IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

PC. CIVIL APPEAL NO. 09 OF 2019

(Originating from District Court of Arusha Civil Appeal No. 29 of 2018, Original Matrimonial Cause No. 37 of 2018 before Urban Primary Court at Arusha)

MWANAISHA MOHAMED ..... APPELLANT

VERSUS

HASSAN MOHAMED ..... RESPONDENT

JUDGMENT OF THE COURT

18/06/2020 & 15/9/2020

GWAE, J

On 20th day of March 2018, the appellant, Mwanaisha Mohamed instituted matrimonial proceedings before Arusha Urban Primary School (" the trial court") against the respondent, Hassan Mohamed praying for divorce and division of matrimonial assets. The decree of divorce was issued and appellant was given a house at Banda11 (Bandambili)-Sombetini area in Arusha City and a grinding machine whereas the respondent was given a house at Unga-limited and a house at Sombetini in Arusha City which the trial court found not to be matrimonial properties.

Aggrieved by the trial court's decision and its subsequent orders, the appellant appealed to the District Court of Arusha at Arusha (hereinafter to be referred to as "the 1st appellate court") but her appeal was entirely dismissed. Still dissatisfied, she appealed to this court against the concurrent decisions of the courts below as her second bite. Her petition of appeal contains two grounds of appeal as was the case before the 1st appellate court, these are;

1. That, the 1st appellate court erred in law and facts by failing to consider the evidence and contribution done by the appellant hence reached into erroneous decision
2. That, the 1st appellate court erred in law and facts to uphold the decision of the trial court which did not consider the evidence tendered by the appellant

For easy of understanding of the matter, it is perhaps apposite to have brief facts of the case between the parties reproduced, that, the parties started living as concubines since 1988 and their relation as husband and wife was blessed with an issue in the year 1990 and another issue in 1996. Their relationship became sour in the year 1998. The appellant then got married to another man known by names of **Mr. Paul Malale** in 2000. The appellant lived with the said Paul Malale till 2010 when he passed away. The marriage between the appellant and the late Paul was not blessed with any issue.

After the demise of the said Paul Malale, the relation between the parties resumed and eventually in the 2012 the parties underwent marriage which was conducted under Islamic rite. However between 2017 and 2018, the parties' relation became undesirable leading to these proceedings.

At the hearing of this appeal before me, the appellant appeared in person, unrepresented whereas the respondent enjoined the legal service of **Mr. Simion Henry**, the learned counsel.

Supporting her appeal, the appellant seriously argued that the decisions of the courts below did not please her particularly on the distribution of matrimonial properties as she was not given any residential house out of two matrimonial houses, one at Unga limited and another at Sombetini area which according to her the same were acquired through the joint efforts of both parties.

Responding to the appellant's oral submission, Mr. Simon vehemently argued that, before the parties' marriage in 2012, the parties were mere concubines adding that the plot of a house at Unga limited was purchased in 1989 and that it was built to its completion in 1992. He also argued that, the plot at Sombetini area was purchased in 1997 when the appellant was not married to the respondent till 2012 when the appellant was married. According to the appellant's advocate, the said houses are therefore not subject to division of matrimonial assets.

In her rejoinder, the appellant stated that the respondent started living with her as husband and wife since 1989 and that they were blessed with two issues. She further stated that, she managed to acquire a house at Bandambili area during the subsistence of her marriage with the late Paul. Hence the house at Bandambili area is her own property as a sole owner. She went on stating that they were under presumption of marriage prior to the lawful marriage conducted in 2012 as they lived for more than 15 years.

Now as to the determination of the **1st and 2nd** grounds of appeal which to my understanding are both questioning valuation and re-revaluation of the evidence by the trial court and 1st appellate court respectively, particularly as far as division of matrimonial assets is concern. Division of matrimonial assets as provided for under section 114 of the Law of Marriage Act, Cap 29 R. E, 2002 (Act) always emphasizes judicial considerations as to each spouse' contributions towards acquisition or improvement of the assets subject of the sought division. This position has been consistently interpreted by our courts for instance in **Mariam Tumbo v Harold Tumbo (**1983) TLR 293.

> "In accordance with s. 114 (2) (b) of the Law of Marriage Act, 1971, the court is required in exercising its power of division of assets to have regard to the extent of contributions made by each party in money, property or work towards the acquiring of the assets;

housekeeping is a conjugal obligation and cannot be equated to work which refers to the physical participation in the production of the asset itself".

It is apparent from the citation and the wording of section 114 of the Act that, the assets must**, firstly** be matrimonial assets and **secondly**, they must have been acquired by them during marriage by their joint efforts.

In our case, the respondent is found contending that, the appellant is not entitled to division of two houses aforementioned on the ground that, there was no marriage that existed between them prior to 2012 due to the grounds that, **firstly,** the appellant and respondent were mere concubines and **secondly**, that, both had not lived in one roof. The respondent also is of the opinion that he contributed in the acquisition of the house at Bandambili as he paid the appellant Tshs. **300,000** for the purchase of the plot between the year 2004 and 2005. Since it is evident that the appellant and respondent lived or cohabitated together from 1988 to 1998 and were blessed with two issues (Salum Hassani-SM2 and Omary Hassan-SM3), thus section 160 of the Act may come into play unless the presumption of marriage is rebutted to the satisfaction of the court, section 160 of the Act of the Act reads;

"160 (I) Where it is proved that a man and woman have lived together for two years or upwards, 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"

(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided or in sub section (I) and such presumption is rebutted in any court with 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 reliefs 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.

According to the evidence adduced by the appellant and her witnesses (SM2-SM4), it is established that the respondent rented a house for the appellant at sombetini area and they were living as husband and wife and their cohabitation was blessed with two issues. From 1988 to 1998, to my opinion, is a long period to justify this court to hold that, there was presumption of marriage between the parties. It should be known that for a man who has another legal wife, it might not be necessary for him to be living under one roof, particularly when he has not sought and obtained the requisite consent from his senior wife (wife's consent) though he has legal capacity. This is in accordance with Islamic laws and norms and as per section 17 (3) of the Act. In the consideration of the period the parties lived together, prior to the appellant's 2nd marriage that is 1988-1998, the relation between the parties is inevitably termed as that of wife and husband.

The respondent's assertions that, he contributed to the acquisition of the house at Bandambili area when the appellant was married to another man (The late Paul), by paying Tshs. 300,000/=or more to the appellant for the purchase of its plot, that cannot, in my considered view, be termed as his lawful contributions towards the acquiring of the matrimonial property since he was no longer a lawful husband to the appellant be it religious form or customary rite taking into consideration that, the appellant by then had no capacity to marry

another man while her marriage with the late Paul was still subsisting. In **Cecilia Mshamu v. Dick Kawago** (2001) TLR 318, where it was held by this court (Kalegeya, J as he then was) that;

> "So long as the marriage between the respondent and another woman remained undissolved, the respondent had no capacity to marry the appellant".

In the case quoted above, the respondent, Dick Kawago was a Christian whose marriage is monogamy, therefore he could not have another valid marriage while his marriage with the appellant, Cecilia was still in existence likewise the appellant in our present case could not have capacity to be married with the respondent when the marriage between her and the late Paul was still valid. His contributions to the acquisition of the house at Banda 11 cannot in anyhow be termed as matrimonial assets for very obvious reason that the same was acquired not during the parties' marriage (See **Bi Hawa Mohamed v. Seif,** (1983) TLR 32 (CAT).

It follows therefore, whatever the respondent did in favour of the appellant's welfare or welfare of their two children or acquisition of any property that could constitute acquisition of matrimonial assets by joint efforts.

However I am not satisfactorily persuaded if the appellant had contributed towards acquisition of the matrimonial assets particularly the said houses as her evidence is to scanty to support her lamentations compared to the respondent's evidence together with that of his witnesses. More so if the appellant contributed to the acquiring of the said 2 houses why she did remain silent from 1998 to 2012 when she was married to that other man?

Neverthess the appellant's household's works from 2012 to 2017 should, in my considered view, be considered as rightly adduced by the appellant's witness (SM3 xx SU1 alikuwa anasaidiwa na mkewe kutunza watoto"). Therefore the appellant must be entitled to certain assets/properties. I subscribe my view to the famous decision in **Bi hawa mohamed v. sefu** (supra) where it was correctly held that;

> "Since the welfare of the family is an essential component of the economic activities of a family man or woman it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets".

Since both parties have not clearly established what was precisely acquired by joint efforts from 2012 to 2017 nevertheless both parties had never said anything to have been acquired in that period (2012-2017) which would have justified the court to order distribution in favour of the appellant

That said and done, this appeal stands dismissed, the concurrent decisions of the courts below are upheld. Having regard to the relations of the parties, I shall make no order as to costs in this appeal and the courts below.

It is accordingly ordered.

M. R. Gwae
Judge
15/09/2019

Right of appeal fully explained

M. R. Gwae
Judge
15/09/2019

HIGH COURT OF TANZANIA