IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

(PC) CIVIL APPEAL NO. 13 OF 2020

(Arising from Matrimonial Appeal No 2 of 2020 from Moshi District Court, Originating from Matrimonial Cause No.4 of 2020, Moshi Urban Primary Court)

ASHA PETER NGOWI ---------- APPELLANT

VERSUS

ABEID AMAN MSELE ---------- RESPONDENT

JUDGMENT

MUTUNGI .J.

This Appeal emanates from a matrimonial petition initially filed with the Moshi Urban Primary court (the trial court). In the said court the appellant petitioned for divorce, division of matrimonial assets and custody of one issue begotten during the existence of the marriage.

Briefly the appellant herein had before the trial court alleged, she had co-habitated and lived with the

respondent for more than 20 years under the same roof. By the grace of God they were blessed with one issue, namely Hadarly Abed. They had previously lived in a mud house built on the respondent parent's piece of land. The same with time crumpled down leaving no alternative to the two, but to renovate the same. They jointly renovated the said house and continued to live therein. As it would be, things turned sour, the respondent became abusive leading to his actions of chasing her away from their home. Due to persistent threats, the appellant could no longer perceiver and she accordingly left. This is how she landed in the trial court.

Upon deliberations the trial court found, under **section 160(1) (2) of the law of Marriage Act, Cap 29 R.E. 2019** the two were presumed to be a married couple. In view thereof, the trial court in terms of **section 114(1) of the law of Marriage Act (supra)** proceeded to divide the properties (specifically the disputed house) according to each other's contribution in constructing the same despite being on the respondent's family land. The appellant was given two rooms therein while the respondent was to occupy eight rooms. The two rooms were given to the appellant to collect rent in order to

cater for maintenance costs. Custody of the child was granted to the appellant and the respondent was to contribute Tshs. 30,000/= per month for the child's maintenance.

The respondent was aggrieved by the said decision and lodged an appeal with the District Court (No. 2/2020) essentially faultering the trial court dismissing and determining the issue of marriage while the two were never married. He further complained why she was given two rooms in a house which was family property and not a matrimonial property. Incidentally the appellant too had a cross-appeal contesting why the trial court held the disputed house was not a matrimonial property. Further, why the trial court did not order for equal division of the matrimonial property and the maintenance amount provided for was in adequate.

In the end the first Appellate Court found, the disputed property was not matrimonial property. The reason being that, the land used to build the said house thereon belonged to the respondent's parents and the house renovated also belonged to his parents. In view thereof the renovated house cannot be regarded as a matrimonial house subject of division. The first Appellate

Court further found, the appellant's stay for more than 20 years pre-supposes that she had some contribution towards the renovation of the disputed house hence deserved some kind of compensation. The court further observed since the appellant had established that she contributed three windows, she was then to be compensated money equivalent to the price of the same. Lastly, the court found Tshs. 30,000/= ordered as maintenance for the child was reasonable and adequate.

The appellant was still uncomfortable with the 1st Appellate court's decision hence this appeal which contains five grounds as hereunder: -

1. That, the 1st Appellate Court completely misconstrued the nature and effect of the concept of Presumption of marriage.
2. That, the first appellate court erred in not granting divorce as prayed
3. That the 1st Appellate Court erred in law and fact by declaring that the house was not matrimonial property.

4. That the 1st appellate court erred in law and fact by marking an order for 'compensation instead of division.
5. That, the 1st Appellate court erred in law and fact by not providing maintenance for the Appellant and the child.

The appellant was represented by Ms Elizabeth Maro Minde learned advocate whereas the respondent was unrepresented. Both parties agreed to proceed by oral Submissions.

Submitting on the first and second grounds, the learned advocate stated, once the two had lived for more than 20 years under the same roof then there was a presumption of marriage. Upon such finding the lower courts should have acknowledged the two had a marriage as per **section 160(2) of the Law of Marriage Act, Cap 29 R.E. 2019** and had a right to maintenance, custody and divorce. Had the lower courts properly construed or acknowledged the meaning of a presumption of marriage then the appellant would not have been denied her right of divorce and the consequential reliefs thereto. The compensation granted

is not backed by any law and worse off the same was never granted.

