IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 105 OF 2008

(CORAM: KILEO, J.A., MMILLA, J.A., And MWARIJA, J.A.)

HIDAYA ALLY ..... APPELLANT

AMIRI MLUGU..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Massati, J.)

dated the 2nd day of August, 2004
in
PC Civil Appeal No. 55 of 2004

JUDGMENT OF THE COURT

Date 10th December, 2015 & 2nd February, 2016

MMILLA, J.A.:

This is a third appeal by the appellant, Hidaya Ally. The respondent, Amiri Mlugu had petitioned her for divorce and distribution of matrimonial property in Matrimonial Cause No. 23 of 2001 at the Ukonga Primary Court. While that court found that there was no formal marriage between the parties, it was nevertheless satisfied that a presumption of marriage had been established. It dissolved the marriage and ordered an equal distribution of matrimonial property which included a house at Kipunguni "B" and a three (3) acre farm at Majohe. The appellant unsuccessfully

appealed to the District Court of Ilala in Dar es Salaam. Still aggrieved, she appealed to the High Court of Tanzania at Dar es Salaam.

After considering the appellant's complaints at great length, the High Court partly allowed the appeal. It held in the first place that a presumption of marriage was not in itself a formal marriage capable of being dissolved under section 107 (2) (c) of the Law of Marriage Act Cap. 29 of the Revised Edition, 2002 **(the LMA),** also that there was no any marriage at all between the parties contrary to what was found by the trial court and upheld by the first appellate court. That notwithstanding however, relying on the case of **Hemed S. Tamim v. Renata Shayo** [1994] T. L. R. 197, it held further that courts have power to order distribution of property once a presumption of marriage is rebutted under section 160 (2) of the LMA just like in dissolution of marriage or separation, provided there is evidence to prove that the property was acquired jointly during the cohabitation. On that footing, while holding that there was no evidence to establish the respondent's contribution to acquisition of the farm at Majohe area, it held that the responded was entitled to a share in respect of the house at Kipunguni "B" on the ground that there was evidence that he was seen supervising the construction of the said house,

therefore that in terms of section 114 (3) of the LMA and the decision in **Uriyo v. Uriyo** (1982) T.L.R. 355, this was contribution towards acquisition of the house. Again, the appellant was aggrieved and preferred the present appeal to this Court.

The appellant's memorandum of appeal to this Court raised two grounds; **one** that, the Hon. Judge erred in law and in fact for holding that there was a presumption of marriage between the appellant and the respondent; and **two** that the Hon. Judge erred in law and in fact in ordering division of the house in dispute despite the fact that the same was not a matrimonial asset.

The background facts of the case were very brief. It was common ground that there was a time when the parties lived together as husband and wife in the 1990s. However, while the appellant said the respondent moved in to live with her in 1998 which was after she had acquired the plot at Kipunguni "B" in 1996, the latter said they began living together in 1996 after they had undergone a customary marriage, and that he moved away in 2001 after misunderstandings cropped up between them culminating into institution of those divorce proceedings. It is a fact that either way, they lived together for more than 2 years.

Before us, the appellant appeared in person and defended herself. However, the respondent did not turn up in court. After satisfying ourselves that he was served by substituted service through publication in the Mwananchi newspaper of 13.11.2015, we allowed the appellant's call for the appeal to be heard ex parte.

In her brief submission before us, the appellant amplified two points; one that the second appellate court wrongly upheld the findings of the lower courts that there was a presumption of marriage between the appellant and the respondent; also that the High Court erroneously held that the respondent was entitled to a 25% share from the house in dispute because that house was not a matrimonial asset. She pressed us to reverse that decision.

To begin with, we agree with the High Court that there was no any formal marriage between the appellant and the respondent. We also stress, as did that court, that the admission of the parties that they had cohabited for at least two years brought their relationship within the purview of section 160 (1) of the LMA, entailing that there was a rebuttable presumption of marriage, and that they rebutted that presumption by adducing evidence that they were not dully married. We further agree with

the second appellate court judge that a presumption of marriage is not in itself a formal marriage capable of being dissolved under section 107 (2) (c) of the LMA, therefore that it was wrong for the trial court and the District Court to hold that there was any marriage at all between the parties. On the basis of the above, we find and hold that the first ground of appeal lacks merit. We accordingly dismiss it.

