IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL N0.43 OF 2022

(Arising from Matrimonial Cause No.28 of 2021 at Ilala District Court)

STAILE FRANCIS KIKO .....APPELANT

VERSUS

DEVIS ALOYCE MISINGO ..... RESPONDENT

JUDGMENT

Date of last order: - 27/02/2023
Date of Judgment: -29/05/2023

OMARI, J.

The Appellant, one Staile Francis Kiko and the Respondent, one Devis Aloyce Misingo celebrated their marriage in the Christian form on 11 June,2011. It would seem they were having a somewhat peaceful matrimonial existence until 23 August, 2020 when the Appellant is alleged to have left her matrimonial home. At the time they were blessed with two children both fairly young and are now aged 5 and 8 years respectively.

The Appellant Petitioned for Divorce in the District Court of Ilala at Kinyerezi vide Matrimonial Cause No. 28 of 2021 praying for a judgment and decree as follows:

i. A declaration that the marriage between the Petitioner and Respondent has been irreparably broken down.

ii. An order to dissolve the marriage and a decree for divorce be granted to the Petitioner.

iii. Division of matrimonial properties.

iv. Custody of children be given to the Petitioner.

v. Maintenance costs for those children be awarded to the Respondent.

vi. An order that all transactions done, if any, in respect of matrimonial property or assets above be nullified and the purchaser if any, be refunded his or her purchase price.

vii. Any other orders or reliefs that the court may deem fit and just to grant.

In his Reply (sic) the Respondent prayed for:

i. An order declaring this marriage has broken down beyond repair.

ii. Issue divorce to the parties.

iii. Custody of the issues to be placed to the Respondent.

iv. Division of matrimonial properties per each contribution.

v. No order as to cost of the Petition.

vi. Any other order(s) or reliefs this honourable court deems fit and just to grant.

On the outset it can be seen that neither of the parties contested the divorce. The only issues in contestation were the custody of children (and the resultant maintenance), as well as the division of matrimonial properties that were jointly acquired by the parties. The trial court concluded that the marriage had irreparably broken down as per the instances given under the provisions of section 107 of the Law of Marriage Act, Cap 29 RE 2019 (the LMA). As for the division of matrimonial properties; guided by section 114 of the LMA and the landmark case of **Bi Hawa Mohammed v. Ally Sefu** [1983] TLR 32; the court awarded a motor vehicle with Registration No. T 948 DSC, a house in Kinyerezi-Kibaga, one plot at Mwembe Mdogo Kigamboni and half (50%) of a plot at Kiharaka Bagamoyo to the Respondent. The Appellant was awarded with one plot at Mwembe Mdogo Kigamboni, the remaining half (50%) of the Kiharaka plot and a 10 acres *shamba* at Mlandizi. Furthermore, based on the court ordered Social Inquiry Report (the SIR) the trial court sought to assess the status of the parties' residence (home environment) *vis a vis* the best interests of the child as per section 4 of the Law of the Child Act, Cap 13 RE 2019 by a Social Welfare

Officer (SWO). The SIR reported that the Respondent has a permanent residence and according to the Magistrate's interpretation of the SIR the Appellants address is "ambiguous." The court granted custody of the two children to the Respondent giving the Appellant access and visitation during holidays.

Aggrieved by the decision of the District Court the Appellant knocked the doors of this court to prefer an Appeal on five grounds namely:

i. That, the trial Magistrate erred in law and fact for failure to evaluate properly the evidence adduced by the Petitioner during trial.

ii. That, the trail magistrate erred in law and fact for failure to distribute equally the matrimonial assets jointly acquired and bears registration of both parties.

iii. That the trial magistrate erred in law and fact by deciding on custody of marriage issues basing on biased social welfare report without taking into consideration of their welfare and age.

iv. That the trial magistrate erred in law and fact by delivering a contradictory judgment.

v. The trial magistrate erred in law and fact by rejecting preliminary objections raised by petitioner's counsel which could assist the court to reach into fair and just decision.

She prayed that this Appeal be allowed, the decision of the trial court be quashed and set aside; and decide otherwise in favour of the Appellant, costs be provided for and any other relief(s) which are deemed fit and just to grant.

