**IN THE HIGH COURT OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**CIVIL APPEAL NO. 16 OF 2022**

*(Originating from Matrimonial Cause No.21 of 2022 at Kinondoni District Court)*

**REHEMA HASSAN ATHUMAN..... APPELLANT**

***VERSUS***

**MACKDONALD A. MAGOHA.....RESPONDENT**

# JUDGMENT

Date of last order: 25/09/2023
Date of Judgment: 27/09/2023

**OMARI J.,**

The parties herein married in the Christian form on 29 November, 2008. They were blessed with a son and in the subsistence of their marriage they built a house in Salasala, Dar es Salaam for which construction began in 2013 and was completed in 2017 when they moved into the said house. In 2021 the Appellant petitioned for divorce in the District Court of Kinondoni vide Matrimonial Cause No. 21 of 2021 seeking for orders *inter alia* that the marriage is irreparably broken down and a divorce decree be issued, custody of the child, that the Respondent be ordered to maintain the child, division of the matrimonial house and that she should get 60% for she highly contributed to the building of the said house.

Upon hearing the parties, the trial court found that the marriage had indeed irreparably broken down, went on to dissolve the marriage and then issued a divorce decree. As for the house at Salasala, the trial magistrate observed that both parties agreed that the house was built through joint efforts however they all claim to have contributed more albeit not producing any evidence to that effect. This led the magistrate to conclude that they had contributed equally to the said house. The learned trial magistrate was not blind to the fact that the two had built the said house on one Rose Magoha's land without her consent and went on to grant 50% of the value of the house to Rose Magoha and the remaining 50% to be shared between the parties. The learned magistrate also ruled that the child should continue to reside with the Respondent, granting the Appellant access and visitation rights. In addition, the learned trial magistrate ordered the parents to maintain the child on an equal basis.

The Appellant, being aggrieved with the whole of the proceedings, judgment and decree of the District Court of Kinondoni in Matrimonial Cause No. 21 of 2021 dated 27thSeptember,2021 appealed to this court on the following grounds:

1. That the trial magistrate erred in law and in fact in admitting in evidence sale agreement as Exh. D-1 while the same was neither attached in the Answer to the Petition nor brought as a list of additional documents.
2. That the trial magistrate erred in law and in fact in holding that the land where the matrimonial house was built belongs to ROSE MAGOHA

while there is evidence that half of the land was sold to one PIUS MAGOHA.

3. That the trial magistrate erred in and in fact by failure to hold that the land where matrimonial house was built was given to the Appellant and the Respondent by ROSE MAGOHA the Respondent's sister as deed of gift *viva voce*.
4. That the trial magistrate erred in law and in fact in placing the custody of their own child to the Respondent who has no place of abode and without taking the opinion of the child.
5. That, the trial magistrate erred in law by ordering the Appellant to maintain the child contrary to the law.

On the basis of the above five grounds the Appellant is seeking for orders that the judgment of the District Court should be allowed to the extent that the Appellant should be given custody of the child That, this court be pleased to declare that the division of matrimonial house be divided as between the Appellant and the Respondent. Further the Appellant prayed for the costs of the appeal to be borne by the Respondent and any other reliefs this court may deem fit and just to grant.

The Appellant had the services of Mr. Meswin Masinga while the Respondent had the services of Mr. Nehemiah Nkoko both of whom are learned advocates. The matter was disposed by way of written submissions and the parties complied with the scheduling order.

To begin with Mr. Masinga sought to drop the fourth ground of appeal therefore leaving only four grounds on which he submitted. On the first

ground of appeal that the trial magistrate erred in law and in fact in admitting in evidence the sale agreement as Exhibit D-1 while the same was neither attached in the Answer to the Petition nor brought as an additional document. Counsel argued that the records are clear that the said sale agreement was brought to court and tendered by one Rose Magoha who was DW 2.

