

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 18 OF 2020

(Arising from Civil Appeal No. 19 of 2019 in the District Court of Masasi delivered on 24th January, 2020. Original Matrimonial Cause No. 160 of 2019 from the Primary Court of Masasi District at Lisekese.)

DEVOTHA EDWARD KAMBONA.....APPELLANT

VERSUS

ANDREA VICENT MILANZI.....RESPONDENT

JUDGMENT

17 & 24 Nov. 2020

DYANSOBERA, J.:

This is a second appeal. The appellant Devotha Edward Kambona is, before this court, challenging the decision of the District Court at Masasi in Civil Appeal No. 19 of 2019 in which her appeal was partly allowed.

The brief facts were that parties had lived together since 2015 and were blessed with not even a single child. During their matrimonial life they managed to acquire some matrimonial assets. After misunderstandings ensued in the parties' relationship, the appellant went to the trial Primary

Court at Lisekese and filed her case. According to the complaint form dated and signed on 13th September, 2019, the claims the appellant presented were the following:-

"Anamdai mdaiwa mgao wa mail. Walikaa pamoja toka mwaka 2015. Kwamba hawakufunga ndoa ya aina yoyote. Mdaiwa aliamua kumuacha mdai bila kosa la msingi. Walipata mali ya pamoja: nyumba 1, kitanda na godoro, pamoja na vyombo vya ndani.

Nathibitisha kwamba yote niliyoyaeleza hapa juu ni kweli kadiri nijuavyo.

Tarehe 13 mwezi 09 mwaka..... 2019

Sgd

.....

Mahali Lisekese

Sahihi ya Mdai....."

At the commencement of hearing of the case, the trial court framed three issues, namely:

- 1. Kama wadaawa walikuwa wanandoa*
- 2. Kama ndoa ya wadaawa imevunjika katika kiwango kisichoweza kuundika tena*
- 3. Kama wadaawa wameunda mali ya pamoja na mgao wa kila mdaawa katika mali hiyo.*

After hearing the parties and their witnesses, the trial Court dissolved the marriage and ordered the division of matrimonial assets as follows:

"Mahakama inaamua kuwa kitanda na godoro husika si mali ya ndoa ya wadaawa. Vyombo vya ndani: katika vyombo vya ndani hakukuwa na ubishani wowote sawa na kusema wadaawa wanakubaliana kuwa walikuwa na mchango sawa katika vyombo vya ndani kwa msingi huu Mahakama inona kila mdaawa anastahili kupata nusu hivyo ama thamani yake.

Madeni ya ndoa: Katika madeni wadaawa wamekubaliana ni kweli walikopa fedha na baadhi ya vifaa vya ujenzi wakati wa kaujenga nyumba yao ya ndoa. Kwa misingi huu na kwa kuwa tayari katika boma wadaawa wamepata nusu ya thamani kila mmoja, katika madeni ya ndoa wadaawa watalipa nusu kwa nusu. Na madeni yaliyohibitika mbele ya Mahakama in bai 19 za futi 10, pesa Tshs. 200, 000/=, boriti 6, solar na battery. Kwa kuwa katika solar na battery hakukuwa na ubishani wowote, kila mdaawa anapatiwa nusu ya thamani na kwa anayeweza kumfidia mwingine nusu ya thamani ili abaki nayo.

Kuku 8 na mpunga debe tatu. Katika vitu hivi kwa kuwa hakukuwa na ubishani SM 1 anapatiwa kuku wanne na mpunga debe moja na nusu na Su 1 anapatiwa mpunga debe moja na nusu na kuku wanne".

In her first appeal before the District Court, the appellant was awarded one third of the value of the house after the valuation. As with respect to the bed and mattress, the learned Resident Magistrate on appeal, joined hands with the trial court that those items were not matrimonial properties as they belonged to their son one Fred Andrea.

The appellant was aggrieved by the decision of the District Court and has come to this court appealing again. Although she has raised a total of four grounds of appeal, her main complaint is found in the 4th ground of appeal that:

4. The learned appellate Magistrate erred in law for failure to resolve all grounds of appeal raised by the appellant in the first appeal which renders the decision biased and prejudicial to the appellant.

On 17th day of November, 2020 when this appeal came up for hearing both parties appeared in person and had nothing useful to add to the petition of appeal the its reply.

I have closely perused the lower courts' records. I have taken into account the petition of appeal and the reply thereof. I am satisfied that the proceedings and judgments of both lower courts were tainted with serious and incurable irregularities in such a way that they cannot be left to stand.

In the first place, the appellant's petition filed at the trial court and the evidence adduced by the parties were clear that there was no any marriage celebrated by the parties. According to claim form it was clearly stated that "Hawakufunga ndoa yoyote". The holding by the trial court that "wadaawa waliunda ndoa ya kimila" was not supported by any evidence. Indeed, section 27 (1) of the Law of Marriage Act [Cap. 29 R.E.2002] is

clear that "Every marriage shall be contracted in the presence of at least two witnesses". As the evidence reveals, no any person did testify to have witnessed the parties celebrating any marriage, be it customary or otherwise. It would seem, the appellant knew that there was no marriage that is why she did not bother to ask any dissolution of marriage. It is preposterous that the trial court dissolved the marriage which did not exist and whose prayer was not made.

Section 114 (1) of the Law of Marriage Act, Cap.29 R. E. 2002 on powers of court to order division of matrimonial assets that:

114.

(1) 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 sale.

As the record demonstrates, the division of the matrimonial properties made by the trial court was in violation of the law in view of the fact that there was no marriage whose dissolution could precede the division.

I am not unaware of the provisions of section 160 (2) of the Law of Marriage Act which provides that courts have the power under those

provisions to make consequential orders as in the dissolution of marriage or separation and division of matrimonial property acquired by the parties during their relationship is one such order; however, such facts had to be pleaded and testified on by parties so as to form part of the record of the court.

For those reasons, the appeal is allowed. The proceedings and judgments of both the trial and first appellate court are declared a nullity and set aside.

Order accordingly.



W.P. Dyansobera

Judge

26.11.2020

This judgment is delivered under my hand and the seal of this Court on this 26th day of November, 2020 in the presence of the four appellants and the respondent.



W.P. Dyansobera

Judge