"ORIGINAL"

IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

MATRIMONIAL APPEAL NO. 17 OF 2016
(Appeal from the District Court Singida
Civil Cause No. 031 of 2015)

NEPSON SIMON ..... **APPELLANT**

VERSUS

AMINA YUSUPH ..... **RESPONDENT**

JUDGEMENT

Mansoor, J:

Date of JUDGEMENT- 26/05/2017

The Appellant was married to Hilda Mgaya, according to the rites of the Christian religion on 12 December 2004, the appellant and his wife being Christians. The marriage certificate was tendered in court as exhibit. The respondent claimed that in 2009, the appellant started to have a relationship with the respondent and has since been living in adultery until 2014, and had one child out of the relationship.

Section 160 of the Law of Marriage Act provides a relief on presumption of marriage, the ingredients of which were mentioned in the case of John **Kirakwe .V. Iddi Siko (1989) TLR 215**. In this case Hon Justice Mwalusanya held that:

> "To constitute a presumption of marriage three elements are necessary: firstly, the parties have cohabited for over two years, secondly, the parties have acquired the reputation of husband and wife and thirdly, there was no formal marriage ceremony between the said couples. "

Also in the case of **Zaina Ismail .V. Saidi Mkondo (1982)** where it was held that under s.160 of the Law of Marriage Act, 1971, parties can raise a presumption of marriage if they have stayed together for a period of over two years; but the presumption is rebuttable and the intention of s. 160 (1) is not to create an alternative procedure of contracting a valid marriage.

Christian marriage is a monogamous one. The man cannot lawfully be the husband of many wives at the same time. It is therefore a ceremony inconsistent with marriage as understood in Christendom that the husband should have more than one wife.

Can a Christian man take a second wife? Can the law on presumption of marriage apply to a Christian man who is lawfully wedded in Christian rites? The point to be decided is not without difficulty. The Law of Marriage Act specifically section 160 of the Act is silent and there is no express provision in the Law of Marriage Act expressing that Section 160 would not apply to a Christian married man who cohabits with a second woman. I have therefore borrowed the wisdom of English cases which serve to illustrate in what cases the English Divorce Court will give relief. **In Brinkley v. Attorney-General (L. R., 15 P. D., 76),** a British subject married a Japanese woman in Japan according to the forms required by the law of that country, and it was ruled that by such a

marriage the husband was precluded from marrying any other woman during the subsistence of the marriage. It held:

> "Marriage must be that of one man and one woman to the exclusion of all others."

In another English case, the case of **Hyde v. Hyde (L. R., 1 P. & D., 130)**, the English Court, held that "marriage as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of all others."

This Court would not grant the relief the respond prays for, on the ground that the marriage being a monogamous one, there cannot be presumption of marriage under Section 160 of the Law of Marriage Act, and the second marriage, if any, cannot be recognized as a marriage by the Court; and, being also of opinion that Section 160 of the Law of Marriage Act, does not contemplate relief in cases where the parties have been married under the rites and ceremonies of Christianity, I hold

that the District Court erred in holding that there was a presumption of marriage.

It is therefore true that as regards the Christian wife, her union with her husband is a voluntary union for her life with one man to the exclusion of all others; this is not the kind of marriage where a husband may marry several wives at one and the same time, or may marry two or more wives during the lifetime of the first wife and that Section 160 of the Law of Marriage Act could not be applicable to a man or a woman who is married in accordance with Christian rites.

