

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)**

**CIVIL APPEAL NO. 344 OF 2019**

**GABRIEL JOHN MUSA .....APPELLANT**

**VERSUS**

**VOSTER KIMATI .....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Dodoma)**

**(Masaju, J.)**

**dated the 14<sup>th</sup> day May, 2019  
in**

**DC Matrimonial Appeal No. 01 of 2018**

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**JUDGMENT OF THE COURT**

02<sup>nd</sup> & 9<sup>th</sup> June, 2021

**KEREFU, J.A.:**

This is a second appeal by Gabriel John Musa, the appellant, who was a losing party in the DC Matrimonial Appeal No. 01 of 2018 before the High Court of Tanzania at Dodoma (Masaju, J.). He had appealed against the decision of the District Court of Dodoma in Matrimonial Cause No.1 of 2017. In that case, through her petition consisting of twelve (12) paragraphs, the respondent alleged that she cohabited with the appellant as husband and wife from 1998 to 2014. That, out of the said relationship they were blessed with three issues namely, Rose Gabriel, Glory Gabriel

and Elizabeth Gabriel born in 2000, 2004 and 2010 respectively. That, they also acquired several properties including two houses situated on Plot No. 36 Block "E" and Plot 20 Block "B" Mlimwa South Dodoma Municipality, eleven motor vehicles, three shops and household furniture. The respondent stated further that in June 2014 they secured an overdraft loan from Diamond Trust Bank of about TZS 225,000,000.00 and mortgaged the two houses.

The respondent alleged further that, their relationship went on well until 2013 when the appellant started to cohabit with another woman whom he later joined and lived with her under the same roof and as such he deserted the respondent. That, all efforts to settle the dispute between them through amicable means by involving relatives and the Marriage Conciliation Board had proved futile. On that basis, the respondent prayed the court to dissolve their marriage, issue divorce and grant the following reliefs; -

1. *Division of matrimonial assets and maintenance;*
2. *Costs of the suit; and*
3. *Any other relief(s) as the court may deem fit and just to grant.*

On the other hand, in his written statement of defence, apart from noting the first and second paragraphs in the respondent's petition which were on parties address for service, the appellant strongly disputed all other claims alleged by the respondent in ten (10) paragraphs of that petition. The appellant further disputed that the house situated on Plot No. 20 Block "B" Mlimwa South Dodoma Municipality was not jointly acquired and the respondent had taken an affidavit on that aspect to waive a requirement of a spouse consent in respect of that property. Thus, the appellant prayed the trial court to dismiss the suit lodged by the respondent with costs.

Upon completion of filing parties' pleadings and for the purpose of determining the controversy between them, the trial court framed and recorded the following two issues which were agreed upon by the parties as indicated at page 40 of the record of appeal: -

- (1) Whether the petitioner is entitled to any share to the purported acquired joint properties; and*
- (2) What reliefs are the parties entitled to.*

After hearing both parties and without determining the issue of presumption of marriage between the parties as provided for under section

160 (1) (2) of the Law of Marriage Act, [Cap. 29 R.E. 2019] (the LMA), the trial court proceeded with the division of the alleged matrimonial assets whereby the respondent was awarded a house situated on Plot 36 Block "E" Mlimwa South Dodoma Municipality. The appellant was awarded a house situated on Plot 20 Block "B" Mlimwa South Dodoma Municipality, five motor vehicles registered in his name, three shops and the household furniture. The appellant was also ordered to pay maintenance to the respondent at the tune of TZS 500,000.00 per month from the date of the judgment.

Aggrieved, the appellant unsuccessfully appealed to the High Court where he had raised the following three grounds; -

- (1) That, the trial court erred in law and fact for ordering division of properties despite the fact that there was no proof of marriage;*
- (2) That, the trial court erred in law and fact for rejecting a copy of an affidavit of the petitioner which was tendered according to law; and*
- (3) That, the judgment by the court is against justice, equity and good conscience.*

After hearing the parties, on the second and third grounds above, the first appellate court, partly allowed the appeal by varying the terms of order of maintenance and ordered that: -