On the day set for hearing of this Appeal, the Appellant was represented by Mr. Christopher Mgalla learned advocate while the Respondent had the services of Mr. Abdul Azizi also learned advocate. When he began his submission Mr.Mgalla prayed to combine the first and second grounds of Appeal and to argue the remaining ones separately. Briefly, he submitted that the Magistrate failed to properly evaluate the evidence adduced before the court regarding the matrimonial assets jointly acquired during the subsistence of the marriage. He went on to state that the Appellant mentioned the said properties in the trial court. As for the documentary evidence of her contribution or joint ownership when she was asked in court, she informed the trial court that all the documents had been confiscated by the Respondent to wit she sought the court to compel the Respondent to

bring the documents so that they could assist the court in determination of the division of matrimonial assets. Moreover, he submitted that the Kinyerezi property was acquired during the subsistence of the marriage and had both their names as joint owners. Making reference to section 114 of the LMA and the case of **Joyce Nyantori v. Ibrahim Yeremiah Mwayela,** PC Civil Appeal No. 12 of 2021 in which this court referred to the case of **Anna Aloyce v. Zakaria Zebadayo Mgeta** PC Matrimonial Appeal No. 1 of 2020, HC Mwanza (Unreported) he argued that matrimonial assets are to be distributed equally between the parties bearing in mind the extent of contribution of the parties in acquiring the said properties. He concluded the submission on the first and second grounds of appeal by asserting that the trial magistrate distributed the matrimonial assets to the Respondent only.

On the third ground of Appeal the learned advocate complained that the Magistrate made the decision basing on the biased SWO report. He went on to state that the Respondent testified in court that the Kigamboni property belonged to his mother which meant he had prayed for custody so that the children can live with his mother and not himself; therefore, the court erred in giving him custody while in actual fact they were going to live with the

Respondent's mother and not himself. He concluded on this ground by stating that this was wrong and contrary to section 26(2) of the LCA which provided for a child under 7 to live with the mother.

On the fourth ground the Appellant's counsel contented that the Judgment of the trial court was contradictory for it stated that it was delivered in the presence of the Republic albeit being a Matrimonial Cause which is bound to lead to confusion while executing it. Lastly the counsel argues that the magistrate's rejection of his client's Preliminary Objections when the Respondent was adducing evidence prejudiced the Appellant in the distribution of matrimonial property. He concluded his submission in chief by beseeching the court to allow the Appeal, quash the decision of the trial court and decide in favour of the Appellant with costs.

When it was the turn of the advocate for the Respondent to submit, he chose to follow the same sequence used by the Appellants advocate. On the first and second grounds of appeal he stated that it was not true that the court failed to evaluate the evidence as adduced by the Petitioner. He went on to submit that the court used the evidence that was submitted before it to reach

the decision, the Petitioner failed to adduce evidence in terms of her contribution. He alluded to the fact that the Appellant told the court she had no evidence of her contribution including that she contributed TZS 100 million towards acquiring the Kinyerezi property yet she could not produce any exhibit. He made reference to the Court of Appeal's decision in **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo,** Civil Appeal No. 102 of 2018 (unreported) **and** that of the High Court in **Hamis Shomari v. Salama,** PC Civil Appeal No. 129 of 2021 both of which among other things spoke of the extent of a parties contribution; this means if a party fails to prove the extent of their contribution the court's hands are then tied since the question of the extent of the contribution is one of evidence. On this ground he concluded that the trial court made it very clear the Appellant had failed to explain plainly her extent of contribution towards the acquisition. As for the issue of the Kinyerezi property being registered in both their names he made reference to the Court of Appeal case of **Amos Masasi v.R,** Criminal Appeal No. 280 of 2019 where it was held that it is the settled position of the law that the Appellate court cannot deal with new things. That the property is registered in both their names is a new thing and should not be considered by the court.

When submitting on the third ground the counsel informed this court that the parties were blessed with two children. The Appellant's counsels' reference to section 26(2) of the LCA was made forgetting that the same provides for a presumption that it is in the best interests of a child under 7 years to be placed with the mother. He pointed out that subsection (1) of the said section provides that the child has a right to live with the parent in whose custody it is their best interest, it is not mandatory for a child to be placed with the mother. The Appellant did not heed to the SWO's requests to meet her as a result they ended up reporting that it is in the best interests of the children to be placed with the Respondent as the Appellant had no permanent address.

