IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 24 OF 2017

(Originating from Arusha Urban Primary Court, Civil Case No. 69/2003, Arusha District Court Civil Appeal No. 55/2005)

JOHN ROBERT.....APPELLANT

VERSUS

CATHERINE INYASI.....RESPONDENT

JUDGMENT

2/10/2018 & 9/11/2018

MZUNA, J.:

This appeal emanates from Arusha Urban Primary Court where the respondent herein instituted a matrimonial cause against the appellant claiming for division of the matrimonial house comprising 5 rooms, the house which was acquired jointly during the time when they were living together. After full trial, the court was satisfied that the suit house was acquired jointly by both parties and ordered the same be sold and the proceeds of sale be divided equally among the parties. Dissatisfied with the decision of the trial

court, the appellant unsuccessfully appealed before the District Court, hence this appeal basing on the following grounds;

1. *That the first appellate court erred both in law and in fact in holding that the appellant lived under presumption of marriage which was never proved.*
2. *That the first appellate court erred both in law and in fact in failure to consider the fact that the land in which the house in dispute is built was acquired by him and his wife who both signed purchase agreement.*
3. *That both court below erred both in law and in fact by failure to consider contradictions made by the respondent's witnesses at the trial court which revealed that the respondent failed to prove her case to the balance of probabilities required in civil claim.*
4. *That both courts below erred both in law and in fact in failure to consider the fact that the respondent and her witnesses could not identify the purchased land in size or boundaries an omission which is fatal to the decision made by both courts.*

On 27th day of September, 2018 when the matter was scheduled for hearing, the appellant appeared alone and informed the court that the respondent refused to be served as evidenced by proof of service of summons to that effect. This prompted the court to proceed *ex parte* as requested.

Let me start with the background story. According to SM 1 Catherine Inyasi, she said that she purchased the suit plot for Tshs 120,000/- way back in 1993 and among the witnesses were the appellant, then as her neighbor. Then they constructed two rooms which was then developed to five rooms. They shifted and stayed therein but the appellant decided to chase her sometimes in 2002. Prior, they stayed in a rented room. Other witnesses to the sale agreement were Ruben Malesi who posed as a witness for the respondent.

That story was also given support by SM 3 Anne Lucas who said that the respondent bought the suit plot from her father and the appellant was a witness and SM 4 Landed Ndarivo. The latter said is also related to the seller and that after purchase by the respondent, she built two rooms mud house but was then rebuilt to a block house by joint effort of both the appellant and the respondent.

The defence case was that it was SU.1 John Robert who bought it for Tshs 100,000/- and the alleged block house was built by himself together with his wife Rozina John (SU2). He tendered copies of TANESCO payment

receipts received as exhibits D1, D2 and D3. Even SU3 Richard Mollel said that the appellant bought the suit plot from his grandfather.

The appellant further summoned Olgenes Lema SU. 5 as the one who demolished a mud house and built block house after being hired by the appellant.

Both the trial court and the first appeal court found in favour of the respondent for the reasons that the size of the plot stated by the appellant as 10 X 7 meters differed with the actual size which they visited and saw that it was 15.7 X 9.5 meters. That SU 4 admitted to have seen the respondent visiting the suit plot during construction unlike the appellant's wife (SU2) though admitted never supplied food to him. That he never knew the wife of the appellant until in year 2000.

Further that the witnesses were elder people from the clan of the seller and that it was the respondent who constructed a house and then saw her staying with the appellant. The court therefore found that the house was built through the joint effort hence the said order for equal division of the proceeds of sale of the said house.

During hearing, the appellant was very brief in his submission. He stated that, he has lodged this appeal because the house belongs to him. He said his wife (SM2) (not the respondent) signed as a witness. The name of her wife is Rozila John who was the 5th witness to the sale agreement. He added that, even SU3 who is related to the seller and is his neighbour gave evidence in his favour. He prayed for this appeal to be allowed.

I have considered his submission and thoroughly combed the record of the lower courts. In the first ground of appeal, the appellant complains that the first appellate court erred both in law and fact in holding that the appellant lived under presumption of marriage which was never proved. It is very clear from the trial court records, in particular the petition filed before the trial court that the respondent sought for a relief of division of matrimonial property based on the ground that from 1994 she agreed with the appellant to live together in the course of which they acquired a house (which is the subject of this matter). According to her, in 2002 the appellant kicked her out from the matrimonial house and married another wife. As already stated above, both lower courts found that there was presumption of marriage, obvious based on the fact there was no any formal marriage between the two and ordered for division of disputed house.

