IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

MATRIMONIAL APPEAL NO.03 OF 2020

(Arising from Nyamagana District Court in Matrimonial Appeal No.16 of 2020, Originating from Nyamagana Urban Primary Court in Matrimonial Case No.18 of 2020)

WARDA IDRISA SADICK ..... APPELLANT

VERSUS

ANSBERT AMESELM MUGISHA ..... RESPONDENT

JUDGMENT

Date of last order: 17.05.2021

Date of Judgment: 21.05.2021

A Z. MGEYEKWA, J

Ansbert Ameselm Mugisha, the respondent, and Warda Idrisa Sadick, the appellant respectively, were husband and wife. Before getting down to the nitty-gritty of the determination of the matter, I find it appropriate to narrate the factual background to the present appeal before me. The factual background is, ostensibly, short and not very

difficult to comprehend. It goes thus: the two started to live together in 2013. The couple was blessed with two issues; Lean (6years) and Ian (3 years).

It appears their marriage went on well all along until the year 2018 when the relationship started to go sour whereas, the appellant was forced to leave the matrimonial house with her two children. The appellant claimed that the respondent abandoned them therefore she was the only one who cared for their children. Therefore the appellant filed a Matrimonial Cause No. 18 of 2020 at the Urban Mwanza Urban Primary Court petitioned for divorce, division of properties jointly acquired during the existence of marriage, and custody and maintenance of children. The trial court dissolved the marriage and ordered division of properties acquired during the subsistence of their marriage and custody of children.

Dissatisfied, the appellant filed an appeal before Nyamagana District Court whereas the first appellant court uphold the decision of the trial court and dismissed the appeal.

Undeterred, the appellant preferred this appeal in this Court. The appeal is predicated on three grounds of appeal namely:-

1. *That the 1st appellate Court like the Trial Court erred in law and fact in issuing a Decree for Divorce while the parties had no legal marriage but only lived under the presumption of marriage.*

2. *That without prejudice to the afore-stated ground above, the 1st appellate court like the Trial court erred both in law and fact by giving the Respondent the house situated at Mahina-Nyanguruguru while the house was acquired jointly the parties herein during the existence of their presumption of marriage.*

3. *That the 1st appellate court like the trial court erred both in law and fact by failing to take into account the provision of section 125 92) and (3) of the Law of Marriage Act and section 26 (2) of the Law of the Child Act when placing the custody order of the children who are below seven years to the Respondent.*

When the matter was called for hearing on 17 February, 2021, the appellant enjoyed the legal service of Mr. Ally Zaid, learned counsel and the respondent appeared in person, unrepresented. By the court order,

the appeal was argued by way of written submission whereas, the appellant filed his submission in chief on 25th February, 2021 and the respondent filed his reply on 15th March, 2021 and a rejoinder was filed on 22nd March, 2021. Mention was scheduled on 18th March, 2021, unfortunately, the lower court records were not brought thus judgment was scheduled on 21st April, 2021.

In his written submission, on the first ground, Mr. Zaid submitted that the first appellate court and the trial court erred in law and in fact in issuing a Decree for divorce while the parties had no legal marriage but only lived under the presumption of marriage. He stated that it is undisputed that the parties cohabited under the presumption of marriage for a period of five years from 2013 to 2018. To support his submission he referred this court to page 5 of the typed trial court judgments and page 6 of the typed first appellate court judgment.

Mr. Zaid continued to argue that the court under section 110 of the Law of Marriage Act, Cap.29 can only issue a decree for divorce for kind of marriage stipulated under section 25 (1) (a) - (d) of the Law of Marriage Act, Cap.29. He added that the parties did not contract formal

marriage instead they lived under the presumption of marriage. Mr. Zaid fortified his submission by referring this court to the case of **Hemed S. Tamimu v Renata Mashayo** (1994) TLR 197, the court held that:-

> *" Having found that the parties were not duly married, the decision of the lower court regarding the dissolution of marriage is void."*

It was Mr. Zaid also cited the cases of **Yohana Amani Lyewe v Theodory Mwaya**, Civil Appeal No. 22 of 2017 HC at Dar es Salaam (unreported) and **Andrew Martine v Grace Christopher**, Civil Appeal No. 68 of 2003 HC at Dar es Salaam (unreported) this court held that:-

> *" ...pursuant to the provision of section 160 (2) court could not have issued order of divorce or separation because the parties had not undergone any formal marriage known in law."*

Mr. Zaid went on to testify that with the above exposition, it is crystal clear that the lower courts grossly erred in both law and fact in issuing the order of divorce.

