

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL No 292 of 2020

[Arising from the Judgment and Decree of the District Court of Kinondoni

at Kinondoni in Matrimonial Cause No 22 of 2019]

BETWEEN

PATROKIL PETER KANJE.....APPELLANT

Versus

LIDYA WILSON KIVUYO.....RESPONDENT

JUDGMENT

MRUMA, J.

Patrokil Peter Kanje the Plaintiff/Appellant herein was married to **Lidya Wilson Kivuyo**, the Defendant/Respondent herein but they are now divorced. He has brought this appeal through memorandum of appeal seeking to assail the decision and orders of the District court which had ordered equal division of a property i.e. a plot located at Goba after its valuation, that the only issue of their marriage be placed under the custody of Respondent and the Appellant pay Shillings 200,000/= monthly for maintenance, on top of school fees and costs of the suit.

The Appellant was aggrieved by the decision and orders of the trial court and he has appealed to this court on the following grounds:

1. That the trial court erred in law and in fact to order the division of matrimonial asset which is no longer under the ownership of either of the parties;
2. That the trial court erred in law to order equal division of matrimonial asset without valuating contribution of each party towards its acquisition;
3. That the trial court erred in law and in fact to order the Appellant to pay costs of the proceedings without considering the circumstances of the proceeding thus, the court's discretion was arbitrary used and;
4. That the trial court erred in law and in facts to grant the Respondent custody of the issue of marriage without taking the wishes of the child.

At the hearing of this appeal, the Appellant was represented by Ms Regina Herman, learned advocate while the Respondent had representation of Mr John Lingopola also learned advocate. The appeal was argued orally.

Submitting in support of the first ground Ms Regina contended that since there was evidence to the effect that the only asset of parties was sold prior to the institution of the present proceedings and there is nothing to show that the sale had been revoked by the court the trial court was wrong to order that property to be divided equally between the parties and without taking into account the fact that it was solely acquired by the Appellant.

Submitting with regard to second ground the learned advocate submitted that before court can order equal division of what it consider to be a matrimonial property it must consider contribution of each party towards its acquisition. She said that before making an order for equal division of Goba the learned trial Magistrate didn't consider the evidence of the Appellant which was to the effect that the Respondent was a mere house wife. The learned advocate referred this court the decision of the Court of Appeal in the case of **Gabriel Nimrodi Kwinjira Versus Theresia Hasan Malongo Civil Appeal No 012 of 2018** (Unreported) where the court held that the extent of contribution was of utmost important to be considered.

Regarding the last ground the learned counsel submitted that before granting custody of a child to a party, court is required to inquire all

circumstances of the case including the wish of the child. He cited the provisions of Sections 38(1) and 73 of GN No 182 of 2016 and stated that the Respondent was homeless and therefore not fit to stay with the child.

Responding to Ms Regina's submissions Mr John Lingopola contended that the trial court was right to order equal division of the matrimonial asset as there was evidence to the effect that it was jointly acquired by the parties. The learned counsel referred the court to paragraph 9 of the Appellant's petition in which he stated that the two jointly acquired a matrimonial property to wit one Shamba at Goba Chaurembo area.

Regarding the Respondent's contribution towards acquisition of the said property, it was the submission of Mr. John that despite the Appellant's admission that the property was jointly acquired, there was evidence from the Respondent to the effect that she was a business woman and she contributed financially towards the acquisition of the said property.

On the issue of costs, the learned counsel submitted that in terms of Section 90 of the Law of Marriage Act, costs is in the court's discretion and that the court didn't err in exercising its discretion the way it exercised it.

Regarding custody of the only issue of marriage the learned counsel submitted that on the undisputed evidence that the Appellant was a drunkard and returns home late at night the trial court didn't err to put the custody of the child to the Respondent.

This being the first appeal the court has a duty of re-evaluating the evidence tendered at the trial to see whether the trial court did properly evaluate it and came into right conclusion of the matter.

The Appellant in his pleadings and evidence on record stated that he married the Respondent on 21st May, 2011 according to Christian Marriage rites. This is not contested. It is also uncontested that there is only one issue of marriage and that the said marriage has broken down irreparably.

During the trial the Respondent claimed that she was a business woman when she got married and that she contributed financially towards acquisition of the matrimonial properties, which is a plot situated at Goba in Dar Es Salaam. She said that she was not aware that the said plot had been sold. This too was not contested.

