**IN THE HIGH COURT OF TANZANIA**
**DODOMA DISTRICT REGISTRY**
**AT DODOMA**
**PC MATRIMONIAL APPEAL NO. 7 OF 2019**

*(Arising from Matrimonial appeal No. 25 of 2019 of Singida District Court and Original Matrimonial Cause No. 8 of 2019 of Singida Urban Primary Court)*

**MARY JOHN MMASY..... APPELLANT**

**VERSUS**

**JOHN AUGUSTINO MMASY ..... RESPONDENT**

**JUDGMENT**

*1st September,2020 & 18th February, 2021.*

**M.M. SIYANI, J.**

On 29th May, 2019, Mary John Mmasy (the appellant) approached the Singida Urban Primary Court where she petitioned for divorce, custody of the children, maintenance and division of matrimonial assets. During the trial, the appellant led evidence that the respondent (John Augustino Mmasy) was her husband having married him under customary law in 2001. According to her, she married the respondent after he had divorced his first wife with whom they contracted a Christianity marriage. The two

then went to live under one roof for 18 years until July 2018, when the respondent brought back his first wife, something which prompted the appellant to initiate divorce proceedings which is a subject of the instant appeal.

Having heard the parties, the trial court found the appellant failed to establish existence of the alleged customary marriage. It was ruled that there was no marriage between the parties herein. The trial court however, presumed existence of marriage under section 160 (1) (2) of the Law of Marriage Act Cap 29. Therefore, while declining to grant divorce decree, the court then went on to determine the question of custody, maintenance and division of asserts jointly acquired by the parties.

The respondent was dissatisfied and on appeal to the District Court of Singida, the decision of the trial court was overturned. The first appellate court found since the respondent herein had a subsisting marriage, the question of presumption of marriage was wrongly invoked by the trial court. It found the appellant, a mere adulterer but that notwithstanding, the first appellate court left it for the respondent to choose between

building a new house for the appellant and her children or allocating any of his houses to her. The appellant was also awarded one motor vehicle make RAV4.

Dissatisfied with the said decision, the instant appeal has been preferred by the appellant. The petition of appeal presented contains nine (9) grounds of complaints as follows:

1. *That, the first appellate court erred in law and fact for deciding the matter against the weight of evidence as adduced by the appellant before the trial court.*
2. *That, the first appellate court erred in law and fact for considering appellant as a concubine who was committing adultery with respondent without assessing grounds of the appellant to live 18 years with the respondent to the date of dispute.*
3. *That, the first appellate court erred in law and fact for holding that the appellant cannot enjoy division of matrimonial properties while the*

*respondent's wife was still in her position contributing her efforts to the marriage.*

4. *That, the first appellate court erred in law and fact for holding that appellant's testimony shows that she was aware of the appellants marriage.*
5. *That, the first appellate court erred in law and fact for being bias for rejecting the tendered evidence by appellant named "mali of tulizozalisha tangu 2001-2008" which is part of the records of the trial court.*
6. *That, the first appellate court erred in law and fact for considering that all properties acquired by joint efforts of the appellant and respondent belongs to the Lake Hill Paradise Motel Company Ltd without any legal justification.*
7. *That, the first appellate court erred in law and fact for awarding the respondent on optional order of deciding to give the appellant any of the houses or build another new house and supporting her financially.*
8. *That, the first appellate court erred in law and fact for not giving an order of actual amount of money for appellant to maintain the children of Marriage per month.*

9. *That, the first appellate court erred in law and fact for ordering appellant to sue the Company in order to recover her shares.*

In this court, the appellant was represented by Ms. Maria Ntui learned counsel and the respondent enjoyed the legal services of counsel Peter Ndimbo. In her brief but detailed oral submissions, Ms Ntui while abandoning the 9th ground, combined her arguments in respect of the 1st, 2nd, and 4th grounds of appeal. She also adopted the same approach with regard to the 3rd, 5th and 6th grounds before arguing separately the 7th and 8th grounds of appeal. On the first group, the learned counsel submitted that there was a failure by the first appellant court to appreciate and accord the required weight to evidence tendered at the trial court. She contended that the appellant lived with the respondent for 18 years and such relationship, was blessed with four children. Ms Ntui submitted further that throughout that period the two worked together till July, 2018 when the appellant decided to bring the marriage to an end having noted that the respondent had another marriage. It was argued that the appellant was not aware with the existing marriage and so in her opinion, it was

wrong for the first appellate court to conclude that parties herein lived as concubines.

