IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL N0. 164 OF 2020

(Originated from Matrimonial Cause No.40 of 2020 at Kinondoni District Court)

SIMBA HASSAN ABDUL.....APPELLANT

VERSUS

ASHA ATHUMANI NDULLAH.....RESPONDENT

JUDGMENT

8th & 30th June, 2023

MWANGA, J.

Parties, in the instant appeal, contracted Islamic marriage on 29th April, 2005 and blessed with one issue named Naufal Simba Hassan. During subsistence of the marriage, couples acquired a house at Salasala area within Kinondoni Municipality in Dar es salaam Region. Nevertheless, the appellant, while at the United States of America from June 2009 the prince of evil spirit intervened the marriage and quarrels occurred between them on allegations of the respondent engaging in extra marital affairs

with another man to the extent of giving birth to a male child out of wedlock.

The effort to reconcile parties through reconciliation board (BAKWATA) did not yield any fruits as the marriage was considered irreconcilable. As a result, the appellant petitioned for divorce to the District Court of Kinondoni. The appellant also prayed for custody of their child and distribution of matrimonial property at 70% for the appellant and 30% for the respondent.

In view of the prayers sought, the trial court managed to declare the marriage broken down irreparably and custody of the child was placed to the respondent. The appellant, however, was given his noble duty to provide maintenance of the child and rights to visitation during the holiday. The trial court went further holding that the house in question was not a matrimonial property subjected of distribution. In fact, the trial court held that the house was owned by the respondent alone. Therefore, the appellant was not entitled to any share.

Being aggrieved with the decision, the appellant knocked the doors of this Court challenging the whole decision on the following grounds: -

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence before her which resulted into a gross miscarriage of justice to the Appellant and the child.
2. The learned trial Magistrate erred in law when she erroneously ordered custody of the child to the Respondent yet there was no evidence tendered before the court to support that the Respondent is employed.
3. The learned trial magistrate erred in law and fact when she ordered that the property (house in Salasala) is not matrimonial property, disregarding the evidence adduced by the Appellant that the house was built by his effort.
4. The Learned Trial Magistrate erred in law and fact in entering judgment for TZS. 100,000/= per month as maintenance.
5. The Learned Trial Magistrate erred in law and fact in failing to examine the financial capacity of the Appellant in awarding the maintenance.
6. The Learned Trial Magistrate erred in law and fact in deciding on matrimonial property in the absence of the schedule of properties to be shared.

The appellant was represented by Ms. Nelly Kwambiwa Machenje, learned Advocate while the respondent was enjoyed the service of Advocate Hussein Swedi, also the learned counsel.

The learned counsel for the appellant consolidated and argued grounds 1, 3 and 6 together. It was her submission that, during the trial appellant attempted to tender receipts from West Union Agent which has his name and the name of the receiver to prove that he was sending money as part of his contribution towards building the matrimonial house at Salasala area. The counsel referred at page 12-13 of the typed proceedings to show that the trial court rejected the said piece of evidence on technical ground. First and foremost, the objection was based on point of fact which would have been ascertained during cross examination as to whether why the receipts lacked signature and or stamp of the agent. The counsel added that, the Respondent at page 28-29 does not dispute if the Appellant was sending her money.

Apart from that, the counsel also referred at page 7 of the judgment where the Trial Magistrate took the same view that, as a general rule, all properties acquired during subsistence of marriage is matrimonial properties and the exception to this general rule is where there is a

personal property. According to her, the trial court was wrong by holding that no any proof given by the appellant that the constructed house was a matrimonial property. The counsel also made reference at page 29-30 when the Respondent tendered a salary slip and bank loan statement in Exhibit D1&D2 to show that she was employed and had a bank loan. However, according to the counsel, there is no single line which the respondent was recorded saying that she used the said loan to buy a piece of land and build a house. Further reference was made by the counsel that evidence of DW2 at page 34 & 35, an officer from the Bank only told the trial court that the Respondent was their customer who used to take loans for improvement of the house only**.**

In view of the above, the counsel concluded that by simple interpretation the house was already in existence.