Mr. Aziz went on to submit that the counsel submitted that the judgment was contradictory, these in his opinion were mere clerical error that does not go to the root of the decision and can be corrected upon application or *suo mottu* as per section 96 of the Civil Procedure Code, Cap RE 2019. On the last ground of appeal, the learned advocate argued that despite what was said by the Appellants' advocate, if one is to look at the proceedings the said

registration card for the commuter bus that is being objected to was tendered and not objected to. He rested his case and prayed for the trial court's judgment to be upheld and due to the nature of the matter this court makes no order as to costs.

I his rejoinder Mr. Mgalla reiterated the first ground and went on to clarify that on page 8 of the trial court's proceedings the Appellant stated that the documents were confiscated by the Respondent. And, on page 14 of the same proceedings the respondent admitted that they bought plots during the subsistence of the marriage and from those statements the trial court should have then ordered the production of the said documents to have a fair and just distribution of the assets. He then went on to state that although he agreed with the authorities as regards new issues at appeal level but still maintained that had the court heeded to the Appellant's prayer that the Respondent be ordered to produce the documents then the anomaly would not have occurred. He concluded that section 114 of the LMA states the kinds of contribution that is money, property or work towards acquisition and the Respondent testified that he used to send the Appellant to collect money and used the Appellant's accounts. Another point of the rejoinder was the

counsel's challenge of section 26 (2) of the LCA., he stated that their position is that it was the position of the law which should be adhered to and it is not just a mere presumption. As for the Appellant not having a permanent settlement; which both counsels agreed it was a place where one lives and can be found via the said address; Mr. Mgalla informed the court that it was not true as she does and she is actually living with the younger child. He finished off his rejoinder by pointing out that there was no notice to use secondary evidence was filed therefore making the admission of secondary evidence wrong.

Having considered both counsel's submissions it opportune for me to determine whether this Appeal is meritorious. I start with the last ground of appeal; that the trial courts judgment states it was delivered on the 29 June, 2022 in the presence of the Republic represented by a State Attorney and the accused person. This, albeit being an error is in no way prejudicial to any of the parties. If one were to do an anatomical representation of a judgment; then the part in which the said error is in would be considered vestigial akin to a vestigial organ in the human body. A judgment is still a judgment without it, and since the parties are known and there is no such error as to

either of the parties as to the identity or otherwise then this is an error that can be corrected and, in my view, does not arise any confusion as execution is done against a judgment debtor so to speak not a person present during delivery of the judgment. So, I find this ground as unmeritorious.

On the first and second grounds of appeal which were argued together, the Appellant's advocate albeit having submitted that the trail court had divided the assets to the Respondent alone; which, as can be depicted from the trail court's judgment is not the case, he was emphatic on the reference to **Anna Aloyce v. Zakaria Zebadayo Mgeta** *(supra)* as cited by this court in **Joyce Nyantori v. Ibrahim Yeremiah Mwayela***(supra)* which stated:

> *'Indeed, there is no fast and hard rule in deciding on the amount of contribution and division of matrimonial assets. Where the matrimonial assets were acquired during the happy days of subsistence of marriage and in the joint efforts of the spouses there is no need or requiring one spouse to give evidence to show the extent of her/ his contribution. The distribution of such assets should automatically proceed in equal terms.'*

This is the ideal situation. However, with all the reverence I grant to the holding above, I am also mindful of the fact that every case and more so matrimonial ones has its own circumstances which would render it to be treated as its own. This brings me to the provisions of section 114 (1) of the LMA which states that:

> *'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 supplied)

The literal interpretation of the provision is that the court has powers to order division of assets acquired by the parties during their marriage by their joint efforts. In this case what is at issue is the joint efforts and the extent of the same in the acquisition of the said matrimonial assets between the Appellant who on one hand is asserting that she contributed and adduced evidence on the same but the trial court failed to properly analyse the same thus, failed to distribute equally the matrimonial assets jointly acquired. The Respondent on the other hand is contesting the above argument by maintaining that the Appellant was unable to adduce evidence as to her contribution thus, the courts findings cannot be faulted since she failed to assert the extent of her contribution as held in **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (*supra)* and **Hamis Shomari v. Salama Limbile** (*supra).*

Section 114 (2) of the LMA in part states:

> *'In exercising the power conferred by subsection (1), the court shall have regard to—(b)* ***the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;'*** (emphasis supplied)