Submitting on the 3rd ground of appeal on the findings that the house was not a matrimonial property for the reason it was built on family land, the learned advocate contended, under **section 160(2) and section 114(3) of Law of Marriage Act (supra)** the court had powers to divide a house jointly acquired in a presumed marriage. Once it was jointly acquired then the appellant was entitled to equal rights. The learned advocate referred the court to the most celebrated case of Bi. **Hawa Mohamed vs Ali Seif [1983] TLR 32** and the case of **Hemed .S. Tamim vs. Renata Mashayo [1994] TLR 197** in support thereof.

Buttressing on the 4th ground, the learned advocate reiterated her earlier submission that, compensation is not provided for in the matrimonial laws. The foregoing notwithstanding the allegations that the land is clan land is irrelevant in the matter. This is from the obvious that the respondent is in charge of the house after all his parents have passed on.

Discussing the 5th ground of appeal on maintenance, the learned advocate contended that maintenance is for the child who is 16 years and that of the appellant. Considering the respondent's life style, is in a good financial position to maintain both of them. More so now that, he is collecting rent from all the rooms and has an ironing business adequate to cater for all the expenses.

In conclusion Ms Minde prayed the divorce order was to be granted together with its consequential reliefs. She further prayed the appellant be accorded her rights.

Contesting the submission by the learned advocate, the Respondent stated the house was the deceased parents lawful property which is still semi-finished.

As for maintenance he replied, the business is just ironing and washing clothes at a low scope and does not fetch enough money. He explained he has another predicament in that, he has been living with HIV, a disease which demands a lot of finances. Nevertheless, he admitted to have lived with the appellant for more than 20 years under the same roof. Further he had maintained their child up to Form II. He clarified the appellant left with all the properties leaving behind a

mattress and those properties which belonged to his parents.

In rejoinder the learned advocate reiterate that, the court should consider the concept of presumption of marriage and see that the divorce should have been granted and the reliefs attached to it accordingly granted.

Before entertaining this appeal, let me on the offset state the legal position that, the second Appellate Court can interfere with concurrent findings of the lower courts only if there is misapprehension of the evidence, miscarriage of justice or violation of principles of law. See the case of **Amratlal D.M.Zanzibar Silk Stores vs A.H Jariwale Zanzibar Hotel 1980 TLR**.

I have thoroughly passed through the submissions made by the parties, perused both lower court files and found, the following issues need to be determined by this court: -

1. Whether the concept of presumption of marriage was properly considered.
2. What are the Appellant's reliefs under the presumption of marriage?

The first issue will cover the 1st and 2nd grounds of appeal while the second issue will discuss the remaining grounds of appeal.

Starting with the first issue, the learned advocate contended since there is proof of a presumption of marriage then a decree of divorce was to be issued. This court finds, while interpreting the concept of presumption of marriage, the trial court came to a conclusion the two conflicting parties had lived under the doctrine of presumption of marriage. This is seen at page 3 of the trial court as stated hereunder: -

> *"Tukirudi upande wa shauri hili inaonekana kuwa hawakuwa wanandoa, kwa suala la cheti cha ndoa au kufunga ndoa iliyotambulika ila waliishi Maisha ya ndoa."*

On the other side of the coin, the first Appellate Court did not indulge itself in discussing the concept of "presumption of marriage", since the same was not contested by the parties in their respective submissions.