Counsel went on to argue that the record also depicts that the same was objected by the Appellant for not being annexed to the Answer to the Petition nor brought as an additional document. He went on to state that Rule 29(2) of the Law of Marriage (Matrimonial Proceedings) Rules, GN. No. 136 of 1971, allows the use of the Civil Procedure Code, Cap 33 (the CPC) in relation to production of evidence in which Oder XIII Rule 1 (1) of the CPC allows filing a list of documents which were not annexed in the pleading to be used in court. According to Mr. Masinga that procedure was not resorted to which in effect was taking the Appellant in surprise and in contravention of the procedure. He cited the case of **Eusto K. Ntagalinda v. Tanzania Fish Processing Ltd,** Appeal No 23 of 2012 in which the Court of Appeal discusses the procedure on how to admit documents and further that documents that was not pleaded, attached or listed cannot be admitted in evidence. He contended that the law requires all documents to be used in evidence to be attached to the pleadings, failure of which the other remedy is to file them as lists of documents under Order XIII Rule 1 (1) of the CPC and the last chance, is by leave of the court and reasons of which must be recorded, per Order VII, Rule 18 (1) of the CPC. He went on to argue that the consequences of admitting documents in the manner which

the trial court did is for the document to be expunged, therefore Exhibit D-1 is to be expunged from the record.

When it was his turn Mr. Nkoko began his submission by stating that he finds the Appellant's submission devoid of merit and just a waste of this court precious time as the appeal itself is vexatious and after acknowledging that the Appellant abandoned the fourth ground went on to submit on the remaining grounds of appeal. On the first ground counsel submitted that it is the Respondent's humble submission that this court should take cognizance that the Appellant does not dispute the authenticity and or relevance of Exhibit D-1 thus their only complaint is the procedure for admission of the same. He went on to argue that the Appellant was merely seeking to mislead this court and set out to explain why. According to counsel, the document was tendered by DW2 and upon the Appellant counsel's objection the court determined the objection and ruled to admit the Exhibit D-1 as per Order XIII Rule 3 of the CPC which empowers the court to admit the document even if its production was not in conformity with Order XIII Rule 1 of the CPC. The trial court found the DW2 had good cause for the non-production of the document which both the Appellant and Respondent including Rose Magoha testified that the said Rose Magoha was in prison during the filing for the Petition for divorce. Mr. Nkoko went on to argue that the case of **Eusto K. Ntagatinda v. Tanzania Fish Processing Ltd**, (supra) that has been cited by the Appellant's counsel in support of the first ground of appel is not relevant to the issue at hand as it did not discuss the provisions of Order XIII Rule 3 of the CPC. He concluded

that this makes the first ground of appeal is devoid of merit and prayed for this court to dismiss it with costs.

In rejoinder Mr. Masinga argued that the Respondent has admitted that the said Exhibit D-1 was neither attached to the Answer to the Petition nor was it brought through an additional list of documents rather, according to the Respondent's submission on the basis of section 3A and Order XIII Rule 3 of the CPC. Counsel went on to argue that the quoted Rule starts with the prohibition that a document which ought to be produced in court but was not so produced in accordance of Rule 1, shall not be received in evidence unless good cause is shown to the satisfaction of the court for non-production and the court to record reasons for so doing. The Appellant's counsel went on to argue that before tendering the Exhibit D-1 then the Respondent ought to have prayed to do so as per Order XLIII, Rule 2 of the CPC to do so. He further argued that DW2 did not give any reasons and moreover the trial magistrate admitted the same without giving reasons making the **Eusto K Ntagalinda v. Tanzania Fish Processing Ltd** (supra)case relevant and insisted that the Exhibit be expunged from the record.

Arguing on the second ground of appeal that is the trial magistrate erred in law and in fact in holding that the land where the matrimonial house was built belongs to Rose Magoha while there is evidence that half of the land was sold to one Pius Magoha. The Appellant's advocate argued that as wrong as it was for the trial magistrate to determine ownership of the land while it was a Petition for divorce that was before the trial court they went on to hold the land was owned by Rose Magoha yet the said witness (DW2)

testified that half of the said land was sold to Pius Magoha her brother. Counsel went on to argue that it was wrong for the trail court to find that the land belonged to Rose Mgoha yet the house was on a plot measuring 25X25.