- (1) The TZS 500,000.00 monthly maintenance order shall remain in force and duration enforceable by respondent up to and by the occurrence of the death of either the appellant or the respondent or the respondent's remarriage to another person or when the parties are fully discharged from loan liability with Diamond Trust Bank and the legal ownership to the property on Plot No. 36 Block "E" Mlimwa South Dodoma Municipality duly devolves to the respondent whichever is the earlier condition or occurrence for determination of the said maintenance order;*
- (2) That, in the event the appellant defaults service of the loan by Diamond Trust Bank as so secured by the property on Plot No. 36 Block "E" Mlimwa South Dodoma Municipality along with the two (2) Scania Lorries (T. 688 BXL and T.545 BSG), Diamond Trust Bank shall not unnecessarily go for disposal of the property on Plot No. 36 Block "E" Mlimwa South Dodoma Municipality; and*
- (3) That, since the prayer for order of dissolution of marriage and decree of divorce were not contested, the trial court's*

*decree shall include orders for dissolution of marriage and granting the decree of divorce accordingly.*

Still aggrieved, the appellant lodged this second appeal. In the memorandum of appeal, the appellant has preferred four grounds. However, for reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal, the appellant was represented by Mr. Fred Peter Kalonga, learned counsel while the respondent had the services of Mr. Leonard Mwanamonga Haule, learned counsel. At the outset, Mr. Kalonga intimated that he will only argue the first and second grounds of appeal, which according to him, if found to have merit, would dispose of the appeal. In the said ground, the appellant contended that: -

- (1) The trial court and the first appellate court erred in rejecting a copy of an affidavit of the respondent which was tendered according to law as the same determines the fate of the division of the matrimonial properties; and*
- (2) Both judgments of the trial court and the High Court are against justice, equity and good conscience in regard to the maintenance of the spouse and the division of matrimonial properties.*

Submitting in support of the second ground, Mr. Kalonga faulted the first appellate court and the trial court for issuing maintenance orders which were ambiguous and non-executable. He elaborated that the trial court ordered the appellant to pay maintenance to the respondent at the tune of TZS 500,000.00 per month from the date of the judgment to an unspecified period. He also said that the first appellate court improperly varied the terms and conditions of the said order, as it ordered the appellant to maintain the respondent until her death and or upon remarriage by another man. Mr. Kalonga contended that, such an order is erroneous and improper as after divorce, it was unfair for the appellant to continue to maintain the respondent. It was his strong argument that those orders were improper because the custody of the children was placed on the appellant who is also responsible with the repayment of the bank loan.

Upon being prompted by the Court as to whether the trial court had powers to divide the matrimonial properties without first determining the issue of presumption of marriage between the parties and grant decree for separation or divorce, Mr. Kalonga said that the court did not have such

powers because division of matrimonial assets can only be granted after award of decree for separation or divorce.

Again, when probed on the order imposed by the first appellate court against the Diamond Trust Bank who was not a party to the case, Mr. Kalonga argued that it was improper for the Court to issue such an order without according the right to be heard to that bank. He added that the order issued against the bank to that effect may not be executable. On the strength of his submission, Mr. Kalonga urged us to allow the appeal, quash and set aside decisions of both lower courts.

In response, Mr. Haule argued that since, the trial court was satisfied that the presumption of marriage between the parties was not contested, those orders were justified and properly issued under section 115 of the LMA. Mr. Haule referred us to exhibit P2 and P3 on the list of matrimonial assets and argued that the amount of TZS 500,000.00 ordered by the trial court is justifiable because a big share of those assets was awarded to the appellant.

On the powers of the trial court to grant such orders before determining the issue of presumption of marriage between the parties, although he referred us to section 160 (1) and (2) of the LMA, Mr. Haule

argued that, in the case at hand, the presumption of marriage was irrebuttable and that is why the trial court proceeded directly to divide the matrimonial property and ordered for the respondent's maintenance. He thus prayed for the appeal to be dismissed for lack of merit.

Having considered the record of appeal and the submissions advanced by the learned counsel for the parties, we are in agreement with Mr. Kalonga that it was not correct for the trial court to proceed with the matter as a matrimonial dispute and directly divide the alleged matrimonial properties without first considering the issue of presumption of marriage between the parties.

Pursuant to section 2 (1) of the LMA and Rule 2 of the Law of Marriage (Matrimonial Proceeding) Rules 1971 GN. No. 136 of 1971, 'matrimonial proceedings' is defined to mean –

*"Any proceeding instituted under Parts II and VI of the Act or any comparable proceeding brought under any written law repealed by the Act, in any court."*

Parts II and VI of the LMA deal with formal contracted marriages and do not relate to presumed marriages. Issues of presumption of marriage are governed by section 160 (1) and (2) which is found under Part VIII of the same law. Therefore, since in the case at hand, the respondent's

petition was predicated on the presumption of marriage, the appropriate section is section 160 (1) and (2). The said section 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.***

(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 order or orders for maintenance and, upon application made therefor 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 proceeding 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 added].*

Following the above provisions, it is clear that the court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce. Therefore, in the case at hand, it was improper for the trial court to frame and determine only two issues of (i) division of matrimonial property and (ii) the reliefs, while leaving apart a substantive issue of whether the presumption of marriage between the parties was rebuttable or not and whether their relationship was irreparably broken down or otherwise.

We are mindful of the fact that in his submission, Mr. Haule argued that the trial court did not consider that substantive issue because it was not disputed that the presumption of marriage between the parties was irrebuttable. With due respect, we find that the argument by Mr. Haule is not supported by the record.

As hinted above, all ten paragraphs of the respondent's petition which were on matters of presumption of marriage alleged by the statement of defence found at pages 22 to 23 of the record of appeal. At any rate, even if both parties' pleadings were not disputing that they were

cohabiting as husband and wife, the trial court was still required to satisfy itself if the said presumption was rebuttable or not, grant decree of separation or divorce then award those subsequent reliefs. Unfortunately, in this case, that was not done. In the case of **Richard Majenga v. Specioza Sylivester**, Civil Appeal No. 208 of 2018, when confronted with an akin situation the Court stated that: -

*"It is clear that the court is empowered to make orders for division of matrimonial assets subsequent to granting of a decree of separation or divorce. Therefore, though in this case both parties' pleadings were not disputing that they were cohabiting as husband and wife but since their relationship was based on presumption of marriage, there was need for the trial court to satisfy itself if the said presumption was rebuttable or not. In the circumstances, we are in agreement with both learned counsel for the parties that **it was improper for the trial court to resort into granting the subsequent reliefs prayed, before satisfying itself on the existence of the presumed marriage.**" [Emphasis added].*

Being guided by the above authority, it is our considered view that, even in this case, it was improper for the trial court to resort into granting

the subsequent reliefs prayed before satisfying itself on the existence of the alleged presumed marriage.

We therefore find, with respect, that had the first appellate court considered the crucial legal matters discussed above, it would not have upheld the decision of the trial court which is erroneous on account of the reasons stated above. In the circumstances, we find the second ground of appeal to have merit.

Since the determination of this ground suffices to dispose of the appeal, we are in agreement with the learned counsel for the appellant that the entire appeal has merit and it is hereby allowed. In the premises, we find that the proceedings before the trial court and the first appellate court were vitiated. As a result, we have no option other than to nullify the proceedings of the trial court from the stage of framing of the issues and quash the judgement and the subsequent orders thereto. We also nullify the High Court proceedings, judgement and subsequent orders as they stemmed from a nullity proceeding.

Consequently, we remit the case file to the trial court with a direction that, the hearing starts afresh from the stage of framing of issues before another Magistrate with jurisdiction. Given the nature of the case and the

circumstances pertaining therein, and in terms of section 90(1) of the LMA, we make no order as to costs.

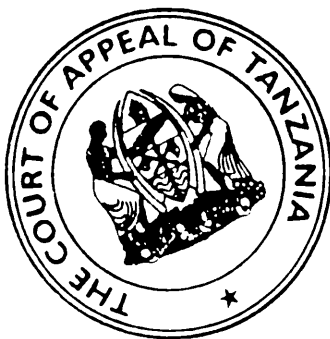
**DATED** at **DODOMA** this 8<sup>th</sup> day of June, 2021.


A. G. MWARIJA  
**JUSTICE OF APPEAL**

J.C.M. MWAMBEGELE  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

This judgment delivered this 9<sup>th</sup> day of June, 2021 in the presence of Mr. Fred Peter Kalonga, learned counsel for the Appellant and Mr. Leonard Mwanamonga Haule, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
H. P. Ndesamburo  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**