It is undisputed that the two had lived for more than 20 years and so they were presumed to acquire a reputation of husband and wife as rightly decided by the trial court. That being the case there was a rebuttable presumption

that the two were dully married. After the court had decided there was a presumption of marriage the court was expected to make subsequent orders upon an application by the deemed wife (appellant). The same is governed by **section 160(1) (2) of the L.M.A (supra)** as hereunder: -

> *"**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." [Emphasis added]

Following the above provision, as rightly submitted by Ms Minde the trial court was empowered to make orders subsequent to the finding of a presumed marriage. Therefore, now that both parties were not disputing they were cohabiting as husband and wife but since their relationship was based on presumption of marriage, then the division of properties jointly acquired, custody and maintenance had to follow event. See the case of **Hidaya Ally vs Amiri Mlugu, Civil Appeal No. 105 of 2008.**

It is on record that since the appellant had prayed for the division of matrimonial assets, the trial court proceeded to determine the same. The only property claimed by the

appellant was a house which she claimed they had acquired through joint efforts.

The issue is whether the said house is subject of division, as part of the properties jointly acquired. From the trial court's record the land where the house is built belonged to the respondent's parents, and the big amount of money used to renovate the said house after it crumpled down was obtained after the respondent sold his father's land and the appellant contributed three windows. The Appellant's claim is found at page 2 of the typed proceedings and for the sake of reference the same reads: -

> *"Nyumba hiyo ilikuwa ya matope ilianguka, ndio tukajenga nyumba nyingine ya tofali. Tumekaa hapo nilichangia tukajenga nyumba ya rumu 10 na madirisha 3 ya kwenye nyumba nimechangia mimi."*

The first Appellate Court on such division had this to say: -

> *"In such evidence, one cannot stand concluding that the said renovation and the party's presence in the said house warrant the same to be regarded as a matrimonial property. As already proved by the parties, the land used to build the said house belongs to the*

Appellant's parents and that the house which was renovated also was his parent's house, therefore if at all the respondent contributed in such renovation the same was done to the house which cannot be regarded as a matrimonial house.

...the same cannot be subjected to the distribution but rather the Respondent was supposed to be compasated from what she contributed in such a renovation.

The proper section in relation to the division of assets, is **section 114 (1) and (2), (b) and (3)** and for the sake of reference it is reproduced as hereunder: -

"Section 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 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 of the assets between the parties of the proceeds of the sale.

(2) In exercising the power conferred by subsection (1), the court shall have regard..... (b) To the extent of the

contributions made by each party money, property or work towards the acquiring of the assets:

(3) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their Joint efforts.

It is a settled principle of law that for division of matrimonial assets, a party claiming must prove the extent of contribution to the said assets so that the court may account for the percentage of division basing on the contribution made. In the instant matter since the land where the house was built was Respondent's parents land then the same cannot be property jointly acquired subject of division in line with the definition already stated. The said land had not been acquired by the parties and neither had the house changed its little to confer ownership to the respondent. Simply renovating the house does not mean ownership had been transferred to the respondent.

As rightly decided by the first Appellate Court, the appellant deserves to be compensated for the three windows she contributed and the efforts put thereon after

evaluation of the same. She had substantially contributed to the improvement of the said house. For this, I find no reason of disturbing the findings of the first Appellate Court as far as the status of the disputed house is concerned.

The appellant's counsel has questioned the legality of the compensation order. It is the settled opinion of this court that apart from the reliefs mentioned under section 160(1) (supra) the court is also vested with powers to order for **"other reliefs"**. In the circumstances of the case, the compensation order suffices as "any other relief" granted to the appellant.

Coming to the custody of the child, I find no reason to differ with the findings of the two lower courts because the child himself chose to reside with his mother and the claim is part of the reliefs envisaged by Section 160(2) of the Law of Marriage Act. The issue is whether the amount of maintenance granted is adequate. In absence of evidence in the trial court as far as the income capability of the Respondent is concerned to provide more than that ordered by the lower courts, I support the findings of the two lower courts and find no basis of ordering otherwise.

In the final analysis I find the grounds raised have no merits. The appeal is dismissed and considering the relationship of the parties herein, I make no order for costs.

B. R. MUTUNGI
JUDGE
23/06/2021

Judgment read this day of 23/6/2021 in presence of both parties.

B. R. MUTUNGI
JUDGE
23/6/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
23/6/2021