IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

PC. CIVIL APPEAL NO. 1 OF 2021

(C/O PC Civil Appeal No.11 of 2020 Mpanda District Court, Original Civil Case No. 57 of 2020 – Mpanda Urban Court)

WENSESLAUS KANYENGELE..... APPELLANT

VERSUS

ZANABIA ERENEST..... RESPONDENT

Date: 11 & 24/08/2021

JUDGMENT

Nkwabi, J.:

According to the respondent, in her testimony in the trial court, she married the appellant in July 1999. The appellant had paid engagement amount but did not pay the dowry. They are blessed with five issues. Later the appellant married another woman and lived with her in the house the respondent contributed in its construction. Then, the appellant stopped having sex with the respondent for six months, and up to the time of the hearing of the case in the trial court, the parties had not had sex for five years. She reported the matter to the ward conciliation board, but the board failed to settle the

dispute. They were able to acquire two houses during the pendency of the marriage and other household properties.

The story of the respondent was supported by the testimony of Flora Peter (SM2) who would maintain the respondent because the appellant was not taking charge.

To counter the story of the respondent, in the trial court, the appellant stated he wanted his wife back. He declared in his defence that they married in 2002. In 2013, he remarked, the respondent became pig headed and in 2014 she deserted her matrimonial home and took all household utensils. He did effort for her to return to the matrimonial home in vain. He referred the matter to the ward reconciliation board which directed the respondent to go back to the matrimonial home but she would not heed. He asserted, he has a house at Kawajense apart from which the respondent resides in, but that house is the property of the issues of the marriage.

In cross-examination, he replied that he does not know the year their last sibling was born. He added, at the time the respondent was deserting the

matrimonial home, he was maintaining his family. He claimed, he does not know what caused the respondent desert the matrimonial home, and disputed having married another woman. He prayed divorce should not be issued. At the marriage ceremony, he had paid engagement amount and paid the dowry hence he was allowed to live with the respondent, he revealed.

Following hearing both parties and their witnesses, the trial court held that the parties contracted customary marriage, and that the evidence reveals that the marriage had irreparably broken down and issued divorce and finally distributed the jointly acquired matrimonial properties.

Resentful of the decision of the trial court, the appellant unsuccessfully appealed to the District Court which upheld the decision of the trial court. Still affronted with the decisions of both courts below, now he appeals to this court.

The appellant lodged a petition of appeal to this court which has five grounds of appeal as listed hereunder:

1. *That the trial magistrate erred in law by entertain the petition without presentation of the Marriage Conciliation Board Certificate by the parties a document which certifies that indeed the parties have failed to reach a settlement and that their marriage if at all existed is irreparably broken down an anomaly which rendered the whole judgment a nullity.*
2. *That the Honourable trial Magistrate erred in law and fact by concluding and ordering maintenance of the 5th offspring of the Respondent by the Appellant without any proof that indeed the Appellant is the biological father nor subjecting the parties to a DNA test thereby prejudicing the rights of the Appellant.*
3. *That the Honourable trial Magistrate erred in law and fact by ordering a 70% to 30% division of the Appellant's Kawajense solo acquired property to both parties respectively yet the property in question was already given cum transferred to the four biological offspring of the parties.*

4. *The Honourable trial Magistrate erred in law and fact by letting the Respondent benefit from her own wrong as she is the one who deserted her homestead, children and the Respondent and not the Respondent who deserted her.*
5. *The Honourable trial Magistrate erred in law by regarding the Kawajense house as a matrimonial property therefore subjection it to division following its order yet there was no marriage existence rather presumption of marriage and the property in question was obtained prior to the existence of the presumed marriage by the Appellant's individual efforts.*

The appellant prayed the appeal be allowed with costs and the following orders be issued by the court:

(i) *The decision of the lower courts be quashed and set aside.*

(ii) *A declaration that the Kawajense house which was acquired by the appellant before the existence of the presumed marriage is not subject to division to the two parties as it is a solo property which was personally acquired.*

(iii) Any other orders that this Honourable Court deems fit and just to grant.

The Respondent offered a tough resistance to this appeal in her reply to the petition of appeal. When the appeal was called up for hearing both parties appeared in person unrepresented. The appellant prayed that the grounds of appeal be adopted as his submissions. The Respondent too said she did not have anything in submission. She prayed her reply to the petition of appeal be adopted as her submissions. Nothing was submitted in rejoinder by the Appellant.

