IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 43 OF 2020

(Arising from the judgment and decree of the District Court of Kinondoni in Matrimonial Cause no. 136 of 2018)

SIGBERT JUSTINE SWAI..... APPELLANT

VERSUS

NEEMA JONAS SARIA.....RESPONDENT

JUDGEMENT

Date of last order: 16.03.2021

Date of Judgement: 28.05.2021

EBRAHIM, J;

This appeal emanates from the decision of the District Court of Kinondoni in Matrimonial cause No. 136 of 2018. The background of the matter as can be deduced from the records is that the appellant and the respondent cohabited a as husband and wife for 6 years since year 2012. They were living at Mbezi Louis, Muhimbili Street. They were blessed with one child namely Merola Sigbert who was born on 9th November 2012. They separated in July 2018 and it was when the Respondent herein filed a matrimonial cause before the District Court of Kinondoni

seeking for orders to dissolve the marriage. The Respondent also sought for custody and maintenance of a child including medical care and education expenses. The Respondent also sought for division of the properties jointly acquired and the cost of the petition.

In determining the matter before him, the trial magistrate found that there was a presumption of marriage and proceeded to declare that **their marriage has been irreparably broken down.** The trial magistrate further apportioned a share of 20% of the value of the house for the development of a house located at Mbezi Louis owned by the Appellant's father, one Justine Ezekiel Swai to the Respondent. He granted custody of the issue to the Respondent and ordered the Appellant to pay Tshs. 100,000/- per month as maintenance allowance and ordered the Appellant to provide for educational and medical expenses of the child.

The appellant was aggrieved with the decision of the trial court. He lodged an instant appeal raising four (4) grounds of appeal as reproduced hereunder;

1. *That the trial magistrate erred in law and fact for giving judgment in favour of a party that had produced no material evidence to prove its case.*
2. *That the trial magistrate erred in law and fact for holding that the respondent is entitled to a 20% share of the development contribution of the house owned by the appellant's father one Justine Ezekiel Swai despite that the appellant proved beyond reasonable doubt that the said house belonged to his father, and that when the respondent came to cohabit with the appellant therein the house was all complete and fully furnished and so the respondent did not add any new material of any value at all.*
3. *That the trial magistrate erred in law and fact by failing to properly record and consider the fact that the respondent had tendered no evidence whatsoever to prove her allegations.*
4. *That the trial magistrate erred in law and fact for awarding a higher figure relating to the monthly maintenance of the child (at Tshs. 100,000 per month) without considering the appellant's limited financial resources, and despite the appellant's plea in court that he was at the time being "UNEMPLOYED"*

This case proceeded exparte against the Respondent, despite several efforts exerted by the Appellant to serve the Respondent as advised and directed by the court. The Appellant

among other efforts affixed summons at the Respondent's place of abode as it can be seen from the affidavit of the court process server sworn on 21.09.2020 and the appended pictures, the Respondent ignored the same and still did not enter appearance.

In this appeal, the Appellant was represented by advocate Sengerema. He adopted the grounds of appeal and told the court briefly that the property adjudged to a portion of 20% to the Respondent is not the property of the Appellant. He stated also that there was no marriage between the Appellant and the Respondent and that the Respondent should also pay cost.

I have followed the submissions by the Appellants as well as visited the proceedings in record. During the trial, the Respondent revealed that she had seen the Tanzania Revenue Authority Property Rate Demand Note 2018/2019 that it was her father in-law who paid the tax. Again, the Appellant explained explicitly that the house belongs to his father. Even the Respondent, in reading her evidence in its context admitted that his father-in-law went together with the Ten Cell Leader to put padlock on the house demanding back his house.

On the 2nd ground of appeal that trial court apportioned a property which was not a matrimonial property, indeed, I must point out at the outset here that the trial court wrongly applied the principle of the law.