Arguing on the second ground, the learned counsel for the appellant stated that faulted the trial court and the first appellate court for placing the house situated at Mahina Nyanguruguru within Mwanza Region to

the respondent while the same was acquired jointly by parties during the existence of presumption marriage. Mr. Zaid referred this court to the third issue, whether the parties have acquired joint assets during their marriage. He went on to argue that according to the evidence in the trial court the only assets acquired by both parties was the house at Mahina. He also referred this court to page 1 of the trial court typed judgment. He lamented that the said house was given to the respondent relied on the betterment of the children who has nothing to do with the presumption of marriage. He argued that the trial court deprived the appellant's equitable shares in regard to the house which was jointly acquired.

In respect to the third ground, the learned counsel for the appellant contended that both lower courts failed to take into account the provision of section 125 (2) and (3) of the Law of Marriage Act that custody of children below the age of seven is better placed with their mother. He also referred this court to section 26 (2) of the Law of the Child Act. He added that for those who are above 7 years of age, the custody is determined on the basis of the welfare of the child. The learned counsel claimed that the children since 2018 are living with their mother and she

is the one who is providing basic needs and paying school fees. In his view, he said that it was not proper for the lower court to give custody of the children to the respondent since it is against the best interest of the child Rule.

On the strength, of the above argumentation, Mr. Zaid beckoned upon this court to allow the appeal and set aside the decision of the first appellate court with costs.

Responding, Mr. Kelvin, the learned counsel for the respondent from the outset stated that the appeal is demerit. He argued that it is the appellant who lodged a petition for divorce at the Urban Primary Court of Mwanza in Matrimonial Cause No. 18 of 2020, however, her intention and mission did not come from the blue skies, it was the plain fact that she acknowledged the existence of a legal marriage. To support his submission he referred this court to page 1 of the typed trial court judgment whereas the appellant petitioned for a divorce. Mr. Kelvin valiantly argued that now the appellant is trying to insinuate while what she prayed for was granted. Mr. Kelvin urged this court to disregard this ground of appeal.

With respect to the second ground, the learned counsel for the respondent stated that the division of properties was fair to all parties. He added that the property allocated to the respondent was not among the matrimonial property. Mr. Kelvin referred this court to exhibit F on page 4 of the trial court typed judgment. Mr. Kelvin continued to state that in our jurisdiction, the property which is in the names of the children cannot be categorized as matrimonial property. To underscore his submission he cited the case of **Gabriel Nimrod Kurwijila v Theresia Hassani Malongo**, Civil Appeal No. 112 of 2018, Court of Appeal of Tanzania at Tanga (unreported) held that:-

> *" A property in the name of the children despite being bought by parents under guardianship does constitute or qualify to be described a matrimonial property."*

Regarding the custody of children, Mr. Kelvin argued that the trial court followed all the required legal procedures before reaching its decision. He added that the trial court considered the welfare of the child as stated on page 7 of the typed trial court judgment whereas the court consulted the expert opinion, the Social Welfare Officer who presented his expert opinion on 11th May, 2020. He went on to state that the Social

Welfare Officer stated that the appellant abandoned her children thus she is unable to take care of them. Insisting, Mr. Kelvin stated that the court considered all criteria as per section 26 (1) (a) – (d) and section 39 (2) of the Law of the Child Act of 2009. He argued that this ground is devoid of merit.

On the strength of the above submission, Mr. Kelvin beckoned upon this court not to interfere with the lower courts' decision. He urged this court to dismiss the appeal with costs.

In his brief rejoinder, the appellant's Advocate reiterated his submission in chief and insisted that the house was acquired by both parties' efforts during their concubine relationship. He argued that if it was the children's property then the same could not have been placed to the respondent. He refuted that the said house is not the children's property. Mr. Zaid distinguished the cited case of **Gabriel Nimrod** (supra) that it has no nexus with the present case and that the property was already been handed to the children before the dispute.