The provision could not be clearer, in exercising the powers to divide or distribute the matrimonial assets the court shall have regard to among others the extent of contribution made by the parties in terms of money, property or work towards the acquisition of the said assets. The Court of Appeal in **Yesse Mrisho v. Sania Abdu,** Civil Appeal No. 147 of 2016 (unreported) had this to say:

> *'There is no doubt that a court when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets.'*

The Court reiterated its position in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo** (*supra)* holding that:

> *'There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets. It is clear therefore that extent of contrlbution by a party in a matrimonial proceeding is a question of evidence. Once there is no evidence adduced to that effect, the appellant cannot blame the High Court Judge for not considering the same in its decision. In our view, the issue of equality of division as envisaged under section 114 (2) of LMA cannot arise also where there is no evidence to prove extent of contribution.'*

Having gone through the record and the evidence adduced by the parties before the trail court, I find that the Appellant was not very precise in the evidence she adduced on the extent of contribution to acquisition the

matrimonial properties. It would seem she was keen on documentation which as can be seen in the record that she did not have for any of the properties and not the extent of her contribution; on page 11 of the trial courts judgment, it is clear that the learned magistrate was concerned to wit:

> *'...without explaining plainly as to what extent did she contribute towards the acquisition because she does not have title deeds of the plots of Kigamboni even the shamba does not have their certificates of ownership and she also does not have document of owning a motor vehicle make Fuso used as a dalala.' (sic)*

The learned magistrate went on to hold that conversely the Respondent had explained the extent of his contribution by producing exhibits of the contribution. While I am bound by the law both statutory and binding case law that requires the court to scrutinize the extent of contribution for it is one of evidence as already elaborated above; I am also alive to the fact that evidence of contribution need not necessarily be of deeds and receipts. I am also alive to the fact that this is not one of those cases that is akin to the **Victoria Sigala v. Nolasco Kilasi,** PC Matrimonial Appeal No. 1 of 2012, High Court (Unreported) which was cited by this court in the **Anna Aloyce v. Zakaria Zebadayo Mgeta** case *(supra)* where it was observed that it is not proper to only require one party to adduce evidence of their contribution

on the basis of them being a woman; also see **Hamis Shomari v. Salama Limbile** (supra).

In the present case, the Appellant was unable to assert her rights over the said matrimonial properties for she failed to produce sworn testimony on the extent of her contribution to the acquisition of the properties albeit stating they were acquired during the marriage. Her testimony was anything but hazy and more inclined towards not having documentary evidence of her contribution, stating that some of the money was channelled through her account and on page 8 of the typed proceedings it is shown she testified in court that she prays for division of matrimonial properties since she participated in the upbringing children of the relatives of the Respondent and also took out loans.

While Appellant's counsel made a rejoinder submission that according to section 114 of the LMA the kinds of contribution include money, property or work towards acquisition a statement which I am in agreement with, I think they should have checked the trial court's record that clearly depicts that the Appellant did not in the words of the trail magistrate "without explaining plainly" the extent of her contribution or even explain how the said loans were taken and ended up in the acquisition of the said matrimonial

properties. She averred to have taken part in the upbringing of the relatives, without any further elaboration.

Further, the Appellant's advocate's contention that had the court heeded to their prayer for the Respondent to produce the documents would have cured the anomaly of introducing new facts at the appeal stage also led me to go through the record of the trial court. On page 8 of the proceedings the Appellant stated in court that she had documents that she left (in her former matrimonial home) but there is nothing to show she prayed for an order for the Respondent to produce the documents. On the same page she also spoke of documents which she did not have because they were confiscated by the Respondent, however, my reading of the said proceedings is that most of the documents are general and not related to her contribution towards the acquisition of matrimonial properties. Furthermore, on page 9 of the proceedings she states she has contributed over 100 million through loans but did not produce any exhibits. Which in my considered opinion was something that she could have obtained whether through the bank, any other financial institution or even VICCOBA since they would surely have a record(s) of the loans and repayment(s) as the case may be. In any case; I have gone through the proceedings, both the original handwritten and typed

proceedings there is nowhere the Appellant or her advocate prayed for the said documents to be produced by the Respondent who had them or had confiscated them as the case may be. Conversely, the Respondent testified that the Appellant had left with everything and adduced evidence to that effect.