I will deal with one ground of appeal after the other. I kick off with the 1st ground of appeal which is that the trial magistrate erred in law by entertain the petition without presentation of the Marriage Conciliation Board Certificate by the parties a document which certifies that indeed the parties have failed to reach a settlement and that their marriage if at all existed is irreparably broken down an anomaly which rendered the whole judgment a nullity.

I agree with the respondent that this ground is wanting in merits. The certificate of the Reconciliation Board was filed in the trial court. The ward reconciliation board categorically indicated that it failed to settle to dispute between the parties in this case. The ground of appeal deserves to be dismissed and I proceed to dismiss it as it lacks cogency.

Advancing in examining this appeal, I consider the 2nd ground of appeal which is that the Honourable trial Magistrate erred in law and fact by concluding and ordering maintenance of the 5th offspring of the Respondent by the Appellant without any proof that indeed the Appellant is the biological father nor subjecting the parties to a DNA test thereby prejudicing the rights of the Appellant.

This ground of appeal should be dismissed as it does not feature anywhere in the defence of the appellant nor when the claim was read over to him that the appellant demanded for DNA test to determine who fathers the 5th child of the respondent. He did not cross examine the respondent on it when she gave her evidence. Therefore, this ground of appeal is an afterthought and

it is dismissed. The respondent was believed her testimony to the effect that the appellant fathers her 5th issue. I have no bases to decide otherwise. Parties are bound by their pleadings and their evidence is the basis for the court to decide. The court cannot decide outside the evidence. In his defence, the appellant claimed not to know the year their last sibling was born, so he acknowledges that he has a 5th offspring with the respondent. In my view, the order of maintenance was based on the evidence. There is no prejudice on the appellant.

The subsequent ground of appeal for my examination is that the Honourable trial Magistrate erred in law and fact by ordering a 70% to 30% division of the Appellant's Kawajense solo acquired property to both parties respectively yet the property in question was already given cum transferred to the four biological offspring of the parties.

The appellant too did not advance any evidence to prove that that house was built or acquired prior to the marriage. This ground of appeal too is

meritless and it is accordingly dismissed. The decision of the trial court on this is firmly grounded on the evidence. The claim, is merely an afterthought.

The upcoming ground of appeal to talk about is that the Honourable trial Magistrate erred in law and fact by letting the Respondent benefit from her own wrong as she is the one who deserted her homestead, children and the Respondent and not the Respondent who deserted her.

I am of the view that the appellant is the author of the breakdown of his marriage by marrying another woman and desertion by denying the respondent conjugal rights especially sexually deserting her. She was justified to do what she did and she cannot be said, in the circumstances, that she benefited from her own wrong. This ground fails.

The final ground of appeal for my deliberation in this appeal is to the effect that the Honourable trial Magistrate erred in law by regarding the Kawajense house as a matrimonial property therefore subjection it to division following its order yet there was no marriage existence rather presumption of marriage

and the property in question was obtained prior to the existence of the presumed marriage by the Appellant's individual efforts.

This ground too has to go down swinging. Property(ies) acquired by the parties to a doomed marriage cannot be given to the issues of the marriage especially without the consent of the other spouse. Issues of the marriage are only entitled to maintenance from their parents and when their parent(s) perish, it is when they become entitled to inherit from such parent(s).

The culmination of the above deliberation, the respondent proved her case on the balance of probabilities. The trial court was justified in reaching at the decision it reached at. The district court was as well justified to dismiss the appeal. This appeal, in this court is as well dismissed for want of merits. In the circumstances of this case as parties were husband and wife respectively prior to the decree of divorce, having five issues of the doomed marriage and division of matrimonial assets order in this matter, each party to bear their own costs.

It is so ordered.

DATED and Signed at SUMBAWANGA this 24th day of August, 2021

J. F. Nkwabi
JUDGE

Court: Judgment delivered in chambers this 24th day of August 2021 in the presence of the appellant and the Respondent both in person.

J.F. Nkwabi
JUDGE

Court: Right of appeal is explained.

J.F. Nkwabi
JUDGE
24/08/2021