I am alive that the trial court found there was a presumption of marriage but he was wrong to declare the marriage was broken as there was no marriage. A decree of divorce can not be issued on parties who were not married but were presumed to be married under **section 160 (1) of Cap 29 RE 2019**. Therefore, the trial magistrate misdirected himself to consider a presumption of marriage as marriage. What he could have done was just to give cognizance to the party's arrangement to terminate their relationship. This court in ***Harubushi Seif vs. Amina Rajabu [1986] TLR 221 at page 225;*** stated inter alia that;

> *"...It is clear that the respondent and the applicant having not been duly married in accordance with the formalities and procedures provided for in the Marriage Act, the respondent had no legal right whatsoever to petition either for divorce or separation. It was incorrect for the lower courts to hold that the appellant and respondent were duly married. But it having been*

satisfactorily proved that the appellant and the respondent have lived as husband and wife for about 15 years, the respondent shall be entitled to file an application for maintenance, for herself, for the custody of the 4 or any other children and also for other reliefs which includes application for division of property for which she may feel she is entitled to a share..."

The law recognises division of property acquired by joint efforts during the subsistence of marriage. **Section 114(1) of the Marriage Act, Cap 29 RE 2019** reads 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***".

The catch phrase here is the assets **"acquired by them during the marriage by their joint efforts".**

Tailoring the above position of the law to the circumstances of our instant case, no property which belongs to another person who is neither a husband or a wife can be apportioned or be subjected to a division as a matrimonial property jointly acquired in the subsistence of marriage of the couple. That is wrong. A

matrimonial property presupposes a property owned by either party in the marriage or presumption of marriage jointly acquired. The Respondent testified at the trial court that she contributed money to the development of the house that they were living in and she knew that it was the Appellant's house. However, the Appellant said that the house belonged to his father and they were only given a place to live in and when the hell broke loose his father wanted his house back. Both exhibits PE1 and PE2 reveals that the name on the property is of Justin Ezekiel Swai and not Sigbert Justin Swai. Infact, the Respondent failed to prove that the house is the property of the Appellant. The Respondent even failed to prove the amount of money she injected in the said development of the house. Be as it might have been, the house cannot be subjected to division as a matrimonial property because it is neither the Appellant's nor Respondent's property. One cannot claim apportionment of a matrimonial asset to a property which does not belong to either of the spouse. Therefore, the trial magistrate erred in ordering apportionment of the house on the property of the Appellant's father.

Coming to the issue of assessment of maintenance allowance. Certainly, there is no hard and fast rule in assessing costs for maintenance in matrimonial issues. The Court has to give regard to the means and station in life of the person so ordered to pay (see the cited case of **Jerome Chilumba V Amina Adamu (supra)**). However, it is not the only criteria to be looked upon. Other factors have also to be considered like cost of living, and/or welfare of the Children and other responsibilities and obligations that the father of the issue's shoulders including but not limited to education, health, food, clothing and social welfare. In this case, it is not recorded anywhere that the Appellant was UNEMPLOYED. Actually that is a new fact that was not raised at the trial for it to be addressed and adjudicated upon. The Appellant said he wanted the Respondent to go back and stay with him. He also said that he gives maintenance to the Respondent. That being the case therefore, in considering the prevailing economic situation, I find no justification to interfere with the assessment of Tshs. 100,000/- ordered by the trial court as maintenance allowance per month.

In the upshot and from the above background, the appeal succeeds only to the extent that there was no marriage between parties; and I accordingly reverse the order of apportionment of 20% of the value of the disputed house to the Respondent as it is not a matrimonial property. I further find it prudent to grant the Appellant with visitation rights to their child upon informing the other party within reasonable time prior to the visit or depending on the circumstances. The Respondent should not unreasonably withhold the right of the Appellant to visit their child and have temporary custody during school holidays and the like.

Further, in case of changes of circumstances which render either party unfit to have the custody of the issue; the other party may move the court to rescind its earlier order.

Following the relationship of parties that it is a matrimonial matter, I give no order as to costs, each party to bear its own.

Accordingly ordered.

R.A. Ebrahim
Judge

Dar Es Salaam
28.05.2021

Court: The Respondent be informed of the judgement

Rights of appeal explained.

R.A. Ebrahim
Judge
28.05.2021