Before penning off on these two grounds let me comment on the issue of the new issues at appeal stage. This one I need not belabour on; as stated by the Respondent's advocate and agreed by the Appellant's advocate this court has already pronounced itself as held in **Monica Sarah John v. Kassimu Rajabu Amour**, Miscellaneous Land Case Appeal No. 138 of 2018, High Court (Land Division) further the Court of Appeal in **Amos Masasi v. The Republic,** Criminal Appeal No. 280 of 2019 was vividly clear that on appeal a court is to look at matters that came up in the lower court(s) and were decided. In other words, this court is estopped from dealing with new matters that were not decided upon by the trail court. Had it been a new ground of Appeal not in Memorandum on an issue that was determined by the trail court then this court would have heard it and decided the same pursuant to Rule 38 (b) of the Law of Marriage (Matrimonial Proceedings)

Rules,G.N. No. 246 of 1997, this is not the case. Conclusively, I find the first and second grounds of appeal as lacking merit.

Ground number three is hinged on the decision of the trail court to grant custody of the children to the Respondent basing on what the Appellant calls a biased social welfare report without considering their age and welfare. From the said ground and the parties' submissions one thing is evident, there was a court ordered SIR to determine the status of the parties' accommodation towards determination of custody. A look at the record depicts that the SIR was considered to be problematic by the Appellant. The Appellant's counsel objected to the order and was of the view that the provisions that guided the court to issue the order that is, sections 31 and 45 of the LCA respectively were applicable in the Juvenile Court, in their view the proper procedure after completion of the parties evidence was for the court to issue divorce and division of matrimonial property according to section 114 of the LMA and maintenance according to section 125 of the LMA. The trial court in its Ruling on the issue held that the said sections of the LCA read together with section 95 of the Civil Procedure Code Cap 33 RE 2019 (the CPC) empowered the court to order a SIR and there is nothing in the LCA that provides that those provisions are only applicable to the Juvenile

Court. The trial court also made reference to section 26 (1) of the LCA which imposes rights to the child (a child's rights) where parents separate or divorce. For avoidance of doubt, I reproduce the section here under:

> *'Subject to the provisions of the Law of Marriage Act, where parents of a child are separated or divorced, a child shall have a right to— (a) maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced; (b)* ***live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child;*** *and (c) visit and stay with other parents whenever he desires unless such arrangement interferes with his schools and training program.'* (Emphasis supplied)

A court is not only empowered to grant custody to a party or in exceptional circumstances a third person, it also has to bear in mind that the child has the right to live with the parent (person) who in the opinion of the said court is capable of raising and maintaining the child in a manner that supports the best interests of the said child. The above section should be read together with section 125 (1) of the LMA which in part states:

> *'In deciding* ***in whose custody, a child should be placed the paramount consideration shall be the welfare of the child*** *and, subject to this, the court shall have regard to—....'* (Emphasis supplied)

Clearly, what a court should aim at is a placement that is in the best interests of the child. Such mandatory requirement in determining all issues involving children is provided for under section 4(2) of the LCA, the section reads:

> *'The **best interests of a child shall be a primary consideration in all actions concerning children** whether undertaken by public or private social welfare institutions, courts or administrative bodies.'* (Emphasis supplied)

A court, before it can pronounce which of the two parents (or even a third party) is to be granted with custody of a particular child it has to make an assessment to determine the best interests of each child in the specific situation. This assessment, therefore, can be made by bringing in the SWO and ordering a SIR to assist with the assessment and ensuing determination. This is clearly stipulated under section 136 (1) of the LMA. The said section states:

> *'When considering any question relating to the custody or maintenance of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.'*

Although SWO's are not expressly named in the text of the section, the heading of this section is "Court to have regard to advice of welfare officers" and in any case a SWO fits the descriptor "...of some person, whether or not

a public officer, who is trained or experienced in child welfare..." given in the said provision. Therefore, the procedure of ordering as SIR is not just in the LCA which might wrongly give the impression that they should be used in the Juvenile Court as counsel for the Appellant seemed to suggest but it also exists in the LMA.

Having analysed the need and necessity of the SIR by the SWO I should now look at the record to figure out why the Appellant might refer to the said report as being biased since the procedural safeguards embedded in the conduct of a SIR require that both parties and where appropriate the children be involved in the various stages which makes it a participatory process. When submitting before this court, the Respondent's advocate remarked that the Appellant did not heed to the SWO's requests to meet with her. The Appellant's advocate did not contradict this statement.