Mr. Zaid, insisted that section 125 (2) and (3) of the Law of Marriage Act, Cap.29 [R.E 2019] and section 26 (2) of the Law of the Child Act

OF 2009 insists that the child below seven years of age be placed in the custody of their mother for the best interest of the child due to the fact that to-date the mother lives with her children.

In conclusion, the learned counsel for the appellant urged this court to grant their prayers.

I have subjected the learned rival arguments by the learned counsel for the parties to serious scrutiny they deserve. Having so done, I think, the bone of contention between them hinges on the question *whether the appellant had good reasons to warrant this court to allow his appeal.*

I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only. It is a settled principle that the second appellate court can only interfere where there was a misapprehension of the substance or quality of the evidence. This has been the position of the law in this country, Therefore this court must be cautious when deciding to interfere with the lower court's decision as was propounded in the case of ***Edwin Mhando v R*** [1993] TLR 174. It is a settled principle that the second appellate court has to deal with the question of law. However, this approach rests on the premise that findings of facts

are based on a correct appreciation of the evidence. In the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

> *" An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."*

In my determination, I will address all three grounds of appeal separately as they appear. On the first ground of appeal, the appellant's Advocate is complaining that the lower court faulted themselves by dissolving the marriage while the parties were not married. I have gone through the court records and found that the appellant in 2020 among others lodged a petition for divorce and the trial court granted her prayer. Both parties have testified to the effect that they have lived together under the same roof for five years from 2013 to 2018. In my considered view, the presumption under section 160 (1) of the Law of Marriage Act, Cap.29 [R.E 2019] presumes that the two were married. Section 160 (1) of the Law of Marriage Act, Cap.29 [R.E 2019] provides that:-

" 160.-(1) Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married."

Applying the above provision of law, in the instant case, the appellant and the respondent lived together for five years therefore they acquired the reputation of being husband and wife. The trial court satisfied itself that the said presumption was rebuttable. Therefore, the rebuttable presumption of marriage was established. Consequently, the Urban Primary Court of Mwanza was satisfied that the marriage of the appellant and respondent was irreparably broken down.

Following the order of the trial court to grant a decree of divorce, the court was empowered to make orders for division matrimonial assets subsequent to determine the issue of custody and maintenance of children as per the requirement of section 160 (2) of the Law of Marriage Act, Cap. 29 [R.E 2019].

Additionally, as rightly pointed out by Mr. Kelvin, learned counsel for the respondent, the appellant is the one who lodged the petition for

divorce at the Urban Primary Court of Mwanza, therefore, coming before the first appellate court and this court claiming that the trial court faulted itself to issue a divorce is an afterthought. Therefore this ground is devoid of merit.

Therefore, I am not in accord with the learned counsel for the respondent's observation that the court under section 160 (2) of the Law of Marriage Act, Cap.29 cannot issue an order of divorce or separation. A divorce can be issued where marriage is broken down irreparable. The same includes a marriage that arose from the presumption of marriage. As it is in this case that the parties lived together for five years, they were presumed that they were married. I will therefore not disturb this concurrent finding of the two lower courts.

Regarding the second ground which relates to the division of property, the appellant complains that the house located at Mahina - Nyanguruguru was acquired jointly by the parties during the existence of their marriage. The law clearly states under section 114 (2),(b) of the Law of Marriage Act, Cap. 29 [R.E 2019]. In exercising the power conferred by the law on the division of matrimonial properties, the court

shall regard the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets. The same was held in the case of **Bi. Hawa Mohamed v Ally Seif** [1993] LR 32, and **Yesse Mrisho v Snia Abdul,** Civil Appeal No. 147 of 2016, Court of Appeal of Tanzania.

In the instant appeal, the records reveal that the properties which was subjected for division were two houses located at Mahina - Nyanguruguru and Ndama Igoma. The appellant testified that both parties have played a role in building and developing the matrimonial house located at Mhina. She claimed that the appellant forced him to vacate the house with their two children and left the respondent occupying the said house.