On the 3rd, 5th, and 6th grounds of appeal, the learned counsel submitted that, it was again wrong for the first appellate court to ignore evidence in respect of the lists of matrimonial properties produced at the trial court and hold that the appellant had no right to share the same despite there being proof that such assets were jointly acquired by the parties. In view of the learned counsel, there was no evidence which contradicted the appellant's evidence on matrimonial assets apart from a mere claim by the respondent that the listed properties were under a company known as Lake Hill Paradise.

Finally; while it was argued by Ms Ntui on the 7th grounds of appeal, that it was wrong for the first appellate court to give an option order to the respondent to decide which house to give the appellant, on the 8th grounds of appeal, she contended that it was either wrong for the first appellate court not to provide specific order for maintenance of the children to the respondent who being a father is legally bound to take care of his children.

The learned counsel urged the court to order the respondent to cover his children's school fees and maintain them at the tune of Tshs 2,000,000/= per month.

Responding the above submissions, Ndimbo contended in respect of the 1st, 2nd, and 4th grounds of appeal, that the first appellate court was proper in deciding the matter as there were no strong evidence tendered by the appellant who being aware of existence of the first Christianity marriage which is monogamous in nature, relied on presumptions of marriage under section 160 (1) of the Law of Marriage Act. According to him, monogamous marriage which under section 9 (2) of the Law of Marriage Act means one man and woman, can only be brought to an end by either death or divorce decree. The learned counsel believed that since the respondent and his first wife were never separated for whatever reason, then their marriage was still in existence and the presumption of the marriage could not apply.

On the 3rd, 5th, and 6th grounds, it was submitted by counsel Ndimbo that the first appellate court was correct in its decision as the appellant failed to indicates which assets were attained prior to their cohabitation and those

which were acquired during their union. With regard to the annexed list, the learned counsel argued that it was the appellant's duty to prove existence of the listed properties but despite indicating the presence of a company, nothing was said as to which assets were owned by the company and those which were matrimonial properties. As such counsel Ndimbo submitted that the trial court wrongly divided the listed assets.

Regarding the 7th and 8th grounds of appeal, the respondent's counsel submitted that the first appellant court in its wisdom left open for the respondent to choose which house should be given to the appellant. That, according to the learned counsel was proper because parties herein were not married. On the question of failure to fix a specific amount of maintenance, Mr. Ndimbo could not fault the lower court's decision because the appellant did not seek a specific amount for that purposes. He submitted that the respondent was ready to discharge his duty of maintaining the children.

I have considered the submissions by both parties and examined the records. In essence the contention in this appeal is basically on; the legal

status of the relationship between the appellant and the respondent, division of matrimonial assets and maintenance of the children. In this judgment thereof, I will respond collectively to the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th on the first two issues above before resorting to the 8th ground. The trial court's record reveals that although when the appellant instituted her petition of appeal, she claimed to have been legally married to the respondent under customary law, but when testifying in court, she gave no evidence on which customs the marriage was contracted. She only alleged that she was the wife of the respondent having started to live with the respondent in 2001. Her testimony was silent as far as customary marriage is concerned. The only clue as to which type of marriage the two celebrated, came from the appellant's mother one Fatuma Said Mkindwa who told the court that her daughter married the appellant under customary rites in 2005. She did not however say which customary law or how the marriage was celebrated. Indeed, her testimony as to when her daughter married the respondent was also contradictory. While at first, she said the two got married in 2001, when cross examined by the respondent on the same issue, she replied it was in 2005.

As it was for the courts below, I believe there was no strong evidence on existence of customary marriage. Indeed, basing on the testimonies tendered by the appellant, it was impossible to conclude any form of formal marriage. On the other hand, the respondent tendered a certificate of marriage to prove existence of another marriage which was celebrated in Christianity rituals. In my considered view, even if there could be such evidence on existence of a marriage as alleged by the appellant, still that 2nd marriage could have been void ab initio as the first Christianity marriage which is monogamous in nature, was still in existence. In agreement with counsel Ndimbo, I therefore hold that both the trial and the first appellate court, were justified in concluding that no formal marriage existed between the parties herein.