She claims said that if it is true that the plot had been sold she is entitled for compensation. She asked the trial court to take into consideration of that disposal.

The Respondent further claimed that she used her earnings to pay school fees for their child and for the entire period of separation (2016 to 2020), she paid shillings 8,649,000/=. She tendered in evidence School fee receipts (Exhibit D1), to substantiate her claims.

On the other hand during the trial the Appellant acknowledged the fact that the Respondent was his wife having married her in church on 21st May, 2011. He stated that the Respondent at the time they were living together was not working. He claimed that he paid school fees for his child though he didn't know which school she was schooling and the class she had reached. He stated that he sold the Goba plot in order to get money which he used to pay for medical charges for his mother who was sick.

The parties in this cause didn't dispute what comprises matrimonial properties. On one hand the Appellant listed one property namely:-

1. One Shamba at Goba Chaurembo in Kinondoni Municipality Dar Es Salaam but the Petitioner had sold the same to one Consolata Gasper Silayo on 12th Day of February 2017."

On the other hand the Respondent has admitted that the couple acquired only that property and insisted that she contributed towards its acquisition and that she was not aware if it had been sold.

It is trite law that whoever alleges must prove. The onus of prove obviously rested on the Respondent to prove both monetary contribution made and non-monetary contribution in acquisition of the property. The onus of proof however, was negated by the fact that in paragraph 9 of the Appellant's petition he clearly stated that the property was jointly acquired and in his evidence in chief he told the trial court that he was ready to compensate her. Because he didn't qualify each party's share in acquisition of the property, the trial court was correct to find and order that they held equal shares thereof.

There is no dispute about co-ownership of the said property as the Appellant himself in his pleadings stated that the property was jointly acquired and he conceded during examination in chief that he was ready to compensate the Respondent. Accordingly grounds 1 and 2 of the appeal are without substance and are hereby dismissed

The provision of **Section 60(2)** of the **Law of Marriage Act**, specifically presumes that where during the subsistence of marriage any property is acquired in the names of the husband and wife jointly,

that there beneficial interest therein are equal. In the present case it is the Appellant who pleaded that the property was jointly owned. He cannot be heard that is not entitled to equal shares.

With regards to maintenance and custody of the only child of the marriage I have of course noted from the evidence tendered that the Respondent has been living with the child since she left the Appellant in 2016, the evidence also shows that the Respondent paid fees for the child (Exhibit D1) though the Appellant disputes this saying he equally paid for the fees, but he didn't tender any receipt in terms of banking slips etc to substantiate his claim. He couldn't even mention the name of the school where his child was and the class she had reached. I also note that the child is a female and is was born on 14th February, 2012 she was therefore under ten years old when the custody order was made. She is now around ten (10) years old. The Appellant in my view based on the evidence tendered, cannot be a suitable person to stay with the child and the submission by the counsel for the Appellant to the effect that the mother was homeless and was not working in view of the birth certificate (Exhibit P2) which shows that she is a businesswoman cannot stand. The best interest of a female child who is under the age of 18 and who has been staying with her mother for over five years prior to the institution of the

proceeding requires that she continues to stay with her mother. Accordingly I dismiss ground four of the appeal

Finally on the question of costs, I would agree with the Appellant's counsel that courts' discretion must be exercised judicially. Judicial exercise of discretion powers entails it has to be exercised basing on what is right and equitable under the circumstances of the case. This is a matrimonial proceeding. The parties were husband and wife. Despite the fact that their marriage has been broken and accordingly dissolved but their child still connects them. One is a father another is a mother. They are not blood related, but their child is blood related to each of them as such they too are now related to each other via their child. Further to that the trial court ordered maintenance of the child at the rate of Shillings 200,000/= among others which means parties shall continue to be in contact. In such circumstance it was not just to order the Appellant to pay costs of the case. Accordingly I allow the Appellant's appeal on the item of costs. I quash and set aside the order for costs and order that each party shall bear own costs.

In the result therefore this appeal is dismissed save for costs aspect which is allowed as explained above. Each party shall bear own costs.




A.R. Mruma

Judge

Dated at Dar Es Salaam this ^{17th} day of May 2022.