When it was his turn, Mr. Nkoko asserted that they should not waste their energy in submitting on this ground as it is from the evidence of both the Appellant and Respondent made it clear to the trial court that the plot that they built their house belongs to Rose Maungu(*sic*) and the fact that the part of the said plot was sold to her brother Pius Magoha does not take away the fact that the said half of the plot remaining belongs to Rose Maungu(*sic*) taking into account that the Appellant never adduced any evidence to show true ownership of the disputed plot rather it was Rose Maungu(*sic*) who produced Exhibit D-1 to prove her ownership over the plot and it should be taken into consideration that since the Appellant has submitted that Rose Maungu (*sic*)did sell part of the plot to Pius Magoha then the remaining part of the plot was hers. Counsel argued that on page 8 of the typed proceedings the Appellant testified that when construction of the said house began Rose Maungu (*sic*)was in prison and on page 9 she also testified that there are no papers to prove Rose Magoha gave them the plot. This, according to counsel means the ownership of the plot on which the house was built is not in dispute thus the second ground also lacks merit and should be dismissed.

In his rejoinder Mr. Masinga argued that the Respondent's counsel has submitted and included a person who was not a party to the trial case neither did her give evidence in trial court. According to Mr. Masinga the counsel for

the Respondent repeatedly referred to Rose Maungu(*sic)* and this Rose Maungu(*sic*) never testified in the trial court. For there were only two witnesses for the Respondents case. He went on to insist that his submission in chief has not been countered as all of the submission referred to a person who features nowhere in the proceedings.

As regard to the third ground of appeal, that the magistrate erred in law and in fact for failing to hold that the land where the matrimonial house was built was given to the Appellant and the Respondent by Rose Magoha, the Respondent's sister as a gift. Mr. Masinga argued that there is no dispute that the house was built by joint efforts of the parties what is in dispute is DW2's contention that the plot on which the house was built belonged to her and she did not give the said plot to the couple. Mr. Masinga submitted further that at page 7 of the proceedings, the Appellant testified that they moved in their matrimonial house in the year 2017 but they started construction in the year 2013, she further testified that the plot was given to them by the Respondent's sister, DW2. Counsel added that, at page 7 of the proceedings, the Appellant testified that DW2 came out of prison in 2019 and she visited at their matrimonial house twice a fact that was not contradicted by the Respondent's counsel. He further argued that this shows that, DW2 knew that the Appellant and the Respondent had built on her plot but she did not take any action against them, even filing a case for trespass she brought her claim after realizing that the Appellant has filed a Petition for divorce. This, counsel argued that is the Respondent's way of seeking to deprive his client of her property. He submitted that the claim by DW2 was an afterthought, by her conduct she is stopped from denying the truth and

referred to section 123 of the Evidence Act, CAP 6 RE 2022 and the case of **Trade Union Congress of Tanzania v. Engineering Systems Consultants Ltd & Two Others;** Civil Appeal No 51 of 2016; wherein the Court of Appeal discusses the principle of estoppel. He added that in this appeal DW2 has been out of prison for one year and 10 months and has done nothing to act against the couple if she at all has any rights over the said plot. Counsel concluded by praying that the property should be divided between the Appellant and Respondent only.

Submitting on the third ground of appeal Mr. Nkoko stated that the same was already elaborated when submitting in the second ground of appeal however, added that that the trial court found rightly so that the Appellant and the Respondent built the so-called matrimonial house on Rose Magoha's plot without her consent and this is clear in the testimony of both the Appellant and the Respondent. Counsel also pointed out that the Respondent testified that Rose Magoha had called the Appellant but could not meet them for they had no time. Mr. Nkoko argued that from the testimony of the parties, it can be depicted that they both knew they are building the said house on Rose Magoha's plot without her permission or consent. As to the contention that the said land was a gift, counsel went on to argue that there was no evidence of this other than the Appellant's statement there wasn't any independent evidence. Counsel cited the case of **Nacky Esther Nyange v. Mihayo Marijani Wilmore and Another** Civil Appeal No. 207 of 2019 and stated that Appellant did not prove in the balance of probabilities that the plot was given to her and the Respondent as a gift but altogether the Respondent does not support that evidence as

he testified that the plot was left under his care by his sister as she was in prison. Counsel concluded on this ground by stating that the cited case of **Trade Union Congress of Tanzania versus Engineering Systems Consultants Ltd & Two Others,** (supra) is not relevant in the present case as the evidence on record does not support the Appellant's argument that the plot was given to them as a gift and prayed for the ground to be dismissed for lacking merit.