In the SIR contained in the record and the Judgment, it is clear that the Appellant choose not to cooperate with the SWO perhaps on purpose or because she did not understand the importance of the procedure and gravity of her malingering in the process. I am inclined to agree with the trial magistrate that the Appellant did not demonstrate ability to provide an environment that fosters the best interests of the two children. Nothing in

her Appeal explains the reasons for not cooperating with the SWO which was actually understood as being secretive, basically connoting her home as not conducive for the cognitive, physical and psychological health and wellbeing and development of the children for the environment is unknown with what seemed to be deliberate efforts to ensure it is not accessed or assessed. I am well aware of the fact that in their submission the advocate for the Appellant made the argument that the law requires that children under the age of 7 years live with the mother. He vehemently contested the Respondent's counsel's argument that this is just a presumption. For ease of reference section 26 (2) of the LCA states:

> *'**There shall be a rebuttable presumption that it is in the best interest of a child below the age of seven years to be with his mother** but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody.' (Emphasis supplied)*

Further section 125 (3) of the LMA states:

> *'**There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother** but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of*

the child by changes of custody.' (Emphasis supplied)

The sections are crystal clear, it is a presumption and that the presumption is a rebuttable one. The word presumption in normal English parlance is defined in the Cambridge Dictionary (see https://dictionary.cambridge.org/dictionary/english/presumption) as:

'the act of believing that something is true without having any proof'

Additionally, Black's Law Dictionary (see Bryan A. Garner, editor, Black's Law Dictionary 9th ed., West Group, 2009 at page 1304) defines the word presumption as follows:

> *'legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption'*

Even before going any further to define a rebuttable presumption, it is clear that the law by stating that there shall be a rebuttable presumption, was not intending an absolute right of a mother to be with a child that is below the age of seven years. Since the provisions are clear that the presumption is rebuttable it is best the phrase "rebuttable presumption" also be defined. Black's Law Dictionary (*supra* at page 1306) defines it as:

> *'An inference drawn from certain facts that establish a prima facie case,* ***which may be overcome by the introduction of contrary evidence.'***
> (Emphasis supplied)

Simply put, the law assumes that it is the best interests of a child below the age of seven is to be with the mother, a presumption that can be rebutted if there is evidence to the contrary. In this case the Appellant's advocate contended that section 26 (2) is the law and not a mere presumption, however, counsel needs to re-read the section since it actually provides for a rebuttable presumption. By evading the SWO and not partaking in the SIR the way she did, the Appellant cast doubt as to whether it is in the best interest to place the children with her. Granted that a SIR is neither mandatory nor is the court bound by the said report as per section 136 of the LMA, it is only a tool that helps a court arrive at the decision to place a child that is based on professional advice and considerations. It is my considered view that it is also not something that should be taken lightly since it is a tool that seeks to assist the court in ensuring the best interests of the child are the paramount consideration in the determination of placement. There being no valid reason for the Appellant not cooperating with the SWO I hold the view that calling the SIR biased is erroneous. I

therefore agree with the trial magistrate that the children be placed with their father.

On the fourth ground of appeal, regarding the objections and more specifically the admission the copy of the Motor Vehicle Registration Card. The record of the trial court depicts that the said objection that was raised on 17 January, 2022 after which the matter was adjourned pending ruling of the objection set for 19 January, 2022. It would seem that on 19 January,2022 a new issue as to the Advocate for the Appellant not having a valid practicing certificate arose and was determined. Then the proceedings further depict on 10 February, 2022 among others the issue of the Motor Vehicle Registration Card which was both certified as a true copy of the original and affixed with stamp duty was tendered and there was no objection on the same. To cap it all off the Petitioner's advocate prayed to close the petition since they did not require more evidence on 10 November, 2021. Therefore, to say that the court went on ahead without considering the objections would be an embellishment on the part of the Appellant. On this I am also inclined to agree with the Respondent's advocate that the said card was tendered and not objected to. Therefore, this ground is also lacking in merit.

In the whole, all the four grounds are unmeritorious. The Appeal is dismissed. Each party to bear their own costs.

A.A. OMARI

JUDGE

29/05/2023

Judgment delivered and dated 29th day of May, 2023.

A.A. OMARI

JUDGE

29/05/2023