As regards the second ground, the starting point is section 160 (2) of the LMA as was found by the second appellate court judge. That section stipulates that:-

> "(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of competent jurisdiction, the woman shall be entitled to apply for maintenance for herself and for every child of the union on satisfying the court that she and the man did in fact live together as husband and wife for two years or more, and **the court shall have jurisdiction to make an order or orders for maintenance and, upon application made therefore either by the woman or the man, to grant such other reliefs, including custody of children, as it has**

jurisdiction under this Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may think fit, and the provisions of this Act which regulate and apply to proceedings for, and orders of, maintenance and other reliefs shall, in so far as they may be applicable, regulate and apply to proceedings for and orders of maintenance and other reliefs under this section." [Emphasis provided].

Ipso jure, the wording of the above quoted section shows that the courts have power to order division of property once the presumption of marriage is rebutted just like in instances of dissolution of marriage or separation. See the case of **Hemed S. Tamim v. Renata Shayo (supra).** In that case the Court held that:-

"*where the parties have lived together as husband and wife in the course of which they acquire a house, despite the rebuttal of the presumption of marriage as provided for under s 160(1) of the Law of Marriage Act 1971, the courts have the power under section 160(2) of the Act to make consequential orders as in the dissolution*

of marriage or separation, and division of matrimonial property acquired by the parties during their relationship is one such order."

As such, it is a misconception for anyone to think that division of matrimonial property can only be ordered in a valid marriage.

However, whether or not to order distribution of matrimonial property the court must take into account the question of contribution by the parties as contemplated by section 114 (2) (b) of the LMA. That section provides that:-

> (2) In exercising the power conferred by subsection (1), the court shall have regard–
>
> (a) NA
>
> (b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets."

The above section underscores that there must be adequate evidence showing the extent of contribution; it can be in terms of money, or any other form of input in relation to the being and/or existence of the property which is the subject of distribution.

In the present case two properties were the hub of contention; the house at Kipunguni "B" and a farm at Majohe. As aforesaid, the High Court held, as did the two lower courts, that there was undisputed evidence to establish that both properties were acquired in the name of the appellant as per exhibits Nos. 3 and 4, on 15.9.1996 and 10.12.1998 respectively. Certainly, that raised a rebuttable presumption under section 60 of the LMA that the properties belonged absolutely to the appellant. It took into consideration the fact that under the law of evidence, where the court is directed to presume a fact, it may regard the fact as proved unless or until it is disproved, and that in the present case the respondent was allowed chance to dispute the presumption. In the end, the High Court found that the respondent did not succeed to demonstrate that he made any contribution in the acquisition of the farm at Majohe and denied him a share thereof. On the other hand, the High Court upheld the lower courts' finding that the respondent managed to establish that he made contribution towards construction of the house, though it apportioned him a share of 25%. It is the appellant's contention that this finding is erroneous in that the said house was not a matrimonial asset.

We hasten to say that we agree with the High Court that there was no dispute that the plot on which the house is built was acquired in the name of the appellant in terms of exhibit No. 3 of 15.9.1996. Also, we are satisfied; as did the High Court that the parties lived together for at least 2 years from 1998 up to 2001. As such, the High Court was justified to uphold the lower court's finding that the respondent was entitled to a share from that house. We are saying so because there was sufficient evidence that the respondent was seen supervising the construction thereof- (see the evidence of SM3 at page 93 of the Court Record).

In terms of section 114 (3) of the LMA, supervision of construction of a house such as in the present circumstances is amongst the inputs which constitute contribution. Section 114 (3) of the LMA provides that:-

> *"(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.* "

See also the cases of **Bi Hawa Mohamed v. Ally Sefu** [1983] T. L. R. 32 and **Uriyo v. Uriyo** (1982) T. L. R. 355. While it was stated in **Bi Hawa Mohamed v. Ally Sefu** that contribution includes domestic services

offered by the spouse, the case of **Uriyo v. Uriyo** is to the effect that physical supervision of clearing a plot or construction constitutes contribution.

Having said that the High Court properly upheld the lower courts' finding that the respondent was seen supervising the construction, we are settled that he was properly adjudged to have been entitled to the share thereof. Also, we agree with the reasoning of that court that the award of 25% in the circumstances of this case was fair. As such this ground too has no merit and we dismiss it.

That said and done, the appeal is devoid of merit; therefore it is dismissed in its entirety. We make no order as to costs.

DATED at **DAR ES SALAAM** this 27th day of January, 2016.

E. A. KILEO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL