IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 52 OF 2020

MARCEL KICHUMISA ..... APPELLANT

VERSUS

MARY VENANT KABIRIGI ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated the 16th day of October, 2014
in
Matrimonial Appeal No. 5 of 2014

.....

JUDGMENT OF THE COURT

28th April & 4th May, 2023

KOROSSO, J.A.:

This is an appeal against the Judgment and Decree of the High Court of Tanzania at Mwanza in PC Matrimonial Appeal No. 05 of 2014 (Mwangesi, J as he then was) pronounced on 16/10/2014. The appeal originates from a complaint instituted by the respondent (the then complainant) against the appellant (the then respondent) at Ilemela Primary Court in Matrimonial Cause No. 43 of 2013 seeking to be granted a divorce decree and division of matrimonial properties. The primary court ruled in favour of the appellant. Discontented with the said decision, the respondent successfully appealed to the District Court of Nyamagana in

Matrimonial Appeal No. 14 of 2013 and dissatisfied, the appellant vainly appealed to the High Court, hence the instant appeal to the Court.

To better appreciate the factual setting underlying this appeal, the background albeit in brief is as follows: The appellant and respondent met and started living together between 1996 and 2013 and their relationship was blessed with two issues. During the peak of their relationship, they cohabited in Ngara, Arusha and Mwanza, while for some time from 2003 the appellant was working in Mozambique up to the year 2010. At the time they met, the appellant who was already married to Paulina Mururu as of 1987, was having difficulties in his marriage. The respondent claimed that she and the appellant married under customary rites and was introduced to all his relatives. She also alleged that at first, she was unaware that the appellant was married, and when she became aware, and queried the appellant he told her he was separated and was in the process of divorcing his wife.

According to the respondent, at around 2007, she and the appellant acquired a plot of land situated at Nyakato Mwanza and constructed a house in which she later moved in and lived there. She further contended that she had purchased a house in Ngara using her own money from the business she was engaged in, and it was in the name of one of their

children as the appellant refused to support the purchase. The said claims were refuted by the appellant arguing that they were unfounded, there being no contracted marriage between himself and the respondent, and no property was acquired jointly. The appellant further contended that having a legal wife, the respondent was a concubine, and that she knew her status in the relationship and accepted it. He also claimed that all the properties claimed by the respondent were those he had acquired with his legal wife. He further contended that it was his legal wife who acquired the plot claimed by the respondent and later constructed a house that was later flooded. He asserted that the compensation received from the Mwanza City Council is what was used to construct the house which the respondent claims to be matrimonial property.

The appellant lodged a memorandum of appeal with four grounds of appeal which when condensed, invariably fault the High Court for; **One,** ordering the division of matrimonial property in the absence of a decree of separation or divorce. **Two,** granting matrimonial cause reliefs related to property acquired during a relationship it declared null and void. **Three,** entertaining claims of an illegal intruder in an existing lawful marriage, and **four,** reaching conclusions that are misconceived, unsupported by evidence, and based on misapprehension of evidence on record.

On the day the appeal was called for hearing, Mr. Marcel Kichumisa and Ms. Mary Venant Kabirigi, the appellant and respondent respectively, were self-represented and each intimated to the Court their readiness to proceed with the hearing of the appeal.

To be noted is that when deliberating on the appellant's grounds of appeal we shall draw from his oral and written submissions. The appellant began by alluding that he would argue the first and second grounds of appeal jointly. He then proceeded to amplify his grounds and argued that in the absence of a decree of separation or divorce, and considering the evidence adduced at the trial, the High Court had no justification to order for division of the appellant's property in the guise that it was matrimonial property acquired during the subsistence of the relationship between the parties. He further contended that under the circumstances, there was nothing before it to even consider the relationship between the respondent and appellant was one that the presumption of marriage could be invoked as prescribed under section 160 of the Law of Marriage Act, Cap 29 (the LMA) because there was an existing lawful marriage between the appellant and Paulina Maruru. He cited the holdings in the case of **Hemed S. Tamim v. Renata Mashayo** [1994] TLR 197 and that of **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32 to cement his stance.

The appellant further urged the Court to consider that in the absence of a subsisting marriage between himself and the respondent, the relationship that existed between the parties was that of cohabitation or concubinage and nothing else. Cases from Seychelles and Kenya were cited, that is, **Octave Arrissol v. Stephenie Dodin SCA** No. 6 of 2003 and **Esther Njeri Gichuiru v. Samuel Kimuchu Gichuru**, Civil Suit 2 of 2007 (OS). In the latter case, the court had the opportunity to discuss the status of couples living in concubinage and held that there are no enforceable legal rights derived from such a relationship. The appellant thus flawed the holding by the High Court that the respondent deserved a share in the properties acquired during the existence of their relationship, notwithstanding the fact that, it had declared that there was no legal marriage between the couple. He concluded by urging us to allow the appeal with costs.

On her part, the respondent did not have much to state, beseeching the Court to dismiss the appeal and find that the decision of the High Court was proper and based on evidence adduced in the trial court. She emphasized that she was married to the appellant and had no idea that he was married to another person when their relationship started. She contended that the appellant had at one time sought her hand in marriage

through her parents in Ngara. She contended that when the appellant was in Mozambique, she stayed in the house with the two of her children born inside their customary marriage. The respondent further contended that the house she lives in currently is one which she had purchased with her own funds around Tshs. 16.5 million which was her share after the house at Kangae Nyakato was sold as per the court order. She implored us to dismiss the appeal.

In rejoinder, the appellant was very brief, reiterating his earlier submissions and denying the respondent having had a hand in purchasing the plot and constructing the alleged matrimonial house as claimed since the requisite plot was acquired by his wife, Paulina Maruru who also supervised the construction of the house thereon. That, there was no contribution from the respondent. He contended that throughout the period they cohabited, the respondent had been dependent on him for the sustenance of herself and her children, thus, any money she had, he was the one who had been sending to her while working in Mozambique. The appellant also expressed his misgivings on the fact that the disputed house was sold for a very low price which he found not palatable and injudicious. He ended by reiterating his prayer for the Court to allow the

appeal and rescind the sale of the house held to be matrimonial property between the appellant and respondent.

Having carefully gone through the record of appeal, and heard the oral and written submissions by the parties, and the cited authorities, our determination of the grounds of appeal will be sequential. The first and second grounds of appeal will be dealt with conjointly. We find it pertinent to start by first revealing matters we find are essentially not disputed by both parties as: **One**, the appellant and respondent were together in a love relationship between 1996 to 2013 and blessed with two issues. **Two**, during the period they were together before 2010, the appellant was sometimes in Mozambique working. **Third**, from the evidence we have gathered that around 2008, the appellant and respondent stayed together in a house in a street where Donald Maige (PW2) and Eugenia Emmanuel (PW3) also lived in. PW2 and PW3 believed the appellant and respondent to be husband and wife. Later a house was built in the same street and the appellant and respondent moved into the said house in May 2012.

We are of the view that upon the High Court's finding that the relationship between the appellant and the respondent was not that of a lawful marriage, a holding that has not been challenged in this appeal,

the issues for determination are: **One**, whether in the relationship that existed between the appellant and the respondent, there could be property acquired identified as matrimonial property. **Two**, whether the High Court's order of division of "matrimonial property" between the appellant and respondent was legally sound under the circumstances.

In addressing issue number one, our starting point will be having a better understanding of what "matrimonial property" is. In the case of **Bi Hawa Mohamed** (supra), the Court had occasion to discuss the matter and adopted the portrayal of the same in Halsbury's Laws of England 4th Edition at page 491, that, a family/matrimonial asset:

> *"refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole."*

Thus, adopting the above definition of what are matrimonial assets, the next issue to consider is what should guide the court in the division of matrimonial property. Section 114(1) of the LMA essentially states:

> *"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 the sale."

Indeed, in the application of section 114(1) of LMA, consideration of section 110 (1) of LMA is imperative. It states:

> *"At the conclusion of the hearing of a petition for separation or divorce, the court may-*
>
> (a) *If satisfied that the marriage has broken down and, where the petition is for divorce, that the break down is irreparable, grant a decree of separation or divorce, as the case maybe, together with an ancillary relief.'*

What is apparent, as held by this Court in **Bi Hawa Mohamed** (supra), the power of the Court to divide assets is derived from section 114 (1) of the LMA that:

> "*the assets envisaged thereat must firstly be* **matrimonial assets***; and secondly, they must have been* **acquired by them during the marriage** by their joint efforts". [Emphasis added]

What is apparent from the above-cited provisions and has been considered in various decisions of this court, including in the case of **Bi Hawa Mohamed** (supra), as shown in the excerpt fronted hereinabove,

is that a decree of divorce or separation must have been issued before a court considers the division of matrimonial property. The above position even applies where there is a presumption of marriage within the context of section 160 of the LMA. For ease of understanding, section 160(1) and (2) of the LMA states:

> *"S. 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 shali 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 rellefs 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].

Therefore, as discerned from above, the condition precedent before the distribution of matrimonial property in the country for any type of marriage recognized is that there should be a decree of separation or divorce.

In the instant case, common factors from the decisions of the Primary, District, and High Courts are that; first, the holding that there was no lawful marriage between the appellant and the respondent. Second, there was no issuance of a decree of divorce or separation. Having gone through the evidence on record we find no reason to depart from the findings above since the respondent failed to establish the existence of a marriage with the respondent. Under the circumstances, there was neither any evidence to lead the courts below to invoke the presumption of marriage between the parties, especially in view of the marriage in existence between the appellant and Paulina Mururu. As a

result, no decree of divorce or separation could be issued by either of the subordinate courts.

Furthermore, it is on record that the Primary Court refrained from granting the relief sought by the respondent of the division of matrimonial property. In the first appeal, the District Court of Nyamagana, without issuing a decree for divorce or separation, proceeded to distribute the house situated at Kangae in Plot No. 292 Block "C' Nyasaka, finding it was jointly acquired between the appellant and the respondent. The District Court further ordered the sale of the said house and thereafter the proceeds be divided equally between the appellant and respondent. In the second appeal, the High Court, held that;

> *"the appellant and the respondent lived and conducted themselves from the year 1996 when their relationship started, to the year 2013, when their relationship got spoiled, was like that of woman and husband, it could however, not be presumed to have been marriage in terms of the provision of section 160 of the Law of Marriage Act Cap 29 because, the appellant had a valid subsisting monogamous marriage with Paulina Maruru and therefore, incompetent to contract other marriage."*

Notwithstanding the above holding, the High Court went on to uphold the order of the District Court for the distribution and sale of the expounded house and division of the proceeds between the appellant and respondent even though no decree of separation or divorce was issued. The High Court justified its holding by introducing a concept of partnership and joint venture collaboration in the non-marriage relationship and upheld the decision and orders of the District Court to sell the disputed house and divide the proceeds between the parties.

With due respect, we are of the view that the High Court upon finding that there was a legal marriage in existence between the appellant and Paulina Maruru at the time of the relationship between the respondent and the appellant, and thus incapable of granting a decree of separation or divorce for such a union, it should not have proceeded as it did. We are of the firm view that had the High Court considered the obtaining legal position expounded herein, then it would not have proceeded to hold that in the instant appeal, there was property jointly acquired and proceed to order distribution of property not proved to be matrimonial property.

Indeed, sections 114(1) and 110(1) of the LMA, clearly stipulate the fact that a decree of divorce or separation precedes the distribution of

matrimonial properties. The said position has been reiterated in various decisions of the Court as reproduced herein above. Certainly, the division of property jointly acquired during the existence of marital-related relations is subject to a decree of separation or divorce having been issued. In the case of **Richard Majenga v. Specioza Sylivester**, Civil Appeal No. 208 of 2018, when addressing a similar matter, 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."*

In the circumstances, we find the first and second grounds of appeal to have merit. Furthermore, we find that the determination of the first and second grounds of appeal is sufficient to dispose of the appeal and find no need to consider and determine the remaining grounds of appeal.

Before we take leave of the matter, we wish to remark that the fate of the house declared to be a matrimonial house, which was ordered to be sold by the High Court taxed our minds extremely. Both parties, through their respective oral submissions, have conceded that the said house was sold as ordered and the proceeds were distributed equally between them. Having carefully and dispassionately deliberated on the

matter, we are of the view that justice demands that we should leave the matter as it is and not disturb what has already been done. If there are any losses suffered, they should lie where they have fallen.

In the end, we allow the appeal to the extent stated herein. Each party to bear its own costs.

DATED at **MWANZA** this 3rd day of May, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of May, 2023 in the presence of the Appellant and Respondent in person is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL