IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MATRIMONIAL APPEAL NO. 2 OF 2019

(Arising from Matrimonial Appeal No. 4 of 2019 of Songea District Court and originating from Matrimonial Cause No. 35 of 2018 of Mbinga Urban Primary Court)

ALFRED KINUNDA.....APPELLANT

VERSUS

MARIA KUMBURU.....RESPONDENT

Date of last order: 25/06/2020

Date of judgment: 30/07/2020

JUDGMENT

I.ARUFANI, J.

This is a second appeal and is arising from Matrimonial Appeal No. 4 of 2019 of Mbinga District Court which originated from Matrimonial Cause No. 35 of 2018 of Mbinga Urban Primary Court. The background of the matter as can be deduced from the records of the lower courts is to the effect that, the appellant and the respondent contracted the civil marriage on 30th April, 2009. Before contracting their marriage the parties involved in a cohabitation which resulted into being blessed with a child namely Miriam Alfred Kinunda who was born on 15th January, 2004. After entering into civil marriage they lived a happy marriage life and acquired different properties up to 2018 when the problems started in their marriage.

After problems started in their marriage the respondent filed Matrimonial cause No. 35 of 2018 in the Primary Court of Mbinga Urban against the appellant seeking for orders of divorce, custody and maintenance of the child, division of joint acquired properties and other relief the court deemed fit to grant. The trial court granted the orders of divorce, placed the child under the custody of the appellant and divided the properties acquired jointly by the parties. The appellant was dissatisfied by the decision of the trial court and appealed to the District Court of Mbinga vide Matrimonial Appeal No. 4 of 2019 which was dismissed in its entirety. The appellant has now come to this court for second appeal to challenge the decision of the District Court basing on six grounds which principally are challenging distribution of the house on Plot No. 308 Block "C" Mbinga Urban he alleged is not a matrimonial property.

The parties appeared in the court in person and were allowed by the court to argue the appeal by way of written submissions. The appellant abandoned the fifth ground of appeal and argued the rest of the grounds of appeal contained in his amended petition of appeal. The grounds of appeal which were argued by the appellant after abandoned the fifth ground of appeal are as follows:-

1. That, the lower courts erred in law and facts to include the house in matrimonial acquired properties as it belongs to a third party one Miriam Alfred Kinunda.

2. That, the alleged house in dispute I bought on 17. 02. 2007 whilst the respondent got into marriage to appellant on 30. 04. 2009 prior she was a concubine and not my wife.

3. That, it is not true if we were living together as husband and wife since 2002, but we were blessed with one child in 2004. I wonder if woman become automatically a wife effective from the day of pregnancy.

4. That, respondent being a witness in the purchase of house agreement in 2007 does not justify she was entitled to that property as ruled by lower courts.

5. That, there is no sold and strong evidence which lower courts took into consideration the extent of money value contributed by respondent towards acquisition of alleged house by merely cooking bans and taking care of the family.

The appellant stated in his submission in relation to the first ground of appeal that, he acquired the house in dispute in 2007 which was before entering into marriage with the respondent in the year 2009 and thereafter the house was dedicated to her daughter namely Miriam Alfred Kinunda. He argued that, under section 114 (1) of the Law of Marriage Act, Cap 29 R.E 2002 the court is empowered to order for division of any asset acquired jointly by the parties during subsistence of their marriage. His submission is that, the lower courts were wrong to order the house which he purchased alone in 2007 before entering into marriage with the respondent to be divided as a matrimonial property.

He stated in relation to the second ground of appeal that, while he purchased the house in dispute on 17th February, 2007 their marriage was contracted on 30th April, 2009 which is prior entering into the marriage and stated that the respondent was a mere concubine and not a wife. He argued that, although the respondent was a witness in the

agreement of purchasing the house but that does not justify she was entitled to get anything from the house as decided by the lower courts. He stated that, the agreement for purchasing the house admitted in the case as exhibit D3 shows clearly that he is the one purchased the house in dispute from Athman Chimgege and the respondent was a witness.

With regards to the fourth ground of appeal the appellant argued that, a witness can be anybody of the age of majority and being a witness does not give him a right of share in a purchased property. He stated further that, in 2007 the respondent was just a friend who was asked by the appellant to witness sale agreement and not otherwise. He stated that, if the respondent used to sale bans the money she obtained therefrom she used for her own use and there was no evidence to prove how much she contributed in purchasing or improving the house in dispute. He stated that, if the respondent contributed anything in the purchase of the house she would have appeared in the sale agreement as a co-purchaser and not as a witness.