In rejoinder to the third ground of appeal as submitted in Respondent's reply, Mr. Masinga sought to clarify that, the deed of gift was issued by Rose Magoha (DW2) and not Rose Maungu that is referred by the Respondent's counsel then went on to emphasize that the land was given to the parties orally. Counsel then reiterated his submission on DW2's conduct after she came out of prison and before the Petition was filed for there is nothing to show that she had done anything about the said house being built on the land. Counsel went on to submit that if DW2 has any claim over the plot, she ought to have filed a land case claiming for her rights but not in the Petition for divorce, which she was not party thereto. Then went on to state that even in the Answer to Petition that was filed by the Respondent there is no prayer for division of property between three people, therefore the Respondent has to be bound by their pleadings.

Submitting on the last ground of appeal that is the trial magistrate erred in law by ordering the Appellant to maintain the child contrary to the law Mr. Masinga stated that in the trial court the Respondent claimed that he is a businessman and further that he is capable of upbringing their only issue of the marriage, despite not praying for the maintenance to be joint the trial

court ordered the parties to equally maintain the child including payment of the school fees. Counsel went on to submit that according to section 129 of the Law of Marriage Act CAP 29 RE 2019 (the LMA) it is the duty of the father to maintain a child. According to counsel the learned magistrate errered to order the couple to maintain the child jointly while the child is placed in the custody of the Respondent.

When it was his turn to submit on the last ground of appeal Mr. Nkoko argued the same has no merit as the trial court was right to order the Appellant to maintain the child equally as she testified to be a businesswoman and taking into account the provision of section 44(a) of the Law of the Child Act CAP 13 R.E. 2019 (the LCA) which gives power to the court to consider the income and wealth of both parents then the child has all right to be cared and maintained by both parents regardless of the provisions of section 129 of the LMA. Counsel went on to submit that the trial court was right in its decision to order the child to be maintained equally by the Appellant and the Respondent and there is no ground advanced by the Appellant for this court to fault or revise such decision thus the ground should also be dismissed with costs. Mr. Nkono concluded his submission by beseeching this court to dismiss the appeal with costs for according to their submission the same lacks merit. Counsel concluded his submission by praying that the appeal be allowed to the extent of his submission.

On his last point of the rejoinder Mr. Masinga argued that the Respondent in his reply submission alleges that the Appellant is equally required to maintain the child citing section 44 (a) of the LCA. Counsel insisted that section 129 of the LMA places a duty to the father to maintain the family, including his

children. Mr. Masinga then stated that he takes note of section 44(a) of the LCA however the same does not state that it is mandatory for both parents to maintain the child. Counsel then went on to state that since the Respondent is awarded custody of the child then he has the duty to maintain the child under section 129 of the LMA.

Having considered both counsel's apt submissions for and against the appeal it is for this court to determine whether the appeal is meritorious and the way forward.

Before going further, I find it imperative to comment on Mr. Masinga's observationas regards the second ground that the person that the Respondent referred to as Rose Maungu was not in the trial court's proceedings as DW2 was Rose Magoha and not Rose Maungu. While I agree with the Appellant's counsel that Rose Maungu does not feature in the trial court's record I do not agree with him that by referring to DW2 as Rose Maungu and not Rose Magoha renders the second and third grounds uncontested for that omission is merely a slip of a pen on the part of the Respondent and that is why the two names are used interchangeably in their submission.

Next, I would like to state that I am mindful that this is a first appeal therefore this court is enjoined to go back to the evidence of the trial court and revaluate it and if need be come to its own conclusion where satisfied the evidence was not properly considered see **Damson Ndaweka v. Ally Said Mtera**, Civil Appeal No. 05 of 1999.