In his printed case, the counsel protested the findings of the trial court that respondent was the sole owner of the house. It was asserted that, page 29 of the typed proceedings indicates that the same trial court rejected the respondent's documents purporting to show that she is the sole owner of the house. Yet, the same court reached to a conclusion that the house was owned by the respondent alone.

In view of that, the counsel is contentions is that the learned trial Magistrate erred in law and fact by failing to properly evaluate evidence which resulted into a miscarriage of justice on part of the Appellant. The counsel cited the provision of Section 110(1)(2) and 112 of the Law of Evidence Act, Cap. 6 R. E 2002, which provides that; whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist and that the burden of proof lies on that person. Also, the learned counsel made reference to Section 114(1) of the Law of Marriage Act, (Cap. 29 R.E 2019) 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 order the sale of any such asset and the division between the parties of the proceeds of sale".***

In addition to that, the counsel also cited Section 160(1) of the Law of Marriage Act, Cap.29 RE. 2019 which provides for presumption as to property acquired during marriage, that; -

"Where during the substance of a marriage, any property is acquire- (a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;"

Regarding grounds No. 2, 4 & 5 of the grounds of appeal, the learned argued that there was no dispute that while still in subsistence of marriage, the Respondent had extra marital affairs with another man to the extent of having a child out of wedlock. In light of that, the Appellant only asked for the custody of the issue of the marriage so that he can raise him because the Respondent is now busy with the other child born out wedlock. According to the counsel, the trial magistrate denied the custody of the issue of the marriage without giving reasons. It was asserted further that; it was wrong for the trial court to order the Appellant to provide Tshs. 100,000/= per month as maintenance without making evaluation as to the financial capacity of the Appellant.

Per contra, Mr. Hussein Swedi refuted the arguments of the appellant in total. He submitted that, the respondent's house is at Mbezi Goba and he had no idea of the house located at Salasala area as claimed by the appellant. According to the counsel, the house was constructed through

loans advanced to the respondent obtained at Barclays Bank and Stanbic Bank. Also, that the respondent used her salary to construct the same. The counsel cited the case of **Kig Bar Groccery & Restaurant Ltd Versus Gabaraki &Another** (1972) E.A 503 where it was held that; no court will aid a man to drive from his own wrong. The counsel also cited the provision of Section 114(1) and 2(b) of the Law of Marriage Act, Cap.29 R.E 2019 stating that the court should consider contribution of each part in the acquisition of matrimonial property.

In addition to that, the counsel advanced his argument that the Western Union documents which the appellant wanted to be admitted were refused because he did not follow procedures stipulated under Section 66,67 and 68 of the Evidence Act, which primarily deals with admissibility of secondary evidence. Trying to discredit the said documents; the counsel contended that the same lacked date, month, year, and the purposes for which the money was sent.

As to the custody of the child, the counsel argued that there is no assurance given that the best interest of the child will be guaranteed in the United States of America since the appellant had failed to show even a

bank slip for payment of school fees. It was the aforesaid facts that the counsel invited this court to dismiss the appeal with costs.

In rejoinder, the learned counsel submitted that the Appellant managed to prove his contribution to the acquisition of the matrimonial landed property within the balance of probabilities. The counsel reiterated further that, it was wrong for the trial court to rejected the said evidence based on technicality. Further that, the respondents failed to establish whether through Exhibit D1 & D2 the land was purchased and improved through the loans taken in 2011, 2016 and 2017 respectively. According to her, since no proof of ownership had been tendered as revealed at page 29 of the proceedings it was clear that the property was obtained during the subsistence of marriage. The counsel also referred evidence from the Appellant to the effect that the respondent did not deny the fact that properties or things like smart phones, laptops, TV's, generators, cameras etc. were being sent so as to raise money for purchasing and constructing the house. The counsel cited the case of **Kig Bar Grocery & Restaurant Ltd Versus Gabaraki & Another** (supra) reiterating the statement that no court will aid a man to benefit from his own wrong. The counsel was referring to the allegations adulterous behavior of the respondent. The

counsel cited Section 64 (3) and Section 107 (2)(a) of the Law of Marriage Act, Cap. 29, R.E 2019 to extent that the respondent should not be allowed to benefit from her own wrong doing. The counsel cited the case of **Omari Chikamba Versus Fatuma Mohamed Malunga** [1989] TLR 39 (HCT) where it was held that: -

> ***"(iv) misconduct by spouse touching to the management of matrimonial property is a relevant factor when the issue of division of matrimonial property upon dissolution of marriage arises"***

On careful perusal of the evidence on record and submissions of the learned counsels, it may be noted that throughout the entire submissions the appellant complained of, the landed matrimonial property, custody of the child and order for maintenance of the child to the tune of Tshs. 100,000/=. In determining this appeal, I shall consider disposing the 1st ,3rd and 6th grounds of appeal as argued together.