The above said, as there was no formal marriage between parties herein, it remains a fact that the appellant and the respondent cohabited for almost 18 years under the presumption of marriage in terms of section 160 (1) and (2) of the Law of Marriage Act which provides as follows:

*(1) 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.*

*(2) When a man and a woman have lived together in circumstances which give rise to a presumption provided for in subsection (1) and such presumption is rebutted in any court of 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 an 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 proceedings 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.*

I have scrutinized the contents of section 160 of the Law of Marriage Act and I believe the said provision simply requires evidential proof that a man and a woman (who are not a subject prohibited relations) have lived together for at least two years in such circumstances as to have acquired the reputation of being husband and wife. See **John Kirakwe Vs Iddi Siko** 1989 TLR 215. From the record and the learned counsel submissions, the fact that the appellant and the respondent have lived together as wife and husband for more than two years, was not a subject of contention at the trial court. The respondent for example, despite denying to have married her, expressly recognized the appellant as his wife having lived with her from 2007 to 2018. In its decision, the first appellate court found that the parties herein could not be presumed to be wife and husband because the respondent had another marriage. As such the learned first

appellate magistrate declared their union a mere *'concubinatus'* and that the appellant was committing adultery with the appellant.

Admittedly, parties herein lived under one roof for almost 18 years. They even got four children out of that union. They considered themselves as wife and husband and from the testimony of Sekunda John Mmassy (the 1st wife) and Fatuma Said Mkindwa (the appellant mother) their relatives also considered them as such. It will be absurd in the circumstance of this case where even the first wife recognizes the appellant as his co wife, to rule that the parties herein did not acquire the presumed status of wife and husband. In my view what gives the parties such status is basically the relatives perception.

Upon revisiting the record and what has been submitted by the learned counsel, I do not think that after 18 years of living together as wife and husband, the society perceived them as adulterers. Therefore, as correctly observed by the trial court, since the question of cohabitation for more than two years, was undisputed, the presumption of marriage was not rebutted despite existence of the respondent's first marriage. That means

being presumed married, the appellant had all the rights available to a dully married woman which includes to apply for maintenance, custody of the children of the union and division of matrimonial property acquired through their joint efforts.

It follows therefore from such conclusion that since the appellant applied for among other things division of assets jointly acquired during subsistence of their union, the trial court was correct in entertaining the same. The law under section 114 (1) and (2) (b) of the Law of Marriage Act, empowers courts of law to divide matrimonial assets between the parties. In doing so, a prudent court will always consider the extent of the contribution made by each part towards the acquisition of the assets through the tendered evidence. Proof of the extent of contribution in acquisition of matrimonial assets is a question of evidence and evidence to that effect must be given. See **Gabriel Nimrod Kurwijila Vs Theresia Hassani Mallongo**, Civil Appeal No. 102 of 2018 CAT (Unreported).

It is therefore a requirement of the law that parties must establish a link between the accumulation of wealth and the responsibility of each couple

toward its accumulation. See **Cleophas M. Mafibaro Vs Sophia Washusa,** Civil Application No. 13 of 2011 CAT (unreported).

In the case at hand, the appellant adduced evidence at the trial primary court to the effect that they acquired several properties with the respondent from 2001 to 2018. Through Ms Ntui, she in fact maintained the same even during the hearing of this appeal. The respondent on his part, claimed that all the acquired properties are owned by their company know as Lake Hill Paradise hence the appellant ought to have proceeded against the company.

The trial record however, indicates the properties alleged to have been acquired during the subsistence of the union were merely listed during trial. In the circumstances, I am of the considered opinion that the fact that the appellant claimed to have jointly acquired some properties with the respondent, should have made it necessary for the trial court to order proof of contribution before deciding as it did. It was therefore incorrect for the trial court to order such division of matrimonial properties without according parties an opportunity to tender evidence as to their existence

and the extent of their contribution. The same was also the case for the first appellate court which placed ownership of a Motor vehicle make RAV 4 to the appellant and directed the respondent to decided which houses should be given to the respondent.

As I conclude, through the 8th ground of appeal, the appellant faulted the first appellate court for not pronouncing a specific amount of money for maintenance purposes. The record indicates that the trial court also did not fix any amount despite ordering the respond to maintain his children. The appellant however, did not challenge the same at the first appellate court. The question of how much the respondent should maintain his children per month, was therefore not determined by the first appellate court and consequently it cannot be determined through a second appeal.

In the event, save for the 8th ground of complaint, the instant appeal holds merits and the same is therefore, allowed. The decision of the first appellate court is hereby quashed and set aside. Likewise, the trial court's findings with regard to division of assets which allegedly were acquired by parties herein, is also quashed. Considering the interest of justice and in

order to dispense justice timely, I order that additional evidence on acquisition of and the extent of the contribution towards the same be received by the trial court which should then make its own findings. As such, the decision of the trial court is hereby varied to the extent stated herein. The matter being a matrimonial dispute, I make no orders as to costs. It is so ordered.

**DATED** at **DODOMA** this 18th Day February, 2021

**M.M. SIYANI**
**JUDGE**