Philemon Lipangahela v. Daud Makuhuna**, Civil Appeal No. 139 of 2002 HC at Da es Salaam (unreported) to support her point.

In respect of the second ground, she submitted that, the District Court correctly extended liability of maintenance from Tshs.80,000/= to Tshs.200,000/= after considering the income of the Appellant. She added that, since the Appellant abdicated his obligation of maintaining his children as stipulated under section 129 (1) of the LMA, the District Court was justified to increase the maintenance amount plus payment of education and medical costs. She prayed for the maintenance amount to remain the same as per order of the District Court. So far as the last ground is concerned, she submitted that, the order of costs was within the mandate of the District Court and hence, the Resident Magistrate committed no error by awarding the same. In that regard, she prayed for the appeal to be dismissed with costs and the judgment of Kinondoni District Court be upheld.

Having thoroughly considered the evidence on record and arguments for and against the grounds of appeal, the issues for determination are; **one**, *whether the Respondent was entitled to the division of the acquired properties*, **two**, *whether the maintenance amount of Tshs.200,000/= per month was justifiable* and **three**, *whether it was proper for the District Court to award costs in favour of the Respondent.*

First and foremost, as rightly held by two Courts below, there was no valid marriage between the Appellant and the Respondent. According to the evidence on record and exhibit RR1, it is undisputed that, on 18th March, 2006 the Appellant married Margareth Ludovick Silayo under Christian rites which according to the LMA is monogamous marriage. Hence, basing on section 15 (1) of the LMA, the Appellant was incompetent to marry, thus, whatever transpired between the Appellant and the Respondent under the customary rites was a nullity.

Since there was no valid marriage between the Appellant and the Respondent right from the beginning, whatever was acquired during their cohabitation, is treated like properties of partners in a partnership. Ordinarily, where a property is jointly acquired and thereby owned, the claim of interest by each one would depend on, one's contribution towards acquisition, upkeep and three, improvement of the property in question. The remaining issue is whether there is evidence to establish the Respondent's contribution towards acquisition, upkeep and improvement over the property subject to this appeal.

At the trial Court, the Respondent was given one plot after it was established that, she contributed towards acquisition, upkeep and improvement. The District Court after considering the evidence on record, upheld the decision of the trial Court in respect of division of the properties. I have thoroughly examined the evidence of both parties in respect of the property in question. According to the Appellant, the disputed plot was acquired on 02/05/2012 at the price of Tshs.3,000,000/=. On the other hand, the Respondent claimed that, the same was acquired between 2014 and 2015 for Tshs.4,000,000/=. Be it as it may, in the main, what I gather from the evidence of both parties, the property in question was jointly acquired. It is also on evidence that, the Respondent developed the house by fixing windows. Therefore, it is the considered view of this Court that, the Respondent has interest over the property in question. In that regard, I find no reason to fault the decision of both Courts below in respect of division of the property in question considering the fact that, the Appellant kept all remained properties including another plot which was also jointly acquired.

Coming to the second issue, it is a common knowledge that, unless parties have agreed otherwise, it is the duty of the father to maintain his children whether they are in his custody or the custody of somebody else.

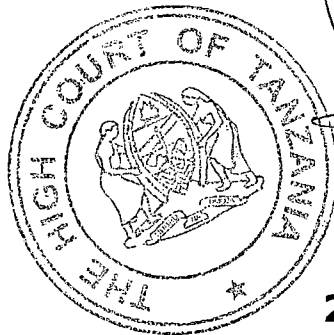
According to the Appellant, their children were living with his parents but the Respondent took them for her own interests. This contention by the Appellant is not supported by the evidence on record. Even if the children were with his parents, it would still be the Appellant's duty to maintain his children. As for the maintenance amount, before increasing the amount from Tshs.80,000/= to Tshs.200,000/= per month, the District Court considered the evidence of the Appellant, the then underlining status of living and needs in the light of the Respondent means of income. On this, I also find no reason to fault the order of the District Court. Besides, according to the evidence, although his monthly income was not disclosed, but apart from being a shareholder at Efatha Foundation Limited, the Appellant runs aluminium business which in one way or another generates an income. Therefore, in the considered view of this Court, the amount of Tshs.200,000/= per month is reasonable.

The issue of costs need not detain this Court. It is common knowledge that, the issue of awarding costs is in the discretion of the Court. Besides, there is no law in matrimonial proceedings that prohibits either the Primary Court, District Court or High Court from awarding costs in favour of succeeding party. It is discretionary and all depend on circumstances of each

case. In that regard, I see no reason to fault the order of costs issued by the District Court.

Having said so, and for the reasons stated above, the appeal is hereby dismissed in its entirety. The judgment and decree of the District Court are upheld. Owing to the nature of the matter, each party shall bear its own costs.

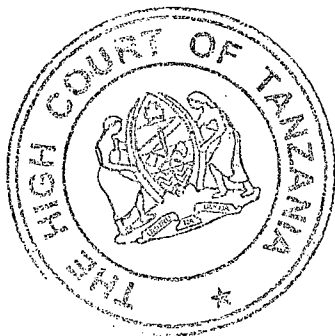
It is so ordered.



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**I. K. BANZI
JUDGE
22/09/2020**

Delivered this 22nd September, 2020 in the presence of the appellant and the respondent in person.



A handwritten signature in black ink, identical to the one above.

**I. K. BANZI
JUDGE
22/09/2020**