It would be material to consider that, parties were legally married on 29th April, 2005 and the appellant petitioned for divorce on 2019. The Respondent contended that she had constructed the disputed landed property on her own. To prove that, she managed to tender Exhibits D1 which was a salary slip and Exhibit D2 which was loan money borrowed

from the two banks. She contended further that, the appellant did not contribute in the acquisition of the house. The evidence on records show that the house was constructed during 2013 to 2014 while parties were still husband and wife. It appears from the record that, for sometimes when the appellant came back from USA had lived in the house with the respondent and their son. In view of that, it would,therefore, be concluded that the said house was acquired when there was a marriage subsisting between the parties. Moreover, I have found out that no evidence of ownership of the plot of land where the house was constructed. Absence of that, is a clear indication that the house was not constructed by the Respondent alone. Additionally, since there is evidence that the appellant used to stay in the same house when he came back from USA, is also an indication that the house was a matrimonial house. The law of Marriage Act, Cap. 29 R.E 2019 defines a matrimonial property to mean: -

> ***"a matrimonial property is property owned or obtained by either or both married spouses before or during their marriage. It is sometimes called matrimonial assets. Matrimonial property includes matrimonial home"***

Again, in the case of **Bi Hawa Mohamed Versus Ally Seif** [1983] TLR 32 the court of appeal observed that: -

> ***"In our considered view, the term matrimonial assets, means the same thing as what is otherwise described as family assets...It refers to those things which are acquired by one or other or both of the parties with intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as whole"***

In the present appeal, there is no doubt that the disputed house was acquired during subsistence of the marriage. As per the law cited and decision above, the said house qualifies to be a matrimonial property even if allegations of the respondent were true that she built it on her own.

Be that as it may, whether the appellant contributed money or not is not really a justification that he did not contribute in the acquisition of the matrimonial property . The law under Section 114 of the Law of Marriage Act is very clear that contributions can take other forms such as money, work as well as advise. Therefore, it is equally important to observe that what matters in distribution of matrimonial properties is the extent of

contribution by each party in terms of the mentioned criterion and, it is not limited to money only. Section 114 (2) (b) of the Law of Marriage Act provides as follows:-

"(2) In exercising the power conferred by subsection (1), ***the court shall have regard-***

(a) N/A

(b) to the ***extent of the contributions*** *made by each party* ***in money, property or work*** *towards the acquiring of the assets"(****emphasis is mine)***

In view of the above, how much each party has contributed is a question of evidence. Section 110 and 111 of the Law of Evidence Act, Cap. 6 R.E 2019 requires such proof. More emphasis was put in the case of **Gabriel Nimrodi Kurwijila Versus Theresia Hassan Malongo,** (Supra) where it was held that;

"...The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the

evidence adduced by the parties to prove the extent of contribution..."

In light of the above, it is my considered view that even the respondent did not adduce evidence to the effect that she was the sole owner of the respective house. The bank officer contended that the loan was for improvement of the house. The appellant, on the other hand, showed at the trial court that there were some communications with the respondent regarding the process of purchasing the plot where the house was built. That can be seen at page 30 of the typed proceedings.

Additionally, the issue whether the house was located at Goba and not Salasala was cleared by PW2; Mjumbe of Mivumoni Street- Salasala who stated that the name Goba and Salasala are sometimes confused by people. As I have pointed out, there was evidence of PW2 who stated that the appellant used to live in the said house even at a time when they tried to settle the matrimonial dispute through their faith leaders at the Mosque.