There is no doubt that this country recognizes marriages conducted in Christendom, and that marriage is the marriage of the exclusive kind in that it is the union of one man and one woman to the exclusion of others . In the case at hand, the Appellant and one Hilda Mgaya contracted a Christian marriage in 2004 in the *Kanisa Katoliki Tabata.* It is true that the appellant has married only one wife, and he was not at liberty to have married another or several wives at the same time, and the court cannot declare the respond now before the

court to be treated as a wife because the presumption of marriage under Section 160 of the Law of Marriage Act is rebutted. There is no presumption of marriage on a man or woman who is legally married under the Christianity rites. A woman cannot acquire the reputation of a married woman if she lives with a married man, specifically if the man has his wife under the Christian laws. As correctly held in the case of **HOKA VS PASTORY MWIJAGE** (High Court of Tanzania at Mwanza, Civil Appeal No. 94 of 1983 that *"where there is no allegations of presumption of marriage section 160 of the Law of Marriage act of 1971 cannot be invoked merely on the account of concubinage association."*

Having held that there was no presumption of marriage between the appellant and the respondent, the Court seized to have jurisdiction to order division of matrimonial properties. The case of **BI HAWA MOHAME vs. Ally SEFU (CA) Civil Appeal No. 9 of 1983**, while quoting what was stated under paragraph 1064 of Lord Hailsham's Halsbury's Laws of England, 4th edition, page 491 that " the phrase family assets

has been described as a covenant way of expressing an important concept, it 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 of them and their children during their joint lives and used for the benefit of the family as a whole."

Since this court cannot declare the relationship of the Appellant and the Respondent to be that of a married man and a woman, the Court does not have jurisdiction to order division of matrimonial assets acquired during the subsistence of the marriage since there was no marriage at all existed between the parties. Pursuant to the provisions of Section 114, Law of Marriage Act and the above cited court decisions; the respondent could only have been entitled to a share of the matrimonial assets, if the marriage between them was a legally recognized marriage under the Law of Marriage Act, which is not the case here.

SECTION 114(2) of the Law of Marriage Act, provides:

"(2) in exercising the power conferred by subsection (1),

The court shall have regard

(a) N/A

(b) To the extent of the contributions made by each party in money, property or work toward the acquiring of the assets;

(e) N/A

(d) To the needs of the infant children, if any, of the marriage, and subject to those considerations, shall incline towards equality of division."

Under subsection 2(b), the law recognizes spouses contributions in terms of money, property or work, and thus for there to be a spouse there must be a lawful wife or a lawful husband.

In the absence of marriage the respondent was to prove by evidence as to existence of joint ownership. The mere existence

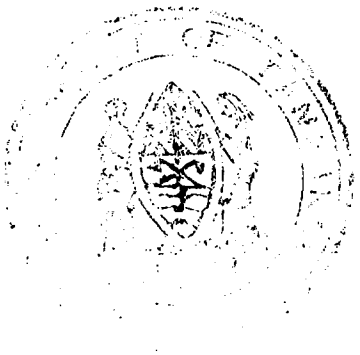
of adultery relationship alone is not enough to hold that the property is the family or matrimonial property. Absolutely, there is no evidence as to the existence of either presumed marriage or joint ownership of the properties and in the absence of any evidence, the contention of the respondent that the property is the joint property or were acquired during the subsistence of the marriage does not merit acceptance. The evidence produced before the lower court on the respondent's contribution towards the acquisition of the properties would have worked if the respondent was a lawfully wedded wife of the appellant.

As for the child, this child was born by an unmarried woman and there is no doubt that the appellant is the child's father. This child was born out of wedlock and the appellant does not deny that he is the parent to the boy and so he must take steps to secure his parental rights. Then, he may choose to ask the court for custody or visitation rights, and if they're granted, he must make an effort to establish a parent-child relationship.

Since the paternity of this boy is not disputed, the appellant who is the father of the boy has the same responsibility to support his child as he would if he were married to the child's mother. The Respondent has not asked the court for child's support. The lower court did not determine the appropriate payment or amounts to be paid by the appellant for supporting the child, hence the respondent may wish to file a case for determination of the child support in the court having jurisdiction. The amount of child support vary from one man and another, they're based primarily on both parents' incomes and depends on the circumstances of each case.

Consequently, and based on the above, the Appeal is allowed. The Judgment and Decree of the Singida District Court in Civil Case No. 31 of 2015 is set aside. No orders as to costs.

DATED at DODOMA this 26th day of MAY, 2017



L. MANSOOR,

JUDGE

26TH MAY 2017