He stated in relation to the third and fifth grounds of appeal which he argued them together that, having a sexual relationship out of marriage which resulted into getting a child does not automatically make a property acquired by each party individually a joint property. He said the lower courts erred to order the division of the house without evidence showing how the respondent contributed in its acquisition. To support his submission he referred the court to section 110 (1) and (2) of the **Evidence Act**, Cap 6 R.E 2002 which requires proof of a fact alleged is in existence and the case of **Elizabeth Saiwa V. Yohana Mpahi**, [1984] TLR 56 where the cited provision of the law was emphasized.

He stated that, the trial court was wrong to base its decision in the case of **Bi Hawa Mohamed V. Ally Seif**, Civil Appeal No. 9 of 1983, HC at DSM and stated that, the cited case is different from their case. He stated in the cited case the issue was about division of assets acquired during existence of marriage whilst the house in dispute in the case at hand was acquired before the marriage. At the end he prayed the appeal to be allowed and the orders of the lower courts to be quashed with costs.

In reply the respondent argued to the first ground of appeal that, the allegation that the house is a property of their child namely Miriam Kinunda is a new fact which was not stated before the trial court when the parties were giving their evidence. She stated that, since the stated fact is a new fact it cannot be acted upon by this court which is sitting as an appellate court. With regards to the second ground of appeal the respondent argued that, the issue is not for the respondent to appear as a witness in the sale agreement but her contribution to the acquisition of the house when they were cohabiting. She said she contributed her effort in acquisition of the house through the money she earned from selling bans.

The respondent stated that, she was living with the appellant as husband and wife under the umbrella of presumption of marriage until when they celebrated their formal marriage in 2009. She argued in relation to the third ground of appeal that, she started cohabiting with the appellant from 2002 and in 2004 were blesses to have one child namely Miriam Kinunda. She argued that, the house which was acquired in 2007 when they were cohabiting is the joint effort property which is supposed to be divided according to the ones contribution. The

respondent submitted that, the lower courts were correct in deciding acquisition of the house resulted from joint effort of the appellant and the respondent. In fine she prayed the appeal to be dismissed.

The appellant stated in his rejoinder that, the issue of the house in dispute to be the property of Miriam Alfred Kinunda is not a new fact. He said it was stated so before the trial court and discussed at page 7 of the judgment of the District Court that they agreed the house is the property of their child. He said he purchased the house in dispute and with the consent of the respondent he willingly dedicated it to their child, Miriam Kinunda. He argued further that, neither a cohabitation which commenced way back in 2002 nor blessing of children, regardless of their numbers which can justify existence of a formal marriage. He reiterated what he stated in his submission in chief and prayed the appeal to be allowed and the respondent to be restrained from dealing with the house in dispute in any purported manner.

Having gone through the grounds of appeal filed in this court by the appellant and the submissions filed in the court by the parties the court has found the main issue for determination in the appeal at hand is whether, the house in dispute was a matrimonial property and was supposed to be divided to the parties as such. After carefully considered the rival submissions made to the court by the parties the court has found the evidence adduced before the trial court by both sides show without dispute that, the house in dispute was purchased in 2007 and the parties celebrated their civil marriage in 2009. The court has also found that, before the house being purchased and the parties entered into civil marriage they had been in cohabitation which in 2004 were blessed to have one child namely Miriam Kinunda. In addition to that the

court has found the sale agreement admitted in the case as exhibit D3 shows the purchaser of the house in dispute was the appellant and the respondent appears in the sale agreement as a witness.

That being undisputed facts the court has found the question to determine in relation to the second, third and fourth grounds of appeal is whether the house purchased by the appellant before entering into civil marriage but he was in cohabitation with the respondent when the house was purchased is a matrimonial property. The court has found the term matrimonial property is not defined in the Law of Marriage Act, Cap 29 R.E 2019. However, my research landed me in a definition provided at **https//www.nsfamily.ca>married** which define it as follows:-

> *"Matrimonial property is property owned or obtained by either or both married spouses before or during their marriage. It is sometimes called matrimonial assets. Matrimonial property includes matrimonial home – the home that the couple lived in during their marriage."*

From the above definition it is crystal clear that, a property obtained by either or both married spouses before or during their marriage can be a matrimonial property. To the view of this court the above definition is tallying squarely with what is provided under section 114 (1) and (3) of the Law of Marriage Act. What is required to be looked at when the court is exercising its power of ordering division of matrimonial assets of the spouses as provide under section 114 (2) (b) of the above cited law is the extent of contribution made by each spouse in acquisition or improving the assets acquired jointly or by one party in the marriage. The above view of this court is being bolstered by what was stated in the cases of **Pulcheria Pundugu V. Samwel Huma**

Pundugu, [1985] TLR 7 and **Mohamed Abdallah V. Halima Lisangwe**, [1988] TLR 197 where it was held inter alia that, the principle underlying division of matrimonial property is one of compensation.