I will jointly deal with the first three grounds for they are intertwined and interrelated therefore creating a confounding effect on each other. The Appellant argues that Exhibit D-1 was improperly admitted and relied upon by the trial court and it should be expunged from the record for even Order XIII Rule 3 of the CPC which the Respondent sought to rely on needs for the person seeking to invoke the same to apply to the court and give reasons. The trial court's record is clear that on 26 August, 2021 one Rose Magoha dubbed as DW2 testified *inter alia* that she was not around for a long time and upon her return she found the parties not living together. She also stated that when she was away the Respondent built a house on her plot. Then she went on to explain that she purchased the land in 2009 from one Riziki and that she had the document to prove the purchase and prayed to tender it into evidence.

At this point Mr. Masinga, the Appellant's counsel objected to the document's production and admission into evidence on the same grounds he has stated in his submission for this appeal.

In response to the above objection Mr. Nkoko who was for the Respondent *inter alia* prayed for the document to be produced under the overriding objective principles then went on to state that counsel is not interpreting Order XIII Rule 2 and Rule 3 of the CPC which explains incidences where documents can be produced after framing of issues. He then went on to state that they have good cause and pray for the document to be admitted into evidence adding that there is relevancy, materiality and competence thus it should be allowed to be produced under section 127 of the Tanzania Evidence Act, CAP 6 R.E.2022.

In his rejoinder Mr. Masinga contended that Mr. Nkoko was misleading the court as the overriding objective principles are not applicable in contravention of procedural laws. He disputed the contention that the witness was away because the Answer was filed on 05 May, 2021 while the witness got back in 2019 so there's a period of almost three years. He then went on to explain that he is aware that the witness is competent, however, what he is at issue with the procedure. He further argued that the document ought to have been produced before framing of issues. Counsel went on to state that under Order XIII Rule 2 of the CPC good cause ought to have been shown on the application for production of the said document and ended his submission by stating that the document should not be admitted into evidence.

On 07 September, 2021 the learned magistrate delivered a Ruling as regards the objection raised by the Appellant's advocate. In the said Ruling the magistrate stated that he would admit the document in the interests of justice stating that its relevant to the case and it will assist the court to the final determination of the case. Furthermore, the learned magistrate made reference to Article 107A of the Constitution of the United Republic of Tanzania, 1977 which enjoins courts to dispense justice without being tied up with technicalities which may obstruct the dispensation of justice; the Ruling then went on to cite the case of the **DPP v. Sharifu s/o Mohamed @Athuman and 6 Others,** Criminal Appeal No. 74 of 2016 in which the Court of Appeal laid down three principles governing the admission of exhibits which are relevancy, materiality and competence. The learned magistrate also referred to the case of **DPP v. Mirzari Pirabarkshi and 3**

**Others,** Criminal Appeal No. 493 of 2016 then went on to overrule the objection raised my Mr. Masinga; thereafter admitted the evidence tendered before the court as Exhibit D-1.

Having reviewed the above I find no reason to fault the learned magistrate's decision to admit the said Exhibit which is the sale agreement for the plot that the house in dispute is built on. However, even if for arguments sake the said document is to be expunged from the record. I do not see how the same would make a difference since through their testimonies both parties agree that the plot is not theirs and it belongs to one Rose Magoha. On page 9 through to 10 of the typed proceedings when being cross examined by the Respondent's advocate the Appellant is quoted to have stated as follows as regards the plot:

> *'The house is on (an)surveyed plot. We don't have papers to that effect. The plot was owned by Rose (Magowa). We did not (they) that plot. (The) gave to us. I did not advise my husband to buy (plot). We had plans to buy another plot but that did not happen. When the construction began Rose Magoha was in prison. I agree to that. We don't have any papers to prove that Rose gave us the plot. I did not go to Rose to tell her anything regards the plot. The document shows that the land belongs to Rose Magoha. I agree that Rose was supposed to be consulted. There is a dispute already. ((sic))*

Moreover, on page 14 of the typed proceedings the Respondent was quoted to have stated as follows:

*'I built on my sisters plot because I was taking care of the plot and I had no problem with my sister we have a good relationship as family. I was taking care of the plot when my sister was in prison (Segerea). When my sister came from prison, I was not in good terms with my wife. My sister wanted to talk to us in regards to that house that we build on (his) property. (The) call my wife and she said she doesn't have time. ((sic))*

On page 17 of the typed proceedings he is further quoted to have testified the following:

*'The house was built on the plot of Rose (Maungu). The documents are not in my possession. I did not produce the document in court Rose came out of prison in 2019. Rose came to my house once. (The) found the house (ready) built on the plot. Rose complained when (the) found that I built the house on her plot. She will come to testify. Rose did not file a case against me. Rose complained that we built on her plot. ((sic))*

It is noteworthy that none of these statements were contradicted by either party. It can thus, be safely concluded that they both knew the plot is not theirs. This being the case even if the infamous Exhibit D-1 is expunged from the record fact will remain that the land on which the house was built on does not belong to the parties. The contention that Rose Magoha had sold half of her land to her other brother as stated in the second ground of appeal, cannot in any way make the remaining land anyone else's so I will not belabor on the same.

Moreover, there being no evidence of the owner gifting the land to either of the parties I ask myself whether the said house be a considered matrimonial property as envisaged by section 114 of the LMA and in many cases including that of **Bi Hawa Mohamed v. Ally Sefu** (1983) 32 TLR as regards to what are matrimonial assets that are subject to distribution. It should be noted that the term matrimonial property is not defined in the LMA but has received broad elaboration through case law. In the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 (unreported) on the distinction between matrimonial home and matrimonial property the Court of Appeal stated that:

> *'On the other hand, the phrase matrimonial property has a similar meaning to what is referred as matrimonial asset and it includes a matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage.'*

Futhermore, the LMA vests courts with the powers to order division of the properties jointly acquired when issuing a decree of divorce or separation, section 114 (1) of the LMA provides:

> *'...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)*

From the above provision and being guided by the cases of **Pulcheria Pundungu v. Samwel Huma Pundungu** [1985] T.L.R 11 and **Samwel**

**Moyo v. Mary Cassian Kayombo** (1999) T.L.R 197 in exercising the powers conferred under section 114 of the LMA a court has to ensure three conditions are established. The three conditions are; that the assets set for distribution must be matrimonial assets, they must have been acquired by the parties during the subsistence of the marriage and they must have been acquired by the joint efforts of the parties; see also **Bi Hawa Mohamed v. Ally Sefu** *(supra).*

It is not in dispute that house in this appeal was acquired, by way of building it by the parties during the subsistence of their marriage, neither is it in dispute that they both contributed to its acquisition. In my considered view what is not clear is whether the same actually belongs to them. It is an establish principle of law that what is on the land/soil belongs to it or as commonly stated in the latin maxim *quicquid plantatur solo, solo cedit.* The land that the house is built on belongs to a third party, the partied herein cannot claim the house to be theirs in isolation of the land it is built on. In the case of **Farah Mohamed vs Fatuma Abdallah** 1992 TLR 205 (TZHC) it was observed as follows:

> *'It seems plain to me that the appellant's contention that Awadh Abdi* ***had bought only a house on the plot and not the plot itself is untenable on the evidence and for the obvious reason that a house is part of the land on which it stands and it could not be sold separately from the land quicquid plantatur solo, solo cedit.'*** (emphasis supplied)

Albeit the context being different, the above observation goes to show that one cannot lay a claim on a house that is separate from the land it is on. In

our case the parties have built a house on land that does not belong to them they cannot then seek for the division of the house as a matrimonial property. See also **Mackson Kabula v. Tedi Sadock** (PC Matrimonial Appeal 1 of 2021) [2021] TZHC 3327 and **Shamshudini Kassam v. Equity Bank (Tanzania ) Limited and 3 Others** (Land Case 11 of 2021) [2021] TZHCLandD 345 which I also consider as persuasive as they discuss the applicability of the principle of *quicquid plantatur solo, solo cedit.*

Having discussed as above, I find it inappropriate to consider the said house as a matrimonial property as it is indeed built by their joint efforts but on land that does not belong to them. Consequently, I find the decision of the trail court that the said property is matrimonial property and ordering for the spouses to take 25% each and the remaining 50% to go to the owner of the plot, that is Rose Mgoha as erroneously done for Rose Mgoha was not a party to the matrimonial proceedings in addition to the said court not being the appropriate forum to determine the dispute over the dispute of who the land belongs to. In totality, the first, second and third grounds of appeal are all dismissed for want of merit.