Reading her testimony, it is vivid that the appellant's testimony was mere words. She did not testify anything regarding the extent of her contribution when acquiring or contracting the said house. On his side, the respondent testified that after the two were separated he bought a plot located at Mhina - Nyanguruguru. The respondent tendered documentary evidence to prove that in 2016 he bought a plot located at

Mhina - Nyanguruguru (Exh.P2 SUI) during their marriage but the certificate of occupancy was issued on 1st March, 2019 to Ansbert Anslem as a guardian of Liam Anslem Mugisha and Ian Anslem Mujuni (minors).

Accordingly to the records, the respondent bought the plot located at Nyanguruguru – Mhina while the two were married. However, he obtained the title in 2019 in the names of his children. In my view, the respondent proved his contribution and acquisition because he was able to tender documentary evidence in court to prove that he is the one who bought the plot, the same is in his children's name and he is a guardian. Therefore, in my view, the issue of equality of division as envisaged under section 114 (2) of the Law of Marriage Act, Cap.29 [R.E 2019] cannot arise since the appellant failed to tender any documentary evidence to prove her extent of contribution.

Moreover, since the house located at Nyanguruguru - Mhina is in the names of the appellant's and respondent's children the same should remain the property of their children. I am in accord with Mr. Kelvin the learned counsel who prepared the written submission for the

respondent that the property which is in the names of the children cannot be categorized as matrimonial property. The same was held by the Court of Appeal of Tanzania in the case of **Gabriel Nimrod Kurwijila** (supra). Since the respondent is the one who contracted the said house and he is the guardian then he can stay with his children under his guardianship until they reach the majority age.

For the aforesaid reasons, I do not think it is prudent to subject this house to the division of properties for the mere reason that the appellant made her contribution in constructing the said house without tendering any documentary evidence to prove her contribution. Although the plot was bought by the respondent in 2016 during their marriage, it is difficult to believe whether the said plot was acquired by both parties.

Additionally, the plot is registered in the children's names and the respondent is a guardian. Would it had been that the appellant has proved that it was a matrimonial house and she contributed in constructing the said house then this court could have decided otherwise. Therefore I will not interfere with the findings of the trial court. Therefore this ground is disregarded.

In determining the third ground which relates to custody of children. In determining the issue of custody and maintenance of children, the law requires the courts to consider the best interest of the child. The law under Section 125 (1) (2) of the Law of Marriage Act, (supra) is very clear that, in determining the issue of custody, the paramount consideration shall be on the welfare of the child. The same was observed in the case of **Celestine Kilala and Halima Yusuf v Restituta Celestine Kilala** (1980) TLR 76 the Court of Appeal of Tanzania observed that:-

" ...the court's paramount consideration is the welfare of the child more than anything."

In addition, Tanzania has ratified the UN Convention on the Welfare of the Child, (CRC), 1989 and domesticated the same by enacting the Law of the Child Act, No. 21 of 2009. The main objective of this Act, among others, is to stipulate the rights of the child and promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child. Section 4 (2) of the Law of the Child Act, (supra) provides that:-

" The best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, court or administrative bodies."

I have perused the court records and found that the issue of custody of children was addressed by both lower courts. After a quick perusal on the trial court judgment, I have found that a Social Welfare Officer was involved to determine the matter and after their investigation the Social Welfare Officer prepared a report and recommended that after the separation of the appellant and respondent, the appellant took her children to one of her relative's house. According to the report among others, they insisted that what matters the most is the welfare of the child, the child is required to live with their father, the respondent since he has time to care and stay with his children.

Gathering from the record and the parties' submission, it is clear that the respondent was a suitable parent to stay with his children compared to the appellant. The trial court was in better position to determine and analyse the case. As long as the Social Welfare Officer was involved in solving the issue of custody of the child and his opinion was not opposed

by the appellant, thus, I find it prudent to uphold the decision of the trial court.

The appellant is entitled and is accorded with the right to see, visit, and stay with his children during weekends and holidays. However, in case of changes of circumstances that render the respondent unfit to have custody of the children, the appellant may move the court to rescind its order. Until such time the trial court order on the custody.

In the circumstances and for the foregoing reasons, I quash and set aside the decision of the first appellate court and partly uphold the decision of the trial. Since this is a matrimonial matter, I do no order costs, each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 21st May, 2021.

A.Z.MGEYEKWA

JUDGE

21.05.2021

Judgment delivered on this 21st May, 2021 in the presence of both parties.

A.Z.MGEYEKWA

JUDGE

21.05.2021