IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL No. 41 OF 2019

(Appeal from the Judgment and Decree of the Resident Magistrate's Court of Dar Es Salaam at Kinondoni, Hon. J. Mushi RM, delivered on 5th September 2019 in Matrimonial Cause No. 55 of 2017

ELIZABETH ERASMUS MALIWA.....APPELLANT

Versus

JOHN BEDA MMASI.....RESPONDENT

JUDGMENT

19th November 2020 13th April, 2021.

J. A. De- Mello, J;

The Appellant unsuccessfully Petitioned against the Respondent in **Kinondoni Resident Magistrate Court,** following a Matrimonial proceeding for Divorce, Maintenance, Upkeep, and Division of allegedly, matrimonial assets.

In arriving to its findings the Trial Court **framed three (3)** issues namely;

1. **Whether there was a marriage between parties, if YES?**
2. **Whether the marriage has broken down irreparably?**
3. **Whether there were any acquired joint properties during the marriage?**

In absence of proof of any existing marriage drawn from the definition of marriage that, the Magistrate referred to, under **section 9(1)** of the **Law of Marriage Act Cap. 29,** it was established non existence of one. Answering this in negative the rest of the issues did not have legs to stand upon, hence dismissal of the entire Petition.

The Appeal was orally argued by parties, with **Counsel Karilo** commencing on behalf of the Appellant, submitting that, the two had cohabited for five (5) years from year 2008 to 2013. The two, were in romantic relationship since 2002, until 2008 when they contracted a customary marriage as evidence in **pages 9 & 10** of the proceedings, he stated. **PW2** corroborated this, as shown in **page 15** of the same, which cumulatively translated into **'presumption of marriage',** he pointed out. The book of **Introduction to Family Law** in **Tanzania 2nd Edition** on **page 90** by **Dr. Clemence Mashamba,** together with the case of **Joshua Kirakwe** vs. **Iddi Siko [1989] TLR 215** were shared to support the alleged 'presumption'. With reference to property allegedly acquired during the subsistence of marriage, Counsel relied on evidence on record as shown in paragraph **5 (i) – (v)** of the Petition, much as was denied by the Respondent.

In response and opposing, **Counsel Conrad** for the Respondent, claimed the Respondent's wife is one **Janet** since **2007** legally consummated with three issues, to have the Appellant as a wife. The alleged presumption is impractical, he lamented. He discounted the position taken from **Family Law (supra)** book as

well as the case of **Joshua (supra)** for customary law to be a lawful marriage, as opposed to a presumed one. Neither documentary nor circumstantial, has the Appellant managed to prove the existence of marriage let alone **"barua ya posa"** as alleged. This was the position held in the case in the case of **Gabriel Kurujila** vs. **Theresia Malongo, CA** at **Tanga, Civil Appeal No. 102 of 2018.** On the **3rd** ground, Counsel and, in total absence of proof for not only ownership but more so jointly acquired, claimed the property alleged to be subject for division was jointly acquired with Janeth and, not the Appellant. Further that, in as far as the sale agreement admitted is concerned, this was bought in year 2006, long before what the Appellant claims to be so, in 2008. That, it all erupted when the adulterous affair was brought to light by the legal wife Janeth and, which ultimately brought the affair to an end. The Appellant was an intruder which lead the Court to properly analyze and, evaluate hence determining the Petition against the Appellant. In line with **section 114** of the **Law of Marriage (supra)** the allegations are misconceived, as Counsel was of the view, if at all. He is of further view that, Civil claim as opposed to matrimonial preferably, as was what the case of **Martin Martin** vs. **Lucy Komanya, Civil Appeal No. 231 of 2017,** would have been appropriate. The Appeal is un-meritorious, qualifying a dismissal.

In a brief rejoinder, Counsel for the Appellant sternly wondered why the Appellant is termed an adulterer and intruder while the two had cohabited for five years and, under one roof.. **PW3** and,

not objected by the Respondent, witnessed the customary marriage as read from **page 20** of the proceedings. That, the matter would have been preferred as Civil, is a misconception, considering the marriage the two had contracted and a customary one.

It is however, trite law in Civil matters that, the '**one who alleges must prove** and, on **balance of probabilities'.** See the case of **Kwiga Masa** vs. **Samwel Mtubatwa [1998] TLR 103** among several other list of precedents. Such burden never shifts as provided for under **section 110(1)** and, **111** of **Cap. 6,** the **Law of Evidence Act.**

Section 110 (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists.

Section 111. The burden of proof in a suit proceedings, lies on that person who would fail if no evidence at all were given on either side.

I had quality time to peruse record from proceedings of the Trial Court and, only to establish that, the Petitioner failed to prove her case while the Respondent and, not duty bound, managed by tendering the following exhibits

1. **Exhibit DE1 – Sale Agreement**
2. **Exhibit DE2 – Marriage Certificate**

Sadly, none was from the Appellant, rendering her claims unfounded and thus baseless. It is the principle of law in Civil

suits that proof must be on **'balance of probability'** of which in the present Appeal record shows the weight was less on the Appellants side. According to **section 9 (1)** of the **Law of Marriage Act 1971,** a marriage means the voluntary union of a man and a woman intended to last for their joint lives. There is an acceptable practice in our country though, where parties belonging to a community or to communities which follow customary law a valid marriage may be contracted according to customary rites of that customary law. In this case nowhere had it been proved for existence of one in customary form. However, and based on evidence the Respondent had contracted a Christian marriage with one Janet as evidenced from exhibit DE2 hence rendering the relationship rather alleged cohabitation with the Appellant illegal for adultery.

In the above premise, I dismiss the Appeal, costs is waived.

J. A. DE-MELLO

JUDGE

13/4/ 2021