Having held the above, I can now turn to the remaining ground of appeal whereby the Appellant is aggrieved by the trial court's decision to order both parents to maintain the child. She is contending that this is a contravention of section 129 of the LMA.

Ordering the maintenance of a child, when sought as an ancillary order to a divorce decree is in our jurisdiction a power of the court that is governed by section 130 of the LMA. The said section provides as follows:

*'(1) **The court may**, at any time, **order a man to pay maintenance for the benefit of his child**— (a) if he has refused or neglected to adequately provide for him or her; (b) if he has deserted his wife and the child is in her charge; (c) during the pendency of any matrimonial proceedings; or(d) when making or subsequent to the making of an order placing the child in the custody of any other person. (2) **The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order....'** (emphasis supplied)*

The above section is very clear as to who and when they can be ordered to pay maintenance for a child. This, according to section 130 (2) includes a woman where the court is satisfied it is reasonable to so order. Further section 129 of the LMA provides for the duty to maintain a child and it reads:

*(1) **Save where an** agreement or **order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person,** either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof. (2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.*

The above section is also very clear the duty to maintain a child falls on the man; save for where an order of the court otherwise provides. This section provides for the duty to maintain children while the earlier cited section 130 provides for powers of the court to order maintenance for children. There is a confounding factor of in what circumstances can women be ordered to maintain children and would have a duty to maintain children. I shall return to this after looking at the corresponding provisions in the LCA for the LMA should not be read in isolation of the LCA in all matters concerning a child.

The LCA has a general provision in the terms of its section 8 which provides for the duty to maintain a child to a parent or any other person having custody of the child to maintain them. Furthermore section 9 of the LCA provides for parental responsibility. What is interesting these sections are couched in inclusivity terms as the duty and the responsibility vests on both parents of the child, that is a man and a woman. Section 26 of the LCA specifically provides for rights of the child where the parents separate which includes the right to maintenance and education of the same quality before the parents separated.

The trial court on page 7 of its judgement stated as follows:

> *'(In) regards to maintenance, the Petitioner and Respondent are all asserting that they have the means to take care of the child. They said they work and have income to raise the child.* ***In the circumstances each one will have full responsibility of maintaining the child for food and other essential necessities of life when in his or her custody. (In) regards to school fees***

***and uniform, parents will have equal responsibility.'*** *(sic)* (emphasis supplied)

The Appellant's complaint is that the trial court erred when it ordered her to maintain the child contrary to the law. From the record and the above quoted passage from the trial court's judgment the order for maintenance was an equal one, that is each to maintain the child in terms of food and other necessities when the said child is in their custody since he is in school for most of the time and attends or should attend to his parents as was ordered by the trial court which the Appellant does not dispute. The order also went on to say the school fees and uniform shall be shared equally between the parents. The trail magistrate in very clear terms stated that he is finding as such because from the testimonies of both parents they were all capable of caring for the child, they work and have income and thus should contribute to the maintenance in the manner envisaged by the provisions of section 129 (1) and 130 (2) of the LMA as already seen. This is my view not contrary to any law more so section 129 of LMA which the Appellant quoted in her submission.

A woman has a duty to maintain her children even if the primary duty of doing so is vested on the father according to the LMA, however the same law provides for that same duty for the mother. As alluded to earlier the LMA has to be read together with the LCA which supports that it is also the mother's duty to care for her child, see also **Denis Fabian Mulinga v. Julieth Joseph Shirima**, Civil Appeal No. 01 of 2023, [2023] TZHC 1. In that respect I find this ground is without merit and dismiss it.

In the end, the appeal fails to the extent already described above. In addition, I invoke my revisionary powers to find that the trial court wrongly determined ownership of the land which the parties built their house then distributed a house which is not matrimonial property therefore, I set aside the order to do so, the other orders of the trial court remain as is. Being that this is a matrimonial matter, I make no orders as to costs.

It is so ordered.

**A.A.OMARI**

**JUDGE**

**27/09/2023**

Judgment delivered on 27th September, 2023.

**A.A.OMARI**

**JUDGE**

**27/09/2023**