That being said and done, I join hand submission of the appellant's counsel who stated that the trial magistrate misdirected to hold that the respondent was the sole owner of the house in question. In that regard, I hold that the landed property in dispute is the matrimonial property subject

of distribution among the parties herein, of course, depending on the extent of contribution by each party.

In the upshot thereof, I am inclined to diverge from the trial court's findings. That, since the house was a matrimonial asset the appellant was entitled to a share. In the final analysis, since the appellant had no evidence as to the extent of contribution in terms of money and the respondent had tendered in court Exhibit D1- salary slip showing the monthly salary of Tshs. 1,195,815/=, Exhibit D2 showing loans taken to the tune of Tshs. 15,733,000 from Barclays Bank, Tshs. 4,000,000/= from Stanbic Bank and the fact that parties had been in subsistence of the marriage for almost five years, I hold that the distribution of the matrimonial house shall be 30% for the Appellant and 70% for the Respondent.

On the other remaining grounds of appeal, that is grounds No.2, 4 and 5 are based on the custody and maintenance of the child. Starting with issue regarding custody of the child, the appellant stressed that the trial court erred in law and fact to order the child to be placed into custody of the respondent for the reason that the respondent had extra marital affairs to the extent of having a child born out of wedlock. In deciding whose

parent, the custody of the child be placed, the court shall consider the best interest of the child. This is enunciated for under Section 125 of the Law of Marriage Act, Cap. 29 R. E 2019 together with Law of Child Act, Cap. 13 R. E 2019. Actually,in the case of **Glory Thobias Salema Versus Allan Philemon Mbaga,** Civil Appeal No 46 of 2019) [**2020] TZHC 3794** it was held that;

> ***"the law is well settled that in any event dealing with a child, the primary consideration shall be on the best interest of the child."***

Similarly, in the case **of *Bharat Dayal Velji Versus Chaduvinesh Bharat, Civil Appeal No. 45 of 2017 [2018] TZHC*** it was held that;

> ***"the best interest caters for beyond financial ability since children needs love, affection and care of which the mother is in a better position to offer her children against whole world"***

Now, in line of the above cases the appellant asserted that the respondent's place has not been suitable for raising their child due to adulterous behavior of the respondent. However, at the trial court, the child was properly placed to the Respondent on the ground that she was

the one who have had stayed with the child when he was 4 years old up to 2016 when the appellant returned from USA. This was stated by the appellant himself at page 17 of the trial court proceedings. And at that particular juncture, the child was fourteen years old and he was at secondary level. Therefore, there was no any other evidence to the contrary. In that material consideration, the trial court considered the best interest of the child, and it should remain so because I find no reason to fault the trial court findings.

The issue pertaining to maintenance of the child. It is a matter of principle that the father has duty to provide maintenance of his children unless otherwise stated. The position is clearly stated under Section 129(1) of the Law of Marriage Act, Cap. 29 of 1971 R. E 2019. Also, in the case of **Assah A. Mgonja Vs Elieskia I. Mgonja,** Civil Appeal No.50 of 1993 it was stated that; -

> ***"The duty to provide for the needs of children lies upon their father unless he is unable to do so for the reason of physical or mental ill-health."***

In the appeal at hand, since the appellant is not falling under the category of incapable person to maintain the child, the trial court was

proper in its order of maintenance of the child. And, the fact that the appellant had presented at the trial court that he was working in USA, and he managed to send some money for the construction of the house, he is a person capable of maintaining the child in the stated sum. In my view, there was no need for assessment of his income on the basis of what he submitted at the trial court.

Conclusively, the appeal is partly allowed to the extent explained above. By upholding the trial court's decision in terms of custody and maintenance of the child'; and varying order of the trial court to the extent that division of matrimonial house shall be at 30% to the Appellant and 70% for the Respondent. Being a matrimonial cause, each party should bear its own costs.

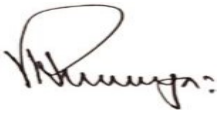
Order accordingly.

H. R. MWANGA

JUDGE

30/06/2023

COURT: Judgement delivered in Chambers this 30th June, 2023 in the presence of Advocate Nelly Kwambiwa Machenje for the appellant, also holding brief of Advocate Hussein Swed for the Respondent.



H. R. MWANGA

JUDGE

30/06/2023