Therefore the argument by the appellant that the house in dispute was purchased in 2007 when the respondent was a concubine and not a wife as they entered into their civil marriage in 2009 is not a sufficient ground for making the house to be not a matrimonial property which the trial court would have no power to divide it under section 114 (1) and (3) of the Law of Marriage Act. The court has also considered the argument by the appellant that the house cannot be a matrimonial property because as shown in exhibit D3 the house was purchased by appellant alone and the respondent was a mere witness but found that, what is supposed to be taken into consideration is whether there is any contribution made by respondent in acquisition of the said house.

The contention by the appellant that blessing with a child in 2004 cannot automatically make the respondent a wife from the day of becoming pregnancy has been considered by the court and found is a contention which has no support of the law. The court has arrived to the above finding after seeing that, our law recognises a man and woman who have lived together for long period of time, in such circumstances as to have acquired the reputation of being husband and wife were dully married under the principle of presumption of marriage. The said principle of presumption of marriage was defined in the case of **Fatuma Amani V. Rashid Athuman** (1967) HCD No. 173 where the court stated that, presumption of marriage is a common law principle which raises a presumption that prolonged co-habitation of parties creates a

valid marriage where circumstances to the contrary do not arise. That common law principle is incorporated in our laws under section 160 (1) of the Law of Marriage Act, Cap 29 R.E 2019 which provides as follows:-

> *"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."*

From the above stated principle of the law it is crystal clear that, even if the appellant would have not celebrated a civil marriage with respondent but under the above quoted provision of the law the parties would have been seen to be dully married and whatever property acquired by each of the parties or jointly is required to be taken is a matrimonial property until when is proved otherwise. Since there is evidence adduced before the trial court showing the appellant and the respondent started their relationship from 2002 and in 2004 were blessed with one issue and confirmed their cohabitation by celebrating a civil marriage in 2009 it cannot be said the house purchased by the appellant in 2007 is not a matrimonial property which was not supposed to be divided to the parties. The above finding of this court is being bolstered by the case of **Hemed S. Tamimu V. Renata Mashayo**, [1994] TLR 197 where it was held that:-

> *"Where the parties have lived together as husband and wife in the course of which they acquired a house, despite the rebuttable of the presumption of marriage as provided for under section 160 (1) of the Law of Marriage Act the courts*

have 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.***" [Emphasis added].

From the above stated position of the law the court has come to the settled view that, despite the fact that the house was purchased by the appellant in 2007 before celebrating their civil marriage in 2009 but as there was evidence which was believed by the lower courts that the parties were in cohabitation from 2002 and in 2004 were blessed with one issue, the lower courts were correct to hold the house was a matrimonial property which was supposed to be divided to the parties as a matrimonial property. That makes the court to find the next question to determine in this matter as it can be deduced from the fifth ground of appeal is what was the contribution of the respondent in acquisition of the said house?

The court has considered the evidence by the respondent that she contributed in acquisition of the house through selling bans which was strongly disputed by the appellant and find that, although it is true that the respondent did not state how much money she contributed in acquisition of the house in dispute through her business of selling bans but her evidence was believed by the lower courts that she contributed in acquisition of the house in disputed through the stated business. Since the lower courts believed the evidence of the respondent and this being the second appeal the court has found that, as held in the cases of **Amratlal Damodar and Another V. A. H. Jarawalla** [1980] TLR 31 and **Bushanga Ng'oga V. Manyanda Maige** [2002] TLR 335 it

cannot interfere with the concurrent finding of the lower courts as there is nothing to show the lower courts misdirected or failed to evaluate the evidence adduced by the parties properly.

The court has also found that, even if it would have been found the respondent did not say she contributed the money she realized from selling bans in acquisition of the house but the lower courts found the respondent contributed in acquisition of the house through domestic work and taking care of the family. The court has found that, the finding of the lower courts is getting support from section 114 (2) (b) of the law of Marriage Act which states categorically that, contribution in acquisition of a matrimonial property can be in the form of money, property or work.

The above finding of this court is being bolstered by the case of **Charles Manoo Kasare & Another V. Apolina Manoo Kasare**, [2003] TLR 425 where it was held inter alia that, a wife cannot be discounted from the business of her husband even if she makes no direct monetary contribution to it; her wifely service would in itself entitle her to a share in the property acquired. The similar holding was made in the case of **Eliester Philemon Lipangahela V. Daudi Makuhuna,** Civil Appeal No. 139 of 2002, HC at DSM (unreported) where it was stated that:-

> *"The appellant's contribution towards the acquisition of matrimonial assets was in terms of work; that is including household chores, bearing and rearing of children, making the home comfortable for the respondent and issue. In addition to her domestic duties, the appellant engaged herself in the sale of bans and vegetable."*

The position of the law stated in the above cited cases make the court to find that, even if the respondent did not contribute cash money she realized from selling bans and she used the proceeds realized from that business of selling bans to take of the child and the family, that is a contribution towards acquisition of matrimonial property which was supposed to be taken into consideration in the division of matrimonial assets. The court has considered the argument by the appellant that the first appellate court erred to base in the case of **Bi Hawa Mohamed** (supra) to decide the appeal he filed in that court as that case was dealing with property acquired during subsistence of marriage while the house in the case at hand was acquired before the marriage and found is devoid of merit.

The court has arrived to the above finding after seeing that, as held in the case of **Hemed S. Tamimu** and other authorities cited hereinabove, once it is established a property is a matrimonial property, the courts have power to order for the same to be divided to the parties notwithstanding the fact that it was acquired during subsistence of presumption of marriage or during subsistence of other form of marriages recognised by the law. That make the court to find the first appellate court did not error in its decision in using the position of the law laid in the case of **Bi Hawa Mohamed** (supra) which recognised domestic work as a contribution towards acquisition of matrimonial property.

Back to the first ground of appeal where the appellant states the lower courts erred in including the house in dispute in matrimonial acquired properties as it belongs to their child, Miriam Alfred Kinunda the court has found that, the evidence adduced before the trial court

shows the parties stated to have agreed the house would have been the property of the mentioned child. In the premises the argument by the respondent that the fact of the child to be given the house in dispute is a new fact which was not tendered before the trial court is not supported by the evidence adduced before that court. The court has found that fact was said by both the appellant and the respondent when each of them was questioned by the trial magistrate and the assessors.

Although the court has found the parties said they agreed the house would have been the property of their child and the appellant said the house which is on plot No. 308 Block "C" is registered in the name of the child but there is no certificate of title or any other evidence tendered in the trial court to show the ownership of the house has ever been transferred to the child. To the contrary the court has found the evidence tendered before the trial court is a sale agreement admitted in the case as exhibit D3 which shows the purchaser of the house is the appellant and the respondent is the witness thereon. Under that circumstance the court has found that, as there is no evidence to show the ownership of the house has been transferred to the child to accomplish the agreement or intention of the parties it cannot be said the house is the property of the child and not a matrimonial property.

The court has arrived to the above finding after seeing that, the position of the law in relation to the issue of interest of children in the distribution of matrimonial assets is a subsidiary issue after considering distribution of matrimonial assets to the spouses. The above stated position of the law was laid by the Court of Appeal of Tanzania in the case of **Isidori Balaga V. Chezalina Balaga**, Civil Appeal No. 41 of 1995, CAT at DSM where it was stated that:-

In deciding the question of distribution of matrimonial assets between the spouses children's interest is a subsidiary consideration as the matter only concern the spouses."

Having found the house in dispute is a matrimonial property which the respondent contributed in its acquisition as demonstrated hereinabove the court has found that, the lower courts were right in deciding the house was required to be divided to the parties as a matrimonial property. Since the finding of the lower courts in relation to the division of the house to the parties is concurrent the court has found as held in the case of **Cecilia Mshamu V. Dick Kawogo**, [2001] TLR 318 it cannot and it has no any reason to fault the finding of the two lower courts in relation to the issue of division of the house in dispute ordered by the trial court and confirmed by the first appellate court.

In the strength of all what I have stated hereinabove the court has found all the grounds of appeal argued in this court by the appellant have not been able to satisfy the court the first appellate court erred in anyhow in its decision. In the upshot the appeal is hereby dismissed in its entirety for devoid of merit. This being matrimonial matter the court is ordering each party to bear his or her own costs. It is so ordered.

Dated at Songea this 30th day of July, 2020

I. ARUFANI

JUDGE

30/07/2020

Court:

Judgment delivered today 30th day of July, 2020 in the presence of the respondent and in the absence of the appellant. Mr. Chris (Clerk) also Present.

M. A. MALEWO

DEPUTY REGISTRAR

30/07/2020

Right of appeal explained.

M. A. MALEWO

DEPUTY REGISTRAR

30/07/2020