Now, the pertinent issue before this court is whether the lower courts properly invoked the doctrine of presumption of marriage? The doctrine of presumption of marriage is provided under section 160 (1) of the Law of Marriage Act, Cap. 29 R.E 2002 which states that;

> *"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."*

The court in the case of **John Kirakwe vs. Iddi Siko** [1989] TLR 215 provided the elements to be applied in invoking the doctrine of presumption of marriage, that;

(a) "That the parties have cohabited for over two years;

(b) That the parties have acquired the reputation of husband and wife

(c) That there was no formal marriage ceremony between the said couple."

Based on the above authoritative case law the decision which I fully subscribe to, in order for the court to invoke the doctrine of presumption of marriage, the applicant must prove that parties have lived together under one roof for two years or more, the parties have acquired the reputation of being husband and wife and that there is no formal marriage ceremony

between the two. The respondent was required to prove that she lived together with the appellant as husband and wife for two or more years as the appellant vigorously denied to have lived with the respondent under one roof.

Going through the respondent's evidence before the trial court, she led no evidence establishing that she lived with the appellant under one roof from 1994 to 2002 as she alleged. The witnesses for the respondent said that they saw them staying together for unspecified number of years. In other words, among all three witnesses who testified in favour of respondent, no one testified that he/she recognized the appellant and respondent as husband and wife and they lived together for such period.

Although SM3 and SM4 testified that after purchase of the disputed house they saw the appellant and respondent living together, but it was not elaborated how long did they saw the parties living together and whether they were living as husband and wife in order to constitute marriage under section 160 (1) of the Marriage Act (supra). The Law of Marriage Act, does not recognize informal union of man and a woman such as concubinage association, unless the same is invoked under the provision of section 160 (1) of the Law of Marriage Act (supra). See the case of **Hoka Mbofu vs.**

Pastory Mwijage [1983] TLR 286 where it was stated that section 160 of the Law of Marriage Act cannot be invoked merely on account of concubinage association. It is only after the petitioner established and satisfied the court that they lived with the respondent under one roof as husband and wife for two or more years, that is when the court will be entitled to invoke doctrine of presumption of marriage. Since in this matter, the respondent failed to give sufficient evidence before the trial court establishing that they lived with the appellant under one roof and acquired the status of being husband and wife, then I find the trial court erroneously invoked the doctrine of presumption of marriage. Equally the trial court erred to apply the provision of section 160 (2) of the Law of Marriage Act (supra) and order for division of the disputed house.

Lastly though in passing, there was no evaluation of the evidence for the following reasons:-

First, if the trial court found the appellant mentioned a different plot based on size, then why grant him half of the value? The alleged contradiction was minor as it was mere estimation which one can say is very close. Their measurement was actual unlike his but it was the same plot.

Second, there was very contradictory statements on the neighbours to the plot from the evidence of SM1 and that of SM2. The former said that at the Eastern side there was Neema Nekule; North Genius; Western Joseph Matokeo and on the South Mr. Lucas Nderivo.

However, SM 2 said that on the East there was Petro Ndelivo; West Mr. Lucas; North Mr. Ndamian and to the South Bomalo la Silayo. These contradictions were not minor but goes to the root of the matter.

Three, if the respondent had a right over the property, what action did she take upon being chased away in 2002 before filing the suit in 2003? Did she complain to any local authority? If not why? Merely saying that she was chased away and the appellant took the sale agreement to my view was not enough.

Four, if SU 4 saw the respondent visiting him at the site, did she pose as a wife or that contributed to its construction. There is no evidence that she paid for the labourers or even took there materials. There is no proof that she contributed to its acquisition and if there was any such contribution for argument's sake, still it could not be 50%.

Five, if the respondent said bought the suit plot alone and then built together with the appellant what were the terms? Why claim half and not all?

Further even the respondent said that at the time of signing the sale agreement to which the appellant signed, he was his neighbor. There is no any document which was tendered to back up the respondent's evidence on the alleged purchase unlike the appellant who tendered it. Above all the evidence of SU3 who was also the relative of the seller was not challenged. The reputation of husband and wife may be acquired from the community or society of people which surrounded them, being neighbours, relatives or the like. Nothing which pointed to that effect.

I am aware that under very rare cases can the second appeal court nullify the concurrent findings of the two courts below. However as above shown, there was no critical evaluation of the evidence and this anomaly I am tempted to believe, if allowed to go unchecked may lead to miscarriage of justice by the so called people who are described as concubines. Surely, the burden of proof remained on the one who alleged, the respondent which I believe never discharged it, albeit on the balance of probabilities.

For the above stated reasons, I hereby set aside the judgment and orders of both the trial court and the District Court.

Appeal allowed with no order as to costs.

Order accordingly.

M. G. MZUNA,

JUDGE. 9/11/2018